



**Draft Terrorism Act 2006 (Disapplication of Section 25)
Order 2010**

**JUSTICE Briefing for House of Commons Debate
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Introduction and summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. On 24 June, the Home Secretary announced that the government would seek to extend the current 28-day maximum period of pre-charge detention in terrorism cases for a further six months from 24 July. This extension is sought in order that the government will have sufficient time to complete its review of counter-terrorism legislation, including the maximum period of pre-charge detention in terrorism cases.
3. We strongly support the coalition government's review of counter-terrorism legislation. Among other things, it was one of the key recommendations of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights in February 2009 that:¹

States should undertake comprehensive reviews of their counter terrorism laws, policies and practices, including in particular the extent to which they ensure effective accountability, and their impact on civil society and minority communities. States should adopt *such changes as are necessary to ensure that they are fully consistent with the rule of law and the respect for human rights, and to avoid all over-broad definitions which might facilitate misuse.*

Nonetheless, while we very much welcome the government's review, we believe that this should not preclude Parliament from taking its own view on the continuing need for the 28-day maximum. This briefing therefore sets out the reasons for our view that the current maximum is:

- plainly at odds with the right to liberty;
- unnecessary;
- far longer than any other western democracy; and
- lacking in effective safeguards.

¹ *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (International Commission of Jurists, February 2009), p164. Emphasis added.

28 days pre-charge detention violates the right to liberty

4. Among the most ancient rights recognised under UK law is the right to liberty.² For this reason, it has for several centuries been a basic common law principle that anyone arrested must be:
 - (a) informed promptly of the charges against him,³ and
 - (b) brought before a judge 'as soon as he reasonably can'.⁴
5. These requirements serve two purposes. First, they act as a check against arbitrary detention by obliging the authorities to specify their accusations against a suspect and by subjecting those charges to independent judicial scrutiny.
6. Secondly, they allow the suspect the opportunity to begin to answer the allegations that are the cause of his detention. Otherwise, as Lord Simonds asked in 1947, 'how can the accused take steps to explain away a charge of which he has no inkling?'.⁵
7. These ancient requirements of the common law not only inspired the Fourth Amendment in the US Bill of Rights,⁶ but also became the model for the right to liberty under the European Convention on Human Rights 1950, and the International Covenant on Civil and Political

² See e.g. Dalton, *Country Justice* (1655), p 406 'The liberty of a man is a thing specially favoured by the Common Law of this Land'.

³ See e.g. *Christie v Leachinsky* [1947] AC 573 at 592 per Lord Simond: 'if a man is to be deprived of his freedom, he is entitled to know the reason why'.

⁴ Sir Matthew Hale CJ, *History of the pleas of the Crown* (1778), Vol 2, p 95: following a suspect's arrest, 'the safest and best way in all cases is to bring [the prisoner] to a justice of peace and by him the prisoner may be bailed or committed as the case shall require'. In situations where a suspect could not be brought immediately before a justice, e.g. if a suspect was arrested 'in or near night', they could be held in 'the common gaol', in the stocks, or exceptionally in a house 'for a day and a night at least, and in some cases of necessity for a longer time, till he can with safety and conveniency convey him to a justice of peace' (ibid, p 96). See also, Blackstone's *Commentaries on the Laws of England*, Book 4, Chapter 21, p 294: 'When a delinquent is arrested ... he ought regularly to be carried before a justice of the peace. The justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged'. In *Wright v Court*, 4 B.&C. 596 (1825), the court held that it 'is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can'.

⁵ *Christie v Leachinsky*, n 3 above, at 593.

⁶ See the decision of the US Supreme Court in *Gerstein v Pugh* 420 U.S. (1975) at 114-116: 'At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. The justice of the peace would 'examine' the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment ... and there are indications that the Framers of the Bill of Rights regarded it as a model for a 'reasonable' seizure'.

Rights 1966. Thus Article 5(2) of the European Convention on Human Rights requires that anyone arrested:⁷

shall be **informed promptly** ... of any charge against him.

8. Article 5(3) similarly provides that anyone arrested or detained:⁸

shall be **brought promptly** before a judge.

9. In addition, Article 5(4) provides that anyone arrested or detained:⁹

shall be entitled to take proceedings by which the lawfulness of his detention shall be **decided speedily** by a court.

10. Near-identical language is used in Articles 9(2), (3) and (4) of the International Covenant on Civil and Political Rights, respectively requiring that anyone arrested:¹⁰

shall be ... **promptly informed** of any charges against him.

shall be **brought promptly** before a judge.

shall be entitled to take proceedings before a court, in order that that court may **decide without delay** on the lawfulness of his detention...

11. The meaning of the term '*promptly*' in Article 9(3) was considered by the UN Human Rights Committee in 1994. The Committee stated:¹¹

⁷ In *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, the European Court of Human Rights referred to Article 5(2) as 'the elementary safeguard that any person arrested should know why he is being deprived of his liberty' (para 40).

⁸ Emphasis added.

⁹ Article 5(4) in particular implies the right of the suspect to be able to challenge his detention in a manner that meets the essential judicial guarantees of fairness: see e.g. the judgment of the European Court of Human Rights in *Weeks v United Kingdom* (1989) 10 EHRR 293, in which it held that 'proper participation of the individual adversely affected by the contested decision' is 'one of the principal guarantees of a judicial procedure for the purposes of the Convention' and that conditions which prevent this (i.e. preventing the accused from attending the hearing and knowing the evidence against them) 'cannot therefore be regarded as judicial in character'.

¹⁰ Emphasis added.

¹¹ Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994). Emphasis added.

More precise time-limits are fixed by law in most States parties and, in the view of the Committee, **delays must not exceed a few days.**

12. The UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment include the requirement that:¹²

Anyone who is arrested ... **shall be promptly informed** of any charges against him.

13. By definition, pre-charge detention under the 2000 Act means that a suspect is unable to know the charges against him. Moreover, Schedule 8 of the Act allows the suspect and his lawyers to be excluded from 'any part of the hearing' to authorise continued detention,¹³ and be denied access to information used by police and prosecutors to justify that detention.¹⁴

14. In our view, it is plain that being held without charge for as long as 28 days is not 'prompt' within the meaning of Article 5(2).

15. It is also obvious that detention authorised by a judge in the absence of the defendant and his lawyer, and without knowledge of the information presented against him, cannot satisfy either the basic right of a suspect to be brought 'promptly' before a court under Article 5(3) or the right to have the lawfulness of his detention 'decided speedily' under Article 5(4).

16. The European Court of Human Rights has repeatedly made clear that the requirements of Article 5 apply even in cases of suspected terrorism. In the 1988 case of *Brogan v United Kingdom*¹⁵, the Court considered the case of 3 suspected IRA members who were detained under the Prevention of Terrorism Act (Temporary Provisions) Act 1984 for periods up to 4 days without being brought before a judge. The Court acknowledged that 'the investigation of terrorist offences undoubtedly presents the authorities with special problems'¹⁶ but concluded that:¹⁷

none of the applicants was either brought 'promptly' before a judicial authority or released 'promptly' following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the

¹² Principle 10, Adopted by General Assembly resolution 43/173 of 9 December 1988. Emphasis added.

¹³ Paragraph 33(3) of Schedule 8.

¹⁴ *Ibid.*, para 34.

¹⁵ (1988) 11 EHRR 117.

¹⁶ Judgment, paragraph 61.

¹⁷ *Ibid.*, para 62.

community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Art 5(3).

28 days pre-charge detention is unnecessary

17. There is no evidence to show that the current maximum of 28 days has proved necessary in order to prosecute suspected terrorists. Since the maximum period was raised in 2006 from 14 days to 28 days:

- Only five suspects have been held for as long as 27 or 28 days;
- Three were released without charge;
- Two – Donald Whyte and Usman Siddique - were charged with terrorism offences, including committing acts preparatory to terrorism under section 5 of the Terrorism Act 2006;
- Both men were ultimately acquitted.

18. All those held up to 27 and 28 days were arrested in the context of Operation Overt, the so-called 'liquid bomb' plot to blow up several transatlantic airliners. However, none of those ultimately convicted – Ahmed Addulla Ali, Assad Sarwar or Tanvir Hussain – were among those detained up to 27 or 28 days. Indeed, all three men who were ultimately convicted were charged within 12 days of their arrest.

19. Of the two men who were held to 28 days and then charged, both were acquitted.

20. Donald Whyte stood trial in the Woolwich Crown Court alongside Abdulla Ahmed Ali, Tanvir Hussain and Assad Sarwar. While the latter three were found guilty of conspiracy to murder in September 2009, the same jury unanimously agreed that Whyte was not guilty.

21. Usman Siddique was tried separately on 2 February 2010. His submission of no case to answer was accepted by the court and he was acquitted. The main evidence against him, an unencrypted CD, was discovered by police on the first day of his detention. His barrister subsequently described the case against him in the Guardian:¹⁸

the high-water mark of the police case against [Siddique] was the finding of a single incriminating CD in the loft bedroom of his family home. It had been discovered on

¹⁸ 'The criminal case of Usman Siddique' by Jo Sidhu, *The Guardian*, 11 February 2010.

open display sitting on a busy desk among a number of other similar discs. It was unencrypted and its contents were instantly viewable on any computer

The CD appeared to be American in origin and was overwhelmingly concerned with computer and software security; essentially it was a hacker's manual. The prosecution did not suggest that such information had anything to do with a terrorist plot. However, a small folder on the CD titled "anarchy" contained 17 subfolders, one of which was called "bombs". This in turn contained four files that gave details on how to make explosive devices. The bombs sub-folder constituted less than 1% of the total material stored on the CD but it was enough to keep the prosecution's case on the rails until the matter finally came before a jury some nearly three and a half years after Saddique's arrest.

The evidence in the trial occupied a mere two days. The defence accepted that Usman Saddique occasionally slept in the loft bedroom, but equally the prosecution conceded that not all of the property found in that room belonged to him. They also had to admit that there was no fingerprint or DNA evidence to suggest he had ever touched the CD. In fact, their computer expert found no evidence that the CD had even been played on any of the computers at the family home.

In short, the evidence that Saddique had at any point been in possession of the CD or was ever aware of its contents was so tenuous that the trial judge rightly concluded that the case should be withdrawn from the jury.

22. As two other barristers involved in the Operation Overt trials have noted:¹⁹

The evidence upon which the charges [against Whyte and Siddique] were based was in the possession of the investigators ***within the first six to 12 days of detention; no material evidence came to light towards the end of the 28-day period.***

23. In the course of attempts by the previous government to lift the maximum period to 42 days, some senior police officers argued that longer periods of pre-charge detention were needed because of the increasing complexity of suspected terror plots. However, there is little evidence to show that the complexity of suspected terror plots has increased significantly since the 9/11 attacks in 2001 or the 7/7 bombings in 2005. Moreover, even if it were true that the complexity of plots is in fact increasing, it is clear that longer periods of precharge detention have little bearing on the ability of prosecutors to charge suspects with terrorism offences.

¹⁹ Ali Naseem Bajwa and Beth O'Reilly 'Terrorising the innocent', *New Law Journal*, 2 April 2010. Emphasis added.

24. First, there is no evidence to show that suspected terrorist plots are growing in terms of either complexity and scale. Previous government attempts to extend the maximum period of pre-charge detention often cited the increased amounts of material seized by police in the course of their investigations, e.g. 274 computers were seized in the Dhiron Barot case in 2004, whereas 400 computers were seized in Operation Overt in 2005. However, such figures do not necessarily reflect any increase in the actual complexity of the alleged plots themselves.²⁰ Statistics concerning the amount of material seized in any particular case, or the number of exhibits used at trial, may only reflect the complexity of the police's own suspicions rather than hard fact. For example, the Forest Gate raid in 2006 involved over 250 police officers, and reportedly followed a two month surveillance operation involving police and MI5,²¹ and the raid itself cost over £2.2 million including £864,300 in overtime payments for the police officers involved.²² The so-called 'complexity' of an investigation, in other words, may have nothing to do with whether a plot actually exists.

25. In any event, even if it were true that the complexity of terrorism investigations were increasing, we are certain that the Threshold Test - together with the lifting of the ban on intercept evidence – makes it possible to bring charges against suspects promptly in even the most complex of cases. Indeed, as two barristers with experience of terrorism cases noted recently:²³

Terrorism investigators tend to pace the investigation according to the available detention time limit. Operations Crevice (the "Fertiliser Case"), Rhyme (the "Dirty Bomb Case") and Vivace (the "21/7" failed London bombings) were all serious and complex investigations, yet entirely reliable charging decisions were made within the then 14 day limit. In fact, no one can point to a single erroneous charging decision made in any terrorism investigation because of an inadequate pre-charge detention limit.

26. During the debate over 90 days pre-charge detention in 2005, we pointed out²⁴ that the Threshold Test – which allows the CPS to charge suspects in cases where further evidence is

²⁰ As the Home Office's 2006 paper noted, 'No individual case since the alleged airline plot in August 2006 has yet exceeded that plot in complexity – though there have been a number of arrests and charges for terrorist offences in alleged plots since then' (*Pre-charge Detention of Terrorist Suspects*, 2007 p 6).

²¹ Guardian, 'Men in gas masks, a broken window, then a single shot', 3 June 2006.

²² Daily Telegraph, 'Chemical bomb' raid that found nothing cost £2.2m', 3 October 2006.

²³ See Bajwa and O'Reilly, n 19 above.

²⁴ See e.g. Home Affairs Committee, *Terrorism Detention Powers* (HC 910: July 2006), paras 110-112.

expected but not yet available²⁵ – enables charges to be brought promptly against suspects in even very complex investigations. At the time, this argument was publicly dismissed by the police who claimed that ‘the Threshold Test was not applicable in terrorism cases’.²⁶ We were pleased to see that the CPS subsequently confirm that the Threshold Test has played a major part in bringing charges against suspects in terrorism cases within the existing time-limit. As the then-DPP, Sir Ken MacDonald QC, told Parliament in December 2007:²⁷

given the nature of the threshold test, the evidence is only required to demonstrate a reasonable suspicion that the defendant committed the offence. I can only say to you that our experience so far has been that we have managed and managed reasonably comfortably.

27. Although we think that existing provisions enable charges to be brought within the existing time limits, we have long supported the lifting of the ban on intercept evidence to enable charges to be brought swiftly against suspects in terrorism cases. Our October 2006 report, *Intercept Evidence: Lifting the ban* makes clear that the UK is the only western country with a statutory prohibition on the use of intercept as evidence in criminal prosecutions. Nor are the UK’s disclosure obligations under article 6 of the European Convention on Human Rights any obstacle in this regard. As the recent Canadian Commission of Inquiry into the Air India bombing noted, disclosure obligations under UK law are in fact less onerous than those under the Canadian Charter of Rights and Freedoms.²⁸

In general, disclosure obligations in both the United States and the United Kingdom are less broad than in Canada. Both the United States and the United Kingdom attempt to flesh-out disclosure requirements in statutes and other rules while, as discussed above, Canada relies on a case-by-case adjudication under the Charter. Both the decreased breadth and increased certainty of disclosure requirements in the United States and the United Kingdom may make it less necessary for prosecutors to claim national security confidentiality over material that may be relevant to a case, but

²⁵ The Threshold Test is contained in the Code for Crown Prosecutors and applies in cases where ‘it is proposed to keep the suspect in custody after charge [e.g. because of the threat of terrorist attack] but the evidence required to apply the Full Code Test is not yet available’ (para 3.3). The Test itself requires prosecutors ‘to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, whether it is in the public interest to charge that suspect’ (para 6.1).

²⁶ Home Affairs Committee, *Terrorism Detention Powers*, n 26 above, para 111. See e.g. the statements of DAC Peter Clarke, then-head of the Met Anti-Terrorism Branch, that ‘I do not think the Threshold Test is at all applicable in these sorts of cases’ and ‘I do not think the Threshold Test is something which really plays into this debate at all’, 28 February 2006, Q 227.

²⁷ Evidence to Home Affairs Committee, Q 551.

²⁸ ‘Disclosure and Secrecy in other Jurisdictions’ in ‘The Unique Challenges of Terrorism Prosecutions’ (Ch 7, Vol 4 at p 267), *Air India Flight 182: A Canadian Tragedy* (June 2010).

which does not significantly weaken the prosecution's case or strengthen the accused's case.

28. Moreover, it is apparent that intercept material from foreign sources (which is exempt from the UK's statutory ban) played a key role in the second and ultimately successful prosecution in the Operation Overt investigation, as the testimony of the current DPP Keir Starmer QC before the Joint Committee on Human Rights in November 2009 makes clear:²⁹

Q171 Patrick Mercer: Can I ask you to throw your mind back to Operation Overt, the intercepted plan to bring down aircraft in the summer of 2006. The procuring of emails from California was crucial in this. Can you clarify the distinction in this particular case between information and evidence?

Mr Starmer (Director of Public Prosecutions): I have to be slightly circumspect about this case because, as you know, I consider there should be a retrial of the three remaining defendants. That, if it goes ahead, is going to go ahead next year and so the case is still live to that extent. In that case, ***some email traffic between alleged conspirators was captured by internet service providers overseas. Efforts were made to obtain it and, eventually, through legal assistance it was obtained. There were a series of court orders in January and February of 2009 that released those emails from a US court of law in the district of California in accordance with a request from the UK. Then it was deployed by us in the second trial, the retrial, in that case. We considered that it added to the strength of the prosecution. It was used as evidence.***

It is almost certain that the UK authorities were already aware of the emails, having already intercepted them in the UK – it is very doubtful that the UK authorities would have known to request the emails from California otherwise. Indeed, it is highly likely that these emails were what motivated the decision of the UK police to arrest the suspects in the first place. However, although intercepted material can form the basis of reasonable suspicion to exercise powers of arrest, it remains unlawful for any evidence to be used in UK courts which even 'tends ... to suggest' the existence of an interception warrant issued by the Home Secretary.³⁰ Accordingly, it would have been impossible to use this material in UK courts until copies of the same emails had been located by internet service providers overseas.

29. The fact that it should have been necessary to seek intercepted emails from servers in California in order to successfully prosecute terrorists here in the UK highlights the absurdity

²⁹ House of Commons Home Affairs Committee, 10 November 2009.

³⁰ Section 17(1)(b) of the Regulation of Investigatory Powers Act 2000.

of the current UK ban on using intercept as evidence. Parliament and the new coalition government should work to lift the ban as an alternative to maintaining the current 28 day maximum.

28 days pre-charge detention is far longer than any other western democracy

30. Although the UK faces a serious threat from Al Qaeda-related terrorism, it is far from unique in this respect. The 9/11 attacks in 2001 and the Madrid bombings in 2004 showed that other democracies also face the same risk. And yet at 28 days, the UK already has a maximum period of pre-charge detention far in excess of any other western country, as the following list of countries indicates:

- Canada 1 day;³¹
- United States 2 days;³²
- South Africa 2 days;³³
- New Zealand 2 days;³⁴
- Germany 2 days;³⁵
- Spain 5 days;³⁶

³¹ Criminal Code (R.S., 1985, c. C-46), s 503(1)(b): 'where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible'.

³² In *County of Riverside v. McLaughlin* 500 U.S. 44 (1991), the US Supreme Court held that the Fourth Amendment required, 'as a general rule', that a suspect must be brought before a judge within 48 hours for a determination of probable cause.

³³ Section 35(1)(d), Constitution of the Republic of South Africa 1996: 'Everyone who is arrested for allegedly committing an offence has the right ... to be brought before a court as soon as reasonably possible, but not later than (i) 48 hours after the arrest; or (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day'. See also section 35(1)(e), entitling those arrested 'at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released'.

³⁴ Section 23(2), New Zealand Bill of Rights Act 1990: 'Everyone who is arrested for an offence has the right to be charged promptly or to be released'. See also section 23(3): 'Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal'. Although legislation does not specify a time limit, the courts have consistently interpreted the requirement 'promptly' in a narrow manner: see e.g. *R v Rogers* (1993) 1 HRNZ 282, in which the Court of Appeal held that pre-charge detention as short as 5 hours was not sufficiently prompt in the particular circumstances of the case.

³⁵ Articles 112-130 of the German Code of Criminal Procedure (*Strafprozessordnung*) set out the various time-limits that a suspect may be detained following arrest prior to being brought before a court. According to the Foreign and Commonwealth Office survey in 2005: 'Anyone arrested in Germany must be brought before a judge by the "termination of the day following the arrest". Usually this is within 24 hours, but can be up to nearly 48 hours' (*Counter-Terrorism Legislation and Practice: A Survey of Selected Countries*, October 2005, para 40). Like the Foreign Office, we take the issue of a judicial arrest warrant (*Haftbefehl*) to be the closest equivalent of a charge in common law terms, in the sense that it involves an independent judicial determination of the evidence identifying allegations against a suspect (c.f. Sec. 112(2) of the Code of Criminal Procedure).

- France 6 days.³⁷

31. Indeed, at 28 days, the UK's maximum period of pre-charge detention is already greater than that in Zimbabwe under Robert Mugabe.³⁸ The former Director of Public Prosecutions, Sir Ken MacDonald QC, described the 28 day maximum as 'by far the greatest period in the common law world'.³⁹

32. As we noted in our November 2007 report, *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US since 9/11*, tight limits on pre-charge detention are no obstacle to the effective prosecution of suspected terrorists. We surveyed ten of the most high-profile terrorism cases since 9/11 in which the FBI, together with state and local police, arrested over 50 suspects in alleged plots aimed at causing widespread loss of life, including the destruction of such key US landmarks as the Sears Tower and the Brooklyn Bridge. Nonetheless, in all ten alleged terror plots between 2002 and 2007, each suspect was charged with a criminal offence within 48 hours of their arrest.

28 days pre-charge detention lacks sufficient safeguards

33. Schedule 8 of the Terrorism Act 2000 provides for judicial authorisation of continuing pre-charge detention beyond 48 hours.⁴⁰ However, the judge is *not* asked to assess whether there is sufficient evidence to justify the police's suspicion that the suspect is involved in terrorism. This is because, by definition, pre-charge detention is used to *gather* evidence against a suspect, not to confirm that those suspicions are justified. Instead, the judge is only required to determine if:⁴¹

³⁶ Article 17(2) of the Spanish Constitution provides that 'Preventive arrest (*La detención preventiva*) may not last more than the time strictly necessary for the investigations which tend to clarify events, and in every case, within a maximum period of 72 hours'. Article 520 bis of the Spanish Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*) permits the further detention of suspects in terrorism cases up to a maximum of 5 days.

³⁷ Under the Code of Criminal Procedure (*Code de procédure pénale* or CPP), the maximum period of pre-charge detention (*garde a vue*) is 1 day (Articles 63-4) but may be extended to 2 days where authorized by a district prosecutor (Art 77) or *juge d'instruction* (Art 154). In terrorism cases (offences under Article 421 of the *Code penal*) an additional 4 days detention may be authorized by a *juge des libertes et de la detention* (Article 706-88 of the CPP). Although we agree that the nature of a *charge* under French law is not precisely the same as a charge in English law, we consider that the specification of an offence against a suspect is the most obvious point of comparison.

³⁸ The current maximum period of pre-charge detention in Zimbabwe under the Criminal Procedure and Evidence (Amendment) Act 2004 is 21 days. In February 2004, President Mugabe used regulations under the Presidential Powers (Temporary Measures) Act 1990 to extend pre-charge detention to 28 days but this was later reduced by the later 2004 Act.

³⁹ Evidence to Home Affairs Committee, n27 above, Q 551.

⁴⁰ Detention up to a total of 14 days may be authorised by a senior district judge; detention for longer periods (up to the maximum of 28 days) requires the authorisation of a High Court judge.

⁴¹ Paragraph 32(1) of Schedule 8.

- (a) there are reasonable grounds for believing that the further detention of the person to whom the application relates *is necessary to obtain relevant evidence* whether by questioning him or otherwise or to preserve relevant evidence, and
- (b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously

34. A key problem is that the pre-charge detention authorisation process often relies extensively on secret evidence. Among other things, the judge can exclude the defendant and his lawyers 'from any part of the hearing'.⁴² The police and CPS can also apply *ex parte* to the judge for permission to withhold information from the defendant and his lawyers.⁴³ The judge may authorise non-disclosure where he is satisfied that there are reasonable grounds to believe that disclosure of the information would result in interference with ongoing terrorism investigations, the recovery of property, or harm to others.⁴⁴

35. We note that the UK courts have yet to rule on whether the judicial authorisation procedure under Schedule 8 of the 2000 Act is compatible with fundamental rights. In our view it plainly is not. In addition to the core requirement of article 5(3) that any person arrested or detained must be brought *promptly* before a judge, there is the basic procedural guarantee of article 5(4) that anyone detained is entitled to have the legality of their detention *decided speedily* by a court. The extensive use of closed material in authorisation hearings means that it is highly unlikely that the authorisation procedure complies with article 5(4). As the Grand Chamber of the European Court of Human Rights held in *A and others v United Kingdom* in February 2009:⁴⁵

Where ... the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

The Strasbourg Court's conclusion on the use of secret evidence was unanimously endorsed by the House of Lords in *Secretary of State for the Home Department v AF and others* in June 2009. As Lord Hope of Craighead noted:⁴⁶

⁴² Para 33(3) of Schedule 8.

⁴³ Para 34.

⁴⁴ The full grounds are set out in paras 33(2) and (3).

⁴⁵ 49 EHRR 29, para 220. Emphasis added.

⁴⁶ [2009] UKHL 28 at para 184.

If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. *It must insist that the person affected be told what is alleged against him.*

And as Lord Justice Laws held in the recent case of *R (Cart and others) v The Upper Tribunal and others*:⁴⁷

In the result it is, in my judgment, impossible to find a legally viable route, somehow navigating between *A and others* and *AF*, by which to conclude that in bail cases a less stringent procedural standard is required than that vouchsafed in *A and others*. In my view *AF* obliges us to hold that the selfsame standard applies...

For these reasons, even in the highly unlikely event that extended pre-charge detention up to 28 days was found compatible with article 5 on other grounds, we think it highly likely that the Schedule 8 authorisation procedure will be found incompatible with the requirements of article 5(4) ECHR.

ERIC METCALFE
Director of human rights policy
JUSTICE
7 July 2010

⁴⁷ [2009] EWHC 3052 (Admin) at para 112.