

Terrorism, counter-terrorism and human rights

– a JUSTICE briefing

17 February 2009



Key issues in UK counter-terrorism policy since 9/11

Indefinite detention without charge

- Indefinite detention of foreign nationals without charge was introduced by Part 4 of the Anti-Terrorism Crime and Security Act 2001
- The Act was passed two months after the 9/11 attacks and the first eight detainees were taken into custody in December 2001
- Between 2001 and 2005, more than 17 people were detained under Part 4
- Detention continued until the judgment of the House of Lords in December 2004 in the Belmarsh case, which held Part 4 incompatible with Articles 5 and 14 ECHR
- Following the Belmarsh case, 11 of the detainees complained to the European Court of Human Rights concerning the government's failure to release them immediately
- The Court will give its judgment on 19 February

*'The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.'*¹

Lord Hoffman, December 2004¹

¹ *A and others v Secretary of State for the Home Department* [2004] UKHL 56

Control orders

- Following the judgment of the House of Lords in the Belmarsh case, Parliament passed the Prevention of Terrorism Act 2005 in a mere 17 days
- The Act allows the Home Secretary to impose a control order on any person she suspects of 'involvement in terrorism'
- Control order restrictions can include curfews up to 16 hours a day, the requirement to wear an electronic tag at all times, a prohibition on visitors without prior Home Office authorisation and a complete bar on phone and internet use
- Breach of any condition is a criminal offence

- 38 people have been subject to control orders since the 2005 Act was passed
- A total of 15 orders are currently in force
- In October 2007, the House of Lords issued a series of judgments concerning the control order regime, including limiting curfews to 16 hours a day²
- A further appeal to the House of Lords will be heard in March and a complaint to the European Court of Human Rights is now pending
- The Act must be renewed annually and is due for renewal by Parliament before the end of March

'Control orders may be much worse than they sound. They can require the victim of the order to remain at his or her home for up to 18 hours a day, with constraints upon receiving visitors, attending gatherings, meeting people or going to particular places during the six hours of 'freedom'. We had measures like that in South Africa. We called them house arrest...'

Justice Chaskalson, May 2007³

² *JJ and others v Secretary of State for the Home Department* [2007] UKHL 45, *Secretary of State for the Home Department v MB* [2007] UKHL 46, *Secretary of State for the Home Department v E and another* [2007] UKHL 476

³ 'The Widening Gyre', (2008) 67 CLJ 69

Pre-charge detention

- At 28 days, the UK currently has the longest period of pre-charge detention of any common law country
- By contrast, the limit in United States, South Africa and New Zealand is two days
- Even in Zimbabwe under Robert Mugabe, the maximum period of pre-charge detention is 21 days⁴
- At the time of the 9/11 attacks, the maximum period of pre-charge detention in terrorism cases in the UK was seven days (as established by the Terrorism Act 2000)
- The limit was increased to 14 days by the Criminal Justice Act 2003
- In late 2005, the government sought to increase the maximum to 90 days. This was defeated but a compromise amendment increased the maximum to 28 days, the current limit
- In 2008, the government tried again to raise the maximum period, this time to 42 days, but was again defeated by Parliament

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- In 1988, the European Court of Human Rights ruled that a four-day period of pre-charge detention by British authorities was contrary to the right to liberty under Article 5 ECHR⁵

'We have no evidence to support that we need beyond 28 days. We certainly have not needed it in any case up until now.'

Sue Hemming, Head of Counter-Terrorism, Crown Prosecution Service, December 2007⁶

⁴ 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 2004 Act

⁵ *Brogan v United Kingdom* (1988) 11 EHRR 117

⁶ Evidence to the Joint Committee on Human Rights, 5 December 2007

Secret evidence

- The Special Immigration Appeals Commission Act 1997 was passed by Parliament, allowing for the use of so-called 'closed material' in deportation cases involving national security
- 'Closed material' is evidence which is kept secret from the defendant and his lawyers
- Instead, the 1997 Act allows the appointment of a 'special advocate' to represent the defendant in 'closed proceedings'
- The special advocate is able to see the closed material but is completely prohibited from discussing it with the defendant
- At the time the 1997 Act was passed, government ministers predicted that closed evidence and special advocates would only be used in a 'very small number' of cases⁷
- By the end of 2008, more than 50 special advocates have been appointed, appearing before an increasing number of courts and tribunals, including control order proceedings before the High Court, parole board hearings, employment tribunals, and planning inquiries
- Most recently, special advocates were used in the Divisional Court in the Binyam Mohammed case⁸
- Use of secret evidence and special advocates has been repeatedly criticised by a number of bodies, including Parliament's Joint Committee on Human Rights and the Council of Europe Commissioner on Human

Rights

- In October 2007, the House of Lords ruled that Article 6 ECHR required sufficient disclosure to a defendant of the evidence against in order for him to receive a fair trial⁹
- However, uncertainties over the scope of the ruling have meant that the issue will be reheard again by the House of Lords before a panel of nine Law Lords in early March

'It is not to the point to say that the special advocate procedure is 'better than nothing' Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.'

Lord Steyn, July 2005¹⁰

⁷ Introducing the Special Immigration Appeals Commission Bill in the House of Lords in 1997, Lord Williams of Mostyn said that 'the numbers likely to be involved are very small indeed' (HL Debates, 5 June 1997, Col 751)

⁸ *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* (2009) EWHC 152 (Admin)

⁹ *MB v Secretary of State for the Home Department* [2008] 1 AC 440

¹⁰ *Roberts v Parole Board* [2005] UKHL 45

Deportation to torture

- Article 3 ECHR and Article 3 of the UN Convention Against Torture both prohibit sending a person to a country where they would face a real risk of torture
- After the 7/7 bombings in 2005, Prime Minister Tony Blair announced that the 'rules of the game are changing', stating his intention to deport suspects to countries such as Algeria, Libya and Jordan despite their poor human rights records
- The government has claimed that it is safe to rely on diplomatic assurances from governments such as Libya to prevent the risk that detainees will be tortured on return
- Since 2005, the British government has negotiated Memoranda of Understanding (MoUs) with Jordan, Lebanon and Libya for the return of suspects
- Although the Algerian government refused to agree an MoU, the British government has nonetheless relied on diplomatic assurances from Algeria against the ill-treatment of any person sent back
- In 2007, the Special Immigration Appeals Commission

(SIAC) held that it would not be safe to return individuals to Libya despite the MoU

- However, SIAC held that it would be safe to return individuals to Jordan and Algeria, despite the well-established reputation of those countries for torturing detainees
- In October 2008, the House of Lords heard appeals against the proposed deportations to Jordan and Algeria. The judgment is expected shortly

'[A] country that promises not to torture anybody we have detained, is most unlikely to admit they ever have tortured anybody. So it is like an alcoholic saying, I'm a reformed alcoholic without ever admitting their alcoholism.'

Lord Bingham of Cornhill, December 2008¹¹

¹¹ *New Zealand press interview*, 8 December 2008: <http://gordoncampbell.scoop.co.nz/archives/160>

The definition of 'terrorism'

- The statutory definition of 'terrorism' is contained in section 1 of the Terrorism Act 2000
- The definition in the 2000 Act includes not only acts of terrorism against the UK and other democratic countries but also any 'use or threat of force' against any government anywhere in the world, including such countries as Burma, North Korea or Syria
- The statutory definition provides the basis for the exercise of a wide range of counter-terrorism powers contained in the 2000 Act, the Anti-Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006 and the Counter-Terrorism Act 2008
- Among these measures is the offence of 'encouraging' terrorism under section 1 of the Terrorism Act 2006
- The definition of 'encouragement' in section 1 includes any statement which 'glorifies the commission ... whether in the past, in the future or generally' of an act of terrorism as defined by the 2000 Act, e.g. including any glorification of any use of force against any government in the past
- Despite minor amendments in the Counter-Terrorism Act 2008, the core definition remains unchanged

Torture and UK involvement in the 'War on Terror'

- Since the 9/11 attacks, the UK government has co-operated closely with the US in terms of defence and intelligence-sharing, participating in the invasions of Afghanistan in late 2001 and Iraq in 2003
- UK co-operation with the US has raised a number of issues concerning potential UK complicity in US policies involving the use of torture, inhuman and degrading treatment
- In addition, questions have been raised concerning the UK's own adherence to Articles 2 and 3 ECHR and the UN Convention Against Torture, including the treatment of individuals detained by UK troops in southern Iraq (e.g. the death of Baha Mousa in September 2003)¹²
- In 2004, media reports revealed that CIA flights containing suspects being subject to extraordinary rendition were flown via UK airports.¹³ A Council of Europe investigation subsequently identified a global 'spiders web' of US transfer points and detention sites that included the UK¹⁴
- In 2005, the House of Lords held that the use of evidence from torture was inadmissible in civil proceedings, contrary to the claims of the Secretary of State
- In 2007, the House of Lords ruled that the UK could lawfully rely on UN Security Council Resolution 1546 to detain a dual UK/Iraqi national without charge in southern Iraq¹⁵
- In 2008, the Divisional Court ruled that it was unable to disclose part of its own previous judgment that indicated the extent of UK knowledge and participation in the possible torture of Binyam Mohammed, a British resident, by the CIA¹⁶

'[T]he use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it.'

Lord Hoffman, December 2005¹⁷

¹² See e.g. BBC News, 'UK Troops 'beat Iraqi to death'', 28 July 2004

¹³ See e.g. Sunday Times, 'US accused of 'torture flights'', 14 November 2004

¹⁴ Final report of Rapporteur of the Parliamentary Assembly of the Council of Europe, June 2006

¹⁵ *Al Jeddah v Secretary of State for Defence* [2007] UKHL 58

¹⁶ See n8 above

¹⁷ *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71



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The ‘twilight struggle’: President Obama and counter-terrorism

What has President Obama done?

Issued three Executive Orders on 22 January 2009:

Review of Detention Policy Options

- Mandates a comprehensive review of the lawful options available to the federal government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations
- Establishes a special task force, headed by the Attorney General and Secretary of Defense, to report within six months

Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities

- Calls for the Guantanamo detention centre to be closed within one year
- Instructs Secretary of Defense to review conditions at Guantanamo and report within 30 days
- Affirms detainees’ privilege of the writ of habeas corpus
- Halts military commissions (bodies appointed to try unlawful enemy combatants’), pending review
- Requires that each detainee’s case will be promptly reviewed:
 - some will be released, or transferred to third countries
 - for those not released, evaluation on prosecution

Ensuring Lawful Interrogations

- Reaffirms adherence to Common Article 3 of the Geneva Conventions
- Prohibits interrogation techniques that go beyond what is permitted in the US army field manual
- Prohibits reliance on post-9/11 directives, memos etc (including those from CIA)
- Closes CIA ‘black sites’ (secret prisons)
- Ensures Red Cross access to detainees

What as President Obama said?

Inaugural Address

- *‘Our nation is at war, against a far-reaching network of violence & hatred’*
- *‘We reject as false the choice between our safety and our ideals’*
- *‘Our founding fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man ... and we will not give them up for expedience’s sake’*

First press conference, 9 February 2009

- *‘My view is also that nobody is above the law, and if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen; but that generally speaking, I’m more interested in looking forward than I am in looking backwards’*

What has Vice President Biden said?

- *‘America will not torture. We will uphold the rights of those who we bring to justice’*
- *‘We will strive to act preventively, not preemptively, to avoid whenever possible, or wherever possible, the choice of last resort between the risks of war and the dangers of inaction’*

What is coming up?

- US District Judge Bates gave Obama administration until 20 February to ‘refine’ the government’s legal position on the four men seeking to challenge their detention at Bagram (airbase in Afghanistan) under habeas corpus
- The Supreme Court also granted the Justice Department a 30-day delay, until 23 March, to say where it stood in the case of Ali al-Marri, a legal resident of the United States. The Bush administration had claimed that it may indefinitely hold al-Marri, without charge in a military brig, on suspicion of terrorism

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