



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# **Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention**

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**Twenty-fourth Report of Session  
2005-06**





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**Twenty-fourth Report of Session  
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appendices*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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## Summary

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In this report, the Committee's third report in its ongoing inquiry into counter-terrorism policy and human rights, the Committee moves beyond the scrutiny of individual measures proposed by the Government to consider more enduring ways of making the Government's counter-terrorism strategy compatible with our human rights obligations. The main focal points of the report are, first, consideration of possible adaptations of the criminal justice system which are capable of facilitating criminal prosecution of terrorist suspects without being incompatible with the UK's human rights obligations; and, second, consideration of possible alternatives to lengthy pre-charge detention.

The Committee welcomes the renewed emphasis on prevention in counter-terrorism policy, reiterating that human rights law requires the State to take such measures as can be shown to be necessary to provide adequate and effective protection against a real risk of terrorist attack. At the same time, the Committee regards it as essential to avoid the risk of counterproductivity which might undermine rather than enhance protection. In the Committee's view, counter-terrorism measures must be tested by the extent to which they can be demonstrated to enhance our ability to identify, apprehend and prosecute individuals planning terrorist attacks whilst remaining within the legal framework provided by our human rights obligations and avoiding counterproductivity (paragraphs 6–12).

In the Committee's view, States are now under an emerging human rights law duty to prosecute those whom it suspects of being involved in terrorist activity in order to prevent future loss of life in future attacks. This makes it all the more important that the Government now urgently addresses the obstacles to prosecuting for terrorism offences with a view to resorting more frequently to the criminal law in the effort to counter terrorism. There is scope for some modification of ordinary criminal procedures to accommodate legitimate concerns about national security, but the procedures must still preserve the essence of the suspect's right to judicial review of detention and to a fair trial before a court which is truly "judicial". Introducing closed evidence and special advocates into the criminal trial, for example, would be incompatible with many of the most basic principles of a fair trial (paragraphs 13–44).

The Committee considers whether there are any useful lessons to be learned from the investigating magistrates system in France and Spain. It finds that the nature of the function of investigating magistrates in France and Spain is more prosecutorial than judicial and therefore would not sit easily with our traditions of judicial independence. It also finds that any withholding of intelligence material from the defendant or the public in such a way that it might influence the outcome of the trial would infringe the right to a fair trial. The Committee is therefore firmly of the view that the investigating magistrates model should not be borrowed wholesale and imported into our own institutional arrangements, nor is there anything in the investigative approach which might be borrowed or grafted on to our more adversarial tradition in this country (paragraphs 45–65, 73–76).

The Committee also considers whether there are lessons to be learnt from the use of “investigative hearings” and “disclosure judges” in Canada. It finds that neither investigative hearings nor disclosure judges operate in practice so as to permit the use of intelligence-derived material in a criminal trial without the defendant having the opportunity to contest it (paragraphs 66–72).

The Committee welcomes the recent developments in the role of the CPS whereby it takes a more proactive role in relation to the investigation of offences, and regards this as going some way towards securing some of the advantages which are claimed for the system of investigating magistrates. If protection of the public through criminal prosecution is genuinely to be the first objective of counter-terrorism policy, then turning information into evidence should be uppermost in the minds of all those involved in acquiring intelligence at the earliest possible stage in that process. Intelligence should always be gathered with one eye on the problem of how to turn it into admissible evidence before a judge in a criminal court. Public confidence in the adequacy of inter-agency arrangements for the sharing of intelligence would be greatly increased if protocols governing such matters, such as exist in Canada, not only existed in the UK but were also publicly available and subject to independent scrutiny (paragraphs 77–90).

The Committee is concerned by the finding of the Home Affairs Committee that the power of pre-charge detention in Terrorism Act cases is used mainly for the purposes of prevention and disruption rather than for the purposes of investigation, and by that Committee’s suggestion that preventive detention be specifically included in the statutory grounds for detention. Preventive detention is not permissible under Article 5(1) ECHR and such an amendment to the Act therefore could not be made without a derogation. The Committee does not consider such a derogation to be necessary. Now the wider offence of acts preparatory to terrorism is available, the police should only use the power of extended pre-charge detention for the purpose for which it was sought, namely to investigate the possible commission of offences with a view to criminal prosecution (paragraphs 91–94).

The Committee considers the use made of intercept material in other countries and the views of the DPP about the current position. It concludes that the ban on the use of intercept evidence in court should now be removed, and attention turned urgently to ways of relaxing the ban (paragraphs 95–101).

The Committee considers that the application of the ordinary law of public interest immunity, together with the appropriate use of special advocates as envisaged by the European Court of Human Rights and the House of Lords, should be sufficient to meet the legitimate concerns of the security and intelligence services about disclosure of material damaging to the public interest, at the same time as safeguarding the right to a fair trial. It also believes that there is scope for more proactive case management of terrorism trials, without judges becoming either investigators or prosecutors, and urges the relevant judicial authorities to encourage such an approach. It also recommends that the Government should urgently consider ways of enhancing incentives to give evidence for the prosecution in terrorism cases and the safeguards which must accompany such

incentives (paragraphs 102–110).

The Committee considers whether further extensions of the period of pre-charge detention beyond 28 days are likely to be necessary. It welcomes the flexibility introduced by the Threshold Test in the Code for Crown Prosecutors, which introduces a threshold for charging which is higher than the threshold for an arrest, in that it must be based on evidence which will be admissible at trial and not merely intelligence information, but lower than the demanding standard of a realistic prospect of conviction. In the Committee's view, lowering the charging threshold, which is essentially what the Threshold Test does, must reduce the force of the case for extending the period of pre-charge detention further beyond the current limit of 28 days (paragraphs 113–129).

The Committee regards the combination of the Threshold Test and active judicial management of the post-charge timetable to be far preferable to lengthy pre-charge detention. In particular it has the virtue of enabling prosecutions to be brought, thereby pursuing the objective of protection and prevention at the same time as giving the defendant the full benefit of the ordinary procedures which govern criminal prosecutions. In the Committee's view, if the actual process in terrorism cases is properly understood, further extensions in the maximum period of pre-charge detention should not be necessary (paragraphs 130–131).

The Committee also recommends that the Home Office amend PACE Code of Practice C so as to permit post-charge questioning and the drawing of adverse inferences from a refusal to answer questions at such an interview (paragraphs 132–135).

The Committee agrees with the Home Affairs Committee's concern about the adequacy of current judicial oversight of pre-charge detention, but does not agree that the enhanced judicial oversight which is envisaged should be carried out on the basis of an investigative approach. Such an approach, in the Committee's view, takes away the very essence of the detained person's right of access to a court to challenge the legality of his detention, by withholding from him the information on the basis of which he is being held. In the Committee's view, Article 5 ECHR requires there to be judicial control in the full sense of an adversarial hearing (paragraphs 136–138).

The Committee is of the view that the use of holding charges should not be regarded as an acceptable alternative to extended pre-charge detention (paragraphs 139–142).

The Committee makes two further recommendations concerning pre-charge detention. First, that there ought to be an enforceable right to compensation for those held in pre-charge detention but not charged, as there is in France. Second, that the Code of Practice should make provision for counselling support for those who are detained beyond 14 days, in view of the severe effect on the mental health of those who were detained in Belmarsh and subjected to control orders (paragraph 143).

In the Committee's view, a combination of the flexibility introduced by the threshold test developed by the CPS, active judicial oversight of the application of the post-charge

timetable, and the possibility of drawing adverse inferences from a refusal to answer questions at a post-charge interview should make it unnecessary to contemplate any further extensions to the maximum period of pre-charge detention of 28 days (paragraph 144).

The Committee welcomes the willingness of the Director General of the Security Service to provide information in the future about the nature and level of the threat from terrorism, but regrets that it did not have the opportunity to ask her a number of important questions of concern in connection with this inquiry. It considers it to be a matter of some importance that the head of the security services be prepared to answer questions from the parliamentary committee with responsibility for human rights. There is an increasingly urgent need to devise new mechanisms of independent accountability and oversight of both the security and intelligence agencies and the Government's claims based on intelligence information. In addition to more direct parliamentary accountability, the Committee considers that in principle the idea of an "arms length" monitoring body charged with oversight of the security and intelligence agencies, independent of the Government and those agencies, and reporting to Parliament, merits consideration in this country (paragraphs 159–164).

The Committee recommends that in future all terrorism legislation should have a life limited to five years maximum, and require renewal by primary legislation not ministerial order, and that, in addition to review by the Government-appointed independent reviewer, provision also be made for parliamentary review of the operation of that legislation (paragraphs 165–169).

# 1 Introduction

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## Our inquiry

1. This is our third Report of this Session in our ongoing inquiry into counter-terrorism policy and human rights. Our first two reports in this inquiry were mainly concerned with the human rights compatibility of particular counter-terrorism measures brought forward by the Government.<sup>1</sup> In this report, we move beyond the scrutiny of individual measures proposed by the Government to consider more enduring ways of making the Government's counter-terrorism strategy compatible with our human rights obligations.

2. Our initial call for evidence at the beginning of this inquiry invited submissions on potential future developments in counter-terrorism policy, including the possibility of allowing sensitive evidence, including intercept evidence, to be adduced in criminal trials and the possibility of establishing a judicial role in the investigation of terrorist crimes.<sup>2</sup> In our first Report, we indicated that we would be continuing our inquiry and expected to give further consideration to matters such as possible mechanisms whereby the judiciary could have an investigative role in relation to terrorist offences, whether and if so the means by which intercept evidence could be used in courts, and the use of lethal force by the police.<sup>3</sup> This Report does not deal with the last of these subjects in view of the decision by the Crown Prosecution Service to prosecute the Office of the Commissioner of the Metropolitan Police for health and safety offences in relation to the shooting of Jean Charles de Menezes in London on 22 July 2005.<sup>4</sup> It is an issue which we may consider in future following the conclusion of criminal proceedings. On 17 January 2006 we issued a supplementary call for evidence, including in relation to these matters. As in all our work, our focus in considering these possible future policy developments has been how to ensure that the Government's policy in this area is compatible with the UK's human rights obligations.

3. In the course of this part of our inquiry we have visited France, Spain and Canada to see if there are any useful lessons to be learned from the experience of those countries in countering terrorism; had an informal meeting with the Director of Public Prosecutions and others from the Crown Prosecution Service; and received a number of written submissions which are published in Appendices to this Report. We are very grateful to all those who have helped us in our inquiry.

4. The main focus of this third Report in this inquiry is consideration of possible adaptations of the criminal justice system which are capable of facilitating the effective criminal prosecution of terrorist suspects in ways compatible with the UK's human rights obligations. It also considers some possible alternatives to lengthy pre-charge detention; publishes the Government's response to our earlier Report on the renewal of the control

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1 Third Report of Session 2005–06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I, HC 561-I; Twelfth Report of Session 2005–06, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2005*, HL Paper 122, HC 915

2 Initial call for evidence, 21 September 2005

3 Third Report of Session 2005–06, *op. cit.*, para. 11

4 We have not therefore published evidence we have received relating either to this particular case or the use of lethal force generally

orders legislation<sup>5</sup>; and comments on other miscellaneous matters concerning counter-terrorism policy and human rights arising from observations made during our visits to France, Spain and Canada.

5. We hope that this Report will make a useful contribution to debate. It is currently our intention to return to keep our inquiry into this subject open, with a view to reporting again on certain aspects of counter-terrorism policy before the Government brings forward its consolidated package of anti-terrorism legislation and proposals in 2007.

## The importance of prevention

6. In all of the countries we have visited, we have found a renewed emphasis on prevention in counter-terrorism policy. The nature of the threat from terrorism is perceived to be such that the authorities feel that they cannot afford to wait for terrorist crimes to be committed and to prosecute the perpetrators after the event, nor even risk intervening at a late stage in the preparation of an attack. The scale of the attacks perpetrated in the U.S.A. on 11 September 2001, and subsequently in Madrid and London, and the avowed intention of terrorist groups to cause mass casualties amongst the civilian population, are seen as calling for earlier intervention in order to protect the public.

**7. We welcome the renewed emphasis on prevention in counter-terrorism policy as a mark of a more mature appreciation that human rights law not only imposes constraints on what States can do but also imposes onerous positive obligations on States to take effective steps to protect the lives and physical integrity of everyone within their jurisdiction against the threat of terrorist attack. This emphasis on the importance of the State's positive obligations has been a recurring theme in the Reports of both this Committee and its predecessor concerning counter-terrorism.<sup>6</sup> We reiterate our frequently expressed view that human rights law itself requires the State to take such measures as can be shown to be necessary to provide adequate and effective protection against a real risk of terrorist attack. Appropriate preventive measures, in other words, are positively required by human rights law.**

**8. At the same time in this context we believe it is essential to avoid any counter productivity which, instead of enhancing protection, may well undermine it. Justice must be seen to be done.**

9. A great deal of the debate in Parliament about the Government's counter-terrorism policy has focused on whether the nature of the threat from terrorism has changed compared to the threat previously posed by terrorism connected with Irish republicanism. The Home Affairs Committee in its recent report on Terrorism Detention Powers considered this question and concluded that:<sup>7</sup>

“ ... the nature of the terrorist threat has changed: while there is no sharp break in the continuum between Irish republican terrorism and terrorism today, there are a number of significant developments. The first of these is that while Irish republican

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5 Appendix 1

6 See for example Third Report of Session 2005–06, *op. cit.*, paras 5–6; Eighteenth Report of Session 2003–04, paras. 7–14

7 Home Affairs Committee, Fourth Report of Session 2005–06, *Terrorism Detention Powers*, HC 910-I, para. 44

terrorism was brutal, and deliberately killed or injured large numbers of people, contemporary terrorism is distinguished by the centrality of the intention to cause mass casualties indiscriminately. Secondly, suicide bombers are a new phenomenon in this country. Thirdly, contemporary terrorism has an international basis which makes conspiracies more extensive and complex and increases the likelihood that recruitment to terrorism will continue to grow. Fourthly, the nature of the current threat appears less amenable to negotiated political resolution.”

10. The Foreign Affairs Committee also recently considered the nature of the ongoing threat from terrorism.<sup>8</sup> It reports that, despite the claimed successes in the campaign against al Qaeda, international terrorists nevertheless clearly retain the capacity to strike across the world. It says that there is broad consensus that al Qaeda continues to represent the most dangerous terrorist threat ever posed by a non-state actor, and that it is al Qaeda’s explicit commitment to mass killing that makes it so dangerous. The Committee concludes that:<sup>9</sup>

“... despite a number of successes targeting the leadership and infrastructure of al Qaeda, the danger of international terrorism, whether from al Qaeda or other related groups, has not diminished and may well have increased. Al Qaeda continues to pose an extremely serious and brutal threat to the United Kingdom and its interests.”

11. We do not think it is necessary for us to take a view on this question for the purposes of this Report. It is sufficient to take as our starting point the obvious fact that there exist individuals who both wish and intend to inflict mass casualties on the civilian population in our country and beyond. We are not in a position to know, even approximately, the number of individuals who have such a desire and intention. Nor, more significantly, do we have any realistic idea of their capacity to do so, or of the likelihood of their having access to weapons of mass destruction. As we have observed before, the information to form these judgments is, regrettably, not in the public domain. **We accept, however, that the gravity of the potential harm is such that any counter-terrorism strategy must have prevention at its heart. Indeed, in our view, counter-terrorism measures must be tested by the extent to which they can be demonstrated to enhance our ability to identify, apprehend and prosecute individuals planning terrorist attacks whilst remaining within the legal framework provided by our human rights obligations.**

12. A preventive counter-terrorism strategy, however, creates a dilemma, because it is potentially in tension with the need where possible to prosecute terrorist suspects using the normal criminal justice system rather than extra-judicial measures. The criminal law has not traditionally been a preventive tool in the UK. One of the central challenges for counter-terrorism policy is how to deploy the criminal process in support of a preventive strategy in a way which does not undermine the very essence of the due process guarantees which are both a part of our traditional common law and a central part of our international human rights obligations. This is the dilemma which much of this Report seeks, constructively, to address.

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8 Foreign Affairs Committee, Fourth Report of Session 2005–06, *Foreign Policy Aspects of the War against Terrorism*, HC 573, paras 7–15

9 *Ibid.*, para. 15

## The relevant human rights standards

13. As we have frequently noted in previous reports on this subject, human rights law both requires States to take positive steps to protect everyone within their jurisdiction against terrorist attack and imposes limitations on the measures which can permissibly be taken to counter a genuine threat from terrorism.

14. In this report our principal focus is on the prosecution of terrorist suspects through the criminal law and their detention pre-charge. We therefore begin by considering the human rights law standards which are most relevant to those aspects of counter terrorism policy.

### *A duty to prosecute terrorist suspects?*

15. Human rights law imposes a duty on States to take positive steps to protect those within their jurisdiction against possible terrorist acts. This duty is now widely recognised in the growing number of guidelines and other standards issued by international bodies concerning the role of human rights in countering terrorism. Article I of the Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism, for example, reaffirms the "duty of States to protect their population against possible terrorist acts."

16. The strongest statement of the duty to combat terrorism in the case-law of the European Court of Human Rights is to be found in the decisions concerning the positive obligations imposed by the right to life in Article 2 of the Convention. States have long been required by the Court's interpretation of Article 2(1) to "take appropriate steps to safeguard the lives of those within its jurisdiction".<sup>10</sup> The precise steps which States are required to take to fulfil this duty are gradually being elaborated by the Strasbourg Court. There is duty on the State to do what could be reasonably expected to avoid a real and immediate risk to life by criminal acts of a third party of which the State or its agents had or ought to have knowledge.<sup>11</sup> There is also a recognised duty on the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences.<sup>12</sup> Merely having the criminal law provisions in place is not enough in itself: they should be backed up by an effective law enforcement machinery to prevent, suppress and punish breaches of those criminal law provisions.<sup>13</sup> Prosecution for unlawful killings is recognised by the Court of Human Rights as a measure of prevention and therefore as a step capable of fulfilling the protective duty imposed by Article 2 ECHR.<sup>14</sup>

**17. As we interpret the Article 2 case law, States are now under a duty to prosecute those whom it suspects of being involved in terrorist activity in order to prevent future loss of life in future attacks. In our view this emerging duty in international human rights law makes it all the more important that the Government now urgently addresses the obstacles impairing the effective prosecution of terrorism offences with a view to resorting more frequently to the criminal law in the effort to counter terrorism.**

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10 See for example *L.C.B. v UK* (1998) 27 EHRR 212, para. 36

11 *Osman v UK* (1998) 29 EHRR 245, para. 116; *Edwards v UK* (2000) 35 EHRR 19, para. 54; *R(Amin) v Secretary of State for the Home Department* (2004) 1 AC 653, para 21

12 *Kaya v Turkey* (28 March 2000) at para. 85

13 *Ibid*

14 *Oneryildiz v Turkey* (2004) 39 EHRR 12

### *The rights of suspects prosecuted for terrorism offences*

18. At the same time as being under a duty to prosecute terrorist suspects States are also under a duty to comply with a number of specific human rights enjoyed by anyone who is suspected of having committed a criminal offence. States must observe the specific rights of those arrested on suspicion of terrorist offences and charged with such offences. The most important of these rights are the due process guarantees contained in the right to liberty in Article 5 ECHR and the right to a fair trial in Article 6 ECHR.

19. The right to liberty in Article 5 requires that to deprive a person of his liberty on criminal charges there must be a reasonable suspicion that he has committed an offence;<sup>15</sup> that an arrested person is informed promptly of the reasons for his arrest and of any charge against him;<sup>16</sup> that a person arrested or detained on suspicion of having committed an offence is brought promptly before a judge and tried within a reasonable time;<sup>17</sup> and that everyone deprived of their liberty by arrest or detention is entitled to take proceedings by which the lawfulness of his or her detention is decided speedily by a court and his release ordered if the detention is not lawful.<sup>18</sup>

20. The right to a fair trial in Article 6 includes a basic right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. There are also a number of more specific rights for anyone charged with a criminal offence: they are to be presumed innocent until proved guilty according to law;<sup>19</sup> the right to be informed promptly and in detail of the nature and cause of the accusation against him;<sup>20</sup> the right to defend himself in person or through legal assistance of his own choosing;<sup>21</sup> and the right to examine or have examined witnesses against him.<sup>22</sup> A person charged with a criminal offence is entitled to be tried in open court, in his presence, in an adversarial hearing where he has access to all the material relied on against him and the opportunity to confront and cross examine witnesses for the prosecution. There must be “equality of arms” as between prosecution and defence.

21. The important question for present purposes is the extent to which the relevant human rights law standards which apply to detention and criminal prosecutions permit of variations or limitations in order to accommodate the particular difficulties which arise in the prosecution of terrorism offences. As we pointed out in our recent Report on the UK’s compliance with the UN Convention Against Torture, the prohibitions on torture, and on deportation to face torture, are absolute: they can never admit of such variations or limitations. The rights to liberty and fair trial, on the other hand, nevertheless leave *some* room for permissible variations in order to accommodate specific concerns which arise from the nature of terrorism.

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15 Article 5(1)(c)

16 Article 5(2)

17 Article 5(3)

18 Article 5(4)

19 Article 6(2)

20 Article 6(3)(a)

21 Article 6(3)(c)

22 Article 6(3)(d)

22. The European Court of Human Rights has interpreted both Articles 5 and 6 ECHR with a degree of flexibility. It takes note of the difficulties that the authorities are faced with in investigating and preventing terrorist attacks. It will “take into account the special nature of terrorist crime and the exigencies of dealing with it as far as is compatible with the provisions of the Convention”.<sup>23</sup> It has explicitly recognised that Article 5(1)(c) ECHR should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of States in taking effective measures to counter organised terrorism, and has accepted that States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or his identity.<sup>24</sup> However, there are limits to the scope of the permitted variation: the Court insists on being able to ascertain whether “the essence” of the safeguard afforded by Article 5(1)(c) has been secured, and therefore requires the State to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.<sup>25</sup>

23. Similarly, the Court has afforded a degree of flexibility in the interpretation of prompt judicial control in Article 5(3) ECHR, acknowledging that the difficulties of judicial control over the arrest of terrorists might justify extending the period of lawful detention to investigate terrorist crimes; but again this flexibility is strictly circumscribed: because the essence of the right to “prompt” judicial control must be preserved, the Court has interpreted “prompt” to require a detainee to be brought before a judge no later than four days from his detention.<sup>26</sup> Although there is room for some flexibility in the application of the guarantees in Article 5, the Court insists that the very essence of the rights in question must not be impaired, and in policing this limit it has consistently made clear that access to proper judicial supervision is an essential factor to safeguard the very essence of those rights. Where a person is subjected to pre-charge detention, the right to take proceedings before a court so that the court decides on the lawfulness of the detention may not be denied: “national authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved.”<sup>27</sup>

24. Some modifications of ordinary criminal procedure are also permissible without conflicting with the right to a fair trial in Article 6 ECHR. For example, in certain circumstances it may be permissible for witnesses to give evidence anonymously.<sup>28</sup> The Court has acknowledged that a degree of flexibility in the content of fair trial rights is permissible: States have to employ means “which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice”.<sup>29</sup> However, once again the scope for modification of ordinary criminal procedures is limited: the question is whether the procedure preserves the very essence of the rights

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23 *Fox, Campbell and Hartley v UK*, (1991) EHRR 159, para. 28

24 *Ibid*

25 *O’Hara v UK* (2002) 34 EHRR 32, para. 35

26 *Brogan v UK* (1989) 11 EHRR 117, para. 62

27 *Al-Nashif v Bulgaria* (2003) 36 EHRR 37, para. 94

28 *Doorson v The Netherlands* (1996) 22 EHRR 330

29 *Al-Nashif v Bulgaria*, op. cit., at para. 97

protected. As with the case law concerning the right to judicial review of detention under Article 5, it is clear from the case-law on Article 6 that ultimately the requirement of adversarial proceedings and equality of arms must be complied with. Anything less does not amount to effective “judicial” control by a “court”.

### **Balancing liberty and security?**

25. In the course of our inquiry we have found the concept of balancing liberty on the one hand against security on the other to be a common feature of political discourse in the UK. In Canada, however, many of the officials with whom we spoke were keen to move beyond the concept of “balancing” liberty and security in their own discourse because it implied that there was a straightforward trade-off between one and the other. In Spain, the State Secretary for Security similarly told us that it was not necessary or advisable to restrict individual rights and freedoms or to weaken the rule of law in order to fight terrorism efficiently and that excessive limitation only played into the hands of terrorists.

26. **We reiterate the importance of not seeing liberty and security as being in an inverse relationship with each other.<sup>30</sup> Less liberty does not necessarily mean more security, nor vice versa. The “balance” metaphor does not seem apt for this reason. We agree with the view expressed by the European Commission for Democracy through Law (the Venice Commission), that “State security and fundamental rights are not competitive values; they are each other’s precondition.”<sup>31</sup>**

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30 See for example, Eighteenth Report of Session 2003–04, *op. cit.*

31 Opinion on the Protection of Human Rights in Emergency Situations, Opinion No. 359/2005, CDL-AD(2006)015 (18 March 2006), at para. 31

## 2 Overcoming Unnecessary Obstacles to Prosecution

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### Introduction

27. The Newton Report recommended greater use of conventional criminal prosecution under the existing range of terrorism-related offences.<sup>32</sup> Our predecessor Committee's Report on the Review of Counter-terrorism Powers agreed with the Newton Report that bringing terrorism back within the scope of the criminal law would be preferable in human rights terms to a regime of indefinite administrative detention. It therefore considered a number of ways in which prosecution for existing criminal offences might be facilitated. It also concluded from the comparative research that we had commissioned that in most other countries the State has sought to deal with those suspected of involvement in international terrorism through criminal prosecution.<sup>33</sup>

28. The Government has repeatedly restated its policy that criminal prosecution of suspected terrorists is its preferred way of dealing with terrorists and disrupting their activity.<sup>34</sup> We welcome this commitment. We wish to re-affirm the importance of using the ordinary criminal process and of liberty only being deprived on the basis of evidence which can be fairly contested in a proper process before the courts. A number of matters give us cause for concern as to whether the possible use of criminal prosecutions is being pursued with sufficient vigour. First, as we have previously pointed out, a number of those previously detained in HMP Belmarsh and subsequently made the subject of control orders report that they have not been interviewed at all by the police during that time. Second, Lord Carlile of Berriew QC in his Report on Control Orders, was concerned by the lack of justification given by the police for their assertion that prosecution was not an option, and suggested that in future the police should give reasons as to why it was not appropriate to prosecute instead of having resort to a control order. Third, there is the notable disparity, on which we have also previously commented, between the number of arrests under the Terrorism Act 2000 and the number of prosecutions. Taken together, these give grounds to question whether enough is being done to fulfil the State's positive duty to protect the public by prosecuting those suspected of involvement in terrorism.

29. One of the central dilemmas which our Government and other Governments face can be shortly stated: what are they to do about individuals in their country who, according to intelligence, pose a serious threat to national security, cannot be deported because they face a real risk of torture or death in their own country, and cannot, at least on current understandings of the criminal process, be prosecuted because the nature of the information against them would not be admissible in a criminal prosecution? They cannot be released into the community because the risk they pose to the public is considered to be too great. They cannot be detained indefinitely because this would be incompatible with

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32 Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review Report*, HC 100 (December 2003), hereafter "The Newton Report"

33 Sixth Report of Session 2003-04, *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuation of Part 4*, HL Paper 38, HC 381

34 See for example the Home Secretary's recent statement to the House of Commons about the Government's Counter-terrorism strategy: HC Deb, 10 July 2006, col. 1117

the European Convention on Human Rights. And, for reasons given in our report on the UK's compliance with the UN Convention Against Torture, we think it is unlikely that they can be lawfully deported on the basis of Memoranda of Understanding with the receiving country where that country has a longstanding record of being in breach of its international obligations regarding torture, in the absence of effective safeguards against abuse, if such effective safeguards were possible.<sup>35</sup> Whether they can be contained by way of control orders, which represent the Government's latest attempt to reconcile these conflicting demands, is currently the subject of litigation. Our own reservations about the human rights compatibility of that solution are a matter of record.<sup>36</sup>

30. We recognise that this is a genuine dilemma for the Government, indeed, for all Governments who today face a threat from international terrorism. Our strong conviction is that the only human rights compatible answer to this dilemma in the long run is to find ways of prosecuting such individuals. We have therefore carefully considered what are said to be the main obstacles to prosecuting such individuals, with a view to assessing whether there are practical ways of overcoming them which do not conflict with our human rights obligations. We have also given careful consideration to whether any modifications to the criminal process might help overcome what are considered to be the main obstacles to prosecution, without departing from the essence of the due process standards which any criminal defendant is entitled to expect.

### **The main obstacles to criminal prosecution**

31. The principal obstacles to the criminal prosecution of terrorist suspects were identified by the Newton Report. These obstacles flow from the fact that much of the information available against a terrorist suspect is likely to be information derived from intelligence.

32. First, intelligence information may not cross the threshold of admissibility which evidence in an adversarial court hearing is required to meet. For example, it might be second or third hand hearsay, or an expert assessment based on a number of inferences from small fragments of information.

33. Second, even if admissible, such information is likely to fall short of the criminal standard of proof beyond reasonable doubt.

34. Third, the statutory blanket ban on the admissibility of intercept evidence in court, in section 17 of the Regulatory and Investigative Powers Act 2000, prevents prosecutions from being brought which could be brought if such material could be relied on by the prosecution.

35. Fourth, even if there were no legal obstacles to the use of such information, the intelligence agencies are not prepared to make it available in open court, for fear of compromising their sources or methods.

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35 See our discussion of this point in our Report on the UN Convention Against Torture, Nineteenth Report of Session 2005–06, *The UN Convention Against Torture (UNCAT)*, Volume 1, HL Paper 185-I, HC 701-I. at paras 95–131

36 Twelfth Report of Session 2005–06, op. cit

36. Fifth and finally, the security services are also concerned about the breadth of disclosure requirements in English criminal law leading to the disclosure of other material not relied on, and perceive the law on public interest immunity to be inadequate

37. We have grown increasingly concerned that the existence of these obstacles to prosecution are taken as fixed and immutable. It is frequently asserted, for example, by Ministers and in the media, that there are a number of dangerous individuals whom it is just not possible to prosecute. The Home Secretary, for example, in his recent statement to the House of Commons about the Government's counter-terrorism strategy, said:<sup>37</sup>

“Prosecution is, and will remain, our preferred way of dealing with terrorists and disrupting their activity. Prosecution, however, is not always possible. Information and knowledge are not necessarily evidence. When, as is sometimes the case, the available intelligence shows that an individual is involved in terrorism, but does not provide enough evidence to secure a prosecution, we must have other options available to us to protect public safety.”

38. One of the main purposes of this Report is to question whether more could in fact be done to overcome what are commonly understood to be the main obstacles to prosecution.

### Using closed evidence and special advocates in criminal trials

39. It is important to begin by explaining why one particular “solution” which is sometimes mooted would clearly not, in our view, be compatible with our human rights obligations.

40. The most direct way of tackling the obstacles to prosecution outlined above would be to introduce a special procedure for terrorist trials in place of the ordinary criminal process, in which judge-only courts can hold closed hearings, using a lower standard of proof than beyond reasonable doubt, and in which the prosecution present to the court intelligence-derived information which is withheld from the defence but on which the prosecution rely to secure a conviction, with the interests of the defence being represented by special advocates. Something along these lines was first suggested as a possibility by the former Home Secretary Rt Hon David Blunkett MP in comments to the press during a visit to Amritsar in February 2004.<sup>38</sup>

41. The reasons why such a process would be inconsistent with the fundamental principles of a fair trial were eloquently put in a letter to *The Times* from six special advocates appointed under the Special Immigration Appeal Commission Act 1997, with experience of the operation of the special advocate system as it operated in SIAC.<sup>39</sup> They wrote:

“We are convinced that both basic principles of fair trial in the criminal context and our experience of the system to date make such a course untenable. It would contradict three of the cardinal principles of criminal justice: a public trial by an impartial judge and jury of one's peers, proof of guilt beyond reasonable doubt, and a right to know, comment on and respond to the case made against the accused. The

37 HC Deb, 10 July 2006, col. 1117

38 As reported in *The Observer*, 1 February 2004

39 Nicholas Blake QC, Andrew Nicol QC, Manjit Gill QC, Ian Macdonald QC, Rick Scannell and Tom de la Mare, letter to *The Times*, 7 February 2004

special advocate system is utterly incapable of replacing these essential fundamentals of a fair trial.”

42. It is of the utmost importance that the origins of special advocates in our law are properly understood, in order to prevent their use in other areas where they may be incompatible with human rights requirements. Special advocates were first introduced in the UK in the context of immigration law, in response to the decision of the European Court of Human Rights decision in *Chahal v UK*. They were introduced to bring about an improvement in the procedural protection available to those who were subject to deportation on the ground that they posed a threat to national security. In the Strasbourg jurisprudence, decisions to deport on national security grounds are not decisions to which the procedural guarantees in Article 6(1) ECHR apply.

43. Criminal trials, on the other hand, attract the full range of due process protections enumerated in Article 6. Secret trials, in which the prosecution seeks to secure a conviction in closed proceedings on the basis of material which is withheld from the defence, are clearly contrary to these requirements. We note that it was an important part of the reasoning in the recent U.S. Supreme Court decision about the unlawfulness of the procedure for using military tribunals to try detainees at Guantanamo that “an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him”, a principle described as “indisputably part of customary international law”.<sup>40</sup> **We agree with the view of the special advocates who wrote to *The Times*, that to introduce the system of special advocates into the criminal trial would be incompatible with many of the most basic principles of a fair trial. We made essentially the same point in our earlier report in which we said that it would in our view be incompatible with the requirements of Article 5(4) ECHR and Article 6 if special advocates were to be used in control order proceedings involving deprivation of liberty.**

44. This does not mean that special advocates have no role to play in criminal proceedings. As we explain below, fairness requires that they should have a role when determining whether the prosecution has made out its claim to withhold information on the basis that disclosure would be contrary to the public interest.

## “Investigating Judges” in Terrorism Cases

### Background

45. At the time of the passage of the Terrorism Act 2006, there was considerable interest in the possible use of “investigating judges” in terrorism cases: that is, judges with some role in the investigation of terrorism offences, similar to the investigating magistrate model used in many European legal systems.

46. The suggestion was first made in 2003 by the Report of the Privy Counsellor Review Committee on the Anti-terrorism, Crime and Security Act 2001 (“the Newton Report”). The Report suggested that one possible way of overcoming some of the obstacles to criminal prosecution in terrorism cases might be to use an investigative approach in the

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40 *Hamdan v Rumsfeld*, No. 05–184 (29 June 2006), available at [www.supremecourtus.gov/opinions](http://www.supremecourtus.gov/opinions)

particular specialised context of terrorism cases.<sup>41</sup> What the Newton Committee had in mind was making a security-cleared judge responsible for assembling a fair, answerable case, based on a full range of both sensitive and non-sensitive material, which would then be tried in a conventional way by a different judge.

47. The Newton Committee thought that such an investigative approach could be well suited to overcoming the risk of disclosure of sensitive material, and the inadmissibility of intelligence-based information as evidence. It believed that it could overcome the disclosure problem by enabling a security-cleared judge to work closely with the authorities to fill any gaps in the evidence and by providing a systematic way of ensuring that exculpatory material was properly taken into account in the case. It considered that it could overcome the problem of intelligence information not being admissible because the case for a blanket rule excluding hearsay is weaker under the investigative model. Professional judges would be responsible for protecting the suspect evaluating the evidence and giving it the appropriate weight, rather than being obliged to exclude it completely.

48. The Newton Committee's suggestion was tentative: it recognised that there were obvious difficulties, but nevertheless thought it would be worth "working up more detailed proposals for an investigative approach for the specialised purpose of handling terrorism cases".<sup>42</sup> It did not envisage seeking to replicate another system in its entirety, but rather to use the underlying principles to devise a system that works in the context of the British legal system.

49. The idea of working up more detailed proposals for an investigative approach in terrorism cases was taken up by Lord Carlile, the Government's reviewer of the operation of the terrorism legislation, in his 2005 Report on the Government's proposals for changes to counter-terrorism laws. Lord Carlile suggested that the Newton Committee's recommendation about the introduction of a system of investigating magistrates "may provide the clue to the system of protections needed to enable the period of detention without charge to be extended to a maximum of three months in rare cases." He envisaged a shift towards a more investigative approach, involving a security-cleared judge with power to require specific investigations to be pursued and the use of a special advocate to make representations on the interests of the detained persons and to assist the judge.<sup>43</sup> Such an approach, Lord Carlile asserted, would be compatible with human rights legislation.<sup>44</sup> The Newton Committee proposal that consideration be given to using a more investigative approach in terrorism cases in order to overcome certain obstacles to prosecution, therefore changed into a proposal for providing stronger protection for a detained person during extended periods of pre-charge detention.

50. Like the Newton Committee's, Lord Carlile's suggestion of such a system was also tentative: he claimed no definitive authority for his suggestions, but hoped that they might provide at least a signpost to an acceptable system.<sup>45</sup>

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41 The Newton Report, paras 224–235

42 *Ibid.*, para. 235

43 Proposals by Her Majesty's Government for changes to the laws against terrorism, Report by the independent reviewer Lord Carlile of Berriew QC, October 2005 at paras 65–67

44 *Ibid.*, para. 68

45 Report by the independent reviewer, October 2005, para. 69

51. Anticipating that this was likely to be an important issue in the debates on counter-terrorism measures, we specifically called for evidence on this matter when we first announced our inquiry into counter-terrorism policy and human rights. In our first Report in this inquiry, we referred briefly to the evidence we had so far received on this question.<sup>46</sup> We noted the oral evidence of the then Home Secretary, the Rt. Hon Charles Clarke MP that although he personally thought that there was a lot to be said for an investigating judge regime rather than the current adversarial system, there was considerable disagreement within Government about the desirability of shifting to an inquisitorial regime for terrorist cases. We also noted that most of the legal and human rights NGOs from whom we had received evidence were opposed to establishing a judicial role in the investigation of terrorist crime, principally on the ground that this would represent a major change from the adversarial system in England and Wales. However, we did not think that this was, of itself, enough of a reason to reject the possibility that there may be scope to devise a novel procedure borrowing elements from the investigating judge model used in some European countries, and we indicated that we intended to return to this question in a later Report.

52. In December 2005 we visited France and Spain to find out more about how investigating magistrates work in practice, how they work in terrorism cases, whether they facilitate much longer pre-charge detention, and whether there are any useful lessons to be learned from the investigative approach which might possibly be capable of importation. Because of the current level of interest in the system in the UK, we think it will be helpful to explain in some detail how the system works in practice in those two countries, before returning to consider whether there are any useful lessons for us.

### *Investigating magistrates in France*

53. In France,<sup>47</sup> in relation to ordinary crime, the first stage in the procedure is the preliminary inquiry (*enquête préliminaire*) which is led by the *police judiciaire* under the authority of the state prosecutor (*procureur de la République*). The inquiry takes place before the decision to prosecute and its aim is to assemble evidence of an offence. During the preliminary inquiry stage, there is a power of pre-charge detention (*garde à vue*). The police may detain an individual, with cause, for up to 24 hours. The prosecutor can authorise detention for a further 24 hours. In terrorism cases, a judge may, on the request of the prosecutor, extend detention twice more for 24 hours at a time. The maximum length of pre-charge detention in terrorism cases in France is therefore 96 hours, or 4 days, with judicial authorisation required after 48 hours. During our visit there was a Bill before the French Parliament which would have extended the maximum period of pre-charge detention in terrorism cases from 4 to 6 days. After 72 hours, the suspect is entitled to a half hour visit, but not continuing assistance, from a lawyer. The lawyer, it seems, is not informed of the details of the case. There is also a medical examination of the detainee, with a doctor giving an opinion on the impact on the person's health if detention is extended.

54. If, during the preliminary inquiry, the prosecutor discovers that a crime has been committed, or has been in preparation, or that a victim exists, he or she can decide to

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46 Third Report of Session 2005–06, op. cit., para. 98

47 We are particularly indebted to Professor Roger Errera for his assistance in helping us to understand the applicable criminal procedure

prosecute. At this point in the process, the case is then handed to a *juge d'instruction*. The *juge d'instruction* is a judge, but in the French system both sitting judges and prosecutors belong to the same body (*le parquet*). The document sent by the prosecutor to the *juge* identifies the nature of the offence and can be directed against a named individual or individuals or against "X". The victim of a crime can also set the prosecution in motion.

55. The handover by the prosecutor to the *juge d'instruction* marks the start of the next phase in the procedure: the investigation. The *juge* is in charge of the investigation and directs the *police judiciaire*. The scope of the investigation is defined by the document sent to the *juge* by the prosecutor: the *juge* can only investigate those offences mentioned in the document. He or she can issue warrants to search or arrest, authorise phone tapping, hear witnesses, visit places, ask for expert reports on technical matters, and order pre-trial detention where necessary (for example, to protect evidence, prevent collusion, or protect people). The task of the *juge* during this phase is to assemble and evaluate the evidence which is collected by the police acting on his or her instructions. At any moment the *juge d'instruction* may indict (*mettre en examen*) a person if he or she thinks that the evidence indicates that it is likely that he has committed, or participated in, the offence mentioned in the file. Once charged, an individual is entitled to have his lawyer present during interview.

56. To secure pre-trial detention, the *juge d'instruction* must first charge the person in specific terms, in accordance with the Penal Code, identifying precisely the offence charged and the relevant details (e.g. "I accuse you of planting a bomb at Gare du Nord on such and such a date"). He or she must then refer the case to another judge of the same court, who will decide whether to hold the person in pre-trial detention after hearing the individual, the *juge d'instruction* and the prosecutor at an in camera hearing, once charged there is no legal limit to the length of pre-trial detention. However, a detained person can ask to be freed at any moment, and all decisions of the *juge d'instruction* can be appealed before a special division of the court of appeal.

57. At the end of an investigation, the *juge*, must do one of two things: either decide that there is no case to answer, in which case, subject to appeal by the prosecutor, the detained person is released; or, if he thinks that there is a sufficient case against an indicted person, send the case to the competent court, which can continue to investigate, and the *juge* disappears from the scene. A person who has been held in pre-trial detention during investigation by a *juge d'instruction* which is not followed by a conviction is automatically entitled to full compensation for financial and professional losses.

58. We heard a number of criticisms of the French system of investigating magistrates while we were in France: in particular that they had excessive powers and that there was a lack of accountability notwithstanding rights of appeal against their decisions. Indeed, we formed the impression that, ironically, just as people in this country begin to take an interest in the system of investigating magistrates, there may be growing discontent with that system within France itself.

### **Investigating magistrates in Spain**

59. In Spain, we learnt that there are three phases in the procedure for investigating terrorist crimes: administrative detention by the police; then if appropriate preventive detention during judicial investigation under an investigating magistrate (*juez instructor*);

then, once charges has been laid, provisional detention pending trial. To activate the investigating magistrate phase, there had to be a “rational indication of criminality” and “probable cause”. The *juez* decides this on a *prima facie* basis, subject to appeal, and then opens and continues his investigation. There has to be concrete and specific reasons for pre-trial detention.

60. Terrorist suspects can be held incommunicado for 72 hours. After 72 hours there can be an extension for a further 48 hours with judicial authorisation, then for additional periods, with judicial authorisation, up to a maximum of 13 days. The purpose of detention at this stage is to enable the investigation to continue. Such detention was said to be subject to strict safeguards, including the requirement of judicial authorisation. The prosecution has to go before a judge and at a hearing has to present the evidence that underpins the case in order to persuade the judge as to whether the person should be detained and if so for how long. The police commit an offence if they detain without judicial authority.

61. In terrorism cases, during the initial 72 hours, the suspect does not have the right to choose his or her own lawyer, but is assigned a duty lawyer from a college of lawyers. We were told that the justification for this restriction on the rights of the suspect is that a lawyer of a suspect’s choosing might be associated with the terrorist group and might therefore prejudice the investigation by passing information back to the group, a concern which we were told had arisen in relation to lawyers acting for suspects associated with the Basque separatist group ETA. After the initial 72 hours suspects can choose their own lawyers. Extensions up to the full 13 days maximum were very rare.

62. As in France, there is close co-operation between the police and the judiciary. The police report directly to the judge responsible for the investigation, who authorises search warrants and the interception of evidence and examines the evidence collected by the police. The investigating magistrate may decide to hold proceedings in secret, for example in a case involving the authorisation of telephone tapping, notification of which would defeat the point of the exercise.

63. We asked Spanish Ministers, prosecutors and police whether there was any pressure to increase the maximum 13 day pre-charge detention period. Ministers said that they had not come under any pressure to do so. Neither the Minister nor the police representative to whom we spoke had any experience of cases in which 13 days pre-charge detention had not been sufficient. No debate was taking place in Spain about extending the 13 day detention period. The prosecution service told us that it was very happy with the powers it had and that it did not want more. We were told that the Government was considering an expert report on the period of incommunicado detention, possibly with a view to amending the law by shortening the period of incommunicado detention. No increase in the maximum period of pre-charge detention was thought to be necessary in Spain, because it was felt that the necessary investigative work would have been done by the police over a long period before the arrest of the terrorist suspect. Even in the absence of prior intelligence, we were told, the police would manage to get the necessary information within the normal detention period of 13 days.

64. It was explained that there is a significant difference between pre-charge police custody and post-charge judicial custody. When suspects move into judicial custody, they move into a legal framework based on guarantees for the individual involved. The whole purpose

of detention at this point is not to enable the investigation to continue, but to protect the public. It was very important for these individuals to be able to know the charges against them to be able to make their statement in response. Pre-trial detention had to be proportionate. It could last for up to four years in terrorism cases, but the maximum period was hardly ever reached, and normally it lasted for an average of about 6 or 7 months.

65. We heard criticisms of the Spanish system from representatives of Amnesty International who said that terrorist suspects were often unable to speak to anyone and were provided with a duty lawyer whom they had not chosen to represent them and who could not defend them. They could not have a private interview or be offered advice, and duty lawyers were not told why the person had been detained, which made representation difficult. Pre-trial investigations were also said to be too lengthy. Similar criticisms of Spanish counter-terrorism policy were made by Human Rights Watch in its 2005 country report on Spain, but that report also praised Spain for seeking to counter terrorism through the criminal justice system.<sup>48</sup>

### ***“Investigative hearings” and “disclosure judges” in Canada***

66. At the time of the passage of the Terrorism Act 2006 there was also some interest here in whether Canada provided an example of a common law system which had developed a workable answer to the problem of how to make use of sensitive intelligence material in criminal trials without disclosing the material itself to the defence. We looked into this during our visit to Canada.

67. We found that there were two possible mechanisms which were being referred to. First, the Canadian Anti Terrorism Act created a new procedure for “investigative hearings”, involving compelled testimony by a named individual in proceedings which could be held in closed session. We were told that the investigative hearings provisions were a response to a perception that people in certain communities knew about certain activities going on or being planned, but were not coming forward to the authorities. They were therefore intended for people who may have material evidence of a terrorist plan, but who are unlikely themselves to be charged. Evidence obtained during investigative hearings cannot be used in criminal proceedings against the compelled individual, whether directly or indirectly.

68. The Supreme Court of Canada considered the compatibility of investigative hearings with the Charter in a case which has become known in Canada as “the Air India case”.<sup>49</sup> The Supreme Court held that there was a presumption that investigative hearings should be held in public, subject to compelling reasons that an investigative judge could use to justify holding it *in camera*. The presumption of openness was necessary to maintain the degree of judicial impartiality and independence which was constitutionally required. We were told that the presumption in favour of open court proceedings which the Supreme Court of Canada upheld in the Air India case has largely undermined the usefulness of investigative hearings from the Government’s point of view.

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48 Human Rights Watch [www.hrw.org](http://www.hrw.org)

49 The case concerned the prosecution of men accused of conspiring to blow up the Air India airliner which was destroyed by an explosion on board and came down off the Canadian coast in 1985

69. Some of the judges in the Air India case were concerned about the impact on judicial independence because of the role it gave to judges in investigating. When we asked a member of the senior judiciary whom we met in Ottawa about the independence and role of the judiciary in the anti-terrorism context, he told us that there was serious public concern that judges could be seen as protagonists in the Government's fight against terrorism, and judges had to be very careful not to compromise their roles by being perceived as being swept up in the Government's fight.

70. The second mechanism which people may have in mind when referring to the Canadian example is the use of "disclosure judges". The Canadian Anti Terrorism Act amended the Canada Evidence Act to enhance executive power to restrict the disclosure of information which might jeopardise international relations, national defence or national security. These provisions apply to all proceedings, including criminal proceedings. The Attorney General must be notified whenever there may be potentially injurious information or sensitive information disclosed as part of proceedings, including criminal proceedings. Whether or not such information should be disclosed is decided by a Federal Court judge, who sits in closed session in the absence of the defendant or his representatives. If the Court orders disclosure the Attorney General may issue a certificate overriding the Court's decision and ordering non-disclosure.

71. The Canada Evidence Act procedure appears on the face of it to contemplate the use of intelligence material in criminal trials without the accused being able to challenge it in any way. In fact, we found that the trial court retains the power to stay all proceedings against the accused where it decides that non-disclosure of sensitive information would mean that the defendant could not have a fair trial. It seemed to us that the system of disclosure judges in Canada operated in practice a similar way to the law on public interest immunity in England and Wales: the right to a fair trial is preserved because the prosecution may not be able to proceed if certain material which is decisive for the defence is unable to be disclosed.

**72. We therefore found that neither investigative hearings nor disclosure judges operate in practice so as to permit the use of intelligence-derived material in a criminal trial without the defendant having the opportunity to contest it.**

### ***Investigating magistrates in England and Wales?***

73. We visited France and Spain with an open mind as to whether there might be some useful lessons to be learned from the investigating magistrates system. However, we found that the nature of the function of investigating magistrates in France and Spain was more prosecutorial than judicial and for that reason would not sit easily with common law traditions. In particular, it required a very close relationship between the investigating magistrate and the police and intelligence agencies. As Juge Bruguiere, a most experienced *juge d'instruction* in terrorist cases, put it to us, in France the intelligence services, law enforcement agencies and the judiciary "worked in synergy". Such a collaborative relationship would, in our view, in this country, be incompatible with the nature of the judicial function as it has traditionally been understood. We also felt that the safeguards for the detained person were much weaker than the equivalent safeguards here, including the possibility of lengthy pre-trial detention on the basis of information which is not disclosed to the detainee and which he or she therefore does not have the opportunity to challenge.

74. The DPP told us that the CPS was open-minded about importing elements of inquisitorial procedure where these could fit into an adversarial system. For example, it could be helpful, and not incompatible with the adversarial principle, to allow a judge to examine technical material about how a listening device had been installed and then to certify the product as evidence, so dealing with defence allegations that a tape had been spliced or otherwise interfered with but without disclosing sensitive information about methods and techniques. However, the DPP warned that importing elements of inquisitorial procedure would not necessarily deal with the greater problem of turning intelligence material into usable evidence. He was aware that some people were arguing that a judge should see intelligence material, of an otherwise inadmissible nature, “sanitise” it, and put it into the trial as evidence against the wishes of the defence. In his view this was based on a fundamental misunderstanding of the role of “disclosure judges” in Canada. On a recent visit to Canada he told us he had spoken to Canadian prosecutors who were horrified at the suggestion that such material could be used as evidence for the prosecution at the trial. This would be contrary to the Charter of Rights, the DPP was told. Inadmissible material could not become admissible simply by certification of a judge. The defence had to be able to test the primary material relied upon against them. The same was true under the ECHR in the DPP’s view. Introducing into a criminal trial sanitised intelligence material which is contested by the defence would require a derogation from the ECHR.

75. This also appears to be the Government’s position. In its supplementary written evidence to our inquiry the Home Office indicated that it had concluded its examination of the possibility of using judges in what it describes as “a pre-trial sift procedure” in terrorist cases, as recommended by the Newton Committee in 2003 and saw no benefit in creating such a procedure.<sup>50</sup> In order for any such procedure to be beneficial, it explained, it would have to allow sensitive intelligence to play a role in criminal trials of terrorist cases while withholding the sensitive aspects of the material from both the defendant and the public. **After careful examination of real intelligence relating to terrorist cases, the Government had concluded that it would not be possible to withhold such material from the defendant or the public in such a way that it might influence the outcome of the trial without infringing the defendant’s human rights. We agree.**

76. **We are firmly of the view that the investigating magistrates model should not be borrowed wholesale and imported into our own institutional arrangements. Nor do we think that there is anything in the investigative approach which might be borrowed or grafted on to our more adversarial, common law tradition.** However, what we saw in France and Spain suggested that there may be scope for exploring whether some of the functions of the investigating magistrate could be performed in England and Wales by developing the role of the Crown Prosecution Service. In France, Juge Bruguiere, for example, suggested to us that one way in which existing systems in England and Wales could be adapted to secure some of what he regarded as the advantages of the French system, without departing too radically from the common law traditions, would be for the CPS to intervene earlier than at present in terrorism cases and to have strategic control over the process. We therefore decided to explore the possibility of developing the role of the CPS and it was partly for this purpose that we decided to hold an informal meeting with the DPP.

## Developing the role of the Crown Prosecution Service

77. The DPP told us that there were broadly two types of terrorist cases:

- Intelligence-led cases where the police made arrests on public safety grounds and the CPS then became involved
- Other cases where the CPS had involvement in the pre-arrest investigation, able to inform and advise the police and security services.

78. Pre-arrest, we were told, the CPS's involvement was often to ensure evidence gathered would be admissible in court, in particular to withstand abuse of process applications by defence lawyers when cases started. The CPS had no formal powers to direct police investigations, but they were in a position to advise the police that for cases to stand up certain evidence would need to be obtained, and in practice the police followed such advice. Formal powers to direct the police would not be desirable.

79. Nowadays, we were told, arrests are usually intelligence-driven: suspects are arrested first and then the case against them can begin to be built. Such cases were said to be more challenging cases to prosecute than the old type of IRA terrorism cases.

80. Since June 2004, radical changes have been made to charging practice. The charging initiative officially rests with the CPS. The CPS has responsibility for deciding whether to bring charges and what charges to bring. The introduction of statutory charging means that, in short, the CPS now makes many of the decisions about charging which the police used to make, and in addition takes a highly proactive role in relation to the police investigation and gathering of evidence. This is reflected in the Director's Guidance on Charging. Crown Prosecutors are responsible for the decision to charge and for the specifying or drafting of the charge in most serious cases, including terrorism cases. Moreover, Crown Prosecutors also provide guidance and advice to investigators throughout the investigative and prosecuting process, including lines of inquiry, evidential requirements and assistance in pre-charge procedures. Both the Code of Practice and the Guidance on Charging makes clear that Crown Prosecutors will be proactive in identifying and where possible rectifying evidential deficiencies. Procedures have been set up to ensure early consultation of the CPS by the police conducting the investigation.

81. In short, although in general terms the CPS remains more reactive to the police and intelligence services, compared to their more proactive prosecutorial equivalent in Europe, and there is no formal power for the CPS to direct an investigation, nevertheless in practice the police seek their advice at an early stage of an investigation, and conduct the investigation in light of the CPS's advice about what is necessary in order for a case to be brought successfully to court and to maximise the chances of a successful conviction.

**82. We welcome the recent developments in the CPS's role whereby the CPS takes a more proactive role in relation to investigation of offences. While the CPS is clearly not a judicial body, and can therefore never be the equivalent of investigating judges, it does have a constitutional status which is independent of the Government, and also has a legal professional expertise on which to draw when advising the police about the conduct of investigations. We regard the growing role of the CPS in relation to the investigation of terrorist offences as going some way towards securing some of the**

advantages which are claimed for the system of investigating magistrates. We recommend that the CPS's growing specialisation in terrorist cases be supported and strengthened.

### Specialisation, centralisation and co-ordination

83. In France many of those we met who had experience of countering terrorism stressed the importance of specialisation, centralisation and co-ordination of and amongst the police, the intelligence services, the prosecution and the courts. We heard that a special division of the national police is in charge of terrorist matters. There are also seven specialised prosecutors dealing with terrorist cases, and seven specialised and centralised *juges d'instruction*, all of whom work closely with the specialised police units and the intelligence services. The Paris court has exclusive jurisdiction to deal with terrorist cases.

84. The decision to centralise and specialise was taken in 1986, in the wake of an increase in terrorism in France. There was a strong consensus amongst those we met that such centralisation and specialisation increases the efficiency of counter-terrorism efforts. Juge Bruguiere, the leading French investigating magistrate specialising in counter-terrorism, told us that in his view methodology was more important than legal tools in countering terrorism. The French Parliament had recognised the need for efficiency in the mid-1980s, and concentrated on centralising procedures, building specialisations, and developing co-ordination between the intelligence services, law enforcement agencies and the judiciary. Close links between all the agencies, including the judges, were necessary, and a preparedness to work closely together and to share information. This also required a high degree of trust between the different agencies. Juge Bruguiere himself worked very closely with the police and the intelligence services. The emphasis in France was on prevention, which required a focus on terrorist networks and on being proactive, including in the gathering of evidence.

85. In Spain also we were told that there is close collaboration between judges on the one hand and the police and the intelligence services on the other, comparable to that in France between the *juge d'instruction* and the police and intelligence services, and that such close co-operation was very important.

86. In England and Wales, the Crown Prosecution Service ("CPS") deals with most cases at local area level, but recently established specialist central divisions to deal with certain categories of case. One of these is the Counter Terrorism Division,<sup>51</sup> which has been set up to deal with all cases of terrorism, war crimes, crimes against humanity, incitement to racial hatred, official secrets, hijacking and any other state crime. It deals with any offences under the Terrorism Act 2000 and other major criminal cases with a terrorist background. The Counter Terrorism Division operates from London, and all work within this category must be referred to this specialist division within the CPS.

87. The Counter Terrorism Division's complement has recently been increased to 10 prosecutors. It has a very close relationship with the Metropolitan Police's Anti-Terrorism Branch, with the security and intelligence services, and with foreign prosecutors and intelligence services, as well as with anti-terrorism units in the West Midlands and Greater

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51 The others are the Special Crime Division and the Organised Crime Division

Manchester police. The formation of the Counter Terrorism Division represents a move towards a more centralised and specialised system for dealing with terrorism cases. After cases were concluded, either with successful convictions or without, the various agencies met to discuss the lessons learnt.

88. We were pleased to learn from our informal discussion with the DPP that efforts have been made to build close working relationships between the CPS on the one hand and the police and intelligence services on the other. The relationship between the intelligence agencies, the police and the Crown Prosecution Service, and their arrangements for sharing intelligence, are clearly of key importance to one of the central questions: how to turn information which is derived from intelligence sources into evidence which is admissible in a criminal prosecution, at the same time as protecting, where necessary, the confidentiality of the human source of the information or the methodology by which the information was obtained. **If protection of the public through criminal prosecution is genuinely to be the first objective of counter-terrorism policy, then turning information into evidence should be uppermost in the minds of all those involved in acquiring intelligence at the earliest possible stage in that process. Intelligence should always be gathered with one eye on the problem of how to turn it into admissible evidence before a judge in a criminal court. Investigations generally should be structured so as to maximise the prospects of information obtained being capable of being used as evidence in a criminal trial.**

89. In Canada we were told that protocols exist governing the sharing of intelligence information between the different agencies, but that these protocols were not in the public domain. We do not know if such protocols about intelligence sharing exist here. **In our view, public confidence in the adequacy of inter-agency arrangements for the sharing of intelligence would be greatly increased if such protocols not only existed in the UK but were also publicly available and subject to independent scrutiny.**

90. In the course of our inquiry we sought a meeting with the Director General of the Security Service, Dame Eliza Manningham-Buller, to discuss these matters, but she was not willing to meet us. We regret that we have not been able to explore issues such as these with any representative of the intelligence services. We suspect that this might require something of a culture shift within the intelligence services, but the progress which is reportedly being made within those services towards accepting that intercept evidence should be capable of being admissible in court suggests that such a shift may be taking place. We return below to the question of how such cultural shifts can be accelerated by introducing greater independent oversight over the intelligence agencies and rendering them more transparent and accountable through more effective review mechanisms than currently exist.

## Offence of “association of wrongdoers”

91. Since 1986 France has had a criminal offence called “association of wrongdoers” (*association de malfaiteurs*).<sup>52</sup> An association of wrongdoers is constituted by any group formed, or any agreement formed, with a view to the preparation of one or several crimes punishable by at least 5 years’ imprisonment, including acts of terrorism. The offence is

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52 Art. 450-1 of the Penal Code

committed by the mere act of being a member of the group or a party to the agreement. It is not necessary for the prosecution to prove that an individual had an intention to commit a specific crime. The existence of preparatory acts is enough.

92. We were not able to ascertain during our visit to France even the approximate number of individuals arrested on suspicion of having committed this offence or the number convicted in any one year. However, we gained the strong impression that there were a large number of arrests for this offence and a small number of convictions, which suggested to us that the offence was mainly being used, not to prosecute individuals for their actions, but in order to gather evidence about possible future terrorist attacks.

93. Juge Bruguiere told us that the existence of the offence enabled a pre-emptive strategy through evidence gathered through third parties. He believed that since 1996 it had prevented one or two terrorist attacks a year. The Director of Criminal Affairs at the Justice Ministry, with responsibility for counter terrorism policy, told us that the existence of the offence was crucial in dismantling terrorist cells, networks and groups and in prevention, as it enabled the collection of information and helped to identify putative terrorist projects. It was said to be widely felt in France that the reason they had not suffered a major terrorist attack since 1999 was due to this capacity to anticipate and prevent which stemmed from the existence of this offence.

94. In this country, the Terrorism Act 2006 introduced a new criminal offence of acts preparatory to terrorism. We welcomed its introduction. Although this offence does not appear to be as widely defined as the French offence of *association de malfaiteurs*, nevertheless it clearly enhances the preventive capacity of the police. **We are concerned by the Home Affairs Committee's finding that the power of pre-charge detention in Terrorism Act cases is used mainly for the purposes of prevention and disruption rather than for the purposes of investigation. We are also concerned by the Home Affairs Committee's suggestion that preventive detention be specifically included in the statutory grounds for detention. The reason for our concerns is that preventive detention is not permissible under Article 5(1) ECHR<sup>53</sup> and such an amendment to the Act therefore could not be made without a derogation from that Article. We do not consider such a derogation to be necessary. In any event, now that the wider offence of acts preparatory to terrorism is available, the police should only use the power of extended pre-charge detention for the purpose for which it was sought, namely to investigate the possible commission of offences with a view to criminal prosecution.**

### Relaxing the ban on admissibility of intercept

95. During our visits to France, Spain and Canada we tried to ascertain what use can be made of intercept material in countering terrorism in those countries. We have also been told that intercept evidence is routinely used in other common law jurisdictions such as the USA and Australia in the prosecution of both terrorism offences and other serious offences.

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53 *Lawless v Ireland* (1979) 1 EHRR 15 at paras 13–14 in which the European Court of Human Rights held that where a person is arrested or detained on the ground that it is “reasonably considered necessary to prevent his committing an offence” in Article 5(1)(c) ECHR, the arrest or detention must still be “effected for the purpose of bringing him before the competent judicial authority”.

96. In France we discussed this issue with the head of UCLAT, the unit for the co-ordination of the fight against terrorism; Juge Bruguiere; and M. Roger Errera, honorary Conseiller d'Etat. We heard that there is an important distinction between the “administrative” and the “judicial” phases of investigations as far as the use of intercept material is concerned. In the administrative phase information could be obtained by the intelligence services through means such as telephone-tapping, but this could only be used for purposes such as to establish that a person had been talking to another person at a particular time: it could not be used as evidence against a suspect. Only when interception was authorised as part of the judicial process could it be used as evidence. If judicially authorised, the transcripts of conversations could be presented to a court.

97. We were told that in the French system not only is anonymous information acceptable, but full protection of the source of intelligence information is guaranteed. The identity of sources is protected in that only the *juge d'instruction* knows the identity of the source. Lawyers for the defence are merely told that such intelligence exists. We were told that the French equivalent of MI5 had a legal arm which would establish whether the information was useful or would provide too much information about sources. Although sources are protected from identification as necessary, the content of intercepts are part of the case file (dossier) compiled by the *juge d'instruction*, which is shown to the defence, in summarised form if the information is sensitive.

98. Though there is no cross-examination in court of statements made by informants, such statements are never sufficient under the French criminal law to secure conviction: other corroborating evidence is also required. Information obtained by intercept is therefore used not so much as proof, but as a starting point for further investigation. Intercept evidence forms part of an array of information or evidence intended to convince a judge of guilt. We heard that it is quite important in helping to secure convictions, particularly because in France confessions cannot be used in evidence. Intercept is just one of many elements, but it is a crucial element.

99. We were struck by the fact that in France evidence obtained by intercept is regarded as playing an important part, not only in the investigation of terrorist suspects by the security services, but in their conviction in criminal prosecutions. Its security services and other law enforcement agencies appear to be quite comfortable with a less than absolute approach which recognises the potential value of such material in criminal prosecutions whilst at the same time acknowledging that in certain circumstances information would reveal too much about sources and therefore should not be disclosed. We found particularly interesting the apparent existence of a specific body within the security services with the task of deciding whether information would reveal too much about sources.

100. The DPP told us that, although there were legitimate arguments both ways, he was in no doubt that intercept evidence ought to be admissible in criminal trials, remarking that one of the best sources of evidence that might exist—intercept—is not available to prosecutors because of the statutory prohibition. He said that targeted intercept of people suspected of being interested in terrorist crime would make a huge difference, and that prosecutorial authorities in other countries found it difficult to understand why the UK did not permit this. The CPS's perception was that the main objection of the security services was the purely practical one of resources, given the large volume of material to be recorded, transcribed and kept in case it was ordered to be disclosed. This was seen as potentially

very time consuming and expensive. The security services would prefer to devote those resources to ensuring that technological developments, such as the advent of internet telephony, did not diminish their capacity to capture information. The CPS was quite sure that ways could be found to protect sources at the same time as using intercept evidence, just as ways had been found in other countries including the U.S. and Australia.

**101. In our view, the ban on the use of intercept evidence in court should now be removed, and attention should be turned urgently to ways of relaxing the ban. This is a matter to which we may well return in a future report.**

### **Public interest immunity and national security confidentiality claims**

102. In Canada, the Federal Court performs the function of weighing the risks and benefits of maintaining secrecy or disclosing information. A summary of the information is provided to the individual concerned. The Attorney General can still order non-disclosure, even after the Federal Court has ordered disclosure, but he then takes the risk that the Court will rule that the prosecution does not have a case to answer in relation to certain counts.

103. The DPP told us that public interest immunity certificates were only used to assert immunity on national security grounds where the material was inherently disclosable to the defence. Much intelligence material was not admissible as evidence anyway, for example because it is hearsay.

104. We acknowledge that there are real practical difficulties here because, as one of the judges we met in Canada described it, judges do not have the expertise to know how one piece of information in the mosaic fits with another piece. Nevertheless, in our view the Canadian example demonstrates that courts are perfectly capable of adjudicating on whether the public interest requires the disclosure of certain information to be withheld or whether this would prejudice the accused's right to a fair trial. In a criminal trial, the Crown can be ordered to disclose even sensitive material to the defence if it might assist them. If the Crown does not wish to disclose such sensitive material, it can always abandon the prosecution.

105. There is a legitimate role for special advocates in a criminal trial when there is argument about whether a claim to public interest immunity should be upheld. Public interest immunity decisions are not about whether the prosecution has to disclose the case on which it relies to the defence; rather, such decisions concern whether the prosecution is obliged to disclose material on which it does not rely, which might assist the defence. When deciding a public interest immunity claim, recourse can be had to court appointed special advocates.<sup>54</sup>

**106. In our view, the application of the ordinary law of public interest immunity, together with the appropriate use of special advocates, as envisaged by the European**

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<sup>54</sup> *R v H, R v C* [2004] UKHL 3, [2004] HRLR 20, in which the House of Lords held that the existing procedures for dealing with claims of public interest immunity by the prosecution should be compatible with the right to a fair trial in Article 6(1) ECHR if operated with continuing regard to the proper interests of the defendant and with scrupulous attention to the principles laid down in the judgment, including the appointment of special counsel in appropriate cases to ensure that the contentions of the prosecution are tested and the interests of the defendant protected, as required by the European Court of Human Rights in *Edwards and Lewis v UK* (App. Nos 39647/98 and 40461/98)

**Court of Human Rights and the House of Lords, should be sufficient to meet the legitimate concerns of the security and intelligence services about disclosure of material damaging to the public interest, at the same time as safeguarding the right to a fair trial.**

### **More judicial control over procedure in terrorism cases**

107. What we saw in France and Spain also raised for us the question whether there is scope for more judicial control over the procedure in terrorism cases, whilst preserving the traditional separation of functions in this country between judges on the one hand and prosecutors and investigators on the other.

108. The CPS told us that judges were still too tolerant of the defence not disclosing their defence until very late. In the CPS's view, judges could handle the disclosure regime more firmly, with clearer timetables and more strictly enforced time limits as to when issues could be raised. For example, late requests for disclosure of documents relating to dealings with foreign governments were sometimes made by the defence, which potentially caused considerable delay. A similar point about the need for a more structured disclosure regime was made by the Newton Report.

**109. We believe that there is scope for more proactive case management of terrorism trials, without judges becoming either investigators or prosecutors, and we urge the relevant judicial authorities to encourage such an approach.**

### **Incentives to give evidence**

110. The DPP told us that in his view there was also a need for a more structured procedure for giving people a sufficient incentive to give evidence for the prosecution, for example through lower sentences and witness protection. He recognised that there was strong media and public opposition to offering lower sentences as an incentive to give evidence but thought that, provided there are sufficient safeguards to take account of fairness and undue pressure, we should be less squeamish about reducing sentences in exchange for information leading to the prosecution of more significant individuals, or a larger number of people. **We recommend that the Government should urgently consider ways of enhancing incentives to give evidence and the safeguards which must accompany such incentives.**

### **Conclusion**

111. It was often commented to us in France and Spain that criminal prosecution, in public, open trials according to normal criminal procedures, is more frequently used in those countries compared to the UK, and that, by contrast, there seemed to be a fear in the UK amongst the police and security services that criminal prosecution would inevitably lead to sensitive sources being revealed in open court, forcing the Government to resort to the use of administrative detention, control orders and Memoranda of Understanding with foreign countries instead of prosecution.

**112. We have sought to canvass in this Report a number of different ways in which to overcome what are currently perceived to be obstacles to prosecuting for terrorist**

**offences. In our view, a combination of the measures canvassed above should help to overcome many of the main obstacles to prosecuting for terrorist offences, without sacrificing the essence of the important due process guarantees which make up the fundamental rights of access to a court to challenge the legality of detention and to a fair trial, which are as fundamental to the common law as they are in the scheme of the European Convention on Human Rights.**

## 3 Alternatives to lengthy pre-charge detention

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### Introduction

113. The Terrorism Act 2006 extends the period of pre-charge detention for terrorist suspects from 14 days to 28 days.<sup>55</sup> In our earlier Report we expressed concern about the adequacy of the procedural safeguards for the detainee in view of the fact that pre-charge detention can be extended under the relevant provisions of the Terrorism Act 2000 in the absence of the detainee or his legal representative and on the basis of material not available to him.<sup>56</sup> We expressed the view that if pre-charge detention was to be extended to as long as 28 days, Article 5 ECHR required that there should be a full adversarial hearing before a judge when deciding whether further detention was necessary.

114. During the debates which preceded the passage of the Terrorism Act 2006, there was often reference to the position in France and Spain where, it was said, much longer periods of pre-charge detention were permitted and had not been found to be incompatible with the ECHR. Indeed, some of the interest in the UK in the European system of investigating magistrates has been driven by the perception that such a system permits lengthy periods of pre-charge detention of several years in some cases. During our visit to France and Spain we therefore tried to ascertain whether this was a valid comparison.

115. Since the passage of the Act, the House of Commons Home Affairs Committee has conducted an inquiry into the case made by the police for an increase in detention powers in respect of terrorist suspects. In its Report, the Home Affairs Committee concluded that the new 28 day time limit may well prove inadequate in the future: although none of the evidence of current and recent investigations would have justified a maximum detention period longer than 28 days, it concluded that the growing number of cases and the increase in suspects monitored by the police and security services make it entirely possible, and perhaps increasingly likely, that there will be cases that do provide that justification.<sup>57</sup>

116. In this part of our Report we do not revisit the question whether the extension of the maximum period from 14 to 28 days was justified, but we consider, in light of the Home Affairs Committee Report, whether further extensions of the period of pre-charge detention are likely to be necessary, or whether, properly understood, the way in which the charging regime works in practice, and other alternatives to lengthy pre-charge detention, together make it unlikely that such a further increase in the maximum period, as envisaged by the Home Affairs Committee, will be necessary.

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55 Sections 23–24

56 Third Report of Session 2005–06, *op. cit.*, para. 99

57 Home Affairs Committee, Fourth Report of Session 2005–06, *Terrorism Detention Powers*, HC 910-I, para. 143

## The meaning of “charge” in France, Spain and England and Wales

117. It became clear to us during our visit to France and Spain that a different concept of “charge” was being used in those countries, compared to England and Wales, which makes simple comparisons of periods of “pre-charge detention” misleading.

### *Thresholds and time limits compared*

118. In the UK, an individual can be arrested under s. 41 of the Terrorism Act 2000 on reasonable suspicion of being involved in terrorism. They can then be held by the police in pre-charge detention for up to 28 days before charge. The threshold for charging them with a criminal offence is whether there is a realistic prospect of conviction, in other words, a greater than 50% chance of them being convicted. Once they are charged, they must be brought before a magistrates’ court within 24 hours. Within 14 days a preliminary hearing is held, from which date the prosecution has 42 days to serve its case on the defence. It then has 28 days to lodge an indictment. The prosecution can apply for any of these post-charge time limits to be extended.

119. In France, police may detain an individual, with cause, for up to 24 hours. A prosecutor can authorise detention for a further 24 hours. After 48 hours, judicial authorisation of further detention is required. A judge can authorise detention twice more for 24 hours at a time, up to a maximum limit on “pre-charge detention” of 96 hours. However, the document which hands the case over from the prosecutor to the juge d’instruction does not resemble a “charge” which would be recognisable as such in England and Wales. It seems more in the nature of a request to investigate a specific offence, possibly specifying the person being investigated but also possibly saying only that X committed the offence. A charge of the kind that we in England and Wales would recognise as such, identifying precisely the offence charged, the person accused and the relevant details need not be brought until considerably later than the 96 hours point.

120. In Spain, the position is similar to that of France. Terrorist suspects can be held for up to 72 hours incommunicado, then for additional periods, with judicial authorisation, up to a maximum of 13 days. In order for the case to be handed over to the investigating magistrate there had to be a “rational indication of criminality” and a “probable cause”. Again, this is quite different from the threshold to be satisfied in order to charge a person in England and Wales (a realistic prospect of conviction).

121. Comparisons of periods of pre-charge detention between England and Wales on the one hand and France and Spain on the other should therefore be made with caution in order to ensure that the comparison is of like with like. It was clear to us that the threshold which had to be reached by the end of the 96 hours maximum pre-charge detention in France and the 13 days’ pre-charge detention in Spain was considerably lower than the threshold for charging someone in England and Wales. On the spectrum between reasonable suspicion and realistic prospect of conviction, the French and Spanish thresholds appeared to be somewhere between the two.

### *The “Threshold Test” in England and Wales*

122. The Code for Crown Prosecutors in England and Wales sets out the tests to be applied by Crown Prosecutors when deciding whether a person should be charged with a criminal offence and, if so, what that offence should be. The Code explicitly provides for a “Threshold Test” to be applied in cases where it is proposed to keep the suspect in custody after charge, but the evidence required to apply the Full Code Test is not yet available.<sup>58</sup>

123. Para. 6.3 of the Code explains that there are statutory limits that restrict the time a suspect may remain in police custody before a decision has to be made whether to charge or release the suspect, but that there will be cases where the suspect in custody presents a substantial bail risk if released, but much of the evidence may not be available at the time the charging decision has to be made. The Threshold Test requires Crown 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.<sup>59</sup>

124. The evidential decision in the application of the Threshold Test requires consideration of a number of factors including the evidence available at the time, the likelihood and nature of further evidence being obtained, the reasonableness for believing that evidence will become available, the time it will take to gather that evidence and the steps being taken to do so, the impact the expected evidence will have on the case, and the charges that the evidence will support.<sup>60</sup>

125. In its recent Report on terrorism detention powers the Home Affairs Committee concluded that “in the large majority of counter-terrorism investigations” the Threshold Test does not apply because there is not the knowledge that further evidence will certainly become available.<sup>61</sup> This conclusion appears to have been based on the evidence given by the police to the Home Affairs Committee to the effect that the Threshold Test was not applicable in terrorism cases.<sup>62</sup>

126. In our informal meeting with the DPP, however, we were told that in most terrorist cases the Threshold Test of “reasonable suspicion” for bringing charges was invoked. The CPS explained that this was not purely speculative, but had to comprise an assessment, based on concrete evidence, that there would in time be sufficient evidence to uphold the charge under the Full Code Test, and could not be based on intelligence (unlike arrests by the police which can be on the basis of reasonable suspicion derived from intelligence alone, or decisions of *juges d’instruction* to hold people in custody, which could be based partly on intelligence). For example, there might be several pieces of circumstantial evidence insufficient to meet the criteria for the Full Code Test but which it was possible to judge would come together over time.

**127. We welcome the flexibility introduced by the Threshold Test in the Code for Crown Prosecutors. In our view it introduces a threshold for charging which is higher than the threshold for an arrest, in the crucial sense that it must be based on evidence**

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58 Code for Crown Prosecutors, para. 3.3

59 Code, para. 6.1

60 Code para. 6.4. See also sections 9 and 10 of the Director’s Guidance on Charging

61 Home Affairs Committee, Fourth Report of Session 2005–06, op. cit., para. 112

62 *Ibid.*, para. 111

**which will be admissible at trial and not merely intelligence information, but lower than the demanding standard of a realistic prospect of conviction, which we accept may be more difficult to reach in terrorism cases. In our view the Threshold Test is a sensible practical response to the dilemma facing the law enforcement agencies in relation to pre-trial detention.**

128. We asked the CPS at our informal meeting whether the possibility of a charge being made under the Threshold Test in the Code for Crown Prosecutors makes it less necessary to extend the period of pre-charge detention beyond the then limit of 14 days. We were told that this is not necessarily so because it can still take a long time even to get to the Threshold Test, for the same reasons as have been relied on in the police case for extending pre-charge detention beyond 14 days. **In our view, however, lowering the charging threshold, which is essentially what the Threshold Test does, must reduce the force of the case for extending the period of pre-charge detention further beyond the current limit of 28 days.**

129. We asked the CPS what safeguards surround the use of the Threshold Test, and in particular what supervision or independent scrutiny there is of the threshold charge decision. We were told that when the Threshold Test was applied and a person held on remand, the Full Code Test had to be applied “as soon as reasonably practicable”, though there was no formal time-limit. As an external safeguard, judges’ directions set the applicable timetable: once a threshold charge had been brought, the CPS immediately had to be able to justify to the court the continued detention of the person charged, and to support any application for an extension of the timetable at the preliminary hearing held within 14 days of the charge. There were also internal CPS safeguards. Though the charge under the Threshold Test would normally stand (it had been changed on occasion), the Full Code Test had to be used before serving the case on the defence. We accept this explanation.

### ***Active judicial oversight of the timetable in terrorism cases***

130. The CPS told us that in most terrorism cases it was not possible to comply with the 42 day time limit for service of the case on the defence. An application for an extension would normally be made at the preliminary hearing, with interim dates for a judicial check on whether the Crown was acting expeditiously. For large and complex cases the extension could be for a period of up to 6 months. We were told that 6 months was the maximum amount of time that it had taken the CPS for inquiries to be conducted. Within that 6 month period information was gradually disclosed to the defence voluntarily.

**131. We regard the combination of the Threshold Test and active judicial management of the post-charge timetable to be far preferable to lengthy pre-charge detention. In particular it has the virtue of enabling prosecutions to be brought, thereby pursuing the objective of protection and prevention at the same time as giving the defendant the full benefit of the ordinary procedures which govern criminal prosecutions. In our view, if the actual process in terrorism cases is properly understood, further extensions in the maximum period of pre-charge detention should not be necessary.**

## Post-charge interviews

132. At present, after charge, the police can only interview defendants if new evidence comes to light, and only then if the defendant agrees.<sup>63</sup> The CPS told us that invariably defendants decline to be interviewed, and at present no adverse inferences can be drawn from this refusal. The CPS told us that a relaxation of these rules, including the ability to draw adverse inferences from a refusal to be interviewed, would be a very useful tool, but as they pointed out this would be of no assistance in cases where there is not yet a charge.

133. The Home Affairs Committee regarded post-charge questioning as not sufficient on its own to replace extended pre-charge detention, but “a useful addition”.<sup>64</sup>

134. We agree with the evidence given to the Home Affairs Committee that human rights law presents no obstacle to the relaxation of the current restriction on post-charge questioning.<sup>65</sup> We would go further, however, and say that human rights law also does not prevent the drawing of adverse inferences from a defendant’s refusal to answer questions at such post-charge interviews. Although the drawing of adverse inferences from a refusal to answer questions clearly engages the privilege against self-incrimination implicit in Articles 6(1) and 6(2), it does not of itself constitute a violation of that privilege: the European Court of Human Rights has held that the right to silence is not an absolute right and that, provided appropriate safeguards are in place, an accused’s silence, in situations which clearly call for an explanation, could be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution against him.<sup>66</sup> Therefore, provided there are safeguards, such as access to legal advice, a requirement that the prosecution have already established a *prima facie* case, and limits to the inferences that would be proper, drawing adverse inferences from a refusal to answer questions post-charge would not necessarily breach the privilege against self-incrimination. The fact that the interview is post-charge is not determinative: adverse inferences are already permitted to be drawn from a refusal by a defendant to testify in his own defence.<sup>67</sup>

**135. We therefore recommend that the Home Office amend PACE Code of Practice C so as to permit post-charge questioning and the drawing of adverse inferences from a refusal to answer questions at such an interview. We would expect an opportunity to scrutinise the adequacy of the safeguards proposed. We consider that this measure on its own will go some way towards reducing the need for a further extension of the period of pre-charge detention.**

## Adequacy of judicial controls

136. In its recent report on terrorism detention powers, the Home Affairs Committee endorsed Lord Carlile’s suggestion of adopting a more investigative approach which it saw as a means of enhancing judicial oversight of pre-charge detention.<sup>68</sup> The Home Affairs

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63 Section 16.5 of Police and Criminal Evidence Act 1984(PACE) Code C

64 Home Affairs Committee, Fourth Report of Session 2005–06, *op. cit.*, para. 109

65 Evidence of Tim Owen QC, *op. cit.*, Vol. II, Ev 8, Q 43

66 *John Murray v UK* (1996) 22 EHRR 29 at para. 47; *Condron v UK* (2001) 31 EHRR 1 at para. 61

67 Criminal Justice and Public Order Act 1994, s. 35

68 Home Affairs Committee, Fourth Report of Session 2005–06, *op. cit.*, paras 125–132

Committee expressed its unease at the prospect of the existing system of post-arrest judicial oversight being used in relation to even longer pre-charge detention. It considered that the combination of pre-charge detention for up to 28 days and the “preventive” use likely to be made of this power meant that new forms of judicial oversight are needed. The Committee went further than Lord Carlile in proposing that there should be independent judicial oversight even prior to arrests being made under the Terrorism Act. Such judicial supervision should also provide for a continual reassessment of whether alternative methods, such as tagging and control orders, would be appropriate.

137. The Home Affairs Committee clearly envisaged such judicial supervision being conducted on an investigative basis, with the supervising judge fully informed of all matters involved in the investigation. It recognised that this would bring some procedures more common in other jurisdictions into our criminal justice system, and acknowledged that we cannot simply import elements from abroad that would not work in the common law system. However, it felt that there should be no bar to adapting such approaches to our needs, and recommended adoption of the principle of judicial oversight from the time that arrest is first considered.

**138. We agree with the Home Affairs Committee’s concern about the adequacy of current judicial oversight of pre-charge detention. However, we do not agree that the enhanced judicial oversight which is envisaged should be carried out on the basis of an investigative approach. Such an approach, in our view, takes away the very essence of the detained person’s right of access to a court to challenge the legality of his detention, by withholding from him the information on the basis of which he is being held. The Home Affairs Committee Report does not address the question of judges having access to sensitive material not disclosed to the detainee. Article 5 ECHR guarantees the right of access to a court to challenge the legality of detention. In our view, the Home Affairs Committee’s proposed system of judicial control does not provide this. We remain of the view expressed in our previous report, that Article 5 requires there to be judicial control in the full sense of an adversarial hearing.**

## Holding charges

139. In our earlier report we said that we found persuasive the evidence of those who argued that the use of holding charges (carrying a likelihood of remand in custody), in combination with other measures, was a possible alternative to extending the period of pre-charge detention.<sup>69</sup> We explored this in our informal meeting with the DPP.

140. The CPS told us that there were practical problems with using holding charges: for example, the problem of finding an appropriate charge, and the potential risk to public safety if the charge were minor and the defendant pleaded guilty and was released on bail. However the CPS’s main objection to the use of holding charges was an objection of principle: holding charges were really an abuse of state power. In theory a person could be held on a holding charge for 6 months or a year and then the prosecution could offer no evidence, but that would clearly be an abuse. The whole purpose of the recent charging reforms was to make sure that the right charge was brought in the first place, and holding charges were therefore contrary to the whole philosophy of those important reforms.

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<sup>69</sup> Third Report of 2005–06, op. cit., at para. 91

141. In its recent report on Terrorism Detention Powers, the Home Affairs Committee reported that the use of lesser charges was opposed by a wide range of witnesses who raised serious practical and moral objections, and it concluded that it would not be an appropriate response to the challenges of counter-terrorism investigations.<sup>70</sup>

**142. We agree that the use of holding charges should not be regarded as an acceptable alternative to extended pre-charge detention, for the reasons given by the DPP.**

### **Compensation and support**

143. We make two further recommendations concerning pre-charge detention. First, that there ought to be an enforceable right to compensation for those held in pre-charge detention but not charged, as there is in France. Second, that the Code of Practice should make provision for counselling support for those who are detained beyond 14 days, in view of the severe effect on the mental health of those who were detained in Belmarsh and subjected to control orders.

### **Conclusion**

144. In our view, a combination of the flexibility introduced by the threshold test developed by the CPS, active judicial oversight of the application of the post-charge timetable, and the possibility of drawing adverse inferences from a refusal to answer questions at a post-charge interview should make it unnecessary to contemplate any further extensions to the maximum period of pre-charge detention of 28 days.

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70 Home Affairs Committee, Fourth Report of Session 2005–06, op. cit., para. 103

## 4 Other matters

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### Control orders

145. We publish the Government's response to our report;<sup>71</sup> but without comment at this stage, in light of pending appeals against the two recent judgments concerning the compatibility of control orders with the ECHR.

### Definition of terrorism

146. In our first report in this inquiry we considered the definition of terrorism in connection with a number of measures being brought forward by the Government which incorporated the definition in the Terrorism Act 2000.<sup>72</sup> In that context we expressed concerns about the width of the definition and expressed our view that it needed to be changed.

147. In Canada we heard that the definition of terrorism in the Canadian anti-terrorism legislation was narrowed in the course of its parliamentary passage, and is narrower in certain respects than the definition in the UK Terrorism Act 2000. We heard that there were still concerns that it was too wide, and in fact recently the Canadian Government has indicated that it also thinks it might be too wide and is considering amending it to remove the requirement that the prosecution prove a particular motive for a terrorist act.

148. This is not a matter on which we have asked for or received evidence. In the course of our inquiry, however, we heard from the DPP that a narrower definition of terrorism would not be unhelpful from the CPS's perspective, as it would enable it to focus its efforts on more serious cases. We can see that one of the problems with the breadth of the definition of terrorism is that it makes prosecutions of terrorist offences more difficult. We are also of course well aware that the width of the definition of the offence also has implications for community relations because of the large amount of discretion which is given to law enforcement officials exercising counter-terrorism powers. This is therefore a matter to which we may return in a future report.

### Discrimination and impact on communities

149. In our earlier Reports we have expressed concern about the danger of counter-terrorism measures discriminating against members of minority groups, and in particular Muslims, and warned of the danger of the counter productivity of some of those measures.<sup>73</sup>

150. We remain very concerned about the impact of the Government's counter-terrorism strategy on the very people and communities whose trust and confidence in the police and security services is essential for the provision of reliable intelligence information.

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<sup>71</sup> Appendix 1

<sup>72</sup> Third Report of Session 2005–06, *op. cit.*, at para. 13

<sup>73</sup> Third Report of Session 2005–06, *op. cit.* and Twelfth Report of Session 2005–06

151. We have found particularly helpful on this question our visit to Canada, where we were struck by the strength of national pride in accepting diversity and encouraging multiculturalism. In Canada, 2% of the population is Muslim, and most of these live in Toronto. We heard that Muslims in Canada were very conscious of the possibility of being subject to surveillance; Muslims were under-represented in the Royal Canadian Mounted Police (RCMP) and the Canadian Security and Intelligence Service (CSIS); allegations of racial profiling persisted and were difficult to prove or disprove in the absence of statistics. We heard that the Arar Commission, which was set up to investigate the rendition of a Canadian-Syrian dual national, Maher Arar, to Syria where he was tortured, is seen as being of great importance by Canada's minority communities. We also heard from Lead Counsel to that Commission that the intelligence services and the police needed to develop a proper understanding of the cultures of the communities with which they were working. We note that there have been many similar calls recently in this country, particularly in the wake of the recent police action under the Terrorism Act in Forest Gate in London.<sup>74</sup>

152. The Canadian Human Rights Commission, which is essentially an anti-discrimination body, indicated to us that the full impact on minority communities of the Canadian Anti-terrorism Act and other counter-terrorism measures taken since 9/11 had not yet been ascertained by the necessary empirical work. We asked whether the Canadian Anti-Terrorism Act and the surrounding climate had led to any discrimination against the Muslim minority or to any perception that Muslims were being targeted. The Commission was aware of a small increase in discrimination allegations against Canadian immigration officials at the border, but there had been no appreciable increase in the number of complaints of discrimination. Research was currently being conducted to establish whether racial profiling was in fact taking place in the exercise of various powers such as stop and search or preventive detention. If that research demonstrated that the powers were being used in a discriminatory way then the Commission would have a lot to say, but it was too early to say at this point.

153. We noted with interest that the Canadian Human Rights Commission has a memorandum of understanding with Canada Borders (the immigration agency), in which Canada Borders agree to be more sensitive to the danger of discrimination in their intelligence handling and in their procedures. There are no court judgments in Canada concerning racial profiling.

154. The Ontario Human Rights Commission recently conducted an inquiry into the effects of racial profiling on individuals, families, communities and society as a whole, undertaken as part of their mandate to advance legislation and improve human rights protection, and culminating in a Report on "The Human Cost of Racial Profiling".<sup>75</sup> Whereas the Canadian Human Rights Commission's research is aimed at ascertaining the existence and extent of racial profiling, the Ontario Commission's inquiry assumed the existence of racial profiling and focused on the effect of such profiling. It sought to answer why it is wrong to racially profile. For the purposes of their inquiry, racial profiling was defined as action taken for securing public safety relying on stereotypes about race, colour, or ethnicity rather than on reasonable suspicion in order to single out an individual for greater scrutiny or different treatment.

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74 For example from Trevor Phillips, Chair of the Commission for Racial Equality

75 *Paying the Price: The Human Cost of Racial Profiling* (Ontario Human Rights Commission), 2003, [www.ohre.on.ca](http://www.ohre.on.ca)

155. The study, which took 500 testimonials from all sections of the community, identified a number of consequences of profiling: (i) it tended to target younger people and hence compromised our future; (ii) it created mistrust of institutions; (iii) it contributed to a feeling of alienation and reduced sense of citizenship; (iv) it impacts on community cohesion; (v) it changes the behaviour of individuals as they try to adapt to the mainstream; (vi) loss of dignity; (vii) physical effects; and (viii) there were economic costs to society as people stopped participating fully.

156. The Ontario Human Rights Commission told us that its research had helped to move the debate about racial profiling in Canada on to the question of how to mitigate the impact of racial profiling on minority communities. We were told that the police were now accepting that racial profiling exists and inviting the Ontario Human Rights Commission to help to address it, realising that racial profiling is counterproductive because it alienates the very community on which they depend for intelligence. The Commission was therefore now focusing on preventive strategies, involving policies, guidelines and training.<sup>76</sup> The Commission also stressed the importance of people having some avenue of recourse, external to and independent from the police, through which they could complain if they felt that they had been a victim of racial profiling.

157. In Canada there have been calls for an amendment to the Criminal Code to define improper racial profiling and to provide remedies and monitoring for these practices, as well as imposing a reporting requirement on law enforcement officials about their use of racial profiling.

158. Two of the counter-terrorism powers in the UK which gives rise to strong concerns about racial profiling are the power to stop and search without reasonable suspicion contained in s. 44 of the Terrorism Act 2000 and the power to stop at ports contained in Schedule 7 of the Act. The operation of the former provision was recently considered by both the Judicial Committee of the House of Lords,<sup>77</sup> and Lord Carlile in his Report on the Operation in 2005 of the Terrorism Act 2000.<sup>78</sup> This is a matter to which we may return in a future report in this inquiry.

## Parliamentary accountability

159. In our earlier reports we have frequently commented on the lack of opportunities for independent democratic scrutiny of the Government's assessment of the level of the threat from terrorism. In particular, we have pointed out that unless both Parliament and the

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76 The Commission has produced, for example, Policy and Guidelines on Racism and Racial Discrimination, available from the Commission's website

77 *Gillan v Commissioner of Police for the Metropolis* [2006] UKHL 12, (2006) 2 WLR 537. The House of Lords upheld the lawfulness of the use of the power to stop and search a student demonstrator and a journalist in the vicinity of an arms fair. Lord Brown of Eaton-under-Heywood said, at para. 81, "Ethnic origin accordingly can and properly should be taken into account in deciding whether and whom to stop and search provided always that the power is used sensitively and the selection is made for reasons connected with the perceived terrorist threat and not on grounds of racial discrimination."

78 Report on the Operation in 2005 of the Terrorism Act 2000, at paras 90–103. Lord Carlile observed that terrorism-related powers should be used for terrorism related purposes, otherwise their credibility is severely damaged, and that in a diverse community the erroneous use of powers against people who are not terrorists is bound to damage community relations. He was sure that s. 44 could be used less and expected it to be used less, and found little or no evidence that the use of s.44 has the potential to prevent an act of terrorism as compared with other statutory powers of stop and search. In his view, however, s.44 remained necessary and proportional to the continuing and serious risk of terrorism.

public are better informed about both the nature and the level of that threat, it is impossible for them to make meaningful judgments about whether the counter-terrorism measures proposed to counter that threat are justified in order to meet that threat.

160. As mentioned above (paragraph 90), we wrote to the Director General of the Security Services, Dame Eliza Manningham-Buller, in January 2006 asking her to give evidence to us or to meet us informally. She refused.<sup>79</sup> She said that all of the areas outlined in our letter have been or are the subject of investigation by the ISC. As far as the use of intercept evidence in court is concerned, she said that this is primarily a matter for the Home Secretary.

**161. While we welcome the Director-General’s willingness to provide information to parliamentary committees about the nature and level of the threat from terrorism, we regret that we did not have the opportunity to ask her a number of important questions of concern to us in connection with this inquiry. We have no desire to obtain access to State secrets, but we do consider it to be a matter of some importance that the head of the security services be prepared to answer questions from the parliamentary committee with responsibility for human rights.**

162. On our visit to Canada, we saw the Security and Intelligence Review Committee which was set up in 1984 by the same statute which established the Canadian Security and Intelligence Service (CSIS). CSIS had 2 review/oversight mechanisms: the internal Government Office of the Inspector General, and SIRC. SIRC’s functions were (i) to review CSIS’s performance of its duties and functions against law, ministerial directions and CSIS’s internal policies, and (ii) to investigate complaints by individuals or groups about any act or thing done by CSIS or the security vetting process. Cases were sometimes referred to SIRC by the CHRC or the Minister of Immigration. SIRC produced annual reports, often opaque because of national security considerations. The Committee consisted of 5 eminent Canadians, who met in Ottawa once a month. We commented in our recent Report on the UN Convention against Torture on SIRC’s role in scrutinising agreements between Canadian and overseas intelligence agencies about the exchange and use of information.<sup>80</sup> The Canadian Government was currently considering a proposal to establish a parliamentary oversight committee, along the lines of our Intelligence and Security Committee, in response to a perceived “democratic deficit” in the oversight of the intelligence services.

163. The Canadian Human Rights Commission was hoping to finalise a Memorandum of Understanding with the intelligence services, which it hoped would include agreement about its role in assisting SIRC with its oversight of the intelligence services.

**164. In our view, there is an increasingly urgent need to devise new mechanisms of independent accountability and oversight of both the security and intelligence agencies and the Government’s claims based on intelligence information. In addition to more direct parliamentary accountability, we consider that in principle the idea of an “arms length” monitoring body charged with oversight of the security and intelligence**

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<sup>79</sup> Appendix 7

<sup>80</sup> Nineteenth Report of Session 2005–06, The UN Convention Against Torture, HL Paper 185-I, HC 701-I, para. 60

agencies, independent of the Government and those agencies, and reporting to Parliament, merits consideration in this country.

### Sunset clauses, reporting requirements and annual review

165. The Canadian Anti Terrorism Act contains a genuine sunset clause: that is, a provision which limits the life of the legislation to five years, and requires new legislation to be passed at the end of that period. This is to be contrasted with the provision contained in the Prevention of Terrorism Bill 2005, often incorrectly referred to as a “sunset clause”, which required the legislation to be renewed after 12 months by ministerial order.

166. The contrast between the two types of provision can be seen by comparing the amount of parliamentary scrutiny of the renewal of the Canadian Anti Terrorism Act with that of the UK Prevention of Terrorism Act 2005. In Canada, there have been detailed hearing before Committees of both the House of Commons and the Senate, examining the operation of the legislation and practice and the evidence of the continued need for it. In the UK, by comparison, there was a single debate of one hour in each House before the renewal of that part of the Prevention of Terrorism Act 2005 which authorises the making of control orders.

**167. We recommend that in future all terrorism legislation should have a life limited to five years maximum, and require renewal by primary legislation not ministerial order.**

168. In Canada we found that there is a new emphasis on the importance of review, and in particular on ensuring that Parliament’s capacity to carry out a meaningful review of the operation of the legislation is bolstered by, for example, reports and the opportunity to hold evidence hearings. The Canadian anti-terrorism legislation also imposes annual reporting requirements and provides for a review of the operation of the Act.

**169. We recommend that, in addition to review by the Government-appointed independent reviewer, in future terrorism legislation provision also be made for parliamentary review of the operation of that legislation.**

### Rights of victims of terrorism

170. In both France and Spain we were told that the rights of victims of terrorism are very strongly protected in law. They receive compensation and assistance from the State. Victims and their associations could also become parties in criminal trials. They seemed to us to have a well established and unquestioned right to participate in both legal proceedings and public inquiries concerning the acts of terrorism in question.

171. This is a matter on which we have not taken evidence in the course of this inquiry, but we are aware of dissatisfaction on the part of many of the victims and families of the victims of the recent terrorist attacks in London about, for example, the amount of compensation they have received and the time it has taken, and the lack of an independent public inquiry into the events of 7 July, such as has taken place in other countries such as Spain. The rights of victims of terrorism to know the truth, to participate in the process of holding violators to account, and to reparation are also increasingly recognised in

international human rights standards.<sup>81</sup> This is therefore another matter to which we may return in a future report in this inquiry.

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81 See our report on the Northern Ireland Offences Bill contained in our Seventh Report of Session 2005–06, *Legislative Scrutiny: Fourth Progress Report*, HL Paper 98, HC 829, for a summary of the relevant standards

# Conclusions and recommendations

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## The importance of prevention

1. We welcome the renewed emphasis on prevention in counter-terrorism policy as a mark of a more mature appreciation that human rights law not only imposes constraints on what States can do but also imposes onerous positive obligations on States to take effective steps to protect the lives and physical integrity of everyone within their jurisdiction against the threat of terrorist attack. This emphasis on the importance of the State's positive obligations has been a recurring theme in the Reports of both this Committee and its predecessor concerning counter-terrorism. We reiterate our frequently expressed view that human rights law itself requires the State to take such measures as can be shown to be necessary to provide adequate and effective protection against a real risk of terrorist attack. Appropriate preventive measures, in other words, are positively required by human rights law (Paragraph 7)
2. At the same time in this context we believe it is essential to avoid any counter-productivity which, instead of enhancing protection, may well undermine it. Justice must be seen to be done. (Paragraph 8)
3. We accept, however, that the gravity of the potential harm is such that any counter-terrorism strategy must have prevention at its heart. Indeed, in our view, counter-terrorism measures must be tested by the extent to which they can be demonstrated to enhance our ability to identify, apprehend and prosecute individuals planning terrorist attacks whilst remaining within the legal framework provided by our human rights obligations (Paragraph 11)

## A duty to prosecute terrorist suspects?

4. As we interpret the Article 2 case law, States are now under a duty to prosecute those whom it suspects of being involved in terrorist activity in order to prevent future loss of life in future attacks. In our view this emerging duty in international human rights law makes it all the more important that the Government now urgently addresses the obstacles impairing the effective prosecution of terrorism offences with a view to resorting more frequently to the criminal law in the effort to counter terrorism (Paragraph 17)

## The rights of suspects prosecuted for terrorism offences

5. As with the case law concerning the right to judicial review of detention under Article 5, it is clear from the case-law on Article 6 that ultimately the requirement of adversarial proceedings and equality of arms must be complied with. Anything less does not amount to effective "judicial" control by a "court" (Paragraph 24)

## Balancing liberty and security?

6. We reiterate the importance of not seeing liberty and security as being in an inverse relationship with each other. Less liberty does not necessarily mean more security,

nor vice versa. The “balance” metaphor does not seem apt for this reason. We agree with the view expressed by the European Commission for Democracy through Law (the Venice Commission), that “State security and fundamental rights are not competitive values; they are each other’s precondition (Paragraph 26)

### **Using closed evidence and special advocates in criminal trials**

7. We agree with the view of the special advocates who wrote to The Times, that to introduce the system of special advocates into the criminal trial would be incompatible with many of the most basic principles of a fair trial. We made essentially the same point in our earlier report in which we said that it would in our view be incompatible with the requirements of Article 5(4) ECHR and Article 6 if special advocates were to be used in control order proceedings involving deprivation of liberty (Paragraph 43)

### **“Investigative hearings” and “disclosure judges” in Canada**

8. We therefore found that neither investigative hearings nor disclosure judges operate in practice so as to permit the use of intelligence-derived material in a criminal trial without the defendant having the opportunity to contest it (Paragraph 72)

### **Investigating magistrates in England and Wales?**

9. After careful examination of real intelligence relating to terrorist cases, the Government had concluded that it would not be possible to withhold such material from the defendant or the public in such a way that it might influence the outcome of the trial without infringing the defendant’s human rights. We agree (Paragraph 75)
10. We are firmly of the view that the investigating magistrates model should not be borrowed wholesale and imported into our own institutional arrangements. Nor do we think that there is anything in the investigative approach which might be borrowed or grafted on to our more adversarial, common law tradition (Paragraph 76)

### **Developing the role of the Crown Prosecution Service**

11. We welcome the recent developments in the CPS’s role whereby the CPS takes a more proactive role in relation to investigation of offences. While the CPS is clearly not a judicial body, and can therefore never be the equivalent of investigating judges, it does have a constitutional status which is independent of the Government, and also has a legal professional expertise on which to draw when advising the police about the conduct of investigations. We regard the growing role of the CPS in relation to the investigation of terrorist offences as going some way towards securing some of the advantages which are claimed for the system of investigating magistrates. We recommend that the CPS’s growing specialisation in terrorist cases be supported and strengthened (Paragraph 82)

### Specialisation, centralisation and co-ordination

12. If protection of the public through criminal prosecution is genuinely to be the first objective of counter-terrorism policy, then turning information into evidence should be uppermost in the minds of all those involved in acquiring intelligence at the earliest possible stage in that process. Intelligence should always be gathered with one eye on the problem of how to turn it into admissible evidence before a judge in a criminal court. Investigations generally should be structured so as to maximise the prospects of information obtained being capable of being used as evidence in a criminal trial (Paragraph 88)
13. In our view, public confidence in the adequacy of inter-agency arrangements for the sharing of intelligence would be greatly increased if such protocols not only existed in the UK but were also publicly available and subject to independent scrutiny (Paragraph 89)

### Offence of “association of wrongdoers”

14. We are concerned by the Home Affairs Committee’s finding that the power of pre-charge detention in Terrorism Act cases is used mainly for the purposes of prevention and disruption rather than for the purposes of investigation. We are also concerned by the Home Affairs Committee’s suggestion that preventive detention be specifically included in the statutory grounds for detention. The reason for our concerns is that preventive detention is not permissible under Article 5(1) ECHR and such an amendment to the Act therefore could not be made without a derogation from that Article. We do not consider such a derogation to be necessary. In any event, now that the wider offence of acts preparatory to terrorism is available, the police should only use the power of extended pre-charge detention for the purpose for which it was sought, namely to investigate the possible commission of offences with a view to criminal **prosecution** (Paragraph 94)

### Relaxing the ban on admissibility of intercept

15. In our view, the ban on the use of intercept evidence in court should now be removed, and attention should be turned urgently to ways of relaxing the ban. This is a matter to which we may well return in a future report (Paragraph 101)

### Public interest immunity and national security confidentiality claims

16. In our view, the application of the ordinary law of public interest immunity, together with the appropriate use of special advocates, as envisaged by the European Court of Human Rights and the House of Lords, should be sufficient to meet the legitimate concerns of the security and intelligence services about disclosure of material damaging to the public interest, at the same time as safeguarding the right to a fair trial (Paragraph 106)

### More judicial control over procedure in terrorism cases

17. We believe that there is scope for more proactive case management of terrorism trials, without judges becoming either investigators or prosecutors, and we urge the relevant judicial authorities to encourage such an approach (Paragraph 109)

### Incentives to give evidence

18. We recommend that the Government should urgently consider ways of enhancing incentives to give evidence and the safeguards which must accompany such incentives (Paragraph 110)

### Conclusion on overcoming obstacles to prosecution

19. We have sought to canvass in this Report a number of different ways in which to overcome what are currently perceived to be obstacles to prosecuting for terrorist offences. In our view, a combination of the measures canvassed above should help to overcome many of the main obstacles to prosecuting for terrorist offences, without sacrificing the essence of the important due process guarantees which make up the fundamental rights of access to a court to challenge the legality of detention and to a fair trial, which are as fundamental to the common law as they are in the scheme of the European Convention on Human Rights (Paragraph 112)

### The “Threshold Test” in England and Wales

20. We welcome the flexibility introduced by the Threshold Test in the Code for Crown Prosecutors. In our view it introduces a threshold for charging which is higher than the threshold for an arrest, in the crucial sense that it must be based on evidence which will be admissible at trial and not merely intelligence information, but lower than the demanding standard of a realistic prospect of conviction, which we accept may be more difficult to reach in terrorism cases. In our view the Threshold Test is a sensible practical response to the dilemma facing the law enforcement agencies in relation to pre-trial detention (Paragraph 127)
21. In our view, however, lowering the charging threshold, which is essentially what the Threshold Test does, must reduce the force of the case for extending the period of pre-charge detention further beyond the current limit of 28 days (Paragraph 128)

### Active judicial oversight of the timetable in terrorism cases

22. We regard the combination of the Threshold Test and active judicial management of the post-charge timetable to be far preferable to lengthy pre-charge detention. In particular it has the virtue of enabling prosecutions to be brought, thereby pursuing the objective of protection and prevention at the same time as giving the defendant the full benefit of the ordinary procedures which govern criminal prosecutions. In our view, if the actual process in terrorism cases is properly understood, further extensions in the maximum period of pre-charge detention should not be necessary (Paragraph 131)

### Post-charge interviews

23. We therefore recommend that the Home Office amend PACE Code of Practice C so as to permit post-charge questioning and the drawing of adverse inferences from a refusal to answer questions at such an interview. We would expect an opportunity to scrutinise the adequacy of the safeguards proposed. We consider that this measure on its own will go some way towards reducing the need for a further extension of the period of pre-charge detention (Paragraph 135)

### Adequacy of judicial controls

24. We agree with the Home Affairs Committee's concern about the adequacy of current judicial oversight of pre-charge detention. However, we do not agree that the enhanced judicial oversight which is envisaged should be carried out on the basis of an investigative approach. Such an approach, in our view, takes away the very essence of the detained person's right of access to a court to challenge the legality of his detention, by withholding from him the information on the basis of which he is being held. The Home Affairs Committee Report does not address the question of judges having access to sensitive material not disclosed to the detainee. Article 5 ECHR guarantees the right of access to a court to challenge the legality of detention. In our view, the Home Affairs Committee's proposed system of judicial control does not provide this. We remain of the view expressed in our previous report, that Article 5 requires there to be judicial control in the full sense of an adversarial hearing (Paragraph 138)

### Holding charges

25. We agree that the use of holding charges should not be regarded as an acceptable alternative to extended pre-charge detention, for the reasons given by the DPP (Paragraph 142)

### Compensation and support

26. We make two further recommendations concerning pre-charge detention. First, that there ought to be an enforceable right to compensation for those held in pre-charge detention but not charged, as there is in France. Second, that the Code of Practice should make provision for counselling support for those who are detained beyond 14 days, in view of the severe effect on the mental health of those who were detained in Belmarsh and subjected to control orders (Paragraph 143)

### Conclusion on alternatives to lengthy pre-charge detention

27. In our view, a combination of the flexibility introduced by the threshold test developed by the CPS, active judicial oversight of the application of the post-charge timetable, and the possibility of drawing adverse inferences from a refusal to answer questions at a post-charge interview should make it unnecessary to contemplate any further extensions to the maximum period of pre-charge detention of 28 days (Paragraph 144)

### Parliamentary accountability

28. While we welcome the Director-General's willingness to provide information to parliamentary committees about the nature and level of the threat from terrorism, we regret that we did not have the opportunity to ask her a number of important questions of concern to us in connection with this inquiry. We have no desire to obtain access to State secrets, but we do consider it to be a matter of some importance that the head of the security services be prepared to answer questions from the parliamentary committee with responsibility for human rights (Paragraph 161)
29. In our view, there is an increasingly urgent need to devise new mechanisms of independent accountability and oversight of both the security and intelligence agencies and the Government's claims based on intelligence information. In addition to more direct parliamentary accountability, we consider that in principle the idea of an "arms length" monitoring body charged with oversight of the security and intelligence agencies, independent of the Government and those agencies, and reporting to Parliament, merits consideration in this country (Paragraph 164)

### Sunset clauses, reporting requirements and annual review

30. We recommend that in future all terrorism legislation should have a life limited to five years maximum, and require renewal by primary legislation not ministerial order (Paragraph 167)
31. We recommend that, in addition to review by the Government-appointed independent reviewer, in future terrorism legislation provision also be made for parliamentary review of the operation of that legislation (Paragraph 169)

# Formal Minutes

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**Monday 24 July 2006**

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Mr Douglas Carswell MP
Lord Campbell of Alloway	Nia Griffith MP
Lord Judd	Dr Evan Harris MP
Lord Lester of Herne Hill	
Baroness Stern	

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Draft Report [Counter-Terrorism and Human Rights: Prosecution and Pre-Charge Detention], proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 171 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Twenty-fourth Report of the Committee to each House.

Several Papers were ordered to be appended to the Report.

*Ordered*, That the Chairman make the Report to the House of Lords and that Baroness Stern make the Report to the House of Commons.

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[Adjourned till Monday 9 October at 4.00 pm.]

## Appendices

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### Appendix 1: Letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department, re Renewal of the Prevention of Terrorism Act 2005

#### RENEWAL OF THE PREVENTION OF TERRORISM ACT 2005

I am grateful to the Joint Committee on Human Rights for its report of 14 February 2006 on the renewal of the Prevention of Terrorism Act 2005 (*Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1-9) Order 2006*). The value of your Committee's report was, I think, demonstrated by the frequent references to it in the renewal debates in both Houses on 15 February. The Government's response is attached.

*Undated*

ANNEX: GOVERNMENT RESPONSE TO THE PRINCIPAL FINDINGS IN THE REPORT BY THE JOINT COMMITTEE ON HUMAN RIGHTS (*COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: DRAFT PREVENTION OF TERRORISM ACT 2005 (CONTINUANCE IN FORCE OF SECTIONS 1-9) ORDER 2006*)

**The case for a consolidating Act is potentially quite strong and we will consider it as a relevant possibility in our continuing inquiry into counter-terrorism policy. However, the effect of the Home Secretary exercising his power to renew the Prevention of Terrorism Act, rather than to bring forward a Bill, is significantly to reduce the opportunity for parliamentary scrutiny and debate of the control orders regime. (Paragraph 12)**

In my statement to the House of Commons on 2 February 2006 I outlined the reasons for not bringing forward a Bill to allow amendment to the Prevention of Terrorism Act 2005 before the renewal of the legislation. In the light of the report produced by Lord Carlile, the independent reviewer of the legislation, on the first nine months of operation of the Act, the Government did not consider that any legislative changes were necessary.

The Government recognises that during the course of the debates on the 2005 Act a commitment was made to Parliament that there would be further opportunity both to debate the control order regime and to amend the legislation. A practical view of that commitment was taken as we felt that there was little merit in introducing a new Bill on control orders at that stage. This was principally because a full cycle of the control order system had not been completed in that legal challenges brought by those who have been the subject of control orders had not been concluded.

I also announced on 2 February the Government's intention to put forward a further Terrorism Bill, which will be subject to pre-legislative scrutiny, in 2007. This Bill will create an opportunity for amendments to be tabled to the Prevention of Terrorism Act 2005. I am grateful to the Committee for its support of consolidating counter-terrorism legislation.

**Laying the renewal order and reviewer's report on 2 February and scheduling the renewal debate in both Houses for 15 February severely restricts the possibility for committees such as ours to discharge our responsibility to scrutinise and report in a fully considered way to both Houses. (Paragraph 14)**

The Government published Lord Carlile's report very shortly after he submitted it. The scheduling of the renewal debates was a matter for the Business Managers who had to be conscious of the renewal deadline of 11 March and the need to allow time for the consideration of the renewal of those control orders made on 11 March 2005 which would otherwise have expired. In the event, the Joint Committee on Human Rights was able to publish its report in advance of the renewal debates and the report was widely cited during those debates.

#### FIVE MAIN HUMAN RIGHTS ISSUES

### **(1) Whether non-derogating control orders are being operated in practice in a way which amounts to a deprivation of liberty, and therefore require derogation from Article 5(1) ECHR.**

The Government acknowledges the concern about the distinction between derogating and non-derogating control orders generally, and the restrictive obligations contained in some control orders more specifically. However, it cannot accept that any of the control orders that have been made to date impose obligations on individuals that amount to a deprivation of liberty. Lord Carlile makes reference in his report to a number of control orders made in November and December 2005, asserting that such orders could not be more restrictive and remain compatible with the ECHR without a derogation.

It is worth clarifying that the 'proforma schedule of control order obligations' annexed to Lord Carlile's report gives an example set of obligations. Less than a third of the control orders made to date contain these most restrictive obligations, and these orders were made with the permission of the Court. The Court did not consider that the obligations amounted to a deprivation of liberty. Section (6)(a) of the Act provides for the Court to quash the order if it finds that the Secretary of State's decision to make an order was "obviously flawed." The Court in each case confirmed the control order. In relation to these control orders, Lord Carlile, who had access to all the material on which the Home Secretary made his decision, says:

They have not been found to amount to the triggering of derogation, indeed there has been no challenge so far on that basis—but the cusp is narrow.

Lord Carlile therefore does not conclude that the obligations amount to a deprivation of liberty, indeed none of the individuals so far have raised the issue of whether their obligations amount to a deprivation of liberty requiring derogation.

As has been consistently made clear, each order is made on a case by case basis and tailored to meet the particular risk posed by the individual concerned. These obligations are considered necessary and proportionate to address the threat to national security posed by the individuals in question.

### **(2) Whether the procedural protections are compatible with Article 5(4) ECHR (right of access to a court to determine the lawfulness of detention) and the right to a fair trial in determination of a criminal charge and to a fair hearing in the determination of civil, rights and obligations under Article 6(1) ECHR, and with the common law right to a fair trial and a fair hearing.**

The Government does not accept that control order proceedings amount to a criminal charge. These are civil procedures, with civil procedure rules—debated by both Houses of Parliament (for England and Wales on 5 April 2005 (Commons) and 7 April (Lords); and for Northern Ireland on 11 October 2005 (Commons) and 18 April (Lords)).

In relation to the standard of proof, the House spent a great deal of time debating this issue during the passage of the Bill in Spring 2006. The Government maintains that “reasonable suspicion” is the appropriate standard of proof for non-derogating control orders, but accepts that where derogating control orders are to be made, then the higher level of proof (balance of probabilities), would be appropriate.

I made clear my views on the necessary separation of powers between the executive and the judiciary with regard to the making and reviewing of control orders during the passage of the Prevention of Terrorism Bill in Spring 2005. I considered that it would be a betrayal of my responsibility as Secretary of State to pass the initial decision to make a control order to the Court. The Government maintains that it is right and proper that the Executive should make the decision to impose a civil order on an individual and the Judiciary to review it.

In control order proceedings wherever possible material is dealt with in open court where the controlled person is represented by legal representatives of their choosing. Where there is sensitive or closed material a special advocate is appointed to represent them. Special Advocates are lawyers who have undergone full-developed security vetting (DV). They are barristers in independent practice of the highest integrity, experience and ability, from civil and criminal practises. They are bound by the ethical standards of the Bar Council.

The Special Advocate is not be able to communicate closed evidence to his or her client, but will be able to respond to evidence on his or her behalf, ensuring that all evidence presented can be contested.

The Special Advocate system has received approval from Lord Carlile and the former Lord Chief Justice Lord Woolf. The Government considers that the Special Advocate procedure accommodates legitimate security concerns whilst also according the individual a substantial amount of procedural justice.

The control order system contains robust safeguards, subject to reporting requirements and judicial oversight

- There is an automatic judicial review of the Home Secretary’s decision to make a control order.
- The review will be a full hearing before the High Court or Court of Session.
- There are separate rules of court set out in the Civil Procedures that allow the Court to hear both open and closed material. As outlined above, in open session the controlled person is represented by Counsel of their choice. Where the court is in closed session, the controlled person’s interests will be represented by a Special Advocate.
- Control orders have a maximum duration of 12 months. They can then be renewed by the Secretary of State, but this provides for a separate right of appeal.
- If a control order obligation is modified without the consent of the controlled person—this also gives rise to a separate right of appeal.
- An individual may also apply to the court for an order to be revoked or an obligation to be modified where there is a change of circumstance.

A delicate balance has to be struck between safeguarding society and safeguarding the rights of the individual. It is the Government’s firm belief that the 2005 Act strikes that balance. However, since there has been no substantive review of a control order to date,

the Government recognises that the judicial processes have yet to be fully tested. Should the legislation require amendment after the system has been through the full cycle, the next Terrorism Bill will provide an opportunity for this.

**(3) Whether individuals who are the subject of control orders are being subjected to inhuman and degrading treatment contrary to Article 3 ECHR**

The Government does not accept that those who are the subject of control orders are subject to inhuman and degrading treatment. During its visits to the UK in July and November 2005 a delegation from the European Committee for the Prevention of Torture (ECPT) met with several controlled individuals. The Committee are due to report substantively in March 2006 on their findings. They did not issue any immediate observations relating to the legislation or its general operation after either visit. Following the November visit the Committee made one recommendation in respect of an individual who is the subject of a control order, to which the Government is, of course, giving careful consideration.

The Government further does not accept that the conditions under which the individuals formerly certified and detained under the Anti-Terrorism, Crime and Security Act 2001 amounted to inhuman and degrading treatment. The Government's full response to the examination by the ECPT in this regard can be found at <http://www.cpt.coe.int/documents/gbr/2005-11-inf-eng.htm>

**(4) Whether the control orders regime has a disproportionate impact on the rights of family members under Articles 8,10 and 11 ECHR.**

The impact on family rights under Article 8, 10 and 11 ECHR is a factor to which the Secretary of State gives close consideration before making a control order.

The conditions imposed on the individual are not directed at the family members and do not prevent them from leading normal lives, and engaging in activities they would normally engage in. The control orders are preventative in nature and allow for continuance of family life in a way that person does not. A control order, even if it requires fairly extensive restrictions on liberty, means that family contact, which is clearly important to maintain, can continue.

There may be some consequent inconvenience to family members who reside at the same address as an individual subject to a control order. There are however means of addressing such issues and we work constructively in each case to do so.

**(5) Whether the control orders regime is being applied disproportionately to foreign nationals, in breach of Article 14 ECHR in conjunction with Articles 8, 9, 10,11 and Article 1 Protocol 1.**

The Government simply does not accept that the control orders regime is being applied disproportionately to foreign nationals. The orders themselves are applicable to any individual engaged in terrorism-related activity, irrespective of nationality, or terrorist cause. Control orders are made on the basis of risk not nationality. The system is applied even-handedly on the same level of proof against all suspects. Lord Carlile was given access to all the supporting material for each control order and did not make any comments to this effect.

**In light of the concerns expressed in this Report, we seriously question renewal without a proper opportunity for a parliamentary debate on whether a derogation from Articles 5(1), 5(4) and 6(1) ECHR is justifiable, that is, whether the extraordinary measures in the Prevention of Terrorism Act 2005, which the**

**Government seeks to continue in force, are strictly required by the exigencies of the situation. It would be premature for us to express a view on that question. We merely conclude at this stage that we cannot endorse a renewal without a derogation and believe that Parliament should therefore be given an opportunity to debate and decide that question. (Paragraph 89)**

For the reasons outlined above, we do not consider that non-derogating control orders are being operated in a way that amounts to a deprivation of liberty requiring derogation from the ECHR.

The Government maintains that control orders are the best way of addressing the continuing threat posed by suspected terrorists who cannot currently be prosecuted or, in respect of foreign nationals, cannot be removed from the UK. This is a view shared by Lord Carlile:

As a last resort (only), in my view the control order system as operated currently in its non-derogating form is a justifiable and proportional safety valve for the proper protection of civil society.

It is the Government's firm belief that the 2005 Act strikes the balance between safeguarding society and safeguarding the rights of the individual.

## **Appendix 2: Letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department, re Counter-terrorism Policy and Human Rights: supplementary call for evidence**

I am very grateful to you and your committee for your ongoing work in this area.

I attach the Government's response to your call for supplementary evidence. As you will see, I have not added further evidence in respect of control orders. My officials have already notified Mr Nick Walker, Clerk to your Committee, of the reasons for this and of the oral statement which I made on this matter in the House of Commons on 2 February 2006.

I look forward to reading your next report on these matters.

*9 February 2006*

ANNEX: SUPPLEMENTARY EVIDENCE SUBMITTED BY THE HOME OFFICE

### 1. ROLE OF JUDICIARY IN TERRORIST CASES

1.1 The Terrorism Bill now has provision for maximum pre-charge detention times of 28 days in terrorist cases under the provisions in section 41 and Schedule 8 of the Terrorism Act 2000. AN extensions beyond 48 hours will have to be approved by a judge. Extensions beyond 14 days will now have to be approved by a High Court judge. Before granting any extensions to detention times, judges will have to be satisfied that the investigations relating to detained persons are being carried out as efficiently as possible.

1.2 Further to the evidence which the Home Office submitted on possible roles for the judiciary in investigating terrorist cases on 24 January 2005, the Home Office has concluded its examination of the possibility of using judges in a pre-trial sift procedure, as recommended by the Newton Committee in 2003.

1.3 In order for any such procedure to be beneficial, it would have to allow sensitive intelligence to play a role in criminal trials of terrorist cases while withholding the sensitive aspects of the material from both the defendant and the public. However, after a careful examination of real intelligence relating to terrorist cases, the Government has concluded that it would not be possible to withhold such material from the defendant or the public in such a way that it might influence the outcome of the trial without infringing the defendant's human rights. It therefore sees no benefit in creating a pre-trial sift procedure for terrorist cases.

1.4 The Government is, however, keeping the issue of the evidential use of intercept under review as discussed below. It will also consider carefully any suggestions the JCHR will make with regard to expanding the role of the judiciary in investigating terrorist cases.

### 2. INTERCEPT AS EVIDENCE

2.1 Following an extensive cross-Departmental, inter-agency review, the Government announced its position on whether to change the law to permit intercept evidence on 26 January 2005 in a Written Ministerial Statement. The review concluded that although there were likely to be extra convictions these would be few in number and limited to lower to middle ranking criminals. It was not likely to be effective against terrorists or top level criminals, who were particularly careful in their use of communications. The Government noted the already substantial results obtained by the UK's intelligence use of

intercept and were not persuaded that the benefits of change outweighed the risks involved.

2.2 In the last few years a number of legal models for intercept as evidence have been examined. None has provided an ECHR-compatible way of allowing intercept as evidence and safeguarding sensitive capabilities and techniques essential to protect the continued productive co-operation between intelligence and law enforcement agencies.

2.3 The last but one review, in 2003, assessed in detail the so-called 'dual warrant' model providing for evidential and non-evidential interception, but found that this would probably not be ECHR compliant and would have imposed a big resource burden on intercepting agencies.

2.4 The 2004 review focussed on a variant, the so-called 'triple warrant' model, involving intelligence only, non-evidential and evidential warrants (see Written Parliamentary Statement of 26/1/05). A key feature of this model was the idea of technical criteria to draw a 'bright line' between sensitive and non-sensitive capabilities and techniques to protect the former from disclosure. The review concluded that the triple warrant model would, at best, have only a very short shelf life because of big changes in communications technologies over the next few years.

2.5 The Home Office led further work in 2005 to assess further the impact of the move to IP technology on interception and the implications for its evidential use. The study, which had substantial input from a cross-section of the communications industry has shown that new technology would make evidential use more, not less, difficult to achieve, not least because of the inherent complexity and diversity of IP communications and the potential difficulties in accrediting the interception systems involved to an evidential standard.

2.6 I have undertaken to share the conclusions of this study with the ISC in due course.

### 3. IMMIGRATION, ASYLUM AND NATIONALITY BILL

3.1 The Government has tabled amendments to clauses 52 *Refugee Convention: Construction* and 55 *Acquisition of British Nationality* which are due to be considered at Lords Report stage on 7 February.

#### CLAUSE 52: REFUGEE CONVENTION: CONSTRUCTION

3.2 Clause 52 provides a statutory interpretation of Article 1F (c) of the 1951 Geneva Refugee Convention, as requiring the exclusion of terrorists from asylum. Sub-section (2) of the clause sets out procedures for the consideration of Article 1F in appeals before the Asylum & Immigration Tribunal (AIT) and the Special Immigration Appeals Commission (SIAC).

3.3 An overlap has been identified between clause 52(2) and section 33 of the Anti-Terrorism, Crime and Security Act 2001 as regards Article 1F cases heard by SIAC. In light of this overlap and procedural differences between the two provisions the Government has brought forward an amendment that would remove the appeals provisions from clause 52, insert a new clause on appeals into the Bill entitled "Refugee Convention: Certification" and to repeal section 33 of the 2001 Act.

3.4 The purpose of the new clause is the same as that of clause 52(2), namely to create a statutory framework for the consideration of appeals where an individual is excluded from the protection of the Refugee Convention. However, the new clause provides for a certification procedure and its scope is broader than clause 52(2), as it applies to appeals relating to the national security aspect of Article 33(2) of the Refugee Convention as well

as to Article 1F, before SIAC and the AIT. In addition, it deletes the provision which excluded review of any decisions to which the certificate relates in any court or proceedings other than SIAC.

*CLAUSE 55: ACQUISITION OF NATIONALITY*

3.5 Clause 55 provides for a new good character requirement for those seeking to acquire British nationality via the registration route. Given the particular status of those British Overseas citizens, British protected persons and British subjects who hold no other nationality or citizenship, the Government has brought forward an amendment to exempt them from the good character requirement.

3.6 The Government remains satisfied that the Immigration, Asylum and Nationality Bill is compatible with the ECHR.

4 TERRORISM BILL

4.1 The Government's response to the JCHR's report on counter-terrorism policy and human rights explained that the Government had decided to accept the inclusion of intent and subjective recklessness tests in clause 2 of the Terrorism Bill. These tests have now been inserted. In addition, the defences in what are now clauses 1(6) and 2(7) have been generalised.

4.2 The Government remains satisfied that the Terrorism Bill is compatible with the ECHR.

## Appendix 3: Submission from Immigration Law Practitioners' Association

1. ILPA has provided evidence to this inquiry. This further evidence comes in response to the JCHR's supplementary call for evidence, which requested, in particular, information on significant changes or additions to the Immigration, Asylum and Nationality Bill made after the publication of, and not covered in, the Third Report of Session 2005-06.

2. The significant changes relevant to the areas of counter-terrorism and human rights are:  
— Amendments to what is now (HL Bill 74) Clause 54 (Refugee Convention: Construction), and the insertion of a new clause, now Clause 55 (Refugee Convention: Certification);  
— Amendment to what is now Clause 58 (Acquisition of Nationality)

CLAUSE 54 (REFUGEE CONVENTION CONSTRUCTION) AND NEW CLAUSE 55 (REFUGEE CONVENTION: CERTIFICATION)

3. Introducing the amendments and new clause at Report stage in the House of Lords on 7 February 2006, the Baroness Ashton of Upholland explained them thus:

"we identified an overlap between the appeal provisions in Clause 52(2) and Section 33 of the Anti-terrorism, Crime and Security Act 2001 as regards appeals on Article 1F while these provisions have the same aim, there are procedural differences between them which mean that they cannot work together. The amendment is designed to address them. It removes the appeals provisions from Clause 52, repeals Section 33 of the 2001 Act and inserts into the Bill a new clause, refugee convention certification" (col 613)

4. It will be clear from the above that the amendments were not designed to, and do not, address the concerns expressed by the JCHR in paragraph 179 of its Third Report, nor the concerns expressed by UNHCR, and by NGOs.

HOW THE NEW CLAUSE DIFFERS FROM THE UNAMENDED CLAUSE IN THE BILL

5. The new clause:

— uses a certification procedure

— covers the whole of Article 1F, not only 1F(c)

— also covers Article 33(2) of the Convention, not only Article 1F. Article 33 prohibits the *refoulement* of a refugee to the frontiers of territories where his life or freedom would be threatened for one of the Convention reasons (race, religion, political opinion etc.). Article 33(2) states that a refugee shall not benefit from this protection where there are reasonable grounds for regarding as a danger to the security of the country where s/he is a refugee or who, following conviction for a particularly serious crime, constitutes a danger to the community of that country.

Note also that it is explicit in the new clause that the certificate can be issued even if Secretary of State does not accept that the person would be a refugee save for exclusion —eg the primary case could be that the appellant is not telling the truth; in the alternative that Article 1F applies.

HOW DOES THE NEW CLAUSE DIFFER FROM S.33 OF ACTSA 2001, WHICH IT REPEALS?

6. We note the following differences:

— ACTSA 2001 s.33, applied only in national security cases, cases considered serious enough that they should be heard before the Special Immigration Appeals Commission. No public good test before issuing the certificate—an extra protection even for those in the SIAC cases under ACTSA.

— The new clause makes reference to the controversial s.72 (Serious Criminal) of the Nationality, Immigration and Asylum Act 2002, which, of course, had not been passed when s.33 was enacted.

— ACTSA 2001 s.33 sought to exclude judicial review challenges to certification. The new clause does not replicate this provision, as the Baroness Ashton expressly identified in introducing it (col. 613). Unlike ACTSA s.33 the new clause does not make express provision for the Secretary of State to quash the certificate nor what happens when the AIT or SIAC do not agree with the certificate.

OVERALL WHAT HAS CHANGED

7. Changes can be summarised as follows:

— The use of a certification procedure in national security cases before the AIT

— Coverage of the whole of Article 1(F) in procedures before the AIT

— Coverage of Article 33(2) in procedures before the AIT

ANALYSIS

8. As stated, the new clause does not address the concerns that were voiced about the original version of this clause in the Bill. It makes an improvement to the situation in SIAC cases by removing the ouster provisions of s.33 of ACTSA 2002. However, it worsens the position of those appearing before the Asylum and Immigration Tribunal (AIT). Procedures previously reserved for those cases to be heard before SIAC, because of the serious national security concerns they raise, will now be applied to cases that have been held not to meet that threshold of seriousness; those that remain with the AIT. Under s.97 of the Nationality, Immigration and Asylum Act 2002, cases are sent to SIAC if the Secretary of State acting in person certifies that the decision appealed against:

— was taken wholly or partly on the basis that the person's exclusion or removal from the UK would be in the interests of national security, in the interests of the relationship between the United Kingdom and another country;

— was taken on the basis of information that, in the opinion of the Secretary of State should not be made public, in the interests of national security, the relationship between the UK and another country, or otherwise in the public interest.

9. ILPA retains all its concerns about, and objections to, the clause. We are pleased to see the "ouster" provisions of s.33 of ACTSA 2001 gone. The new clause does however highlight the strength of the JCHR's comment that "The necessity for the new provisions may be questionable" (para. 174 of the *Third Report*) and their calls for a narrower definition of terrorism to be used and reference to inchoate offences to be removed. Cases which raise national security concerns will go to SIAC, yet countering terrorism is presented as the rationale for the clause.

## CLAUSE 58 (ACQUISITION OF NATIONALITY)

10. The government amended this clause at Lords Report to remove the reference to s.4B of the British Nationality Act 1981, so that the good character test will not be applied to applications from British Overseas Citizens, British subjects and British Protected Persons with no other nationality. ILPA welcomes this amendment. We asked in our briefing for Grand Committee "Are these people so very different from the stateless, who are given protection under this clause? We are pleased that what the Rt. Hon David Blunkett MP described as *about righting an historic wrong ...* " (Commons Consideration of Lords Amendments 05 11 02 col. 147) in 2002, when these people were given to the entitlement to register as British, has not been undermined.

11. The Lord Filkin said, in introducing the amendment to right this historic wrong at Lords Report on what became the Nationality, Immigration and Asylum Act 2002:

"My Lords, my right honourable friend the Home Secretary gave an undertaking in another place to reconsider the position of British overseas citizens who have no other nationality. As matters stand, those citizens have no right of abode, either in this country or elsewhere.

The Home Secretary stated the Government's view that we have a moral obligation to them of long standing and that the present unsatisfactory situation represented unfinished business. We have since concluded that a similar obligation is owed to British subjects and to British protected persons without other nationalities."

*(Nationality, Immigration and Asylum, Bill 9 Oct 2002 Column 286)*

We are pleased that these people with "no right of abode, either in this country or elsewhere" will retain their right to register. However, we consider that if the government has accepted this principle then other changes need to be made to the clause to reflect it. Sub-section 58(2)(d) should be removed. This refers to section 1 of the British Nationality (Hong Kong) Act 1997 which concerns Hong Kong residents whose entitlement to register derives from their having a form of British nationality other than British Citizenship and being, on 4 February 1997, stateless but for that citizenship and who have not since renounced any other citizenship. To amend the Bill to allow these people to register by entitlement would be in line with the government's amendment to leave out "4B". Similarly subsection 58(2)(e) should be deleted, Article 6 of the Hong Kong (British Nationality) Order 1986 is entitled "Provisions for reducing statelessness". Article 6(3) says:

"(3) A person born stateless on or after 1st July 1997 outside the dependent territories shall be entitled, on an application for his registration as a British Overseas citizen made within the period of twelve months from the date of the birth, to be registered as such a citizen if the requirements specified in paragraph (4) below are fulfilled in the case of either that person's father or his mother"

We suggest that it is in line with the UK's obligations under both the UN Convention on the reduction of statelessness, and the UN Convention on the Rights of Child, to allow those who are, in effect, stateless babies under 12 months to register as British.

12. The Parliamentary Under-Secretary of State, the Baroness Ashton of Upholland, was faced both in Grand Committee and at Lords Report the criticisms levelled at the clause for subjecting *inter alia* babies under 12 months to the good character test and denying them the opportunity to register by entitlement. She said in Grand Committee:

"Concern has been expressed that we would extend the rule to very young children or even babies—that was raised with me yesterday. Of course, the rules would state

that that would be a silly thing to do, and it would not happen. (19 Jan 2006 : Col. GC279)

We have voiced our objections this legislation, and to the passing of “silly” legislation in any event. We have a further concern that the approach outlined would not be possible in practice. The sole purpose of the clause is to subject the identified groups to a good character test when they apply to register. Three provisions apply *only* to babies under 12 months—subsection 58(2)(e) as described above, and the references to s. 3(2) and s.17(2) of the British Nationality 1981 in s. 58(2)(a). Were guidance to seek to lift these groups as a whole (and no one has suggested it is possible to distinguish good and bad under-12-month-olds) out of the application of the clause, would this not be in direct conflict with, and thus *ultra vires* the statutory provision?

10 February 2006

## Appendix 4: Letter and submission from Joint Council for the Welfare of Immigrants

INQUIRY INTO COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: IMMIGRATION, ASYLUM AND NATIONALITY BILL – CITIZENSHIP CLAUSES

The JCWI (Joint Council for the Welfare of Immigrants) is an independent national organisation which has been providing legal representation to individuals and families affected by immigration, nationality and refugee law and policy since 1967. JCWI actively lobbies and campaigns for changes in law and practice and its mission is to eliminate discrimination in this sphere.

We enclose herewith an opinion on the citizenship clauses in the Immigration, Asylum and Nationality Bill and its human rights implications, commissioned by JCWI and drafted by Adrian Berry of 6 King's Bench Walk. In brief, JCWI has various concerns in relation to these clauses, in particular in relation to:

- The proposed tests to deprive of citizenship and right of abode (and its potential arbitrary use and effect):
- The “chilling” effects of the citizenship clauses on ethnic minority communities in terms of freedom of expression and association.

We have also enclosed herewith JCWI's latest briefing<sup>1</sup> and proposed amendments in terms of third reading in the House of Lords (not printed).

*7 March 2006*

Annex:

IN THE MATTER OF THE PROPOSED CHANGE IN CITIZENSHIP LAW IN THE IMMIGRATION, ASYLUM AND NATIONALITY BILL

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### ADVICE

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1. This advice will cover the following proposals in the Immigration, Asylum and Nationality Bill:

- (i) Deprivation of Citizenship
- (ii) Deprivation of the Right of Abode
- (iii) Deprivation provisions in force from 1 January 1983 to 31 March 2003
- (iv) Deprivation and its impact on the European Convention on Human Rights and the Human Rights Act 1998

2. The version of the Bill being used in the preparation of this advice is HL Bill 74 as amended on report on 7 February 2006.

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<sup>1</sup> Not printed

(I) DEPRIVATION OF CITIZENSHIP

3. Historically very few persons have been deprived of their citizenship (or subject status under earlier legislation) . In a written answer to the House of Lords on 8 July 2002 Lord Filkin noted:

Lord Filkin: Between 1915 and 1948, 287 British subjects were deprived of that citizenship status. Between 1949 and 1973 10 citizens of the United Kingdom and Colonies were similarly deprived by order of the Home Secretary. An equally small number were deprived by order of colonial governors. There have been no deprivations since 1973, although a number of cases have been considered. The names given to British nationals have changed over time as new legislation has been introduced.

THE CURRENT TEST FOR DEPRIVATION OF CITIZENSHIP

4. The current test for deprivation of British Citizenship, in force since 1 April 2003 following the enactment of the Nationality Immigration and Asylum Act 2002, requires the Secretary of State to be satisfied that a person has done something *seriously prejudicial to the vital interests of the United Kingdom*. When this test was introduced, and for the first time, those acquiring British Citizenship by birth or descent could be deprived of British Citizenship provided they would not thereby become stateless. Under section 40(2) of the British Nationality Act 1981 ("the 1981 Act") it states:

The Secretary of State may by order deprive a person of citizenship status if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of –

- a. the United Kingdom, or
- b. a British Overseas territory.

5. By section 40(4) the Secretary of State may not make the order under section 40(2) if he is satisfied that the order would make a person stateless.

6. Before making an order under section 40(2) the Secretary of State must give written notice to the person, under section 40(5) specifying that he has decided to make the order, giving the reasons for the order, and notifying him of a right of appeal against the deprivation of citizenship to the Asylum and Immigration Tribunal or, in cases certified as involving a national security element, international relations or another public interest, to the Special Immigration Appeals Commission (SIAC).

7. In making an order, the powers of the Secretary of State are conditioned by section 4 of the Nationality, Immigration and Asylum Act 2002, which states:

(4) In exercising a power under section 40 of the British Nationality Act 1981 after the commencement of subsection (1) above the Secretary of State may have regard to anything which-

- (a) occurred before commencement, and
- (b) he could have relied on (whether on its own or with other matters) in making an order under section 40 before commencement.

8. In *R(Hicks) v Secretary of State* [2005] EWHC 2818 (Admin), High Court, 13 December 2005 Collins J held that:

“16 ... Thus it is necessary to refer to s.40 of the 1981 Act as originally enacted to see what matters could have been relied on to justify deprivation. Section 40(1) dealt with the obtaining of registration or a certificate by fraud, false representation or concealment of a material fact, provisions which are now in s.40(3) of the substituted section. The relevant provisions for the purposes of s.4(4)(b) of the 2002 Act were contained in s.40(3) which read:-

“Subject to the provisions of this section, the Secretary of State may by order deprive any British citizen to whom this subsection applies of his British citizenship if the Secretary of State is satisfied that that citizen –

(a) has shown himself by act or speech to be disloyal or disaffected towards Her Majesty; or

(b) has, during any war in which Her Majesty was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war, or

(c) has, within the period of five years from the relevant date, been sentenced in any country to imprisonment for a term of not less than twelve months.”

The ‘relevant date’ is the date of registration or the grant of a certificate of naturalisation (s.40(4)). Subsection (5) provides:-

“The Secretary of State –

(a) shall not deprive a person of British citizenship under this section unless he is satisfied that it is not conducive to the public good that that person should continue to be a British citizen; and

(b) shall not deprive a person of British citizenship under subsection (3) on the ground mentioned in paragraph (c) of that subsection if it appears to him that that person would thereupon become stateless.””

#### THE RIGHT OF APPEAL

9. A person who is given written notice of a decision to make an order has a right of appeal to the Asylum and Immigration Tribunal or to the Special Immigration Appeals Commission, see section 40A of the 1981 Act and Section 2B of the Special Immigration Appeals Commission Act 1997.

10. Section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 amends section 40A of the 1981 Act by repealing subsections (6) to (8), with effect from 5 April 2005. Although the appeal is in form against the decision to make an order, the order for deprivation of citizenship can be made even if an appeal is lodged. The appeal is not suspensive.

#### THE MEANING OF THE CURRENT TEST

11. The current test was introduced by the Nationality, Immigration and Asylum Act 2002. In the debate on that measure in the House of Lords, Lord Filkin, for the Government stated (8 July 2002, Col 535):

Lord Filkin: I thank both noble Lords for their contribution to the discussion of whether or not the

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term "vital interest" is beneficial. I shall seek to suggest why it is in the general interest for the term not to be defined further.

Ever since the British Nationality and Status of Aliens Act 1914, the law has made provision for citizenship conferred by administrative grant to be withdrawn where the person concerned is found subsequently to have harmed, or posed a threat to, vital state interests.

In current legislation, such actions are expressed in terms of disloyalty or disaffection towards the Crown, or as unlawful trade or communication with an enemy in time of war.

Those expressions, while they still carry meaning, have become dated and perhaps fail to reflect the full width of activity that might threaten our democratic institutions and our way of life. September 11th provides a horrific illustration of the sort of threat that we have in mind.

The Government are on record as stating that the term "vital interests" will be interpreted as covering threats to national and economic security and to public safety—in that respect we are foursquare with the points made by the Official Opposition—but not to actions of a more general criminal nature, of which Members of the Committee will be aware from the debate in another place.

The term occurs in the 1961 and 1997 conventions. It is not expressly defined in either of those places. As a term of international law, the concept is an evolving one. That is right and necessary. If one reflects on how our perceptions of the vital interests of a state could be threatened and how all of us have shifted in the past 12 months. One hopes that it will not occur, but it is conceivable that we may yet further change our perception.

For that reason, the concept being an evolving one, and states being allowed a margin of appreciation in applying it to situations arising within their own jurisdictions that they might not previously have conceived were possible, seems to me to be right and proper.

I hope that the Committee will understand, therefore, why we do not consider "vital interests" to be a term that benefits from an attempt at further definition on the face of the Bill.

I remind the Committee of the safeguards, both in the Bill and in current legislation, against the arbitrary use of the deprivation powers. A right of appeal against deprivation will lie either to an immigration adjudicator in the first instance or to the Special Immigration Appeals Commission. To repeat the points we made on a previous amendment, the challenge in such a hearing is on the merits and on the law. A defence could be that this does not touch on the vital interests of the state. That would be a perfectly open line of argument to be made by a defence counsel at an appeal hearing before an adjudicator or before SIAC.

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For those reasons, I hope that both Benches will recognise why we feel that it is not in the interest of the Government or of the state that the term is given a tighter definition than it already has.

12. The test for *vital interests* was defined by Lord Filkin by reference to the 1961 and 1997 Convention. This is a reference to the 1961 United National Convention on the Reduction of Statelessness and the 1997 European Convention on Nationality. The importance of both Conventions is considered below.

#### THE PROPOSAL IN THE IMMIGRATION, ASYLUM AND NATIONALITY BILL

13. In the Immigration, Asylum and Nationality Bill ("the Bill") currently before Parliament a new test for deprivation of nationality is proposed. The test for deprivation has been made *easier* for the Secretary of State to satisfy.

14. The proposed Clause 56 is as follows:

#### Deprivation of citizenship

(1) For section 40(2) of the British Nationality Act 1981 (c. 61) (deprivation of citizenship: prejudicing UK interests) substitute—

"(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."

(2) At the end of section 40A(3) of that Act (deprivation: appeal) add—

", and

(e) section 108 (forged document: proceedings in private).";

(and omit the word "and" before section 40A(3)(d)).

15. The effect of the change is that the Secretary of State need no longer be satisfied that a person has done anything *seriously prejudicial to the vital interests of the United Kingdom*. Instead he need only be *satisfied* that the *deprivation is conducive to the public good*. This is a much easier test to satisfy.

#### THE ANALOGY WITH THE TEST FOR DEPORTATION

16. In addition, the new test is drawn from the test the Secretary of State must satisfy in order to deport a person subject to immigration control. By section 3(5)(a) of the Immigration Act 1971 a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good.

17. Currently a British citizen cannot be deported. He or she has a higher standard of protection than a person subject to immigration control. This may reflect the importance attached to protecting the rights of citizens. A British citizen has as a right the right of

abode, and is free to live in, and to come and go into and from the United Kingdom, see sections 1(1) and section 2(1)(a) of the Immigration Act 1971.

18. The effect of clause 56 will be to reduce the standard of protection for those at risk of deprivation of citizenship to that which is applied to those persons subject to immigration control who are at risk of deportation. The further effect will be that a person may be stripped of citizenship and thereafter made subject to a decision to deport, on the application of the same test: whether the Secretary of State is satisfied that such a measure is conducive the public good. While a British citizen may not be deported, see section 5(2) Immigration Act 1971, he may be stripped of his citizenship and then deported.

19. This drop in the standard of protection needs to be understood in the context that deportation is itself the most severe form of removal from the United Kingdom as a deportation order remains in force after a person has been lawfully removed and prevents a person from returning lawfully to the United Kingdom until such time as it is revoked, see sections 5(1) and (2) of the Immigration Act 1971.

#### THE CURRENT TEST FOR DEPRIVATION OF CITIZENSHIP AND ITS SIGNIFICANCE FOR COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

20. The current stronger test of "*conduct seriously prejudicial to the vital interests of the United Kingdom*" reflects the Council of Europe 1997 Convention on Nationality which entered into force on 1 March 2000. The United Kingdom has neither signed or ratified this Convention. Article 4a of the Convention gives the right to a nationality but not to a specific nationality.

21. Article 7 of the European Convention on Nationality states:

"Article 7 – Loss of nationality *ex lege* or at the initiative of a State Party

1. A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases:

...

d. conduct seriously prejudicial to the vital interests of the State Party;

...

9. A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless, with the exception of the cases mentioned in paragraph 1, sub-paragraph b, of this article."

22. In addition, the current stronger test of "*conduct seriously prejudicial to the vital interests of the United Kingdom*" reflects the 1961 United Nations Convention on the Reduction of Statelessness. The United Kingdom has signed and ratified this Convention.

23. Article 8 of the UN Convention on the Reduction on Statelessness states:

"Article 8

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.

...

3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

(a) that, inconsistently with his duty of loyalty to the Contracting State, the person

...

(ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;

...

4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body."

24. The United Kingdom signed this Convention on 30 August 1961 and ratified it on 29 March 1966. Under it the United Kingdom may deprive a person of his nationality or citizenship if at the time of signature, ratification or accession it specified retention of such a right on a ground, being a ground existing in national law at that time, on the ground, among others, that a person, inconsistently with the duty of loyalty to the United Kingdom, has conducted himself in a manner *seriously prejudicial to the vital interests of the United Kingdom*.

25. The United Kingdom has entered a declared specification as to the application on the Convention in the following terms:

"[The Government of the United Kingdom declares that], in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person

...

"(ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty."

26. To be clear, the current test for deprivation of citizenship is consistent with the United Kingdom's obligation under the Convention on the Reduction of Statelessness. The proposed test under Clause 56 is not, on its face, consistent with such obligations. Although the Convention has not been incorporated directly into municipal law, it binds the United Kingdom at an international level. Furthermore, it is remarkable that the United Kingdom would seek to depart from a test consistent with this international obligation and substitute one that is plainly less exacting and therefore *prima facie* inconsistent with such obligations.

#### (ii) DEPRIVATION OF THE RIGHT OF ABODE

27. Furthermore it is also proposed to enact provisions to deprive persons who hold the right of abode but not actual British citizenship. The right of abode may be held separately from British citizenship, as a result of the transformation from Empire to Commonwealth and the postwar de-colonisation process whereby the status of British Subject was sub-

divided into citizenships that pertained solely to newly independent Commonwealth states.

28. The holder of the right of abode is free to live in, and to come and go into and from the United Kingdom. The right of abode has been acquired and maintained by (i) some Commonwealth citizens of other Commonwealth countries and (ii) some persons who hold second class forms of British nationality<sup>2</sup> who do not have the right of abode by entitlement.

29. In respect of the latter, those who are British Subjects, a small residual class of persons following legislative changes under the British Nationality Act 1981, who have acquired the right of abode are treated by the Government along with British citizens, as British nationals for European Community purposes.

30. The proposed Clause 57 of the Bill is as follows:

Deprivation of right of abode

(1) After section 2 of the Immigration Act 1971 (c. 77) (right of abode) insert—

“2A Deprivation of right of abode

(1) The Secretary of State may by order remove from a specified person a right of abode in the United Kingdom which he has under section 2(1)(b).

(2) The Secretary of State may make an order under subsection (1) in respect of a person only if the Secretary of State thinks that it would be conducive to the public good for the person to be excluded or removed from the United Kingdom.

(3) An order under subsection (1) may be revoked by order of the Secretary of State.

(4) While an order under subsection (1) has effect in relation to a person—

(a) section 2(2) shall not apply to him, and

(b) any certificate of entitlement granted to him shall have no effect.”

(2) In section 82(2) of the Nationality, Immigration and Asylum Act 2002 (c. 41)

(right of appeal: definition of immigration decision) after paragraph (ia) insert—

“(ib) a decision to make an order under section 2A of that Act

(deprivation of right of abode),”.

31. The test for deprivation of the right of abode will be similar but not the same as that for deprivation of citizenship. The Secretary of State must *think*, rather than be *satisfied* as

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<sup>2</sup> British Overseas citizens (BOC), British subjects (BS), British Protected Persons (BPP), British Nationals (Overseas) (BNOs), and British Overseas Territories citizens (BOTC)

for deprivation of citizenship, that it would be conducive to the public good for the person to be excluded or removed from the United Kingdom. Furthermore, unlike the proposed deprivation of citizenship provisions, there is no requirement that the Secretary of State need be satisfied that the person would not otherwise be stateless when making an order. While an order is in force any certificate of entitlement to the right of abode has no effect. A decision of the Secretary of State to make a deprivation order may be appealed to the Asylum and Immigration Tribunal.

(iii) DEPRIVATION PROVISIONS IN FORCE FROM 1 JANUARY 1983 TO 31 MARCH 2003

32. It is important to appreciate that the current existing test for deprivation of citizenship is already an easing of the test and has been in force only since 1 April 2003. Prior to this the test was much harder for the Secretary of State to satisfy. Deprivation of citizenship could only be applied to those who had registered or naturalised as citizens under previous legislation. It could not be applied to those who had automatically acquired British citizenship by birth or descent. This distinction no longer applies since 1 April 2003.

33. Prior to 1 April 2003, certain British citizens who had acquired such citizenship by particular forms of registration or naturalisation could, by order, be deprived of British citizenship if the Secretary of State was satisfied as to the test set out at paragraph 8 above in the citation from *R(Hicks)*.

34. Under these provisions the Secretary of State could not deprive a person of British citizenship unless he was satisfied that it was not conducive to the public good that the person should remain a British citizen or that the person had, within 5 years of being registered or granted a certificate of naturalisation, been sentenced to imprisonment for not less than 12 months, if to do so would render the person stateless.

(iv) DEPRIVATION AND ITS IMPACT ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE HUMAN RIGHTS ACT 1998

35. The United Kingdom has signed<sup>3</sup> but not ratified the Fourth Protocol of the European Convention on Human Rights. It has also not incorporated any of its provisions into the Human Rights Act 1998. However Article 3(1) of the Fourth Protocol states:

“No one shall be expelled from...the territory of the State of which he is a national”

36. This Article may not be relevant to those who are expelled after being first deprived of citizenship but it gives an indication of the seriousness with which expulsion of a state's indication is considered.

37. The main Articles of the European Convention of Human Rights upon which the proposed changes to the test for deprivation may impact are:

- (i) Article 10 Freedom on Expression
- (ii) Article 11 Freedom of Assembly and Association
- (iii) Article 14 Prohibition of Discrimination

38. Article 10 states:

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

39. Article 11 states:

#### Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

40. Article 14 states:

#### Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

#### THE CHILLING EFFECT

41. It may be that few citizens are likely to be deprived of citizenship under the proposed measures, however the measures will have a broader effect on others. While few may be deprived of their citizenship, many others, not least from minority communities, will suffer a chilling effect whereby they cease to exercise fundamental rights of freedom of expression and freedom of association in order to avoid individuals and communities coming to the attention of the Secretary of State and risking deprivation of citizenship.

#### FREEDOM OF EXPRESSION

42. Freedom of expression occupies a high place in the hierarchy of rights in a democratic society. It has been described as the “primary right” essential to the functioning of a democratic society, per Lord Steyn in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 125G HL. Political speech in particular enjoys the highest degree of protection, per Lord Steyn, *ibid.* 127A.

43. In *R v BBC, ex parte ProLife Alliance* [2003] 2 All ER 977, para 6, Lord Nicholls stated:

“Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts.”

44. Where a speaker seeks to criticise government actions the European Court of Human Rights has emphasised that restrictions on freedom of speech will only be permitted in the most exceptional circumstances, see *Castells v Spain* (1992) 14 EHRR 445, para 46.

45. If a person makes a statement that could be characterised as support for terrorism, this could still attract the protection of Article 10 albeit it may not attract such a high degree of protection, see *Purcell v Ireland* 70 DR 262 (1991).

46. However, Article 17 of the Convention may play role in determining how far a person may rely on Article 10.

47. Article 17 ECHR states:

“Nothing in this Convention may be interpreted as implying for any state, group, or person, the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth therein or at their limitation to a greater extent that is provided for in this Convention.”

48. Article 17 ECHR provides a check on the use of Article 10 where a person seeks to engage in an activity of perform an act aimed at destroying or unnecessarily limiting the rights and freedoms under the Convention. This Article is available whenever a person seeks to rely on Article 10. It prevents an abusive reliance on the Convention. However, it is applied in extremely limited scenarios such as engaging in Holocaust denial, *Gaurady v France* (7 July 2003 Admissibility Decision of European Court of Human Rights). Furthermore, it would act to prevent abuse where Article 10 was relied upon by an unmeritorious applicant, regardless of which test for deprivation of citizenship was being applied.

49. In the absence of Article 17 being applied to prevent reliance on Article 10 by a person who the Secretary of State proposes to deprive of citizenship, then the full protection of Article 10 ought to apply.

50. The loosening under the proposed test for deprivation of citizenship may serve to constrain those who have not done anything seriously prejudicial to the vital interests of the United Kingdom but are merely people who have engaged in controversial political speech protected by Article 10 that nonetheless enables the Secretary of State to conclude that he is satisfied that their presence is not conducive to the public good.

51. There must be a concern that freedom of expression, a right upon which citizens rely, is undermined by the implicit threat of deprivation of citizenship to communities and individuals whose engagement in politics touches on matters of state policy and national security.

52. In the context of deciding whether to deport person, the Secretary of State has indicated that there are certain so-called unacceptable behaviours that will be taken into account. The Home Office stated:

“The list of unacceptable behaviours is indicative rather than exhaustive. It covers any non-UK citizen whether in the UK or abroad who uses any means or medium, including:

- Writing, producing, publishing or distributing material;
- Public speaking including preaching;
- Running a website; or
- Using a position of responsibility such as teacher, community or youth leader to express views which:
  - Foment, justify or glorify terrorist violence in furtherance of particular beliefs;
  - Seek to provoke others to terrorist acts;
  - Foment other serious criminal activity or seek to provoke others to serious criminal acts; or
  - Foster hatred which might lead to inter-community violence in the UK.”

*(Home Office 24 August 2005)*

53. These are exceptionally broadly drawn.

54. Those who hold and articulate views as to the role of the United Kingdom government in the Middle East, the role and meaning of Islam as the basis for political practice, and express views as to the desirability of political action on these issues may find the scope of their debate subject to self-censorship in order to avoid any risk of deprivation of citizenship. Furthermore, they may be made subject to attempts to deprive them of citizenship as a result of articulating sentiments that are profoundly antithetical to the position of the United Kingdom government but which nonetheless could not be construed as acts that are seriously prejudicial to the vital interests of the United Kingdom under the current test.

55. The mere existence of this new test on the face of the Act, irrespective of its application, may drive such persons out of the democratic process as the right itself is impaired by the chilling effect it has on free expression. The provision is liable to have that effect.

56. Moreover, any attempt to deprive a person of citizenship under the new test, may on the facts of the case, interfere with the right to freedom of expression by placing such a position whereby he can be deported

57. Under the proposed clause it would be possible for the Secretary of State to decide that he was satisfied that it was conducive to the public good to deprive a person of citizenship, a necessary precondition to deportation, on the basis of speeches and acts of expression or on the imparting and/or receipt of information and ideas. Such a decision would engage Article 10(1) ECHR.

58. If Article 10(1) is engaged then the issues moves on to consider Article 10(2). The decision to deprive a person of citizenship would constitute an interference or limitation with the right protected on the basis that it could inhibit or prevent the exercise of the right. The interference to the right of freedom of expression would be prescribed by law, being based on a statutory provision. The real question is whether the Secretary of State can show that the interference is necessary on a democratic society, that is that there is a pressing social need for the measure and that it is proportionate, and that the reasons given to justify the decision are relevant and sufficient.

59. Under Article 10(2) the Secretary of State could provide justification based on the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime among others.

60. In my opinion it would be open to the Secretary of State to justify a decision to deprive a person of citizenship as being a necessary interference with the right of freedom of expression on the basis of one of the reasons given above, but such a decision will be viewed as draconian, as it strikes at the very basis of democratic entitlement to participate in a society on the basis of membership of that society and to articulate and receive political opinions by peaceful means. Furthermore, a person facing deprivation of citizenship may very well have a good deal to say about the actions of the state attempting deprivation and articulate them through the particular perspective that caused the Secretary of State to take a decision to deprive him of citizenship in the first place.

61. The breadth of the exercise of discretion by the Secretary of State (“... *If the Secretary of State is satisfied ...*” (Clause 56(2)) and thereafter the consideration by the Asylum and Immigration Tribunal creates the opportunity for a breach of Article 10 ECHR. Give the nature of the interference, deprivation of citizenship, strong justification will be required. The Secretary of State will have to provide justification that establishes pressing social need and that such a decision is proportionate (including reasons as to why a less restrictive measure could not be employed).

62. It will be easier for the Secretary of State to justify a measure on the grounds of national security, see *Shayler* [2003] 1 AC 247 where greater deference will be shown by the Courts, than on the basis of justification based on the prevention of disorder or crime.

63. In conclusion, in my opinion, the width of the proposed new discretion will have a chilling effect on the right to freedom of expression for particular individuals and communities. In addition, an individual decision to deprive a person of citizenship may very well impact upon that person’s freedom of expression. In an individual case the extent of the interference would need to be considered, bearing in mind the high protection afforded to political speech and the extent to which the freedom has been impaired. Consideration would be to be given to the particular facts of a case.

64. Any interference occasioned by deprivation proceedings by the Secretary of State will require strong justification to show that it is relevant and sufficient and that there is a pressing social need for such a measure. Having regard to the draconian nature of deprivation the Secretary of State will need to show why such a measure is proportionate and why the aim achieved by deprivation could not be met by some less restrictive measure. In my opinion a court ought to be very slow to find measure to deprive someone of their citizenship to be a proportionate interference under Article 10 where such a measure is based on the imparting and receipt of information and ideas and on the holding of opinions, however unsavoury. There ought to be very few circumstances where such a measure could be justified.

#### FREEDOM OF ASSEMBLY AND ASSOCIATION

65. These are two separate rights. Freedom of assembly is a fundamental right in a democratic society and is not to be restrictively interpreted, *G v Germany* 60 DR 256 (1989) E Comm HR. Any restriction must be required by law and must be for a legitimate aim. Unless there is compelling evidence that an assembly is likely to lead to violence and serious public disorder, it will be unlawful for a state to take measures that prevent freedom of assembly however shocking the views expressed might be, see *Stankov v Bulgaria*, European Court of Human Rights 2 October 2001. However where there has been an incitement to violence at the assembly the margin of appreciation afforded to the state will be greater.

66. As for freedom of expression, so to for freedom of assembly will the threat of commencement of deprivation of citizenship proceedings, by reference to the list of 'unacceptable behaviours or otherwise', impair the enjoyment of the right for persons so affected.

67. Freedom of association involves protection for political parties, such parties being considered to be essential to the proper functioning of democracy. However a political party must use legal and democratic means and must propose only such changes as are compatible with fundamental rights, see *Refah Partisi v Turkey* (2002) 35 EHRR 57. Any restriction must be required by law and must be for a legitimate aim.

#### FREEDOM FROM DISCRIMINATION

68. One has to bear in mind that deprivation of citizenship is a measure permitting expulsion. It leads to an immigration measure. Those individuals likely to be affected are those with dual nationality that is of the United Kingdom and other states, and who accordingly not being rendered stateless by deprivation of British Citizenship. Many such dual nationals will come from minority communities who have retained the nationality of their country of origin. The measure for deprivation of citizenship could well fall more heavily on minority communities where such persons have recently settled in the United Kingdom and who have retained the citizenship of another country, and their children who, although acquired British nationality through their birth, may also have acquired their parents' nationality of origin. There is a clear potential for the legislation to have a discriminatory effect on such persons that cannot be justified.

69. In contrast, few of those who acquire citizenship automatically by being born in the United Kingdom to white British citizens are unlikely to hold dual nationality, unless perhaps they are Irish,<sup>4</sup> and so they will not be liable to deprivation of citizenship in consequence of acts of political speech and association because to deprive them of citizenship would render them stateless. The provisions are clearly capable of having unjustified discriminatory effect contrary to Article 14 ECHR.

70. In *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, Brooke LJ at para 20 stated in respect of Article 14 ECHR that the test was:

"(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions ... (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification."

71. This test was arguably re-formulated in *R (Carson) v Secretary of State For Work & Pensions* [2005] UKHL 37 but it serves well enough here. There would appear to be no adequate justification to support measures which permit dual nationals to be deprived of British Citizenship whilst those who solely hold British Citizenship are protected. Simply because it is possible to deprive the former without rendering them stateless, does not mean that there is adequate justification. The measure arguably has a discriminatory effect.

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4 Irish citizen as European Union citizens can, in any event, rely on the higher standard of protection from expulsion under Directive 64/221/EEC

## Appendix 5: Submission from Liberty

### 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.

### SUMMARY

1. Security and freedom are not diametrically opposed or mutually exclusive values. The most effective way of countering the threat from terrorism will involve laws and processes which respect the values and rights that terrorism seeks to undermine. The international human rights framework left to the world by the generation which survived the Holocaust and the Blitz pays considerable respect to questions of public safety. There is no need for this framework to be undermined in the name of a "war against terror".

2. We share the Government's stated preference for prosecuting international terrorists. Criminal prosecution is both fairer and more effective than controls imposed by the executive. We therefore welcome the Joint Committee on Human Rights' ("JCHR") consideration of ways in which the criminal justice system might be adapted to facilitate criminal prosecution in the terrorism context, instead of continued recourse to executive restrictions on freedom, like those imposed under control orders. For this reason we support the proposal to lift the ban on the use of intercept evidence in criminal proceedings. We do not, however, agree with the proposal to give judges an investigative role in the criminal justice process. This idea, borrowed from civil law jurisdictions like France, is incompatible with our common law adversarial system and would not, in reality, address the arguments used by the Government for not prosecuting terrorists. In practice, the use of specialist investigative judges in the terrorism context in France has given rise to significant concerns of unfairness and the necessary impartiality of the investigative judge has been questioned.

3. The use of deliberate and lethal force is the gravest of steps in a democracy. It can only ever be justified where "absolutely necessary"; where there is no other way of effectively protecting the lives of others. We therefore welcome the JCHR's intention to consider the use of lethal force in the context of terrorism.

### INTRODUCTION

4. On 21 September 2005 the JCHR announced an inquiry into "counter-terrorism and human rights". The Committee sought evidence on the human rights implications of counter-terrorism policy in the UK since 7 July 2005 and potential future developments in that policy. In October 2005 Liberty responded to that call for evidence.<sup>5</sup>

5. On 17 January 2006 the JCHR issued a further call for written evidence, seeking written evidence on, amongst other things,<sup>6</sup> the following matters:

(a) possible mechanisms whereby the judiciary could have an investigative role in relation to terrorist offences;

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5 Available at: <http://www.liberty-human-rights.org.uk/resources/policy-papers/main.shtml>

6 For example, the JCHR sought evidence on "the human rights implications of the operation of the control orders system since it came into effect". We submitted our response to this matter above in early February (available at: <http://www.liberty-human-rights.org.uk/resources/policy-papers/main.shtml>)

- (b) whether, and if so how, intercept evidence could be used in courts; and
- (c) the use of lethal force by police.

Our October 2005 response addressed the first two questions. Here we supplement those responses and consider the additional question about the use of lethal force by the police.

#### AN INVESTIGATIVE ROLE FOR THE JUDICIARY?

##### *Context*

6. We already have a vast array of laws designed to tackle the threat from international terrorism. We do not need to look to counter-terror laws in other countries to identify a pick-and-mix array of additional counter-terrorism measures and processes. Unfortunately, it appears that this is the way in which comparative law is currently being used by policy-makers.<sup>7</sup> Instead, we should be asking whether our existing terrorism laws, and those which are currently proposed, are really necessary. In this context comparative law can provide useful guidance on how we might more proportionately, and in line with our domestic and international human rights obligations, tackle the threat from terrorism. This is the context in which the JCHR looked to the law of other jurisdictions in its 2004 report, "Review of Counter-Terrorism Laws". Its research enabled it to conclude that "it must be possible to deal adequately with the threat from international terrorism by measures which enable the use of the criminal law against those suspected of international terrorism, of whatever nationality, and without derogating from international human rights obligations".<sup>8</sup> As the Committee identified, this was also the "central insight of the Newton Report".<sup>9</sup>

7. The Newton Committee is often misinterpreted as giving a ringing endorsement to the proposal to give our judges an investigative role in the criminal justice process. In reality, this was just one of a number of tentative suggestions made by the Committee about how we might be able to address the Government's reluctance to prosecute those suspected of international terrorism and, therefore, its arguments for sweeping executive powers to deprive a person of their liberty.<sup>10</sup> We support the Newton Committee's attempts to identify ways of facilitating the criminal prosecution of terrorist suspects instead of continuing to resort to restrictions on liberty imposed by Ministers. As the Newton Committee argued, any additional laws designed to facilitate criminal prosecutions must replace rather than supplement laws that undermine the presumption of innocence and the right to liberty, such as Part IV Anti-Terrorism, Crime and Security Act 2001 ("ATCSA") and, by implication, the Prevention of Terrorism Act 2005 ("PTA").

#### OUTLINE OF OUR ARGUMENTS AGAINST THE PROPOSAL

8. As we explained in our previous response, we do not support the idea of making "a security cleared judge responsible for assembling a fair, answerable case, based on a full range of both sensitive and non sensitive material".<sup>11</sup> In outline, our reasons for opposing this suggestion are as follows:

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7 Cf Foreign and Commonwealth Office "Counter-Terrorism Legislation and Practice: A Survey of Selected Countries" October 2005

8 JCHR, "Review of Counter Terrorism Powers", 2003-04, 4 August 2004, HL 158/HC713, para 84

9 *Ibid*

10 Privy Counsellor Review Committee: "Anti-terrorism, Crime and Security Act Review: Report", 18<sup>th</sup> December 2003

11 *Ibid*, para 224

(a) This proposal, based on the juge d'instruction system common in a number of civil law jurisdictions such as France, would constitute a fundamental departure from the adversarial procedure familiar in common law jurisdictions like our own. It is not possible or desirable simply to transpose part of another state's legal system onto our own, especially when the underlying framework is fundamentally different. Importing this aspect of the French criminal justice system into UK law would undermine the essential attributes of our adversarial procedure and lead to great inroads into the due process rights afforded to defendants.

(b) The Newton Committee believed the juge d'instruction system would deal with the argument that normal criminal prosecution is impossible because of "the risk that the process of prosecution will lead to the need to disclose sensitive material".<sup>12</sup> This belief was mistaken. The juge d'instruction system would not prevent the disclosure of security-sensitive information. In fact, the evidence collated by the juge d'instruction can be reviewed by both the prosecution and defence and the prosecution and defence may, as the investigation proceeds, request specific investigative action. Access to the evidence gathered by the juge is a vital fair trial guarantee, indispensable if the defendant is to be able to answer the case against them and to ensure that the juge d'instruction has gathered all available exculpatory evidence.

(c) Liberty is concerned that any move away from our adversarial system, i.e. towards the juge d'instruction system, might recreate the problems and the injustices associated with the 'Diplock' courts used in Northern Ireland.

(d) In practice there have been a number of problems with the use of juges d'instruction in the counter-terrorism context in France. We expand upon some of these practical problems below.

#### THE PROBLEMS WITH THE JUGE D'INSTRUCTION SYSTEM IN FRANCE

9. The small group of juges d'instruction that specialise in terrorism cases have become high-profile figures in France.<sup>13</sup> They have begun to work directly with the domestic intelligence authorities (Direction du Surveillance Territoire) ("DST") who also act as a judicial police force. The DST inform the juges d'instruction when they believe that an investigation has identified a potential terrorist offence. The juge d'instruction may then transform the intelligence investigation into an official judicial investigation. Following this, they may authorise the use of investigative techniques and the evidence which is then obtained by the DST may be used in the criminal proceedings. The degree of cooperation has led some commentators to describe the "struggle against Islamist terrorists" as being "co-managed by the anti-terrorism magistrates and the DST" in which the "magistrates remain the masters of 'grand strategy'".<sup>14</sup> As discussed below, this has also given rise to doubts about the practical impartiality of the juges d'instruction.<sup>15</sup> The UK criminal justice system seeks to avoid these problems by means of the distinct roles given to the legislature, enforcement agencies and the judiciary.

10. Writing in 1999 the Fédération Internationale des Ligues de Droits de l'Homme ("FIDH") reported on the "seeming lack of impartiality" of the juges d'instruction, which, they argued is evidenced by:

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12 *Ibid*, para 227

13 Shapiro J and Suzan B, "The French Experience of Counter-terrorism", *Survival* (the International Institute for Strategic Studies), Vol. 45, no.1, Spring 2003, 67-98, 78

14 *Ibid*. p. 83

15 FIDH, "France: Paving the way for arbitrary justice"; Amnesty International: "Human Rights Dissolving at the Borders? Counter-Terrorism and Criminal Law in the EU", IOR 61/013/2005, 31 May 2005

(a) The widely held views amongst defence lawyers that the main objectives of the juges d'instruction was not to conduct an impartial investigation but to establish culpability, "drawing almost invariably the worst inferences from evidence";<sup>16</sup> and

(b) The way in which interviews were conducted by juges d'instruction and the hostility to defence lawyers' interventions.<sup>17</sup>

11. Once a case is passed to a juge d'instruction the suspect can be detained indefinitely pending trial with the regular agreement of the juge des libertés et de la détention (discussed below). In practice this has led to very lengthy periods of pre-trial detention, due to the limited number of specialist juges d'instructions and the fact that a single juge has to collate the entire case file. FIDH have reported on the delays experienced between the detention and trial of those suspected of terrorist offences. After explaining that the standard period of detention pending trial was 4.4 months in 1997 it explained that, in one terrorist case, each of the 160 people arrested was detained for an average of 14 months, with four suspects being detained in custody for over four years.<sup>18</sup> It commented that the figures "betray a disturbing lack of urgency on the part of the competent authorities in dealing with the issues of bail and pre-trial detention",<sup>19</sup> which it attributes to either insufficient resources or inefficiency.<sup>20</sup>

12. FIDH also criticized the excessive and unsupervised powers of the juge d'instruction to order the detention of a person under investigation. There were particular concerns that remand provisions were being abused and that custody was being used to put pressure on suspects to provide a confession. The duties of the juge d'instruction in France formerly involved both examination of the case, and the authorisation of detention. FIDH argued that such decisions should be made in open hearings at which all parties would have the right to make representations.<sup>21</sup> Since FIDH's report, a juge des libertés et de la détention has taken over the traditional and controversial responsibilities of the juge d'instruction with respect to decisions on provisional detention and the extension of police custody in terrorism cases.<sup>22</sup> The necessity to separate these roles is indicative of the conflict in the original duties imposed on the juge d'instruction. Any attempt to import this system into English law would be likely to require a similar division of responsibilities, perhaps requiring an examining judge with a separate judge to authorise detention, and a further judge to conduct the trial. This is an unnecessary and inefficient duplication.

13. Although, in theory, the evidence against the suspect, which is gathered by the juge d'instruction, must be accessible to both the prosecution and defence during the course of the investigation, FIDH commented that, in reality, the degree of transparency is limited. They reported that access for defence lawyers to the juge d'instruction's dossier was often delayed, that inadequate facilities were given for its review and that the costs of copying it were prohibitive. FIDH also commented on limited access to free or subsidised legal or translation services for many suspects.<sup>23</sup> In addition, FIDH noted that the juges 'instruction

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16 *Ibid.* p.15

17 *Ibid.* pp.18-19

18 *Ibid.* pp.11-12

19 *Ibid.* p.12

20 *Ibid.*

21 *Ibid.* p.13

22 Law No. 2000-516 of 15 June 2000

23 FIDH, "France: Paving the way for arbitrary justice", p.21

frequently refused to undertake investigations requested by defence lawyers and gave “mechanically negative responses to applications for bail”.<sup>24</sup>

#### THE USE OF INTERCEPT EVIDENCE IN THE COURTS

14. The Government argues that another reason why it may not be possible to prosecute those suspected of involvement in international terrorism is the fact that the evidence on which the suspicion is based would be inadmissible in court.<sup>25</sup> Some evidence should never be used in legal proceedings, i.e. evidence obtained by torture. There are, however, no fundamental human rights objections to the use of intercept material, properly authorized by judicial warrant, in criminal proceedings. Nevertheless, intercept evidence is currently inadmissible in English law.

15. The interception of communications is permitted under the terms of the Regulation of Investigatory Powers Act 2000 (“RIPA”) in a restricted range of circumstances. In particular, the Secretary of State may issue a warrant authorising or requiring interception if this is necessary, inter alia: (a) in the interests of national security; or (b) for the purpose of preventing or detecting serious crime, provided that the interference is proportionate.<sup>26</sup> Despite the fact that RIPA permits interception, Section 17 prohibits evidence, questions, assertions or disclosures for the purposes of, or in connection with, any legal proceedings that might suggest that unlawful interception of post or telecommunications has occurred or that an interception warrant has been issued.<sup>27</sup> This reflects the Government’s view that “allowing the use of intercepted communications as evidence would reveal the authorities’ capabilities, prompting criminals to take more evasive action”.<sup>28</sup>

16. The Newton Committee concluded that lifting the blanket ban on the use of intercepted communications in court would be “one way of making it possible to prosecute in more cases”.<sup>29</sup> It proposed the removal of the bar as a “more acceptable and sustainable” approach to the threat from terrorism than executive powers to restrict liberty which evade the criminal justice process.<sup>30</sup>

17. Liberty wholeheartedly supports this proposal. We have on many occasions urged the Government to remove the bar on intercept evidence in open criminal proceedings in order to facilitate criminal prosecutions in terrorism cases.<sup>31</sup> We do not intend to repeat these arguments in detail but, in outline, they include:

(a) As David Ormerod points out, “the refusal to allow intercept product to be used as evidence for prosecution can hardly favour crime control in its pure sense of maximising convictions.”<sup>32</sup> Removal of the bar on intercept evidence would overcome one of the primary obstacles to bringing proper criminal proceedings against terrorist suspects. Much

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24 *Ibid.* p. 32

25 Newton Committee Report, para 207

26 Section 5. There are a number of other situations in which communications may be intercepted. For example, where one party to the communication consents to the interception, the interception does not require a warrant but only a directed surveillance authorisation which may be issued by a superintendent (Section 3)

27 There are exceptions for proceedings for offences under RIPA 2000 and other communications legislation, and for control order, Special Immigration Appeals Commission and Proscribed Organisations Appeal Commission proceedings (i.e. closed proceedings).

28 Newton Committee Report, para 209

29 *Ibid.*, para 208

30 *Ibid.*, paras 208-215. See also Lord Lloyd, Inquiry into Legislation against Terrorism, 1996, Cm 3420; Lord Carlile’s evidence to the Home Affairs Select Committee (Minutes of Evidence 11<sup>th</sup> March 2003)

31 Cf Liberty’s October 2005 response to this inquiry, at paras 22-26

32 Ormerod D, “Telephone Intercepts and their Admissibility”, *Crim. L. R* 2004, Jan, 15-38, 31

of the evidence gathered must be by way of intercept and would certainly be sufficient to meet the relevant charging standard. Continuing inadmissibility means that charges cannot be brought as easily.

(b) The imperative behind the historic bar is the protection of security services sources and methods rather than any obvious concerns for the fairness of the trial process. As Ormerod explains “there is something inherently incoherent and illogical in a scheme which seeks to authorise an activity (ss.1-9), recognises that that activity must lead to material which will be relevant at trial (s.18), and yet seeks to suppress that material and even the fact of its existence (s.17).”<sup>33</sup>

(c) As far as we are aware, this bar is an anomaly. Worldwide, only the UK and Republic of Ireland maintain a ban on the use of such evidence.<sup>34</sup>

(d) The Government’s position is inconsistent. Foreign intercepts can be used if obtained in accordance with foreign laws. Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping may also be admissible even if they were not authorised and if they interfere with privacy rights.

(e) If there are concerns over protecting a state’s sources then clearly established rules of Public Interest Immunity allow disclosure to be withheld from the defence and the public. This is particularly applicable when there are state interests that require protection or when informers and undercover sources have been used.

#### NECESSARY SAFEGUARDS

18. As we noted in our previous response to this inquiry, the existing rules of criminal evidence would apply to ensure that evidence is not admitted in such a way as to prejudice a case unfairly. In particular, Section 78 of the Police and Criminal Evidence Act (“PACE”) gives the court the discretion to exclude evidence if “having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission...would have such an adverse effect on the fairness of proceedings that the court ought not to admit it”. There is a further common law power to exclude though this is rarely used.

19. Most other countries allow the use of intercept evidence in criminal proceedings, including most other Council of Europe members. We would urge the JCHR to survey the laws relating to the use of intercept evidence in these jurisdictions to identify the legal safeguards that are in place to ensure that the use of such evidence does not infringe fair trial rights and unnecessarily compromise the effectiveness of the Government’s covert surveillance capabilities.

#### UPDATE ON THE CURRENT POLITICAL DEBATE

20. Since our last response to this inquiry, there have been a number of positive developments regarding lifting the ban on intercept evidence, revealing a growing political consensus that the current law is unsatisfactory. In his recent report on the operation of the PTA, Lord Carlile reiterated his view that “there might possibly be a few cases in which it would be appropriate and useful to deploy in a criminal prosecution, material derived from public system telephone interceptions and convertible into criminal evidence”.<sup>35</sup> On presenting the Carlile Report to Parliament earlier this month, the Home

33 *Ibid*

34 Newton Committee Report, para 211

35 “First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, 2<sup>nd</sup> February 2006, para 37

Secretary stated that the Government was working “to find, if possible, a legal model that would provide the necessary safeguards to allow intercept material to be used as evidence”<sup>36</sup> and has promised a report on this matter later this year.<sup>37</sup> Sir Menzies Campbell MP has asked the Government to “introduce the effective and practical measure of permitting the use of telephone intercept evidence in our courts, so that we may bring suspected terrorists to trial”.<sup>38</sup> Patrick Mercer MP agreed that “if intercept evidence is admissible in court, we shall be able to obtain more prosecutions”.<sup>39</sup>

21. We welcome these developments but are disappointed that, nearly 10 years after lifting the bar on intercept evidence was first proposed by Lord Lloyd,<sup>40</sup> there have been no legislative proposals to achieve this. Given that criminal prosecution would be the best way of tackling the threat from international terrorism, from the perspective of both fairness and effectiveness, this deplorable delay is entirely inconsistent with the Government’s duty to take reasonable and proportionate steps to protect the public from acts of terrorism and its stated commitment to pursuing prosecutions wherever possible.

*February 2006*

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36 HC Deb, 2 Feb 2006, col 479

37 HC Deb, 2 Feb 2006, col 482

38 HC Deb, 15 Feb 2006, col 1415

39 HC Deb, 15 Feb 2006, col 1509

40 Lord Lloyd, Inquiry into Legislation against Terrorism, 1996, Cm 3420

## Appendix 6 : Submission from the Northern Ireland Human Rights Commission

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights, advising on legislative and other measures which ought to be taken to protect human rights, advising on whether a Bill is compatible with human rights and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.

2. The Commission has considered the human rights compatibility of the proposals in the Terrorism Bill, and in other developments in counter-terrorism policy, including those referred to in the 21 September call for evidence from the Parliamentary Joint Committee on Human Rights (JCHR). This briefing reflects the Commission's position on deportations to states where torture is known to occur, and on several outstanding points of concern in the Terrorism Bill, following the defeat of the proposed 90-day term for detention without charge. While the Commission holds that any government has the duty to protect the human rights of everyone within its jurisdiction by maintaining defences against terrorism, including appropriate legislative measures, it is concerned that in the present climate some of the measures proposed in the United Kingdom go beyond acceptable bounds in terms of trespassing on individual rights. In particular, no-one should be deported to countries where they are at risk of torture. In relation to the Terrorism Bill provisions, the amended proposal for 28-day detention is in breach of Article 5 of the ECHR; the speech offences are too widely drafted; and there needs to be further specific consideration of the impact of applying the Bill in Northern Ireland.

### DEPORTATION AND ARTICLE 3

3. One of the most pressing matters in the present range of measures; in terms of the potential for serious violation of human rights, is that identified at point (ii) of the JCHR's call for evidence:

the Government's intention to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances and the potential conflict with Article 3 [of the European Convention on Human Rights]

The urgency arises primarily from the UK Government's planned intervention in a European Court case, referred to below. The Government has also been very active in seeking bilateral agreements on deportations of suspected terrorists to countries of origin or nationality, or other countries that would be willing to accept a person suspected of terrorist offences but whom the UK authorities are unable to prosecute.

4. The statutory remit of the Northern Ireland Human Rights Commission relates to the effectiveness in Northern Ireland of human rights protections, and it may be asked why the Commission should take an interest in what might be seen as a foreign policy issue. There are a number of reasons why the Commission regards the question of deportation on the basis of diplomatic assurances as one of particular importance to its remit. The Commission is still the only statutory human rights agency within the United Kingdom, and as such it is under a duty to review law and practice relating to the protection of human rights, and to offer advice when it sees fit. Under section 69 of the Northern Ireland Act

1998, that duty is defined as specifically including the Convention rights, so if it should happen that any Government seeks to narrow the effective range of protection available under an Article of the Convention, this Commission is obliged to offer its advice to the contrary. The Article in question is one of the most fundamental rights, of an absolute and nonderogable nature. Finally, the Commission's interest in this matter is also informed by the more than hypothetical possibility that certain individuals within Northern Ireland might fall within the scope of a policy of deportation based on assurances. In recent times at least two non-nationals have been detained in this jurisdiction in connection with alleged terrorist activities not connected with Northern Ireland affairs.

5. The United Kingdom has a wide range of relevant obligations under international law. For present purposes, reflecting the concerns behind the call for evidence, we will refer mainly to obligations relating to torture, although this matter also engages concerns around the right to life, 'disappearances', arbitrary detention, and other fundamental rights. In the modern era, the treaty obligations concerning torture are essentially elaborations of Article 5 of the 1948 Universal Declaration of Human Rights (UDHR), which asserts that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. That Article, with the rest of the Declaration, was formulated in the aftermath of the Second World War to articulate the democratic community's repudiation of and revulsion at the atrocities of the fascist era. This was regarded 57 years ago as the minimum acceptable standard for any modern, humane state.

6. Much of the content of the UDHR is said by scholars to have, over time, acquired the force of customary international law, binding on all states, but in the immediate post-war era this was not the case. European states in particular were keen to underwrite that declaratory instrument with an inescapable treaty obligation. Thus the key international commitment for the United Kingdom, as the Joint Committee indicates, is Article 3 of the European Convention on Human Rights. This obligation, accepted by the United Kingdom in 1950, echoes the UDHR in providing that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". That is the Article in its entirety; it must be read with Article 15, which permits absolutely no derogation from Article 3, and with Article 1, committing signatory states to "secure to everyone within their jurisdiction the rights and freedoms defined in ... of this Convention". Every human being in the jurisdiction of the United Kingdom is entitled to the protection of this state from torture, and from any act, including removal to another state, that would expose him or her to the risk of torture. The state cannot limit or escape from its ECHR obligation to protect from torture all UK residents, nationals and non-nationals alike, other than by renunciation of the entire Convention.

7. In 1968 the United Kingdom signed, and in 1976 it ratified, the International Covenant on Civil and Political Rights (ICCPR), Article 7 of which provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...". The structure of this United Nations instrument corresponds with the ECHR obligations in that Article 4 of the Covenant permits no derogation from Article 7, and by Article 2 States party undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." Again, the only legal means of escaping the scope of Article 7 is by renouncing the Covenant in its entirety.

8. The United Kingdom was among the first to sign, and was the fifth state to ratify, the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This Convention, while primarily directed at the establishment of an inspection regime for places of detention within the States party, was explicitly inspired by, and intended to underline the commitment of the signatories to, Article 3 of the ECHR.

9. As at the European level, the global community also sought to reinforce and elaborate the anti-torture provisions of the ICCPR by means of a subject-specific treaty. In 1988 the United Kingdom ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), which it had signed three years earlier. The CAT provides a definition of torture, emphasises the absence of any exception or excuse in relation to its absolute prohibition, requires states to take steps to criminalise and prosecute instances of torture, and includes the following Article of special relevance for present purposes:

#### Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

10. The United Kingdom's obligations under international law would clearly preclude it from handing a person over to a state that indicated an intention to torture, or that agreed torture was likely to occur. Since no state is ever likely to make such an admission, account must be taken of the country's human rights record, among other considerations, in assessing whether there are "substantial grounds" that the person would be "in danger: the test is not whether there is a probability that the person will in fact be tortured. Where the United Kingdom is concerned as a potential sending country, it cannot surrender anyone to a place where the person will be in danger of being tortured, or to a country that refuses to provide guarantees against torture. The question is whether, in a state where torture and other such violations are known to occur, the danger can be neutralised by measures that ensure either that any individual removed to that state can continue to enjoy the effective protection of the United Kingdom, or that the receiving state can offer that individual an equivalent level of protection.

11. As regards the first aim, the only straightforward way of ensuring that a person remains under the protection of the United Kingdom is for that person to remain within the UK's jurisdiction; to remove any person from the reach of the UK authorities and from effective access to its courts, to a country that is known not to meet its obligations under human rights treaties, must surely expose that person to a significantly greater danger than would arise from keeping the person in the UK. Even if credible assurances could be obtained and proved effective, it can be argued that for the UK to require another state to protect someone to UK standards is in effect sub-contracting to the other state the obligations that the United Kingdom has assumed for itself under the various treaties.

12. Nevertheless, the indications are that the Government is seeking ways to remove persons to other states with poor human rights records. The suggestion is that effective protection against torture will be maintained by the receiving Government providing assurances to that effect, possibly backed up by some form of periodic contact with or enquiries about the deportee. The international human rights community, including the Committee Against Torture and other UN organs, have consistently expressed serious concerns about the adequacy and effectiveness of "diplomatic assurances" in relation to deportation or refoulement (forced return) to states where torture is used.

13. Particularly strong objections arise in relation to removals to countries such as Algeria, countries with very poor human rights records and where there is extensive evidence over many years of torture, inhuman or degrading treatment or punishment, "disappearances"

extra-judicial executions. It is surely incontestable that torture and other gross violations only occur in two circumstances: either where a state permits the practice, or where a state is unable to prevent it happening. The United Kingdom must not hand over any person to a country that permits torture, nor to a country that is unable to prevent torture.

14. Algeria (to continue with this example, since it is one of the countries allegedly being targeted for deportations) signed the UN Convention Against Torture in 1985, but has not fulfilled its reporting obligations under that treaty since 1996, when it submitted a report that was two years overdue. On that occasion, the Committee Against Torture, having examined the Algerian report, noted its concern

... at reports from human rights organizations concerning extrajudicial executions, disappearances and a rising incidence of torture since 1991 ...

The Committee felt the need to “remind the State party that torture is not warranted in any exceptional circumstances”, noted the inadequate definition of torture in Algerian law, and alluded to the lack of independence and effectiveness of the Algerian judiciary, particularly in relation to supervision of detained persons. The Committee asked that inquiries be held into allegations of torture, and the results published, and further asked that it be given information on all the individual cases raised by human rights non-governmental organisations (NGOs) during the examination. The reports that fell due in 1998 and 2002 were simply not submitted by Algeria.

15. During the 1990s it is estimated that some 100,000 Algerian people were killed in a particularly brutal era of political violence and state repression. Excesses attributed to the armed forces and civilian groups allied to the state included the “disappearance” of at least 7,000 individuals, and according the NGO Human Rights Watch, reporting in 2003,

Not one security force agent accused of participating in an act of ‘disappearance’ has been charged or brought to trial, and few, if any families of a ‘disappeared’ person have been provided with concrete, verifiable information about the fate of their missing relatives.

16. The situation in Algeria has improved somewhat but the UK Foreign and Commonwealth Office still advises that the country is far from secure. As of 13 November 2005, the FCO warns:

We advise against all travel to the south eastern provinces ... There is a continuing threat from terrorism in Algeria. Algeria faces a serious internal security problem from terrorist insurgency ... a total of 930 people (including 539 terrorists) were killed in terrorist-related incidents during 2003 ... in 2004, 433 people (including 240 terrorists) were killed in such incidents. Many attacks are directed at security forces; but there is also indiscriminate armed violence against civilians and villages.

The Northern Ireland Human Rights Commission is in no position to attribute responsibility for human rights violations in other countries and, specifically, it is not suggesting that the Algerian government would torture any person deported to that country. But there is, at least, strong evidence that the Algerian authorities are not yet in a position to secure the safety of their own population. It would be unreasonable to ask a country facing such difficulties to guarantee the personal integrity and protection from torture of a person deported to it from the United Kingdom. Given that radical Muslim insurgents, according to Algerian government statistics, are more than half of those who are killed in the ongoing internal conflict, there is a particular difficulty in entrusting to the protection of that government those Algerian nationals who have been mooted as liable to removal.

17. Moral considerations aside, the main practical obstacle to deportation to torturing states is the ECHR. The UK Government is currently actively seeking to overturn the 1996 judgment of the European Court of Human Rights in the *Chahal* case, the key ruling preventing deportation of persons to countries where they might be subjected to torture. The UK has recently declared its intention to intervene on the side of the Dutch government in the case of *Ramzy v the Netherlands*, in which Mr Ramzy seeks to prevent his deportation to Algeria. He is alleging that upon return he will be persecuted. The governments will argue that in the current situation of terrorist threat they should be able to 'balance' the rights of the individual not to be tortured against national security and safety of their citizens. Such a position would seriously undermine the protection offered currently under Article 3 ECHR. The Commission urges Parliament to consider whether it has any means of halting the intervention or influencing its course so that the protections in Article. 3, the UN Convention' and other instruments are not discarded.

#### THE TERRORISM BILL

18. The Terrorism Bill proposes a range of new offences and procedural provisions to complement the existing anti-terrorism legislation in the UK. The Government has already been defeated on its proposal to allow for detention without charge in terrorist cases to up to 90 days. This was a measure for which no compelling case was ever made, and even the amendment allowing for up to 28 days is far in excess of the rule applying in most comparable states. Until January 2004 the maximum period of detention without charge was 7 days, and to quadruple that period is no small matter. The 28-day limit conflicts with Article 5(3) of the European Convention (providing that any person arrested on suspicion of committing a crime should be promptly brought before a judge and charged, or promptly released). The Commission reiterates its view that anti-terrorism legislation should be framed in a way that does not require any derogation from the international human rights standards by which the state has agreed to be bound, including, in this context, Article 5 of the European Convention and the corresponding obligation in the International Covenant on Civil and Political Rights.

19. Clause 1 of the Bill proposes a new offence of "encouraging terrorism", which is very broadly drafted as publishing a statement which the person making the statement believes or "has reasonable grounds for believing" is likely to be understood by members of the public as directly or indirectly inciting to commit terrorist acts. For the offence to be committed there does not have to be an intent to incite acts, only an awareness that the statement might be so construed. It is irrelevant whether the statement is actually understood by anyone as incitement, or whether anyone hearing, reading or otherwise accessing the statement is, in fact, encouraged and commits a terrorist act. Such wide drafting goes against the principle of the clarity of the law, does not sufficiently define what behaviour is expected of persons subject to the law, and can have significant negative effect on freedom of speech in a democratic society. Courts would have some difficulty in determining guilt on the basis that one person knew, believed, or had "reasonable grounds for believing" quite how another person might "reasonably ... infer what he or she meant by a particular statement. The court's interpretation of what one person probably thought about what another person probably meant could equate to a seven year prison sentence.

20. The Commission welcomes the Government's retreat from the proposal to create a free-standing offence of "glorifying terrorism". This would have criminalised perceived expressions of support for past terrorist acts, without the need to prove intent to incite further acts. This potentially raised even greater difficulties in relation to freedom of expression, with the prospect of specific instances of non-state violence anywhere in the world having to be scheduled into or out of the scope of the offence depending on the view taken by the Government of the day as to whether particular past actions were too remote in time, or had been justified or excusable in the particular historical circumstances.

The “glorification” concept has now been subsumed into the clause 1 “encouragement” offence, so that a statement “glorifying” past or future terrorist acts, or such acts generally, will automatically be covered by the offence if “members of the public could reasonably be expected to infer” that approval of particular acts invited people to emulate those acts.

21. There has been little discussion to date of whether the Bill’s provisions, or particular parts of it, are required in Northern Ireland. The Commission has a position of neutrality on all political matters, but it is obliged consider the particular circumstances of Northern Ireland in assessing how a particular legislative or policy proposal will impact on the enjoyment of human rights in this jurisdiction. It is beyond contest that civil and political rights, and economic, social and critical rights, can only be fully enjoyed in conditions of peace and stability. Measures that could interfere with progress towards such conditions, even were they of themselves compatible with the human rights standards that they directly engage, need to be considered in context. It is necessary therefore to address any potential in the Bill’s provisions to undermine efforts being made to normalise and stabilise the political and security environment in Northern Ireland. This, of course, can only be a speculative exercise in advance of measuring the actual impact of any enactment, but the Commission suggests that the issues raised below merit informed consideration.

22. The introduction of new and exceptional legislation in this jurisdiction, particularly one containing speech offences, does not sit easily alongside the process of normalisation of the criminal justice framework and could have a negative effect on the peace process, one element of which has been the removal of anti-terrorist provisions. The Commission, while recognising that Northern Ireland is not immune from the dangers posed by new forms of international terrorism, is concerned that measures adopted in that context should not be allowed to undermine the progress made in moving towards a post-conflict dispensation in this region.

23. Aside from the normalisation principle, there is one specific way in which the Bill’s provisions could be counter-productive in Northern Ireland. There exist a large number of paramilitary organisations, only one of which has declared that it has completed the process of disarming itself. That group, in turning away from its campaign of violence, has not denounced its past activity, which those who speak for it have regularly described as a “legitimate struggle”. If that group is to hold to a peaceful and democratic path, and if the other armed groups are to be persuaded to decommission their arsenals, it is necessary to consider whether this would be helped or hindered by criminalising every expression of support for the acts that they have carried out in their past campaigns. Those seriously seeking to retain or secure influence with such a group may from time to time say things that, while strengthening their credibility with the group, could lay them open to prosecution under the present Bill.

24. Even in the one organisation that has decommissioned, those of its political associates who wish to “keep on board” the more militant sections of their support are highly likely to say things about past acts that non-supporting or ill-informed “members of the public ... are likely to understand ... as a direct or indirect encouragement ... of acts of terrorism”. It is hard to envisage how, for example, a Republican Easter Rising commemoration might take place without things being said that could be understood as incitement. A rigorous application of the proposed law in Northern Ireland could have a dramatically destabilising effect on the peace process, while a failure to apply it in Northern Ireland, while applying it to (for example) British Muslims, immediately raises questions of discrimination.

25. There has always been a different regime of special powers, emergency or anti-terrorist legislation in Northern Ireland which the state has justified on the basis of the different level and nature of the threat; in that sense, the Government’s historic position has been

that Northern Ireland is a case apart and needs security legislation that responds to its own particular circumstances. That being so, no part of the Terrorism Bill should apply in Northern Ireland unless a proper case can be made as to why it is needed. If most of the Bill is to have effect in Northern Ireland, the region should be excluded from the application of any provision that, on balance, is not likely to be beneficial there, and in that context the speech offences in particular need careful examination. And as a bottom line, if the Bill in its entirety is enacted for Northern Ireland, great care must be taken in any use of the new powers and offences so that they do not become a real obstacle to the processes of peace and normalisation. Northern Ireland is in a situation of rapid change, and considerable sensitivity is needed in any matter that has the potential to exacerbate or reawaken conflict between the institutions of the state and the paramilitary organisations, those in the process of ending their activities as well as those that are still actively involved in violence and other forms of criminality.

26. The Commission will need to give further consideration to several other aspects of the Bill and may issue a further briefing in due course.

*November 2005*

## Appendix 7: Correspondence between the Chairman, the Director General of the Security Service and the Chairman of the Intelligence and Security Committee

LETTER FROM THE CHAIR TO DAME ELIZA MANNINGHAM-BULLER DCB, DIRECTOR GENERAL, THE SECURITY SERVICE

We have been in informal touch with your private office to see if you would be willing to speak to the Joint Committee on Human Rights in connection with inquiries which we are currently conducting into (i) counter-terrorism policy and human rights and (ii) UK compliance with the UN Convention against Torture. I enclose copies of the published terms of reference of each inquiry for your information. The specific points on which we believe it would be helpful for us to know the Security Service's views are—

- (a) the extent to which the Service is, or could take steps to ensure it is, aware that information it receives from foreign agencies may have been obtained by the use of torture
- (b) any information which the Service may have about extraordinary renditions using UK airports
- (c) the Service's views about the ban on the use of intercept evidence being used in court in terrorism cases.

I appreciate that you report to the Intelligence and Security Committee. I wrote to the Chairman of that Committee to see if he would have any objection to us meeting you and attach a copy of that letter and his reply. I also understand that you hold roughly annual meetings with the members of the Commons Home Affairs Committee.

I would be grateful if you would let me know if you would be willing to meet my Committee to discuss the matters I have outlined. We would of course be happy to comply with any requirements you might have in terms of the confidentiality of any meeting.

*18 January 2006*

LETTER FROM THE CHAIR TO RT HON PAUL MURPHY MP, CHAIRMAN, INTELLIGENCE AND SECURITY COMMITTEE

As part of my Committee's current inquiries into (i) counter-terrorism policy and human rights and (ii) UK compliance with UNCAT (see attached terms of reference), we have been in contact with Eliza Manningham-Buller's office to see if she would be willing to talk to us about three issues in particular where it would be helpful for us to know the perspective of the Security Service:

- (i) the extent to which it is, or could take steps to ensure it is, aware that information it receives from foreign agencies may have been obtained by the use of torture
- (ii) any information which the Service may have about extraordinary renditions using UK airports
- (iii) the Service's views about the ban on the use of intercept evidence being used in court in terrorism cases.

We understand from the Director General's office that it is her practice not to speak to parliamentary committees, either by giving formal evidence or in informal meetings, though she does provide information to your committee.

If the Director General were willing to speak to us, we would be content to do so in private session, either formally or informally, and would give an undertaking to keep under secure conditions information which she identified as sensitive.

Before my Committee decides whether to renew its request to the Security Service, I would be grateful if you would let me know whether your Committee would have any objection to us doing so.

*21 December 2005*

LETTER FROM RT HON PAUL MURPHY MP, CHAIRMAN, INTELLIGENCE AND SECURITY COMMITTEE

Thank you for your letter of 21 December. It may help you to know that the ISC is conducting its own inquiries into rendition and torture (where relevant to the British intelligence Agencies), and will be covering the issues that you raise. As regards the meeting that you are seeking, the ISC felt that this is a matter for your Committee and Eliza Manningham-Buller.

I understand that you are also interested in meeting with GCHQ as part of your work on the use of intercept as evidence in court. Again it may help you to know that a study is currently being concluded by the Home Office on this matter and that the Home Secretary has committed to sharing his findings with the ISC at the earliest suitable opportunity. Given the Home Office lead I suggest any enquiries that you have about intercept be addressed to that Department.

*11 January 2006*

LETTER FROM DAME ELIZA MANNINGHAM-BULLER DCB, DIRECTOR GENERAL, THE SECURITY SERVICE

1. Thank you for your letter of 18 January.
2. I regret that I do not consider I can be of assistance to your committee in the areas outlined in your letter, all of which have been or are the subject of investigation by the ISC. You will no doubt be aware that the Foreign Secretary made a Written Statement to the House on 20 January on rendition. I can add nothing to that. My witness statement to the House of Lords, subsequently publicised by Channel 4 news, and numerous statements by the Foreign Secretary and others to the Foreign Affairs Committee and in other fora have put on record the complexities in dealing with information which may or may not have been obtained under duress. With regard to the use of intercept evidence in court, as the Chairman of the ISC has advised you, this is primarily a matter for the Home Secretary.
3. As my office advised you when you made an initial request for me to see the Committee, I am required by the Intelligence and Security Act to provide information to the Intelligence and Security Committee (ISC). Safeguards exist under the Act to safeguard sensitive information provided to the ISC, the release of which could be prejudicial to the operations of the intelligence agencies. I have on occasion briefed the Home Affairs and other select committees. These background briefings have been with the approval of the Home Secretary and related to threats to UK national security, specifically terrorist threats. It would be inappropriate for me to comment on matters of Government policy.

*23 January 2006*

# Reports from the Joint Committee on Human Rights in this Parliament

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The following reports have been produced

## Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888

Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume II Oral and Written Evidence	HL Paper 185-II/ HC 701-II
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547