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WINTER LECTURE SERIES

TERRORIST LEGISLATION

IS OUR FREEDOM BEING PROTECTED OR ERODED?

[2 CPD POINTS]

**THURSDAY 18TH SEPTEMBER 2008
REGISTRATION 6.00PM
LECTURE WILL COMMENCE AT 6.30PM**

**Venue: ARUNDEL HOUSE
13-15 Arundel Street
Temple Place
London
WC2R 3DX**

Chair: Richard Ferguson QC

Speakers: Eamonn Sherry & Pavlos Panayi

**'THE FIGHT AGAINST TERRORISM – is our freedom being protected
or eroded?' – EAMONN SHERRY**

Prevention of terrorism legislation in the United Kingdom
and the effect on the criminal justice system

Introduction:

Condemning the terrorist attacks on September 11th 2001 the UN Security Council called upon all states to take the action necessary to stall such threats. The text of United Nations Security Council Resolution 1368 adopted on the 12th September 2001 stated that the attacks were marked as a threat to international peace and security and there were calls upon the international community to redouble their efforts to prevent and suppress terrorist acts.¹

To begin to consider the idea of fundamental liberties or freedoms specifically with reference to criminal justice, the right to liberty and security best expresses what we are seeking to protect. It is the balance between liberty and security that faces the greatest threat in the face of the war on terrorism and it is proposals for anti-terrorism legislation that frequently provide the greatest challenge to fundamental freedoms in the operation of the criminal justice system. Few would argue that security can be disregarded because of a possible threat to human rights:

'The real debate is not...about whether such laws are necessary, but about what kind there should be. The key lies in properly assessing both what kind of crisis the country faces and how four competing objectives can be simultaneously fulfilled: responsible management of

¹ See S/RES/1368 (2001).

an often incalculable risk, and compliance with democracy, the rule of law and human rights'²

The Prevention of Terrorism (Emergency Provisions) legislation (hereafter the PTA) was first enacted in the UK in 1974 following the Northern Ireland (Emergency Provisions) Act 1973 (hereafter the EPA). The EPA itself emerged from a review of the operation of the successive Special Powers Acts that had been operating in Northern Ireland since 1922 conducted by the Diplock Commission.³ The PTA's continued to be reviewed and then renewed until 2000. By the 1990s this legislation was part of the legislative fabric, despite the 'temporary' nature. The potential impact of having such legislation on the statute book on the criminal justice system is arguably two fold – firstly there is a 'normalisation' of exceptional powers by their very continuation, secondly there is the application of exceptional measures to 'circumstances for which they were never intended'.⁴ Since 2000 there have been four separate pieces of specific legislation as well as provisions made in other pieces of legislation which provide powers in the 'fight against terrorism'. There is currently a further counter-terrorism bill before Parliament.

The Terrorism Act 2000

The acknowledged aim of this legislation was to move the constituent provisions in the anti-terrorist bracket – largely drawn from the successive PTAs – from emergency law into normal law. In 2000 The Terrorism Act (TA 2000) was passed which reviewed and revised the UK's anti-terrorism laws, placing all relevant powers into one wide-ranging piece of permanent legislation. The increased powers apply to acts of terrorism internationally and are not confined to the actions of terrorists directed at the government or subjects of

² Steven Greer 'Human Rights and the struggle against Terrorism in the United Kingdom' (2008) E.H.R.L.R. 163 at p163.

³ The Diplock Commission reported in 1972 see 'Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland' Lord Diplock, 1972 (Cmnd 5185).

⁴ Hillyard 'Suspect Community', London 1993, at p263.

the UK.⁵ The TA 2000 received Royal Assent on the 20th of July 2000, coming fully into force by the 19th of February 2001. It was on the 19th of February that the previous anti-terrorism powers contained in the Prevention of Terrorism Act 1989 (PTA) and, for Northern Ireland, the Northern Ireland (Emergency Provisions) Act 1996 (EPA) were terminated (Section 2). Unlike the PTAs the TA 2000 is not subject to renewal.

The 2000 Act drew upon the UK's legislative experience in relation to terrorism and especially that passed since 1974. As well as the various incarnations of the PTA, 1978 saw the Suppression of Terrorism Act and 1996 the Prevention of Terrorism (Additional Powers) Act. In 1998 the Criminal Justice (Terrorism and Conspiracy) Act was passed in the aftermath of the Omagh bombing. Therefore, despite the successive PTAs there had still been 'gap filling' in these other pieces of legislation. When contemplating the TA 2000 the government appears to have had the explicit aim of attempting to avoid this piecemeal approach and be comprehensive:

'...there is a need to modernise and streamline the existing legislation, which will involved dispensing with some of the existing powers, retaining some as they are and strengthening others, in order to maximise the appropriateness and effectiveness of the UK's response to all forms of terrorism.'⁶

The reality of this aim must now be re-considered in the light of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001), Terrorism Acts in 2005 and 2006 and the current proposals for further counter-terrorism legislation.⁷

⁵ There were earlier provisions for the PTA to apply to international terrorism since 1984, but this did not include proscription of international organisations see below.

⁶ CM 4178 at p1.

⁷ This in itself cannot be considered without reference to terrorist attacks since the TA 2000 came into force.

The TA 2000 was preceded by a full inquiry into this country's anti-terrorist powers, carried out by Lord Lloyd of Berwick.⁸ The terms of reference were to consider the position where there may be lasting peace in Northern Ireland (given the background of the ceasefire that had then been in place for sometime) but taking into account the continuing threat from other kinds of terrorism. This exemplifies the shift towards international terrorism even prior to the attacks of September 11, 2001. The overall conclusion of the review was that once lasting peace has been established in Northern Ireland, there would be a continuing need for specific counter-terrorist legislation to deal with the threat of international and domestic terrorism. The report stated explicitly that 'the new legislation should be confined to what is needed in the way of permanent legislation to meet the foreseeable terrorist threat'. The report recommended that the power to proscribe terrorist organisations should be retained and extended to cover international terrorists. It was also suggested that there should be a new offence of membership of a terrorist organisation (whether or not proscribed) and a new offence of being concerned in the preparation of an act of terrorism. The government largely relied on the PTAs and the EPAs as a foundation for the Act in terms of the offences and powers that would apply. A summary of the main 'new' provisions is set out below. However, there were some significant changes; for example exclusion orders and provisions relating to internment were removed only to be effectively replaced in the legislation and then repealed again since (see below).

The Definition of Terrorism

Section 1 of the TA 2000 expanded the definition of terrorism.⁹ Terrorism became 'the use or threat of action where the use or threat is designed to influence the government or to intimidate the public or a section of the public and the use or threat is made for the purpose of advancing a political,

⁸ Inquiry into Legislation on terrorism Cm.3240 October 1996

⁹ The previous definition of terrorism in the PTA being as at section 20 - 'The use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear'.

religious or ideological cause or if the threat of action involves serious violence against a person, serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public or a section of the public or is designed to interfere with or seriously disrupt an electronic system'. Further, the use or threat of action which involves the use of firearms or explosives is terrorism whether or not the provision that such action is designed to influence the government or to intimidate the public or a section of the public is satisfied. The government is defined as the government of the United Kingdom, a part of the United Kingdom or of a country other than the United Kingdom. Coupled with this the reference to the public, person or property is a reference to that situated outside of the United Kingdom i.e. a country other than the United Kingdom.

Terrorist Property

Sections 24-31 provided the power to seize cash at borders, if there were reasonable ground for suspecting that the cash is intended to be used for terrorism. Any monies seized could be forfeited under section 28 on the civil standard of proof. These sections have since been repealed and replaced with more comprehensive provisions (see below).

Judicial authority to decide upon continued detention

The TA 2000 added a judicial procedure for authorising continued detention – previously this was within the ambit of the powers of the Home Secretary. Section 41 in conjunction with schedule 8 made provision for when an application is made for continued detention under the TA - a judicial officer must take the decision. The maximum period of detention in the TA was seven days; this was amended to fourteen days and later again. The concession of judicial intervention was clearly as a result of the impact of human rights jurisprudence and removed the need for a derogation to be entered in relation to this aspect of anti-terrorism law as was previously relied

on under the Prevention of Terrorism Act.¹⁰ This position was altered swiftly with the passing of the 2001 act.

Proscribed Organisations Appeal Commission

A Proscribed Organisations Appeal Commission was created by virtue of section 5 to consider and review applications to de-proscribe. Following an application to the Secretary of State to remove an organisation an appeal can be lodged. This body must allow an appeal if the decision to refuse to remove an organisation was not compatible with the principles of judicial review. There is also a further right of appeal beyond this body to the Court of Appeal. Following a decision by either appeal body the government must 'take steps' to enact that decision.¹¹

The Anti-terrorism, Crime and Security Act 2001

September 11th 2001 is the date immortalised as 'the day that changed the world'. When Parliament reconvened following the attacks on September 11, 2001 it was apparent that there would be a focus upon what would be appropriate action to be taken in the aftermath. At that time the threat was perceived, at least in the eyes of the public, to remain imminent and reports of intelligence as to threats directly to Britain ran rife in the press.

'...it is precisely in such circumstances as the aftermath of the attacks of 11 September that the protection of human rights will come under the greatest pressure from the demands of the state (and of public

¹⁰ See *Brogan v UK* [1989] 11 EHRR 117 – a breach of article 5(3) was found as the suspect had not been brought promptly before a judge or other officer authorised by law to exercise judicial power. The derogation entered by the UK following this decision, to allow the Secretary of State to continue to authorise detention, was lifted on the 19th of February 2001 when the TA 2000 came fully into force. The decision in *Brannigan and McBride v UK* [1994] 17 EHRR 539 had approved the derogation as being related to a public emergency.

¹¹ See also schedule 3 TA 2000 and SI 2001 No.2944

opinion) for greater security, and the demands placed upon Government agencies to be seen to be 'doing something'.¹²

On the 15th October 2001 the Home Secretary, David Blunkett, announced to the Commons the Government's intention to present a bill containing measures 'necessary to counter the threat from international terrorism'.¹³ The debate began with proposals for legislation – not with a review of whether existing powers, notably those in the Terrorism Act 2000, would be sufficient to deal with the new turn that terrorism had taken.

The bill itself was introduced in the House of Commons on the 12th of November 2001. On the 12th of November the Commons also were presented with The Human Rights Act 1998 (Designated Derogation) Order 2001, made on the 11th November and brought into force on the 13th November.¹⁴ The Order specified derogation from Article 5(1) of the European Convention on Human Rights (ECHR). The proposed derogation noted in the Order was justified directly by reference to the 'terrorist attacks in New York, Washington D.C. and Pennsylvania on 11th September 2001'.¹⁵

'There exists a terrorist threat to the United Kingdom from persons suspected in involvement in international terrorism. In particular there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups and who are a threat to the national security of the United Kingdom. As a result, a public emergency, within the

¹² Introduction to the Report of the Joint Committee on Human Rights published 14th November 2001

¹³ HC debates 15 October 2001 col 923

¹⁴ SI 2001/3644

¹⁵ *ibid.*

meaning of Article 15(1) of the Convention, exists in the United Kingdom.¹⁶

The Order went on to explain the existence of a need for extended detention of foreign nationals in prescribed circumstances as proposed in the Anti-terrorism, Crime and Security Bill. Extended detention is clearly in conflict with the terms of Article 5(1) of the ECHR and the necessary derogation under Article 15 was therefore made 'until further notice'.

The Bill was passed into the Anti-terrorism, Crime and Security Act 2001 on the 13th December 2001. Under eight weeks passed between introduction to Royal Assent for a far-reaching piece of legislation which seems set to endure for as long as the legislation passed under similar conditions in 1974. The attention inevitably focused, as it has in subsequent legislation, on provisions for extended detention and the derogation noted above. It is arguable that as a result other, very significant changes went through almost through the back door for example in relation to disclosure of information (see below).

The Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001) consists of fourteen parts, a glance through the headings of each part demonstrates that the Act appears to be a 'catch-all' piece of drafting covering a vast range of provisions relating to subjects as diverse as Weapons of Mass Destruction to Immigration and Asylum. Some of the main provisions are set out briefly below:

Part 1 – Terrorist Property/Part 2 – Freezing Orders

In the Terrorism Act 2000 the financing, preparing or carrying out of acts of terrorism were made into broad offences.¹⁷ ATCSA created new powers for the seizure/forfeiture of terrorist property which replaced s24-31 of the Terrorism Act 2000.

¹⁶ Op.cit 3

¹⁷ see s15-18 Terrorism Act 2000

Part 3 – Disclosure of Information

The government availed themselves of the opportunity to extend existing provisions relating to disclosure of information by public authorities in relation to *any criminal investigation* (Section 17). Similar provisions were dropped from the Criminal Justice and Police Bill 2001 because of opposition. This is a prime example of the use of legislation, justified with reference to an emergency situation, being used to provide powers that are far-reaching and liable to have an impact beyond what is strictly required. Despite opposition the provision remained wide-ranging and is not referable specifically to terrorism being framed in terms of 'any criminal investigation'.

Part 4 – Immigration and Asylum

Indefinite detention without charge of foreign nationals suspected of terrorist involvement

Of all the proposed measures in the original Bill it was this aspect that caused the most concern in the debates on the Bill. It is also this aspect that gave rise to the Derogation Order approved by Parliament as set out above. The Act provided that in prescribed circumstances a person reasonably suspected of being a terrorist¹⁸ (as certified by the Home Secretary) could be indefinitely kept in detention in this country without being charged with any offence. This provision was designed to cater for those persons suspected of involvement with 'terrorism' who cannot be charged and cannot be deported because of the overriding protections of the Refuge Convention that a person must not be removed to a country where they may face death or torture. There was a perceived lacuna in relation to those who cannot be prosecuted under any existing, or new, offence but are believed to pose a danger.

¹⁸ Originally this applied to 'International Terrorist' but the definition was changed to the all-encompassing 'terrorist' following amendments proposed to the government (see HL November 29th 2001 col 483 and HC December 12th 2001 col 916)

Section 21 provided that 'a terrorist' is defined as a person who (a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism, (b) is a member of or belongs to an international terrorist group, or (c) has links with an international terrorist group. Despite opposition in the consultation process the incredibly wide terms 'links' formed part of the legislation. Anyone fitting within this definition could be indefinitely detained under Section 23 of the Act if they cannot be prosecuted, deported or removed. At the time of the proposals particular concern was voiced because of the manner in which it was proposed the certification by the Home Secretary that a person fell within this category could be challenged. The 2001 Act established a right of appeal to the Special Immigration Appeal Commission (SIAC) where the hearing would be held 'In Camera'. The Appellant would be entitled to the services of an advocate who would be privy to security based information (having been 'approved') that the Appellant or any chosen representatives would not be entitled to hear or see (and of course therefore not be able to challenge). The Bill was amended to provide that the SIAC would be a 'superior court of record'; as a result of the SIAC is not subject to the protections provided by the ability to challenge a tribunal's decision through Judicial Review. Habeas Corpus is also excluded from this process. However, in *Secretary of State for the Home Department v Rehman*¹⁹ the House of Lords held that the SIAC could review decisions of the Home Secretary and therefore in cases under the Part 4 provisions of the Act could review certification decisions. This review could be based on the information prevailing at the time of the Home Secretary's decision as well as any new evidence.

It was provided that this aspect of the legislation would lapse automatically after five years unless expressly renewed by virtue of legislation. Further that it must be reviewed after 15 months and thereafter annually. The reviews were to be conducted by Lord Carlisle of Berriew. The provisions have now been

¹⁹ [2001] UKHL 47

repealed. Part 4 also dealt with fingerprints providing the power to retain the fingerprints of asylum and immigration applicants indefinitely. This was not restricted to those suspects of involvement with terrorism.

Part 5 – Race and Religion

This part of the government's proposals provoked perhaps the most open debate outside the two Houses; for example the celebrated letter of the comedian Rowan Atkinson to The Times relating to issues of freedom of speech. An offence of incitement to religious hatred was originally set out. This country's law relating to blasphemy had long been said to be out of date in order to reflect the growing multi-cultural and multi-faith society. However, the use of a Bill proposed to deal with a threat to security in the aftermath of September 11th was arguably not the place to review this area. This was accepted eventually and the offence removed from the final version of the Bill. However, the Act does widen racial hatred offences to include religious hatred. Offences that were previously 'racially aggravated' now become 'racially or religiously aggravated'.²⁰

Part 10 – Police Powers

Fingerprinting, searches, photographing suspects, face coverings (right to remove for ANY offence).

Part 11 – Retention of Communications Data

As in the debates on Part 3 of the Bill, concerns arose as to proposals for data held by internet and telephone service providers to be retained in relation to criminal investigations. The basis of the Bill's proposals comes from the powers set out in the Regulation of Investigatory Powers Act 2000 (RIPA) which allows data from such agencies to be retained in relation to issues of national security and crime prevention (as does the Electronic Communications Act 2000). The Bill proposed that the Home Secretary should issue a code of

²⁰ Clause 39. This applies to offences of assault, criminal damage, public order offences and harassment. It also provides for sentences to be increased by virtue of a finding of religious aggravation.

practice for use of these powers but could replace this code of practice which would be voluntary with mandatory directions as to retention. This provoked outcry particularly in the House of Lords. An amendment was passed to limit the powers proposed to retention of data re criminal activity directly or indirectly related to national security. The amendment was carried on the 13th December and the government eventually conceded. Again these provisions are not limited to suspected terrorism but instead apply generally to criminal investigations.

The Terrorism Act 2005

The main purpose of the 2005 Act was to replace Part 4 of the 2001 Act (indefinite detention), which had been found incompatible with the Human Rights Act. This act provided for a regime of control orders where the subjects do not need to be accused of any crime or told why they are under suspicion. Two forms of control orders were created that place obligations and restrictions on those suspected of terrorist activity. Firstly, the derogating control order (which requires a derogation from Article 5 ECHR where a public emergency is declared) and secondly, a non-derogating control order (aspects of which have been subsequently declared incompatible with the Human Rights Act due to the level of restrictions for example, twelve hour curfews are compatible with ECHR, eighteen hour curfews are not *Secretary of State for Home Department v JJ* [2007] UKHL 45. See also *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140). Control orders can be imposed where the Secretary of State considers it necessary to restrict the movements of those for whom there are reasonable grounds for suspecting that the person in question is or has been involved in terrorist-related activity in order to protect the public. See attached report from the Human Rights Committee under the ICCPR at paragraph 17 which raises concerns as to the control order regime suggesting a review to include ensuring that those subject to order can make challenges with access to legal counsel of their own choosing who can consider the evidence on which the order is made

and ensuring that those subjected to control orders are promptly charged with a criminal offence.²¹

The Terrorism Act 2006

The Terrorism Act 2006 was introduced in the aftermath of the London bombings in July 2005. The 2006 Act which came into force on 14 April 2006 created new offences such as the encouragement of terrorism (section 1), the preparation of terrorist acts (section 5) and training terrorists (section 8). It also specifically addressed the question of the length of time for which a terrorist suspect could be held without charge – the government initially attempted in 2006 to extend to 90-days. The Terrorism Act 2000 originally provided for up to seven days detention with judicial authorisation after the first two days. This was subsequently amended by Section 306 of the Criminal Justice Act 2003 which allow for judicially approved detention up to fourteen days. The 14 days limit was extended again in the 2006 Act to 28 days (see sections 23-25). Other provisions include powers relating to search warrants for all premises and the extension of the powers of prescription.

The Counter-Terrorism Bill 2008

The UK parliament's website's summary of the bill states that:

'The Bill contains a number of provisions which the Government states are designed to enhance counter-terrorism powers. The main elements of the bill are:

- A provision to allow the pre-charge detention of terrorist suspects to be extended from 28 days to 42 days in certain circumstances
- Changes to enable the post-charge questioning of terrorist suspects and the drawing of adverse inferences from silence

²¹ Human Rights Committee, Ninety-third session, 7-25 July 2008.

