PRE-TRIAL DETENTION AND CONTROL ORDERS UNDER BRITISH ANTI-TERROR LEGISLATION POST 9/11: BALANCING A NEED FOR SECURITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS – AN OVERVIEW

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Contemporary British anti-terror legislation has been characterised by an extensive use of extra-ordinary detention measures: the Terrorism Act 2000 and Terrorism Act 2006 contain provisions, which enable the extended pre-charge detention of terror suspects beyond the limits of normal criminal procedure.

The now repealed provisions of Part IV of the Anti-terrorism, Crime and Security Act 2001 allowed the indefinite detention of foreign national terror suspects on a quasi-judicial basis. Its successor, the Prevention of Terrorism Act 2005, enables the use of Control Orders, effectively a form of house arrest characterised by restrictions on an individual's liberty.

In short, these measures have in common the extensive limitation of the individual's right to liberty under Article 5 of the European Convention on Human Rights. Whilst the judiciary have curtailed the most abhorrent manifestations of such extra-ordinary measures, as detailed, the legal framework as it exists today, still raises ECHR compliancy issues.

Legal reformation should be sought to end such an impasse by amending at the very least the statutory framework already in place. Ideally anti-terror detention provisions should be brought back within the sphere of criminal law and in compliance with the ECHR.

La législation contemporaine anti-terroriste britannique a été caractérisée par l'utilisation considérable de mesures extraordinaires de détention : la Terrorism Act 2000 et la Terrorism Act 2006 contiennent des dispositions qui permettent la détention prolongée préalable à l'accusation de personnes soupçonnées de terrorisme au-delà des limites de la procédure criminelle normale.

Les dispositions, maintenant abrogées, de la Partie IV de la Anti-terrorism, Crime and Security Act 2001 permettaient la détention indéfinie de ressortissants étrangers soupçonnés de terrorisme sur une base quasi-judiciaire. Son successeur, la Prevention of Terrorism Act 2005, permet l'utilisation d'Ordonnances de contrôle, qui sont effectivement une forme de détention à domicile caractérisée par des restrictions sur la liberté d'un individu.

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En bref, ces mesures ont en commun de limiter considérablement le droit de l'individu à la liberté énoncé à l'Article 5 de la Convention européenne des droits de l'homme. Bien que l'appareil judiciaire ait restreint les manifestations les plus odieuses de mesures extraordinaires du genre, tel que détaillé, le contexte judiciaire tel qu'il existe aujourd'hui soulève encore des questions de conformité à la CEDH.

Il faudrait préconiser des réformes juridiques pour mettre fin à une telle impasse, en modifiant tout au moins le cadre statutaire déjà en place. Idéalement, les dispositions de détention anti-terroristes devraient être ramenées dans la sphère du droit criminel et en conformité à la CEDH.

I. INTRODUCTION

"The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve"

Lord Hoffman in *A v Secretary of State
for the Home Department*¹

Lord Hoffman's dissenting judgement in the seminal case of *A v Secretary of State for the Home Department* encapsulates the concern that contemporary anti-terror detention measures available to the British Authorities could not only pose a threat to the traditional protection British citizens enjoy from their state, but also constitute a possible breach to the United Kingdom's (UK) obligations under the *European Convention on Human Rights of 1950 (ECHR)*.

Extra-ordinary powers of extended pre-charge detention, under the *Terrorism Act 2000 and Terrorism Act 2006*, and quasi-judicial detention under the now repealed provisions of the *Anti-terrorism, Crime and Security Act 2001*, and more recently the *Prevention of Terrorism Act 2005* have attracted controversy and extensive judicial challenge based on *ECHR* grounds.

The Anti-terrorism, Crime and Security Act 2001 [ATCSA hereafter] introduced the sceptre of indefinite trial without detention² and showed an evident absence of compliance with the *ECHR*, in particular the right to a fair trial under Article 5 of the *ECHR*. The House of Lords ruling in *A v Secretary of State for the Home Department* was predicated by the enactment of the *Human Rights Act 1998 [HRA hereafter]*, which fully incorporated the *ECHR* into British Law, enabling the judiciary to undertake "the difficult task of adjudicating upon ... [the] ...

1 *A v Secretary of State for the Home Department*; *X v Secretary of State for the Home Department*, [2004] UKHL 56; [2005] H.R.L.R. 1st para. 96 [*A v Secretary of State*].

2 Under part IV of the *ATCSA*, referring to the possibility to detain foreigners as terrorist suspects without any formal court order.

compatibility and compliance”³ of primary legislation against the *ECHR* for the first time.

The important role, which the *HRA* as the domestic implementing legislation of the *ECHR*, plays for the protection of human rights in the UK is exemplified by successful subsequent judicial challenges⁴ of other anti terrorism measures such as the control order regime which was established by the *Prevention of Terrorism Act 2005* [*PTA 2005* hereafter], which replaced the *ATCSA*. The most recent House of Lords’ ruling in *Secretary of State for the Home Department v AF*⁵ could further question the future of the control order regime *per se*, and as such effectively affecting the whole concept of the UK’s present anti terrorism legislation.⁶

This article aims to outline the various extra-ordinary anti-terror detention provisions introduced by the UK government as a response to 9/11⁷ and 7/7 and to highlight the scope of the extra-ordinary anti-terror detention provisions within the ambit of their judicial challenges.

II. THE *TERRORISM ACT 2000* AND ITS PRECURSOR LEGISLATION

On 20th July 2000 the *Terrorism Act 2000* [*TA 2000* hereafter] was enacted, designed to constitute a general provisional formula of anti terrorism legislation, resembling an “all-encompassing statement of laws ... [offering] ... a more considered code”⁸ than the anti-terror legislative “disorder” of the preceding century, constituting an “incremental extension”⁹ of temporary and emergency legislative provisions.

The *TA 2000* is relevant for the post 9/11 anti terrorism legislation in general as it continues to shape and frame the course of contemporary anti-terror legislation, with the basis of many of today’s provisions being “the direct descendant of decades of counter-terrorist laws”¹⁰ forged as a legal response to the troubles in Northern Ireland.¹¹

A. Northern Irish Legislation

The troubles in Northern Ireland called for a resolute response by the UK

3 *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2008] H.R.L.R. 5, [*JJ*] at para. 65.

4 *Secretary of State for the Home Department v JJ*; *Secretary of State for the Home Department v E* [2007] UKHL 47; [2008] H.R.L.R. 7; *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] H.R.L.R. 6.

5 *Secretary of State for the Home Department v AF (FC) and another and one other action* [2009] UKHL 28 [*AF*].

6 Under Article 15 *ECHR*, section 14 *HRA*, respectively.

7 Referring to the attacks on the United States of America, executed by mostly Saudi-born terrorists on 11 September 2001.

8 C. Walker, *Blackstone’s Guide to The Anti-Terrorism Legislation* (London: Oxford University Press, 2002) at 4.

9 *Ibid.*

10 B. Brandon, “Terrorism, human rights and the rule of law: 120 years of the UK’s legal response to terrorism” (2004) Dec. Crim L. Rev. 981 at 987.

11 Referring to the political unrest in Northern Ireland from the mid 60s onwards.

government authorizing its security forces to apply extra-judicial detention measures: the “genesis of much of the ... [modern]... anti-terror legislation we can see today”¹² can be traced back to the *Civil Authorities (Special Powers) Act (Northern Ireland) 1922*, which allowed under regulation 12, the internment of “a person who is suspected of or having acted or being about to act in a manner prejudicial to the preservation of the peace or the maintenance of order in Northern Ireland,”¹³ comparable to contemporary detention without trial under the *Anti-Terrorism, Crime and Security Act 2001*.

The subsequent Detention of Terrorists (Northern Ireland) Order 1972¹⁴ “introduced limited procedural safeguards,”¹⁵ converting internment measures into interim custody orders, which limited an individual’s detention under the *Act* to 28 days, unless their case was referred to a commissioner for determination. The commissioner, could under section 5 make a detention order, under which the duration of the individual’s detention was unlimited.¹⁶

This series of legislative powers effectively allowed “internment ... intended to prevent suspected terrorists, who were unlikely to be convicted in a criminal court, from continuing their active service in paramilitary organisations.”¹⁷ Consequently, these measures were challenged before the European Court of Human Rights (ECtHR) as a contradiction to Article 5 of the *ECHR* in the pivotal case of *Ireland v UK*,¹⁸ where the ECtHR held that “the existence of such an emergency ... [was] ... perfectly clear from the facts summarised.”¹⁹ The court, with a remarkable degree of deference to the British authorities, held that the “national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”²⁰ and that the “the British Government ... [was] reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism.”²¹

B. British Legislation

As a consequence of the Northern Irish conflict, which saw an increased threat of terrorism for the British public at home, a series of Prevention of Terrorism (Temporary Provisions) Acts²² were enacted by Westminster: they all were temporary in nature and re-enacted (or amended) on a regular basis. Such measures were however focused on pre-charge detention within the remit of the traditional criminal justice system. Consideration of these powers is vital, due to the

12 Brandon, *supra* note 10 at 982.

13 Civil Authorities (Special Powers) Act (Northern Ireland) 1922, Regulation 12 (SI 1956/191).

14 Detention of Terrorists (Northern Ireland) Order 1972, s.4 (SI 1972/1632 (N.I.15)).

15 Brandon, *supra* note 10 at 983.

16 Detention of Terrorists (Northern Ireland) Order 1972, s.5 (SI 1972/1632 (N.I.15)).

17 Brandon, *supra* note 10 at 985.

18 *The Republic of Ireland v The United Kingdom* (1979-80) 2 E.H.R.R. 25 [*Republic of Ireland*].

19 *Ibid.* at para. 205.

20 *Ibid.* at para. 207.

21 *Ibid.* at para. 212.

22 *Prevention of Terrorism (Temporary Provisions) Act 1974; Prevention of Terrorism (Temporary Provisions) Act 1976; Prevention of Terrorism (Temporary Provisions) Act 1984.*

parallels capable of being drawn with pre-charge detention powers under the *Terrorism Act 2000* and *Terrorism Act 2006*.

A key feature was the possibility under s.12 of these Acts to keep an individual in police custody for 48 hours,²³ extendable by a further 5 days on application to the Secretary of State,²⁴ on the proviso that a police constable had “reasonable grounds for suspecting”²⁵ that the individual was “concerned in the commission, preparation or instigation of acts of terrorism.”²⁶ Such detention constituted a *prima facie* breach of Article 5(3) *ECHR*, which provides individuals shall be “brought promptly before a judge or other office authorised by law to exercise judicial power,” and was argued in the application in *Brogan v UK*.²⁷ There the ECtHR held that there was a breach of Article 5(3) *ECHR* due to the lack of a judicial control over the decision to extend any detention period under s 12(5) of the *Prevention of Terrorism (Temporary Provisions) Act 1984* and that such “lengthy a period of detention without appearance before a judge ... [in this instance] ... would be an unacceptably wide interpretation of the plain meaning of the word ‘promptly.’”²⁸ Consequently, the actions by the UK authorities could have been regarded as derogations from Article 5 *ECHR*. In *Brannigan v UK*,²⁹ the ECtHR was forced to deliberate the validity of the derogation. As in *The Republic of Ireland v The United Kingdom*,³⁰ “a wide margin of appreciation ... [was] ... left to the national authorities,”³¹ “by reason of their direct and continuous contact with the pressing needs of the moment ... to decide both on the presence of ... an emergency and on the nature and scope of derogations necessary to avert it.”³² Accordingly it was held “there can be no doubt that such a public emergency existed at the relevant time,”³³ allowing the derogation and effectively the restriction of the individual’s rights under Article 5 of the *ECHR*.

The importance of such an explicit endorsement of the UK’s ability to derogate from one of its core *ECHR* obligations is evident, as these provisions continued to exist until the enactment of the *Terrorism Act 2000* and continue to affect the legal culture of anti terrorism legislation to this day.

C. The Terrorism Act 2000

The *Terrorism Act 2000* [TA 2000] was an attempt to address a number of concerns: the enactment of the *HRA* of 1998 in 2000 produced the need for “a more thorough rights audit of existing anti-terrorism provisions.”³⁴ in order to limit the need to derogate from Article 5 of the *ECHR* and to account for a

23 *Prevention of Terrorism (Temporary Provisions) Act 1984*, s.12(4).

24 *Ibid.* at s.12(5).

25 *Ibid.* at s.12(1)(a).

26 *Ibid.* at s.12(1)(b).

27 *Brogan and Others v United Kingdom* (1989) 11 E.H.R.R. 117.

28 *Ibid.* at para. 62.

29 *Brannigan and McBride v United Kingdom* (1994) 17 E.H.R.R. 539 [Brannigan].

30 *Republic of Ireland, supra* note 18.

31 *Ibid.* at para. 43.

32 *Ibid.*

33 *Ibid.* at para. 47.

34 Walker, *supra* note 8 at 2.

reality where “hastily drafted”³⁵ legislation led to judicial challenges as witnessed in *Brannigan*.³⁶ This was to be achieved by showing a “greater willingness to allow judicial and independent scrutiny.”³⁷ Consequently, the *TA 2000* featured as a safeguard for the proposed seven days pre-charge detention³⁸ as its strongest anti terrorism measure, the procedural requirement whereby an application to a judicial authority for a warrant of detention³⁹ had to be made.

With the *TA 2000*, anti-terrorism legislation seemed to have returned to the ambit of domestic legality within the parameters of the normal UK criminal justice system and the *ECHR*, with derogations removed and extreme measures such as internment and detention without trial jettisoned.

However, the unfolding events of 9/11 and the subsequent “war on terror” would change this: past measures and provisions utilised in Northern Ireland would be recalled as the Government faced a new kind of threat: the threat of “franchised” Islamist terrorism at home and abroad.

III. THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 AND A V SECRETARY OF STATE FOR THE HOME DEPARTMENT

The *Anti-Terrorism, Crime and Security Act 2001* was “heralded as necessary to fortify the gaps and weaknesses in the UK’s counter-terrorism laws exposed by the attacks in America.”⁴⁰ These gaps were considered serious enough to necessitate the *ATCSA* being “carried through Parliament with expedition,”⁴¹ receiving Royal Assent, merely a month after its first reading.⁴² Such a speedy legislative process was enabled by “debate in the House of Commons ... [being] ... severely curtailed by time-tabled motions.”⁴³ The sceptre of emergency legislation, cast aside by the *TA 2000*, seemed to have returned when the UK faced a new terrorism threat.

Part IV of the *Act* attracted the most criticism and required a notice of derogation⁴⁴ from Article 5 of the *ECHR* under section 14 *HRA*, “barely two years after ... [the *Human Rights Act*] ... had been incorporated into UK law.”⁴⁵

A. Pre-trial measures under Part IV of the *ATCSA*

Part IV of the *ATCSA* was to many a “legislative morass,”⁴⁶ permitting the

35 *Ibid* at 4.

36 *Brannigan*, *supra* note 29.

37 Walker, *supra* note 8 at 5.

38 *Terrorism Act 2000*, Schedule 8, Part III at para. 29.

39 *Ibid.* at para. 29(1).

40 R. Talbot, “The balancing act; counter-terrorism and civil liberties in British anti-terrorism law” in J. Strawson, ed., *Law after Ground Zero* (London: The Glasshouse Press, 2002) at 124.

41 D. Hoffman & J. Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998*, 2d. ed. (Harlow: Pearson Longman, 2006) at 326.

42 *Ibid.*

43 Walker, *supra* note 8 at 7.

44 *European Convention on Human Rights 1950; The Human Rights Act 1998* (Designated Derogation) Order 2001 (SI 2001/3644).

45 Brandon, *supra* note 10 at 990.

46 Walker, *supra* note 8 at 7.

Secretary of State to issue a certificate for the detention of any foreign national immigrant whose “presence in the United Kingdom ... [he thought was a] ... risk to national security”⁴⁷ and suspected was a terrorist,⁴⁸ enabled by immigration provisions under the *Immigration Act 1971*.⁴⁹

Following such detention the suspected terrorist could be deported under section 22, or, as was far more likely, detained under section 23 if their “removal or departure from the United Kingdom [was] prevented (whether temporarily or indefinitely) by – (a) a point of law ... or (b) a practical consideration.”⁵⁰

In practice these principles, along with an inability to prosecute many such detainees under normal criminal law, “because the evidence against them ... [was] ... based on sensitive intelligence which ... [could not] ... be presented to a court,”⁵¹ led to a regime of indefinite detention without trial. The olive branch of voluntary deportation appealed to relatively few detainees as they did “not wish to do so because they would return to a regime which [was] oppressive.”⁵²

The very Government which had - after the end of the “troubles” with the Belfast agreement of 1998 - repealed legislation enabling internment “describing it as ‘a process that is against the rule of law and undermines democratic principles’”⁵³ reneged on its own conviction when finding that “detention [was] the lesser of two evils between letting a suspected terrorist organise freely or over-riding a fundamental human right.”⁵⁴

The scope of possible anti-terrorism offences available under the *TA 2000* should have provided the Government with the sufficient means to try and detain such individuals under (normal) criminal law. Sacrificing well established civil liberties “on the altar of anti-terrorism priorities”⁵⁵ reminiscent of the Troubles in Northern Ireland returned when “short- term counter terrorism tactical gains,”⁵⁶ became the priority.

B. Judicial challenges to the ATCSA: *A v Home Secretary of State for the Home Department* and other cases

Before turning to the dictum of *A v Secretary of State for the Home Department*,⁵⁷ which challenged the validity of Part IV of the *ATCSA*,⁵⁸ it is necessary to reflect on the two particularly pertinent earlier cases; *Singh*⁵⁹ and *Chahal*.⁶⁰ *Singh* concerned a foreign national detained under the *Immigration Act 1971* for a time totalling approximately 4 months without criminal charge, pending his removal

47 *Anti-terrorism, Crime and Security Act 2001* at s.21(1)(a).

48 *Ibid.* at s. 21(1)(b).

49 Walker, *supra* note 8 at 227; *Immigration Act 1971*.

50 *Anti-terrorism, Crime and Security Act 2001* at s.23(1)

51 Hoffman & Rowe, *supra* note 41 at 330.

52 *Ibid.*

53 Talbot, *supra* note 40 at 128.

54 *Ibid.* at 128-9.

55 *Ibid.* at 133.

56 *Ibid.* at 134.

57 *A v Secretary of State*, *supra* note 1.

58 *Anti-terrorism, Crime and Security Act 2001*, Part IV [ATCSA].

59 *Regina v Governor of Durham Prison Ex p. Singh (Hardial)* [1984] 1 W.L.R. 704 [Singh].

60 *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413.

from the United Kingdom. Such detention was successfully challenged as the Secretary of State “was under a duty to act promptly in carrying out the process of deportation and he should not exercise the power of detention unless the person subject to a deportation order could be deported within a reasonable time.”⁶¹

*Chahal*⁶² concerned a foreign national detained for a number of years pending his deportation on national security grounds. Such a potential deportation was successfully challenged, as “whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.”⁶³

Part IV of the *ATCSA* thus aimed to end “a perceived dangerous mismatch between the threat of foreign terrorism and the compulsory protection required by international laws relating to asylum or human rights of foreign dissidents.”⁶⁴

A v Secretary of State for the Home Department was a challenge to the legality of the *ATCSA* based on the conviction that “in the absence of either an actual, or a specific and imminent, terrorist attack on the United Kingdom, there was no ‘public emergency threatening the life of the nation,’ that the measures were not proportionate”⁶⁵ and that the special detention regime under the *ATCSA* was discriminatory on grounds of nationality and/or immigration status,⁶⁶ thus constituting a possible violation of Article 14 of the *ECHR*.

The legal consequences of this case for the UK constitutional system were significant: this was the first occasion where the UK’s judiciary under section 4 of the *HRA* was to judge the validity of an Act of Parliament, against any pretext of age-old judicial deference to “the sovereign status of the Westminster Parliament.”⁶⁷

While the majority held, that there was a “public emergency threatening the life of the nation,” a necessity for any Article 15 *ECHR* derogation, and that in this situation “great weight [was to be accorded to the] political judgment of the Government and Parliament”⁶⁸ in its assessment of such a dangerous situation, they ruled that “judicial deference did not preclude the courts from reviewing the compatibility of the measures with the requirements of *ECHR* Art.15.”⁶⁹ Rejecting an “extreme view of deference ... [the House of Lords] ... did not take the view that there were “no go” areas into which the courts could not enter,”⁷⁰ subjecting measures which had an affect on the right to individual liberty to “a

61 *Singh*, *supra* note 59 at 704.

62 *Chahal*, *supra* note 60.

63 *Ibid.* at para. 80.

64 Walker, *supra* note 8 at 218.

65 *A v Secretary of State*, *supra* note 1 at para. H 5.

66 *Ibid.*

67 M Elliott, “Detention without trial and the ‘war on terror’” (2006) 4 International Journal of Constitutional Law 553 at 554. Section 4 of the *HRA* authorizes domestic UK courts to hold primary legislation to be incompatible with the *ECHR*.

68 *A v Secretary of State*, *supra* note 1 at para. H7.

69 *Ibid.* at para. H8.

70 M Arden, “Human rights in the age of terrorism” (2005) 121 Law Q. Rev 604 at 614.

level of scrutiny of higher intensity.”⁷¹

In regard to questions of proportionality and discrimination, the provisions of the *ATCSA* were held to be disproportionate on the grounds of a discriminatory effect,⁷² which was not “strictly required by the exigencies of the situation,”⁷³ as required by Article 15. Consequently it was ruled that “the part 4 regime was incompatible with articles 5 and 14 of the *ECHR*.”⁷⁴

A v Secretary of State for the Home Department remains a significant judgment to this day particularly in regards to the “approach of the ... judges ... to the question of justification ... [and] ... whether security justified detention without trial.”⁷⁵ The ruling marks a turning point in terms of judicial scrutiny of actions of the executive in connection with the War on Terror. Judicial deference had in effect “all but evaporated in relation to the question about whether a national security issue justifies some specific course of action,”⁷⁶ thus exemplifying the crucial role of the House of Lords in “reviewing executive action against the benchmark of human rights”⁷⁷ in the context of the detention of terror suspects. This declaration of incompatibility had far reaching consequences for government and judicative alike, with the former appearing “to feel morally (or at least politically) bound to jettison the detention-without-trial regime.”⁷⁸

IV. THE *PREVENTION OF TERRORISM ACT 2005* AND ITS JUDICIAL CHALLENGES

The *Prevention of Terrorism Act 2005* was the UK government’s answer to the House of Lords’ ruling in *A v Secretary of State for the Home Department* in order to design “a new mechanism, namely control orders, for those who could not be prosecuted or deported”⁷⁹ accounting for the government’s conviction that the abandoned *ATCSA* had played an essential part in containing possible terrorist threats in modern day Britain. A speedy drafting process was essential, as the detention provisions of the above discussed *ATCSA* “remained in force only if renewed annually”⁸⁰ meaning that “the passage of ... [the] ... legislation through Parliament was remarkably swift,”⁸¹ totalling only six days.

The new anti-terror measures, control orders under section 1 of the *PTA*, allow “tailor-made” restrictions to be placed on individuals suspected of terrorism related activity,⁸² resembling effectively a form of house arrest. Other possible restrictions under section 1(4) include “electronic tagging, curfews ... [and]...

71 *Ibid.*

72 *A v Secretary of State*, *supra* note 1 at para. 73.

73 *Ibid.* at para. 68.

74 Elliott, *supra* note 67 at 555.

75 *Ibid.* at 559.

76 Elliott, *supra* note 67 at 558.

77 Arden, *supra* note 70 at 624.

78 Elliott, *supra* note 67 at 560.

79 Arden, *supra* note 70 at 609.

80 *ATCSA*, *supra* note 58 at s. 29.

81 Elliott, *supra* note 67 at 562.

82 A. Hardiman-McCartney, “Controlling control orders: Article 5 ECHR and the Prevention of Terrorism Act 2005” (2007) 66 Cambridge L.J. 6 at 6.

prevention or limitation placed on association with other individuals.”⁸³ Control orders can be made under section 2 if the Secretary of State “has reasonable grounds for suspecting the individual is or has been involved in terrorism related activity”⁸⁴ and “considers it necessary, for purposes connected with protecting members of the public from a risk of terrorism.”⁸⁵ These new measures could “be made irrespective of the suspected terrorist’s nationality”⁸⁶ and supposedly drafted as to “... not restrict the liberty ... of individuals to an extent that is incompatible with the *Convention*.”⁸⁷

The implementation of the Control Order regime quickly saw judicial challenges, questioning the compatibility of the *PTA* with Articles 5 and 6 of the *ECHR*,⁸⁸ as individuals were effectively placed “back in detention pending deportation without any imminent prospect of deportation.”⁸⁹

A. Secretary of State for the Home Department v JJ and Others

One of the more comprehensive judicial challenges of the *PTA* was the case *Secretary of State for the Home Department v JJ*,⁹⁰ concerning six individuals who were subjected to comparable forms of control orders, which in one case subjected one individual to a 16-hour curfew at a specified address. *Secretary of State for the Home Department v JJ* tested the very concept of liberty and its deprivation, in light of the *ECHR* Strasbourg system and addressed some of the worst excesses of the *PTA*.

It was held by the majority that for a deprivation of liberty contrary to Article 5 *ECHR*, classical deprivation of liberty such as being “locked up in a prison cell or its equivalent”⁹¹ was not a prerequisite. Lord Bingham encapsulates the view of the majority, when stating that “deprivation of liberty may [...] take numerous other forms,”⁹² beyond the “ordinary parlance”⁹³ used. Citing authoritative ECtHR cases *Guzzardi*⁹⁴ and *Engel*,⁹⁵ he stated that “account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question.”⁹⁶ Consequently, the fact that the lives of the individuals were “wholly regulated by the Home Office, as a prisoner’s would be;”⁹⁷ constituted the very “antithesis of

83 B. Middleton, “Control orders: out of control” (2007) 173 J. Crim. L. 3 at 3.

84 See *PTA*, s. 2(1) (b).

85 *Ibid.*

86 Arden, *supra* note 70 at 609.

87 Elliott, *supra* note 67 at 563-4.

88 Personal Liberty under Art. 5 and the right to a fair trial under Art.6 of the *ECHR*.

89 Walker, *supra* note 8 at 1140.

90 *JJ*, *supra* note 3.

91 *Ibid.* at para. 12.

92 *Guzzardi v Italy* (1981) 3 *E.H.R.R.* 333, para. 95, concerning a judicial compulsory residence order for an individual suspected of being a member of the Italian mafia – an early example for a control order.

93 *JJ*, *supra* note 3 at para. 12.

94 *Guzzardi*, *supra* note 92 at paras. 92, 94.

95 *Engel and Others v The Netherlands (No. 1)* (1979-80) 1 *E.H.R.R.* 647 at para. 59.

96 *JJ*, *supra* note 3 at para. 16

97 *Ibid.* at para. 24.

liberty and [was] more akin to detention in an open prison.”⁹⁸

L.L. Carswell and Hoffman, as the minority, opposed this wide definition of deprivation of liberty and held that liberty should be “interpreted in the narrower sense,” and construed strictly as “physical incarceration or restraint.”⁹⁹ Lord Hoffman went even further warning against an “over-expansive interpretation to the concept of deprivation of liberty,” which would create “a restriction on the powers of the state to deal with serious terrorist threats to the lives of its citizens.”¹⁰⁰ The minority consequently could only see a potential breach of Article 2 of Protocol No 4 to the *ECHR* which concerns the freedom of movement but not Article 5 of the *ECHR*.

The uniqueness of the control order regime was acknowledged by the court as a “difficulty attending the process of classification ... [of Control Orders in relation to whether they are *ECHR* compliant or not] ... suggesting that in such cases the decision is one of pure opinion,”¹⁰¹ dampening the potential authority of *Secretary of State for the Home Department v JJ*. After all it was held in *Guzzardi* that “the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance.”¹⁰² Lord Brown provided guidance on the issue of how long control order curfews should be to remain *ECHR* compliant by finding that “I would regard the acceptable limit to be 16 hours.”¹⁰³ This *dictum* was consequently applied in *E*¹⁰⁴ and *Secretary of State for the Home Department v MB*,¹⁰⁵ and serves to clarify, at least one point of law. The House of Lords ruling in *Secretary of State for the Home Department v JJ* remains “a further blow to the government’s anti-terrorism strategy, with Article 5 placing greater limits than envisaged on the scope of control orders.”¹⁰⁶

B. *Secretary of State for the Home Department v MB*

Secretary of State for the Home Department v MB concerned the question “whether the modified procedural and evidential rules ... [used in Control Order hearings] ... violated Art. 6 of the *ECHR*,”¹⁰⁷ revolving around the Secretary of State’s obligation under section 3(1) (a) of the *PTA* to approach a court with an application to grant permission for the imposition of control orders. Such an application involves a hearing to ascertain whether the Secretary of State’s reasoning behind the application for a control order was not “obviously flawed.”¹⁰⁸ The Secretary of State can, and did in this case, also make an application to

98 *Ibid.* at para. 21.

99 *Ibid.* at para. 69.

100 *Ibid.* at para. 44.

101 *Ibid.* at para. 17.

102 *Guzzardi*, *supra* note 92 at para. 93.

103 *JJ*, *supra* note 3 at para. 105.

104 *Secretary of State for the Home Department v E* [2007] UKHL 47; [2008] *H.R.L.R.* 7.

105 *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] *H.R.L.R.* 6 [*MB*].

106 Hardiman-McCartney, *supra* note 82 at 8.

107 A. Sandell “Liberty, fairness and the UK control order cases: two steps forward, two steps back” (2008) 1 *Eur. H.R.L. Rev.* 120 at 122.

108 *Prevention of Terrorism Act 2005*, s. 3(2)(a) [*PTA*].

withhold evidence used to support the grounds for making the Control Order,¹⁰⁹ from the individual concerned, due to national security concerns.¹¹⁰ To mitigate such a closed evidence procedure, provisions are made for the use of a special advocate procedure,¹¹¹ whereby a security vetted advocate is appointed who is privy to the closed material, but unable to relay this to their client. Such “non-disclosure of the closed material” meant that “the very essence of the right to a fair trial hearing was impaired in the control order proceedings”¹¹² and subject to a judiciary review in *Secretary of State for the Home Department v MB*.

Lord Carswell agreed that “it may be legitimate to withhold a certain amount of significant material from a party where there are sufficiently strong counter-vailing reasons to set against the individual’s right grounded in Art. 6”¹¹³ such as public interest, a balancing act between the two conflicting interests had to be struck to avoid “the grave disadvantages of a person affected not being aware of the case against him.”¹¹⁴ Therefore the fact that the defendant “was confronted by a bare, unsubstantiated assertion which he could do no more than deny,”¹¹⁵ was sufficient to find a violation of Art. 6 of the *ECHR* and the control order in question. The majority decision held that “with strenuous efforts from all, difficult and time consuming though it will be, it should usually be possible to accord the controlled person “a substantial measure of procedural justice,”¹¹⁶ whilst still protecting national security and keeping evidence closed, with only few exceptions in cases where “to do so would be incompatible with the right of the controlled person to a fair trial.”¹¹⁷

C. *Secretary of State for the Home Department v AF (FC)* and another and one other action

The most recent decision of the Appellate Committee of the House of Lords in *Secretary of State for the Home Department v AF*¹¹⁸ concerned the question whether “the procedure that resulted in the making of the control order satisfied the appellant’s right to a fair hearing guaranteed by Article 6”¹¹⁹ of the *ECHR*, and may lead to an all out abandonment of “the discredited control order regime.”¹²⁰ That the Appellate Committee heard such an appeal was due to recent Strasbourg case law, such as *A v United Kingdom*,¹²¹ where the ECtHR

109 *Ibid.* Schedule para. 4 (3)(b).

110 *Ibid.* Schedule para. 4 (3)(d), which might even lead to a statutory duty under Schedule 2(b).

111 *Ibid.* 4(2)(c) and 7.

112 *MB*, *supra* note 105 at para. H8.

113 *Ibid.* at para 80.

114 *Ibid.* at para. 35.

115 *Ibid.* at para.41.

116 *Ibid.* at para.66.

117 *Ibid.* at para. 73.

118 *AF* *supra* note 5.

119 *Ibid.* at para. 1.

120 F. Gibb, “Terror law in turmoil as lords back suspects’ fight against house arrest” *The Times* (11 June 2009) 6.

121 *A v United Kingdom* (Application No 3455/05) (unreported, February 19, 2009) [*A v United Kingdom*].

had considered the Article 5(4)¹²² implications of closed evidence terror proceedings “in particular the lack of disclosure of material evidence except to special advocates.”¹²³

In essence the principle established by *A v United Kingdom*¹²⁴ and applied in *Secretary of State for the Home Department v AF*¹²⁵ was that “the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions ... [to the special advocate] ... in relation to those allegations,”¹²⁶ with the ECtHR stating that “non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him”¹²⁷

The principles of the earlier *MB* decision appear to have been replaced with “a rigid rule that the requirements of a fair hearing are *never* satisfied if the decision is “based solely or to a decisive degree” on closed material.”¹²⁸

Consequently, Lord Hoffman expressed his fear that such judicial review may very “well destroy the system of control orders.”¹²⁹

The full effect of *Secretary of State for the Home Department v AF* is unknown at this time, as the cases “must now return to the lower courts to be reheard.”¹³⁰ However it appears that the “Home Office will need to decide either to release more material to the men and to the public, or rescind the orders.”¹³¹

The Home Office “has released [AF] regarded as one of Britain’s most dangerous terror suspects ... to avoid disclosing evidence against him.”¹³² This administrative decision “could prove to be the final nail in the coffin of the system”;¹³³ if the “Government is unwilling to make public what it knows, or believes, about AF, then it is unlikely to be prepared to disclose what intelligence it holds about the other 19 men living under control order restrictions.”¹³⁴

We will see whether the ruling in *AF* will be regarded as the “water shed” moment of the control order regime: the end to the regime *per se*, or a the catalyst for further amendment of the regime to allow suspects such as *AF* to be detained within the scope of the *ECHR*.

D. Consequences of *Secretary of State for the Home Department v AF*?

Prior to *Secretary of State for the Home Department v AF*, the judiciary broadly regarded the control order regime as being *ECHR* compliant, despite quashing a number of the control orders. This served to “to dispel some of the tension be-

122 *European Convention on Human Rights 1950*, Article 5(4).

123 *AF*, *supra* note 5 at para. 48.

124 *A v United Kingdom*, *supra* note 122.

125 *AF*, *supra* note 5.

126 *Ibid.* at para. 59.

127 *Ibid.* at para. 65.

128 *AF*, *supra* note 5 at para. 71 [Emphasis in original].

129 *Ibid.*

130 Gibb, *supra* note 120.

131 *Ibid.*

132 F. Gibb, “Top terror suspect is freed over secrets fear – Home Office orders release to protect evidence” *The Times* (7 September 2009) 1

133 *Ibid.* at 12.

134 *Ibid.*

tween the executive and the judiciary at this crucial time,”¹³⁵ but has been made possible by some remarkable concessions by the judiciary, allowing “significant inroads into core civil liberties.”¹³⁶

The fallout from *Secretary of State for the Home Department v AF* has yet to be felt. Faced with the possibility of having to reveal more closed evidence, the British Authorities may choose to abandon a discredited Control Order regime, rather than reveal sensitive sources of intelligence. Worryingly, derogation from Art. 6 of the *ECHR* may be forthcoming, should the Government deem it necessary to maintain the Control Order regime, whilst deeming it impossible to countenance revealing further evidence.

Until the full effect of *Secretary of State for the Home Department v AF* can be assessed, the following considerations should be made to address some *ECHR* compliance issues, violations respectively: the introduction of a statutory limit on the length of curfews inherent in control orders strengthens further the obiter of Lord Brown in *Secretary of State for the Home Department v JJ*¹³⁷ and may be a “small step to take, but it will serve to remove some of the ambiguity in this area,”¹³⁸ as – arguably – only one obiter is “a very slender legal basis”¹³⁹ on which to assess *ECHR* compliance. With regards to the considerations of the special advocate procedure, it was “undoubtedly right ... [to find] ... that the ... procedures [do] go at least some way to redressing”¹⁴⁰ concerns regarding the use of closed evidence. However the process remains “far from perfect”¹⁴¹ and *ECHR* compliance remains a concern. The “insertion of an express reference to the right to a fair hearing” into the statutory framework,¹⁴² removing any potential ambiguity in terms of section 3 of the *HRA*,¹⁴³ and the reading down technique employed in *Secretary of State for the Home Department v MB*¹⁴⁴ would further mitigate such concerns. “The imposition of an obligation ... to provide a statement of the gist of any closed material”¹⁴⁵ used in hearing proceedings would further ensure Article 6 compliance here. Nonetheless the viability of such reforms is highly questionable, considering the inherent national security implications.

Unease surrounds the potential indefinite nature of control orders. Statutory clarity should be sought here most vehemently as “some of the controlees have

135 Middleton, *supra* note 83 at 4.

136 Sandell, *supra* note 107 at 124.

137 *JJ*, *supra* note 3 at para. 105.

138 Middleton, *supra* note 83 at 4.

139 Joint Committee on Human Rights (JCHR), “Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill: Twentieth Report of Session 2007-2008” HC (2007-2008) 554 at para 89.

140 Sandell, *supra* note 107 at 127.

141 *Ibid.*

142 JCHR, *supra* note 139, at para 90.

143 *HRA*, section.3, concerns the interpretation of legislation.

144 A reading down technique is a judicial technique of interpretation whereby the judges read and give effect to a domestic provision, except where to do so would infringe an individual's convention rights. Instead of lodging a declaration of incompatibility, the judiciary uses the reading down technique as in the majority of instances the implementation of the domestic statute is fully *ECHR* compliant, see Hoffman & Rowe, *supra* note 41 at 60.

145 JCHR, *supra* note 139, at para 90.

already been the subject of their orders for a considerable time, and ... their orders cannot be continued indefinitely.”¹⁴⁶ “A statutory presumptive clause against the extension of control orders beyond two years, save in genuinely exceptional circumstances”¹⁴⁷ should be considered seriously.

Despite such concerns, the above mentioned judicial limitations have already made “an incursion into the exceptional procedural framework within which control orders operate,”¹⁴⁸ curtailing the worst excesses of the regime. Some sort of compromise, aligning the judicative with the executive approach, would surely be preferable to an otherwise “unwelcome and scarring clash with the senior judiciary”¹⁴⁹ akin to that in the case of *A v Secretary of State for the Home Department* and which would eventually lead to the necessity to draft new legislation.

V. THE *TERRORISM ACT 2006* AND PRE-CHARGE DETENTION

This contemporary legislative provision for the extended pre-charge detention of terror suspects runs concurrently to the quasi-judicial detention provisions of the *PTA*¹⁵⁰ as detailed above. Pre-charge detention builds on the foundation of the provisions of the *TA 2000*, whereby under section 41 of the *TA 2000* a police constable may arrest “without a warrant a person whom he reasonably suspects to be a terrorist,” with a pre-charge detention of the suspect for up to 7 days. *The Terrorism Act 2006* (*TA 2006*) aims at being in line with the recent developments of the *ECHR* law, particularly Art. 5, as a consequence of the experience of the Northern Irish Troubles and its legal challenges before the ECtHR, particularly the cases of *Brannigan*¹⁵¹ and *Brogan*.¹⁵²

The initial power to detain a terror suspect for a period of seven days pre-charge under *TA 2000*¹⁵³ was further extended: a terror suspect may now be detained by virtue of sections 23, 25 of the *TA 2006*¹⁵⁴ for a total period of 28 days,¹⁵⁵ amending therefore Schedule 8 of the *TA 2000*.¹⁵⁶

A. The new detention procedure under the *TA 2006*

The detention of terror suspects is for the first time scrutinized after the normal 48-hour pre-charge custodial limit: “in the absence of authorization for continued detention, a terror suspect must be released after 48 hours in

146 Joint Committee on Human Rights (JCHR), “Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009: Fifth Report of Session 2008-2009” HC (2008-2009) 282 at para. 29.

147 *Ibid.* at para. 30.

148 Sandell, *supra* note 107 at 129.

149 Middleton, *supra* note 83 at 5.

150 *PTA*, *supra* note 108.

151 *Brannigan and McBride v United Kingdom* (1994) 17 *E.H.R.R.* 539.

152 *Brogan and Others v United Kingdom* (1989) 11 *E.H.R.R.* 117.

153 *Terrorism Act 2000*, Schedule 8, Part III, at para. 29.

154 *Ibid.* at ss. 23-25.

155 A. Jones, R. Bowers & H. D. Lodge, *Blackstone's Guide to The Terrorism Act 2006* (London: Oxford University Press, 2006) at 61.

156 *Terrorism Act 2000*, Schedule 8.

custody.”¹⁵⁷ Hereafter a “warrant of further detention”¹⁵⁸ issued by a judicial authority¹⁵⁹ must be applied for, enabling detention for a maximum of seven days from the time of arrest. This period can be extended by way of an “extension of warrant”¹⁶⁰ which enables detention up to a maximum aggregate of 28 days from arrest. Whilst such an extension appears to be alarming, extensions of warrant can only be for seven days beyond the first 14. As an additional safeguard, reflecting the gravity of the length of the pre-charge detention, after 14 days any further extension to the detention period must be heard before a senior judge,¹⁶¹ or high court judge.

One considerable concern in the context of the issuance of such warrants of extension raises from the possibility of detention in order to obtain evidence. Under Schedule 8, para. 32(1) - (1A) of the amended *TA 2000*¹⁶² “a judicial authority may issue a warrant of further detention if it is satisfied that,”¹⁶³ “the further detention of a person is necessary ... *to obtain relevant evidence* whether by questioning him or otherwise,”¹⁶⁴ an extremely wide provision. Indeed “it is difficult to conceive a case where there would not be outstanding enquiries to be made ‘with a view to obtaining relevant evidence.’”¹⁶⁵

Such concerns are amplified, when one considers recent amendments made by section 28 and Schedule 2 of the *Criminal Justice Act 2003*,¹⁶⁶ to section 37 of the *Police and Criminal Evidence Act 1984 (PACE)*,¹⁶⁷ the criminal charging procedure, formulating a new “Threshold Test,” to be used “in cases where it is inappropriate to release a suspect on bail,”¹⁶⁸ with terrorist cases being a prime example. Such changes mean an individual can be charged if “there is at least a reasonable suspicion against the person of having committed an offence”¹⁶⁹ as opposed to the normal *PACE* provision that a person be charged where there is “sufficient evidence to charge that person for the offence for which he was arrested.”¹⁷⁰

The existence of such a new liberal criminal charging procedure carries “at least as many and certainly more concealed risks of causing unfair extended detention.”¹⁷¹ The danger of possible Article 5 *ECHR* violations is apparent; charging on the basis of reasonable suspicion could merely mirror continued

157 Jones, Bowers & Lodge, *supra* note 155 at 64; *Terrorism Act 2000* s 41(3).

158 *Terrorism Act 2000*, Schedule 8, at para 29.

159 *Ibid.* at para. 29(1),(4).

160 *Ibid.* at para. 36, inserted by *Terrorism Act 2006*, s. 25(3).

161 *Ibid.* at para. 36 (1A).

162 *Ibid.* at paras. 32(1) and (1A) (as inserted by *Terrorism Act 2006* s.24(3)).

163 *Ibid.* at paras. 32(1).

164 *Ibid.* at paras. 32(1A) (as inserted by *Terrorism Act 2006* s.24(3)). Emphasis by authors.

165 Jones, Bowers & Lodge, *supra* note 155 at 70.

166 *Criminal Justice Act 2003*, s. 28; Schedule 2.

167 *Police and Criminal Evidence Act 1984*, s.37.

168 Jones, Bowers & Lodge, *supra* note 155 at 77.

169 *Ibid.*

170 *Police and Criminal Evidence Act 1984*, s.37(1).

171 JCHR, “Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual renewal of 28 Days 2008: Twenty-fifth Report of Session 2007-2008” HC (2007-2008) 825 at para. 25.

pre-charge detention, albeit with a semi-permanent remand in custody.¹⁷² However, threshold charging should be promoted as an alternative; its use would mark a shift towards “normal” criminal justice, thus abandoning the questionable rationale behind pre-charge detention.

B. Parliamentary Oversight of the 28 Day Detention

Parliamentary control of the *TA 2006* under section 25¹⁷³ was designed to give the provisions political accountability, but has been already been questioned by human rights defender bodies such as the Joint Committee on Human Rights (JCHR). Tasked with reporting to Parliament on the necessity of the renewal of section 23¹⁷⁴ under the so called “sunset clause,”¹⁷⁵ the JCHR is exasperated by the Government’s failure to “provide sufficient information to allow us to ascertain whether the power to detain people without charge for up to 28 days is necessary.”¹⁷⁶ Questions arise surrounding the use of any parliamentary oversight when such information regarding the provision in practice is less than forthcoming.¹⁷⁷ Clearly “parliamentary oversight ... [needs to] ... be improved”¹⁷⁸ to ensure the provisions are subject to full political and moral accountability otherwise the assessment of whether renewal is necessary, is impossible.¹⁷⁹ Despite this criticism the annual re-enactment of this sunset clause, following parliamentary debate, has happened to date twice so far.¹⁸⁰ This is even more significant when considering the recent furore surrounding the proposed new Counter-Terrorism Bill¹⁸¹ which would have introduced a new 42 day detention possibility. Despite the fact that this proposal was near unequivocally abandoned in the face of public and House of Lords’ condemnation, it is highly likely that the present 28 day detention will be around for a long time to come.¹⁸²

C. Antiterrorism legislation within the ambit of Article 5 of the *ECHR*

Another concern surrounds the provisions of Schedule 8, paragraph 33 of the *TA 2000*¹⁸³ which governs the representation rights an individual has at judicial hearings, in the context of the issuance of an extension of warrant. Under this provision “a judicial authority may exclude any of the following persons from any part of the hearing – (a) the person to whom the application relates; (b) any-

172 JCHR, “Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill: Ninth Report of Session 2007-2008” HC (2007-2008) 199 at para. 80.

173 The Secretary of State can under s.25(2) “by order made by statutory instrument disapply this section in relation to any period of not more than one year,” provided it is “laid before Parliament and approved by a resolution of each house.”

174 *Terrorism Act 2006*, s.23.

175 *Ibid.* s. 25.

176 JCHR, *supra* note 171 at para. 3.

177 *Ibid.* at para. 9.

178 *Ibid.* at para. 11.

179 *Ibid.* at para. 21.

180 The *Terrorism Act 2006* (Disapplication of Section 25) Order 2007 (SI 2007/2181); Order 2008 (SI 2008/1745).

181 Counter Terrorism HC Bill (2008).

182 Jones, Bowers & Lodge, *supra* note 155 at 74.

183 *Terrorism Act 2000*, Schedule 8 at para 33.

one representing him.”¹⁸⁴ To many, including the JCHR, this does not “satisfy the stringent requirements ...of ... Article 5 *ECHR*”¹⁸⁵ as the “the hearing ... is not a fully adversarial hearing.”¹⁸⁶ Such shortcomings are remarkable considering the extensive use of Special Advocates in Control Order proceedings, which provide an *ECHR*-compliant model that could be mirrored here.

That the House of Lords Appellate Committee has yet to decide such an issue is merely due to the fact that “there is no right of appeal against a judicial decision extending pre-charge detention.”¹⁸⁷ Judicial review has been sought regarding the potential Article 5(3) and (4) *ECHR* implications of not providing the right to appeal, but failed on technical grounds.¹⁸⁸ A more successful common law challenge to these provisions may provide interesting results. In the mean time reform in this area is needed, to ensure full *ECHR* compliance.

The pre-charge detention regime provided by the *Terrorism Act 2000*, as amended by the *Terrorism Act 2006*, appears *prima facie* to be *ECHR* compatible.

VI. POSSIBLE ALTERNATIVES TO DETENTION MEASURES

Despite ardent judicial opposition and some reform overall, *ECHR*-compliance of the discussed detention measures remains a difficult issue, due to the fact that they all authorize substantial restrictions of liberty without criminal charge. Ideally “counter-terrorism measures ought not to be extraordinary measures in a special category of their own, but, as far as possible, part of the ordinary criminal law of the land.”¹⁸⁹

The following alternatives might end the present situation, as injustices will inevitably arise from such measures.¹⁹⁰ Firstly, the introduction and wider use of a refined system of “Threshold Charging” in order to charge terror suspects rather than to detain them under extra-ordinary provisions.

As discussed above, the use of Threshold Charging within the remit of the *Police and Criminal Evidence Act 1984 (PACE)*¹⁹¹ criminal charging procedure, allows the Crown Prosecution Service (CPS) to charge an individual using a lower evidential threshold “in cases where it is inappropriate to release a suspect on bail,”¹⁹² for example in terror cases. Rather than charging an individual where there is “sufficient evidence to charge that person for the offence for which

184 *Ibid.* at para 33(3).

185 JCHR, *supra* note 171 at para. 31.

186 *Ibid.* at para. 32.

187 JCHR, “Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill: Twentieth Report of Session 2007-2008)” HC (2007-2008) 554 at para. 23.

188 *R on the application of Nabeel Hussain v The Hon. Mr. Justice Collins* [2006] EWHC 2467 (Admin).

189 JCHR, *supra* note 187 at para. 5.

190 J Russell, “Liberty’s Second Reading Briefing on the Counter-Terrorism Bill Part I – Pre-Charge Detention” (March 2008), online: Liberty <<http://www.liberty-human-rights.org.uk/publications/pdfs/counter-terror-bill-detention-provisions-2nd-reading-commons-final.pdf>> accessed 21 April 2008 at 14.

191 *Police and Criminal Evidence Act 1984*, s.37.

192 Jones, Bowers & Lodge, *supra* note 155 at 77.

he was arrested,¹⁹³ the standard evidential threshold, an individual could be charged if “there is at least a reasonable suspicion against the person of having committed an offence.”¹⁹⁴

This threshold is only used “provided there is a reasonable likelihood of relevant evidence becoming available within a reasonable time which will enable the [normal] higher charging threshold to be applied,”¹⁹⁵ at a later date before trial: an inherent safeguard against prolific use of the new evidential threshold.

Threshold Charging could therefore be used to charge terror suspects earlier and on a lower evidential threshold, thus negating current stated difficulties charging terror suspects due to a lack of court-admissible evidence: one of the main arguments for the use of pre-charge detention. Facilitating post-charge judicial detention and allowing time post-charge to gather more evidence could bring more suspects within the remit of the “normal” criminal justice system; preferable to extended pre-charge detention and its inherent *ECHR* compliancy issues.

The use of such a regime carries its own Article 5 considerations, which need to be addressed. Recommendations for such a regime include placing the test “on an explicit statutory footing”¹⁹⁶ and that the “CPS be required to disclose to the suspect and the court when it has charged on the threshold test in order to provide the opportunity for the court to subject the prosecution’s timetable to independent scrutiny.”¹⁹⁷ Such reform would ensure that the use of the Threshold Test does “not operate in practice in a way which impinges disproportionately on the liberty of the individual.”¹⁹⁸ Threshold Charging could offer a viable alternative to extended pre-charge detention, when used in combination with a Post-Charge Questioning regime.

Section 22 of the (largely unsuccessful) *Counter Terrorism Act 2008* provides that “a judge of the Crown Court may authorize the questioning of a person about an offence after the person has been charged with the offence ... if the offence is a terrorism offence or it appears ... that the offence has a terrorist connection.”¹⁹⁹

If enacted it could “enable police to charge suspects earlier,²⁰⁰ when used in combination with the above mentioned Threshold Charging procedure. An individual could be charged on reasonable suspicion²⁰¹ of committing a terrorist offence using the lower evidential threshold provided; having gained more evidence through post-charge questioning that individual could later be charged

193 *Police and Criminal Evidence Act 1984*, s.37(1).

194 *Ibid.*

195 Joint Committee on Human Rights, “Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill: Ninth Report of Session 2007-2008” HC (2007-2008) 199 at para. 74.

196 *Ibid.* at para. 84.

197 *Ibid.* at para 81.

198 *Ibid.* at para. 42.

199 *Counter Terrorism Act 2008*, s.22 (2).

200 Russell, *supra* note 190 at para. 7.

201 Jones, Bowers & Lodge, *supra* note 155 at 77.

under the normal threshold.²⁰²

To clarify, the use of section 22²⁰³ would negate standard police procedure: “A detainee may not be interviewed about an offence after they have been charged with, or informed they may be prosecuted for it.”²⁰⁴ The structure of section 22²⁰⁵ was therefore informed by much debate surrounding its *ECHR*²⁰⁶ implications, with many wanting to ensure a “potentially oppressive power is not used oppressively in practice.”²⁰⁷ Significant procedural safeguards were a result. Chief amongst these is the inherent judicial control of the process. Also post-charge questioning “must not exceed 48 hours”²⁰⁸ which ensures that charging on whimsical evidence, followed by extensive post-charge questioning does not occur. The Non Governmental Organization, Liberty,²⁰⁹ recommends an alteration whereby terror suspects could be charged on a preparatory offence and “once new evidence ... comes to light suggesting that a more serious charge might be appropriate”²¹⁰ subsequently questioned within the parameters of section 22.²¹¹ In reality terror investigations often uncover “enough evidence to support a charge for a lower offence”²¹² within a relatively short time span. Charging on such evidence and then “looking for evidence to support the more serious offence after charge,”²¹³ would “negate one of the central planks put forward in justification of pre-charge detention extension,”²¹⁴ and could even enable charging those subject to Control Orders.

Secondly, the broader use of intercept evidence in criminal proceedings could alleviate the inability of the Crown Prosecution Service to prosecute terror suspects successfully due to an inherent inability to gain credible, admissible evidence of their criminal activities. Concerns regarding national security often bar the use of certain evidence in court, such as phone-tap and internet based intercept evidence. The *Regulation of Investigatory Powers Act 2000 (RIPA)*²¹⁵ proves to be a particular thorn in the side of anti-terror prosecution. By section 17 “no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings ... which (in any manner) ... (a) discloses, in circumstances from which its ori-

202 *Police and Criminal Evidence Act 1984*, s.37(1).

203 *Counter Terrorism Act 2008*, s.22.

204 *Police and Criminal Evidence Act 1984* (PACE) Code C, par 16.5.

205 *Counter Terrorism Act 2008*, s.22.

206 *European Convention on Human Rights 1950*.

207 JCHR, *supra* note 187 at para. 58.

208 *Counter Terrorism Act 2008*, s.22(4)(b).

209 Russell, *supra* note 190; G. Crossman, “Liberty’s Second Reading Briefing on the Counter-Terrorism Bill in the House of Commons: Part 2 – Non detention extension provisions” (March 2008), online: Liberty <<http://www.liberty-human-rights.org.uk/publications/pdfs/counter-terrorism-bill-non-detention-provisions-2nd-reading-commons-final.pdf>> accessed 20 April 2008.

210 Russell, *supra* note 190 at para. 29.

211 *Counter Terrorism Act 2008*, s.22.

212 Russell, *supra* note 190 at para. 29.

213 *Ibid.* at para 30.

214 Crossman, *supra* note 209 at para.15.

215 *Regulation of Investigatory Powers Act 2000*.

gin ... may be inferred, any of the contents of an intercepted communication or any related communications data.”²¹⁶ The question whether such restrictions could be amended (or even repealed) without compromising national security in order to remove one of the main obstacles to prosecuting terrorist crime²¹⁷ was made the subject of the *Chilcot Review*,²¹⁸ undertaken by the Government to “advise on whether a regime to allow the use of intercepted material in court can be devised that facilitates bringing cases to trial while meeting the overriding imperative to safeguard national security.”²¹⁹ Admirably the review started with the belief that “the best available evidence (for and against the accused) should be made available to the court ... [and that] ... a class of potential evidence (such as intercepted material) should only be excluded if there are powerful reasons for doing so.”²²⁰ However it was noted “that the UK’s strategic intelligence capability must not be compromised,”²²¹ as it “is a critical component ... essential for national security and so must be retained and protected.”²²² A possible new model for the use of intercept evidence was suggested whereby “all intercepted material would be potentially admissible as evidence.”²²³ Should the admissibility of such evidence be questioned, to protect any sensitive intelligence capabilities being revealed, “closed hearings, at which the defendant’s interest would be represented by a Special Advocate, would be used,”²²⁴ reminiscent of the Control Order hearings, which are seen as being *ECHR* compliant.

Such a model would strike “the right balance between ensuring a fair trial, including defence ability to probe the integrity of intercept product, whilst ensuring that disclosure of intercept capabilities and techniques is kept to an acceptable level.”²²⁵ Potentially such procedural measures could steer anti-terror provisions back into the “strict use of normal legal process.”²²⁶ As a result “the need for exceptional measures such as Control Orders and lengthy pre-charge detention will be significantly reduced or even disappear, and public confidence in the criminal justice system will be maintained.”²²⁷

Despite the possible advantages, the practical benefit of intercept evidence was questioned by the *Chilcot Review*, as there was no “evidence that the introduction of intercept as evidence would enable prosecutions in cases currently

216 *Ibid.* s.17.

217 Joint Committee on Human Rights, “Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill: Ninth Report of Session 2007-2008” HC (2007-2008) 199 at para 87; Russell, *supra* note 190 at para.7.

218 Sir J. Chilcot GCB, Lord Archer of Sandwell, A. Beith MP and Lord Hurd of Westwell “Privy Council Review of Intercept as Evidence: Report to the Prime Minister and the Home Secretary” (Cm 7324, 2008) .

219 *Ibid.* at para. 1.

220 *Ibid.* at para. 6.

221 *Ibid.* at para.10.

222 *Ibid.* at para. 46.

223 *Ibid.* at para. 191.

224 *Ibid.* at para. 192.

225 *Ibid.* at para. 207.

226 *Ibid.* at para. 49.

227 *Ibid.*

dealt with through Control Orders.”²²⁸ In addition, “the proposed use of phone tapping evidence to secure convictions in terrorist and criminal trials has been shown in secret tests to be unworkable.”²²⁹ Also, secret tests of the Intercept Evidence regime have encountered “real legal and operational difficulties.”²³⁰

The use of Intercept Evidence in other Common Law jurisdictions provides a useful point of comparison to help inform this debate. In Australia intercept evidence is admissible in court; subject to similar curtailments as proposed by the Chilcot Model. The *National Security Information (Criminal and Civil Proceedings) Act 2004* “provides a means of introducing classified material into a criminal case in sanitised form [...] material is shown to the judge and cleared defence counsel – who are forbidden to reveal the material to their clients.”²³¹ Such a model formed the basis of the proposed Chilcot model. Doubts remain in regard to the practical benefit of such a model both to the UK and Australian authorities when combating terrorism; although 1,486 convictions in Australia in 2006²³² were attributable to the use of intercept evidence, none were for terrorist offences.

A similar system operates in Canada whereby all “law enforcement intercept material is useable in evidence ... subject to disclosure rules.”²³³ Protection from disclosure of sensitive intercept techniques is provided by The *Canada Evidence Act (CEA) 1985* section 37; providing for the protection of police techniques, intelligence and informants [when] in the public interest.²³⁴ Should an objection be lodged by the defendant under section 37 against the non-disclosure of such information, “the court will determine whether the public interest in disclosure outweighs the public interest in non-disclosure.”²³⁵

Despite being an attractive model to the UK authorities, allowing intercept but protecting sensitive techniques, the Canadian model produces a relatively low conviction rate; of those cases “where intercepted material was [cited] in evidence”²³⁶ the conviction rate was only “between 20% and 46% from 2001-2003”²³⁷ compared to a 90% conviction rate where intercept techniques were used to gather evidence, but no intercept was cited in evidence.²³⁸ The benefits of using a similar intercept regime in the UK are thus debatable.

Concluding, one can state that the use of intercept evidence and post-charge questioning within the ambit of the “normal” criminal justice system could alleviate any continued need or want for extensive pre-charge detention and quasi-judicial detention. The prospect of the use of post-charge questioning is very

228 *Ibid.* at para 59.

229 S. O'Neill, “Demise of system inevitable” *The Times* (7 September 2009) 12.

230 *Ibid.*

231 Chilcot et al., *supra* note 218 at 154.

232 *Ibid.* at para. 155.

233 *Ibid.* at para. 158.

234 *Ibid.* at para. 161.

235 *Ibid.*

236 *Ibid.* at para. 159.

237 *Ibid.*

238 *Ibid.*

real in the near future²³⁹ and should be welcomed. Liberty's²⁴⁰ proposed model, above, appears to offer a viable all-encompassing alternative to detention measures.

However the prospects of the future admissibility of intercept evidence are rather dim: highlighted by the *Chilcot Review*,²⁴¹ the operability of the British intelligence branches requires that the secrets of intercept techniques be protected from too much public scrutiny.

VII. CONCLUSION

The use of extra-ordinary anti-terror detention still raises questions of *ECHR* compliance to this day, despite the meandering course of legislation in the last decade. The brief prospect that the *Terrorism Act 2000* would provide an "all-encompassing statement of laws ... [offering] ... a more considered code"²⁴² than the earlier provisions reflecting on threats posed (mostly) by the Northern Irish Troubles was clearly a premature hope.

The subsequent enactments of the *Anti-terrorism, Crime and Security Act 2001*, *Prevention of Terrorism Act 2005*, *Terrorism Act 2006*, *Counter Terrorism Act 2008* highlight the fact that anti-terror legislation continues to be of an *ad hoc* nature with the danger that it might induce Parliament "to create new offences and grant more powers to the police and the security service."²⁴³

Despite still open questions, the judiciary has proved to be able to counter the most draconian limitations to the individual's liberty to an astonishing extent: as an example might serve the fact that *PTA 2005*²⁴⁴ and the Control Order regime had to be introduced after the declaration of incompatibility made by the Law Lords in *A v Secretary of State for the Home Department*, marking a "landmark decision ... used as a point of reference by courts all over the world ... [as] ... a powerful statement by the highest court in the land ... [that]... even the Government, ... even in times when there is a threat to national security, must act strictly in accordance with the law."²⁴⁵

The subsequent limitations to the Control Order regime by the judiciary are testament to its ability to remedy the most abhorrent manifestations of detention measures. The impact of *Secretary of State for the Home Department v AF*²⁴⁶ could prove to be pivotal for the very future of the Control Order regime. Until such a decision, the Control Order regime continues to raise issues of *ECHR* compliance, which can only be resolved through statutory amendment or by an altogether abandonment of the quasi-judicial process.

Extended pre-charge detention of terror suspects also retains a *prima facie*

239 At the time of writing, s. 22 of the *CTA 2008* was not yet enacted.

240 Russell, *supra* note 190; Crossman, *supra* note 209.

241 Chilcot *et al.*, *supra* note 218 at para. 65.

242 Walker, *supra* note 8 at 4.

243 D. Feldman, "Human rights, terrorism and risk: the roles of politicians and judges" [2006] Summer, P.L. 364 at 382.

244 *Prevention of Terrorism Act 2005*.

245 Arden, *supra* note 70 at 622.

246 *AF*, *supra* note 5.

degree of *ECHR* compliance. The experience of the Troubles is clear to see in the drafting of the pre-charge detention provisions of the *Terrorism Act 2000* and the *Terrorism Act 2006*. The introduction of a series of judicial safeguards to the process should be applauded, despite clear weaknesses in the regime, which again pose far-probing questions.

Recourse to “normal” criminal processes is advocated as an ideal to end this myriad of compliancy issues. The use of alternatives such as post-charge questioning used in tandem with Threshold Charging, could constitute an altogether different approach which would align anti-terror measures fully with the parameters of the “normal” criminal justice system. The admissibility of intercept evidence in criminal proceedings could also instigate such a change. Caution should accompany such reform, as it is essential that the ability to foil terror plots, safeguarding national security, be retained.

What does remain clear is that detention measures as discussed in this article should not remain a permanent fixture in a modern, civilized society, due to the inherent dangers of creating permanent limitations of our civil liberties: for “once a power is granted, it tends to extend its empire by a process of what can be called ‘legislative creep.’”²⁴⁷

Concluding, we can only concur with Sir Winston Spencer Churchill’s caveat, whereas

*The power of the executive to cast a man into prison without formulating any charge known to the law and particularly to deny him the judgement of his peers, is in the highest degree odious, and is the foundation of all totalitarian government.*²⁴⁸

²⁴⁷ Feldman, *supra* note 243 at 370.

²⁴⁸ Winston Churchill, cited in A. Simpson “Round up the usual suspects: the legacy of British colonialism and the European convention on human rights” (1996) 41 *L. Rev.* 631.