

PROTECTION OF FREEDOMS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

The Department published an ECHR memorandum on Introduction of the Protection of Freedoms Bill in the House of Commons on 11 February 2011¹. This supplementary memorandum addresses the ECHR issues arising from Government amendments tabled for Commons Report stage.

The temporary extension of the maximum period of pre-charge detention for terrorist suspects under Schedule 8 to the Terrorism Act 2000 to 28 days

2. As an exceptional measure, new clause (*Emergency power for temporary extension and review of extensions*) gives the Secretary of State an emergency order-making power when Parliament is dissolved to provide for the temporary extension of the maximum period of detention under section 41 of the Terrorism Act 2000. This provision provides that the Secretary of State may make a temporary extension order if Parliament is dissolved and up until when the Queen's Speech is delivered, to provide that the maximum period for pre-charge detention for terrorist suspects in Schedule 8 to the Terrorism Act is to be 28 days, rather than 14 days, for a period of 3 months only from the date of the order. During all other times, if this exceptional measure is required, Parliament will be asked to enact the fast-track legislation which makes provision to extend the maximum detention period for terrorist suspects. Save where such an order is made (or fast-track legislation enacted), the maximum limit for pre-charge detention will remain at 14 days following arrest (or the beginning of an examination under Schedule 7 to the Terrorism Act 2000). This will be the norm and half the maximum period which was available under the Terrorism Act 2000 and 2006 between 25 July 2006 and 24 January 2011.

3. Article 5 provides that everyone has the right to liberty and security of person. No one shall be deprived of their liberty unless that the detention falls within one of the six specified exceptions in Article 5(1) and is in accordance with a procedure prescribed by law. The provisions relating to the pre-charge detention of terrorist suspects engage Article 5 but are compatible with that ECHR right and remain so compatible when the maximum period is 28 rather than 14 days.

4. Article 5(1)(c) permits detention for the purpose of bringing an individual before the competent legal authority on reasonable suspicion of having committed an offence. The provisions fall within this limb of Article 5(1) as they provide for the continued detention of persons reasonably suspected of having committed terrorism offences or being concerned in the commission, preparation or instigation of acts of terrorism, for the purpose only of enabling the charging of that person.

¹ Available at <http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/human-rights-memorandum>

5. There is no specific ECtHR jurisprudence on the length of time that a person can be detained before they are charged, but there are the overarching principles that detention under Article 5 must not be arbitrary and must proportionate to the attainment of its purpose. The need to detain terrorist suspects for longer than other criminal suspects before charge is necessary for a number of reasons, including the following:

- (a) With recent terrorist attacks designed to cause mass casualties, the need to ensure public safety by preventing such attacks means that it is necessary to make arrests at an earlier stage than for other offences. This often means that less evidence has been gathered at the point of arrest, which means that more time is needed post-arrest to gather sufficient evidence to charge a suspect.
- (b) Longer time limits are needed to cope with the fact that terrorist networks are often international, requiring enquiries to be made in many different jurisdictions and evidence obtained from abroad and there is often the need to find interpreters for rare dialects.
- (c) Terrorist networks are increasingly using sophisticated technology and communications techniques: in recent cases a large number (sometimes in the hundreds) of computers and hard drives have been seized with much of the data on those computers having been encrypted.

6. Detention under Schedule 8 to the Terrorism Act, including when exceptional circumstances justify an increase to a maximum period of 28 days, will remain compatible with Article 5 for the following reasons:

- (a) A judicial authority must approve ongoing detention beyond 48 hours and up to 14 days; and any detention beyond that (up to the maximum of 28 days) must be approved by a senior judge. Applications for extended detention may only be for a period of 7 days or less at a time. This requirement to appear before the court within 48 hours and for continual judicial oversight provides the essential feature of the guarantee in Article 5(3) that persons arrested or detained in accordance with Article 5(1)(c) are entitled to a prompt appearance before a judge or judicial officer.
- (b) Applications for detention beyond 14 days may only be made with the personal consent of the Director of Public Prosecutions (DPP) in England & Wales, the DPP for Northern Ireland in Northern Ireland and the Lord Advocate in Scotland.
- (c) Suspects are entitled to be legally represented in connection with the extension of detention hearings.
- (d) Further detention may only be granted if the judicial authority is satisfied that (a) the investigation is being conducted diligently and expeditiously and (b) there are reasonable grounds for believing that the detention is necessary for one of the reasons specified in paragraph 32(1A) of Schedule 8. Those reasons are that the detention is necessary to obtain or preserve relevant evidence, or pending the outcome of an examination or analysis of relevant evidence.

- (e) The judicial authority may review the lawfulness of the arrest² – that is that the police had reasonable grounds to suspect the individual was a terrorist (namely, a person who has committed one of a number of specified terrorism offences or who is or has been concerned in the commission, preparation or instigation of an act of terrorism).
- (f) If at any point before a warrant is due for renewal a person's detention no longer meets the test for detention he must be released immediately (paragraph 37 of Schedule 8).
- (g) The maximum detention limit of 28 days will only last for a period of 3 months, following which it will revert to 14 days. If at the end of that period, any person is in detention and has been detained for more than 14 days, that person must be released.
- (h) Further oversight is provided by the requirement on the independent reviewer of terrorism to report annually on the operation of the provisions in the Terrorism Act 2000. This report is laid before Parliament.

Home Office
September 2011

² In the matter of an application for judicial review by Collin Duffy and Others [2009] NIQB 31 paragraphs 28 and 29.