

UNITED KINGDOM

SUBMISSION TO THE JOINT
COMMITTEE ON THE DRAFT
DETENTION OF TERRORIST
SUSPECTS (TEMPORARY
EXTENSION) BILLS

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UNITED KINGDOM: SUBMISSION TO THE JOINT COMMITTEE ON THE DETENTION OF TERRORIST SUSPECTS (TEMPORARY EXTENSION) BILLS

On 26 January 2011, the UK Home Office published the findings and recommendations of its Review of Counter-Terrorism and Security Powers (the Review) – the aim of which was “to ensure that the powers and measures covered by the review are necessary, effective and proportionate and meet the UK’s international and domestic human rights obligations”.¹ One of the key recommendations of the Review was that the number of days an individual suspected of terrorism-related offences could be held in pre-charge detention should be reduced from 28 to 14 days.² The Review further recommended, however, that emergency legislation extending this period of pre-charge detention back to 28 days also be drafted and reviewed, and then essentially held in waiting, to be possibly enacted by Parliament in the future “in order to deal with urgent situations”.

In line with these recommendations the UK government allowed the order providing for a 28-day maximum period of pre-charge detention, provided for by the Terrorism Act 2006, to lapse.³ As a result the maximum period an individual can be held without charge on suspicion of terrorism-related offences automatically reverted to 14 days. The government also published the Protection of Freedoms Bill, which once enacted will provide for the permanent reduction of the maximum period of pre-charge detention to 14 days (i.e. eliminating the power to extend the period by executive order, and meaning that any new extensions could only be made by legislative amendment).⁴ On 11 February 2011, the UK Home Office published the Draft Detention of Terrorist Suspects (Temporary Extension) Bills; their stated rationales are to provide for contingency powers to extend the number of days of pre-charge detention back to 28 days in response to an undefined urgent situation where 14 days pre-charge detention would be considered inadequate.

In response to a call for evidence by the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills (the Joint Committee), which has been appointed to conduct pre-legislative scrutiny on Bills, Amnesty International would like to raise the following concerns for the committee’s consideration:⁵

HUMAN RIGHTS CONCERNS RAISED BY PROLONGED PERIODS OF PRE-CHARGE DETENTION

Amnesty International has consistently opposed the power to detain individuals without charge for up to 28 days since the limit was extended by the United Kingdom government in 2006.⁶ Indeed, while any reduction from the previous status quo of 28 days represents an important step, the organization considers that the current 14 days limit is itself too long a period to detain individuals suspected of criminal offences without charging them.

In light of this the organization would like to reiterate the following concerns with respect to any extension of the time limit for which individuals suspected of terrorism-related offences can be held without charge.

International treaties to which the UK is a party require that people detained on suspicion of the commission of a criminal offence are charged promptly and are tried within a reasonable time in proceedings which fully comply with international fair trial standards or are released.⁷ Amnesty International considers that prolonged detention without charge or trial undermines fair trial rights, including the right to be promptly informed of any charges, the presumption of innocence, including the right to silence, and the right to prepare and present a defence, as well as undermining the right to liberty and freedom from arbitrary detention and the right to freedom from torture and other ill-treatment. In its 2008 Concluding Observations on the periodic report of the UK under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee stated that it had been “disturbed by the extension of the maximum period of detention without charge of terrorist suspects under the Terrorism Act 2006 from 14 days to 28 days” and reiterated to the UK government that, in connection with articles 9 and 14 of the ICCPR, the UK “should ensure that any terrorist suspect arrested should be promptly informed of any charge against him or her and tried within a reasonable time or released.”⁸

Further, Amnesty International’s monitoring worldwide of the right to a fair trial over several decades has shown that prolonged periods of pre-charge detention can create a context in which coercive conditions or abusive practices may be used to force detainees to make involuntary statements, such as confessions. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: “It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.”⁹ The organization considers that the likelihood of breaches of this Principle increases with the length of time people are held in police custody.

In this regard, it is worth noting that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, in commenting on the pre-charge detention periods in its report on its December 2007 visit to the UK, emphasised that “in the interests of the prevention of ill-treatment, the sooner a criminal suspect passes into the hands of a custodial authority which is functionally and institutionally separate from the police, the better” and that “for as long as a criminal suspect does remain in the custody of a law enforcement agency, stringent safeguards must be in place” including the requirement that the detained individual is “physically brought before a judicial authority at regular intervals”¹⁰. The Committee expressed concerns about practices that it considered to be inconsistent with these principles, at least some of which it found not to have been adequately addressed by the time of a subsequent report in December 2009.¹¹

EMERGENCY POWERS

Amnesty International understands from the public statements made by the UK government that the Bills are intended to serve as emergency legislation to enable the UK government to extend the maximum period of pre-charge detention of individuals suspected of terrorism-related offences to 28 days in response to an unspecified future “urgent situation” where the government regards 14 days as insufficient.¹² However, the validity of exceptional measures depends to a significant degree on the particular details of the “urgent situation” invoked to justify them. This fundamental concept is embodied throughout international human rights law. For instance, measures that infringe on human rights must be, among other things, proportionate to the specific problem the measures are to address; derogations in situations

of emergency must be limited to only those measures that are “strictly required by the exigencies of” the specific “situation” of emergency in which they are exceptionally enacted, a standard which again incorporates a requirement of proportionality.¹³

In light of this, Amnesty International believes that to embark on a formal procedure of parliamentary scrutiny of what is presented as exceptional legislation to extend periods of detention without charge in an emergency, but in the absence of any specific emergency or even detailed hypothetical scenarios, cannot by definition possibly engage in any meaningful or rational assessment of the proportionality of that period of detention to the situation invoked to justify it. To the contrary, embarking on such an exercise carries the risk that if and when the government actually asks Parliament to pass the bills into law, this supposed prior “scrutiny” will be invoked in hopes of persuading Parliament to decline to consider in any detail the proportionality of the proposed measures to the particular “urgent situation” in which they are said to become necessary. This concern is particularly heightened by the fact that the government appears to be asking this Joint Committee to consider the legislation as possibly acceptable in relation to a nearly-infinite spectrum of possible situations ranging from one in which the only justificatory factor might be that “multiple large and simultaneous investigations” are underway (which one might have assumed would be the case with UK counter-terrorism investigations at any ordinary time), through to one in which there are ongoing multiple attacks with weapons of mass destruction.

Amnesty International therefore suggests that the Joint Committee consider simply declining to conduct “parliamentary scrutiny” of these draft bills in the abstract: first, because this cannot be a rational exercise, at least from the point of view of their human-rights-consistency, in the absence of particular circumstances of emergency against which the measures contained in the bills could be meaningfully assessed; and second, on the basis that passing draft legislation through the committee processes in the absence of any meaningful specification of the circumstances in which the laws would be enacted can only be prejudicial to the proper processes to be followed in the event of an actual emergency in which legislative amendments might be proposed.

THE JUDICIAL AUTHORIZATION PROCESS FOR EXTENDING PRE-CHARGE DETENTION

Amnesty International would also like to draw the Joint Committee’s attention to weaknesses in the judicial authorization process for extending pre-charge detention beyond the ordinary limit of 48 hours. This process is in fact of concern whether the limit remains at the current 14 days, or is extended to 28 days and continues to be governed by Schedule 8 of the Terrorism Act 2000 which already provides for the judicial authorization process of continuing pre-charge detention for individuals suspected of terrorism-related offences. Amnesty International continues to have concerns that this process may not be compatible with the procedural guarantees of article 5(4) of the ECHR, as it fails to provide sufficient safeguards against arbitrary detention.

Of particular concern is that under Schedule 8 of the Terrorism Act 2000 the judge authorizing the detention can exclude the person who is being detained and his or her lawyer from any part of the hearing of the application for an extension of his or her detention.¹⁴ The judge may also grant permission to withhold information from the detained individual and his or her lawyer upon the request of the police and Crown Prosecution Service. Prolonged detention may therefore be authorized by a judge in the absence of the individual concerned

and their lawyer and largely on the basis of closed material, denying the detained person from effectively challenging the basis the government has invoked for his or her detention. In light of this Amnesty International believes that the judicial authorization process as currently provided for under Schedule 8 of the Terrorism Act 2000 may not be compatible with article 5(4) of the ECHR.¹⁵

CONCLUSION

Amnesty International opposes any extension of the number of days of pre-charge detention of individuals suspected of terrorism-related offences. Prolonged detention without charge or trial undermines human rights. The organization respectfully submits that the Joint Committee should decline as a matter of principle to engage in supposed scrutiny of measures (such as extension of pre-charge detention to 28 days) that have been presented by the Home Secretary as being designed for “exceptional” or “emergency” situations, but where parliamentary review is requested in the absence of any actual emergency or any specifically detailed definition of the circumstances in which the measures are proposed to be enacted. To do otherwise would seem inconsistent with fundamental principles of international human rights standards, as well as potentially prejudicial to the actual legislative processes needed to weigh the lawfulness of responses to any actual emergency.

ENDNOTES

- 1 See Home Office “Review of Counter-Terrorism and Security Powers: Terms of Reference”, 29 July 2010
<http://www.homeoffice.gov.uk/publications/counter-terrorism/ct-terms-of-ref/counter-terrorism-terms-of-ref>. The Home Secretary for the Home Department, Theresa May, presented the findings of the Review of Counter-terrorism and Security powers before parliament on 26 January 2011. The full report of the review, published the same day, can be accessed here
<http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/?view=Standard&pubID=853783>
- 2 Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations, January 2011, p. 13.
<http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary>. The Review was announced on 13 July 2010 (see Home Office Press Release, “Rapid review of counter-terrorism powers”
<http://homeoffice.gov.uk/media-centre/press-releases/counter-powers>), and its terms of reference subsequently published on 29 July 2010 (see <http://www.homeoffice.gov.uk/publications/counter-terrorism/ct-terms-of-ref/counter-terrorism-terms-of-ref?view=Html>).
- 3 On 20 January 2011, Damian Green, Minister for Immigration, announced to parliament that the government would not extend the order allowing a 28 day limit to hold individuals suspected of terrorism-related offences without charge, as a result the maximum limit of pre-charge detention would revert to 14 days as of 25 January 2011.
<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110120/debtext/110120-0001.htm#11012055000006>
- 4 The Protection of Freedoms Bill was published on 11 February 2011. Part 4, clause 57, of the Protection of Freedoms Bill provides for the permanent reduction of maximum detention period to 14 days through the following provisions:“(1) In paragraph 36(3)(b)(ii) of Schedule 8 to the Terrorism Act 2000 (maximum period of pre-charge detention for terrorist suspects) for “28 days” substitute “14 days” and “(2) Omit section 25 of the Terrorism Act 2006 (which provides for the 28 day limit in paragraph 36(3)(b)(ii) of Schedule 8 to the Act of 2000 to be 14 days subject to a power to raise it to 28 days).”
- 5 See Joint Committee on the Draft of Terrorist Suspects (Temporary Extension) Bills call for evidence:
<http://www.parliament.uk/documents/lords-committees/DTS4DraftcallforevidenceFINAL.pdf>
- 6 UK: The Prevention of Terrorism Bill: A grave threat to human rights and the rule of law in the UK, AI Index: EUR 45/005/2005; UK: Amnesty International's briefing on the draft Terrorism Bill 2005, AI Index: EUR 45/005/2005; UK: Amnesty International's briefing on the

Counter-Terrorism Bill 2008, AI Index: EUR 45/010/2008; UK: Submission for the review of counter-terrorism and security powers, AI Index: EUR 45/015/2010.

7 Article 9(2) of the International Covenant for Civil and Political Rights (ICCPR) requires that "Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be informed of any charges against him." Similarly, Article 5(2) of the European Convention on Human Rights (ECHR) requires that "Everyone who is arrested shall be informed promptly, in a language which he understands, the reasons for his arrest and of any charge against him". See also, the right to be promptly brought before a judicial authority (ICCPR article 9(3), ECHR article 5(3)), to effective access to a means of challenging the lawfulness of the detention (ICCPR article 9(4), ECHR article 5(4)), and the right to fair trial without undue delay (ICCPR article 14, ECHR article 6). See also Principle 10 of the UN Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Adopted by General Assembly Resolution 43/173 of 9 December 1988.

8 Human Rights Committee, Concluding Observations on the UK, 30 July 2008, UN Doc CCPR/C/GBR/CO/6.

9 UN Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Adopted by General Assembly Resolution 43/173 of 9 December 1988, Principle 21.

10 Report to the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 6 December 2007, date of report 1 October 2008, CPT/Inf (2008) 27.

11 Report on the visit carried out from 8 November 2008 to 1 December 2008, date of report 8 December 2009, CPT/Inf (2009) 30.

12 See the preface to the Draft Detention of Terrorist Suspects (Temporary Extension) Bills and the statement by the Home Secretary on the Counter-Terrorism and Security Powers Review, 26 January 2011,

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110126/debtext/110126-0001.htm#11012654000005>.

13 See ICCPR article 4; ECHR article 15; Human Rights Committee, General Comment no 29 on States of Emergency, CCPR/C/21/Rev.1/Add.11 (31 August 2001), adopted 24 July 2001, paragraphs 4 and 5: "A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. ... When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality. ... The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited "to the extent strictly required by the exigencies of the situation". This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation..." See also General Comment no 31 on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 6.

14 Schedule 8 of the Terrorism Act 2000, paragraph 33(3).

15 Amnesty International would note that specifying that a "senior judge" must make these decisions for extensions beyond 14 days, as the second of the two bills would do, would not address these concerns, which do not go to the qualifications of the individual making the decision but rather the potential for unfair procedures.

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