CHARGE OR RELEASE

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

TERRORISM PRE-CHARGE DETENTION

COMPARATIVE LAW STUDY

November 2007

Jago Russell

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at: http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml

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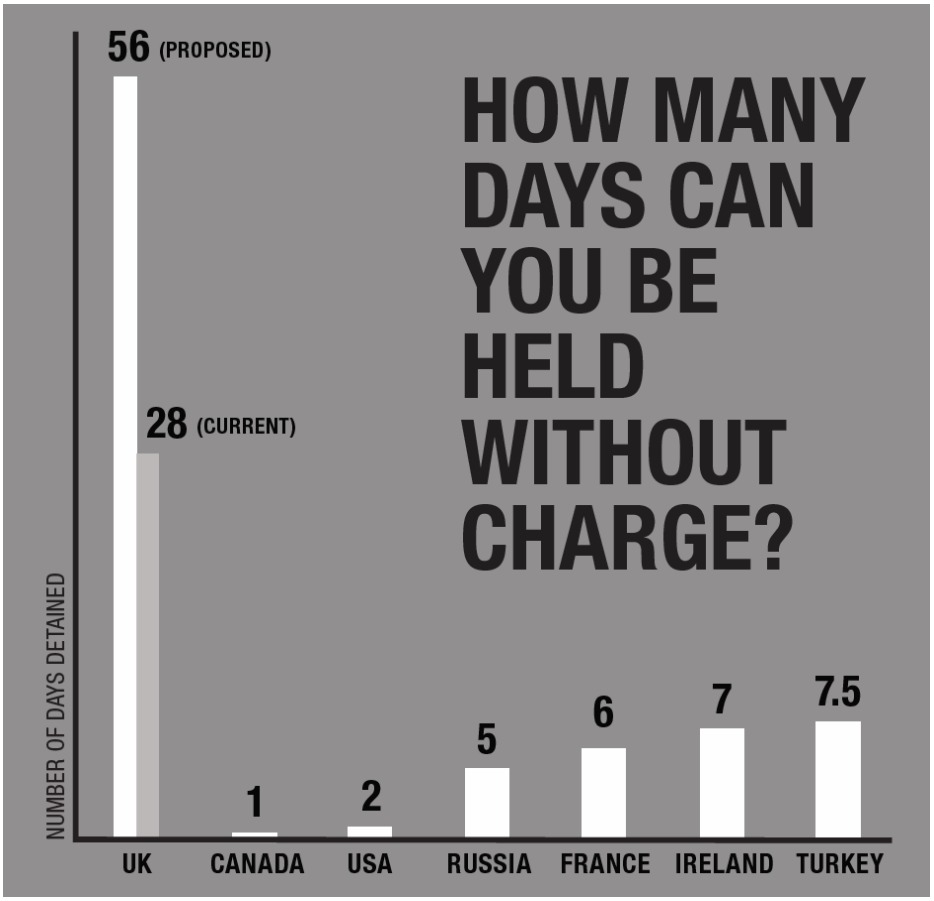
Jago Russell, Editor of the Report

EXECUTIVE SUMMARY

- This report demonstrates that the existing 28 day limit for pre-charge detention in the United Kingdom already far exceeds equivalent limits in other comparable democracies. These findings, based on advice and assistance from lawyers and academics in 15 countries around the world, provides further evidence that any increase beyond 28 days cannot be justified. How can our Government and some of our police argue that the UK needs to hold people for over a month when so many other countries manage with pre-charge detention periods of less than a week?



- There can be no doubt about the international nature of the threat from Al-Qaida-inspired terrorism. Like the United Kingdom, Spain, the US and Turkey have all suffered from terrorist attacks in recent years. Police in these countries must also face the same investigative challenges cited in support of longer pre-charge detention - the greater complexity of terror plots, their international dimension and the need to intervene and arrest

suspects earlier. Despite this, the legal limit imposed on the pre-charge detention of terror suspects in these countries is much shorter than in the UK. The US constitution limits pre-charge detention to 48 hours, the closest equivalent to pre-charge detention in Spain is limited to five days and Turkish criminal law only permits 7.5 days' detention before charge.

- Any extension to pre-charge detention would put the UK further out of line with comparable democracies around the world. Not only does this further undermine arguments that we really need to hold people for over a month without charge, it could also have broader implications. Some states, and some individuals seeking to radicalise Muslim youths, might use the disparity to undermine the UK's claim to civility and moral authority. Other governments might see this as a green light to pass their own unjust and over-broad measures against those they consider a threat.
- No two legal systems are exactly the same and comparisons are not always simple but this does not mean we should shut our eyes to overseas experience. The UK's counter-terror laws do not exist in a vacuum. Difficulties in drawing comparisons can, indeed, be over-played. Some countries have very similar criminal justice systems to our own, making comparisons relatively straightforward. None of these permits pre-charge detention for anything like 28 days. In countries that do not have the exact concept of "pre-charge detention", like France and Germany, we asked lawyers qualified in those jurisdictions to identify the closest equivalent. We found that the closest equivalent to a charge must happen within a matter of days; not months or years as Sir Ian Blair and others have suggested.
- Detaining people for over a month without charge would inevitably lead to injustice, would undermine our ability to fight terrorism by winning hearts and minds and would fly in the face of the British tradition of liberty and justice. This report presents further evidence that this dangerous and potentially counter-productive step is unnecessary. Liberty has identified better ways of meeting all of the arguments for longer pre-charge detention. Many of these more proportionate alternatives have not yet even been tried.

INTRODUCTION

The current threat from Al-Qaida-inspired terrorism is truly international in scope. Since 2001 Islamist terrorists have taken hundreds of lives in the UK, Spain, the US, Turkey and elsewhere. Governments around the world have rightly sought to protect their citizens from these threats. Some have tried to do so while respecting the framework of basic rights and freedoms drawn up by the international community after the horrors of the Holocaust. Sadly, others have been far too willing to cast-aside these basic democratic values as inconvenient "rules" of an outdated "game", in pursuit of a so-called "new normal". Examples of unjust and counter-productive policies from around the world abound: Guantanamo Bay, secret prisons and extraordinary rendition, and, in the UK, control orders, the internment of foreign nationals in Belmarsh prison and, most recently, proposals to detain terror suspects for over a month without formally accusing them of any criminal offence.

Under UK law people suspected of involvement in terrorism can already be detained for 28 days (increased from 14 days in 2006) before they must be either charged with an offence or released.[1] The Government has recently announced its intention to extend the maximum period of pre-charge detention beyond 28 days.[2] In this report we consider how the UK law on pre-charge detention and the current proposals to change it compare with the law in other comparable democracies. Have other countries, facing the same threat from Al-Qaida-inspired terrorism, also resorted to lengthy pre-charge detention in order to tackle this threat? Before discussing our findings, we consider two preliminary questions. First, why should we care about the law in other countries? Secondly, is it really possible to draw worthwhile comparisons when legal systems differ so much?

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[1] Schedule 8 of the Terrorism Act 2000, as amended by the Terrorism Act 2006.

[2] Cf: http://security.homeoffice.gov.uk/news-publications/news-speeches/new-ct-strategy

Relevance of Comparisons

Few would doubt that detaining people for over a month without charge is a grave matter. It would have serious implications for the individuals that are directly affected, for the ability of the UK to fight terrorism by winning hearts and minds, and, more broadly, for the tradition of liberty and justice in Britain. It is not, therefore, surprising that parliamentarians of all parties have demanded that clear and compelling evidence is produced as to the necessity of the new proposals before Parliament is asked to vote on this issue. The findings in this report are central to the question of whether further extensions to pre-charge detention in the UK can really be justified.

Other countries face similar threats to the UK from Islamist terrorism. They also face the same difficulties the UK Government has cited in support of allowing longer than 28 days' pre-charge detention: the need to intervene early given the scale of the threat, the absence of warnings before an attack and the use of suicide bombers; and increasing complexity in terms of material seized, the use of false identities and international networks. Given these similarities, a consideration of how other comparable democracies have responded to these challenges is a useful guide to the necessity and proportionality of the UK Government's proposed response. Can the UK's police truly need the power to detain suspects for over a month without charge when the police in other jurisdictions are managing with far shorter time limits?

The question of how UK law compares with the law in other comparable democracies could also have broader implications. If UK law is significantly more repressive than the law in other countries, some will use the disparity to question Britain's moral authority. One can imagine dictators like Mugabe using such a disparity to undermine British attempts to persuade the international community to condemn Zimbabwe's human rights record.[3] One

[3] In his address to the 2007 Labour Party Conference, for example, the Prime Minister Gordon Brown stated that "You know, there is a golden thread of common humanity that across nations and faiths binds us together and it can light the darkest corners of the world.

could also imagine those seeking to radicalise young Muslims pointing to this policy to argue that the UK is a country without values and whose law is unjust. We have no doubt that people around the world are looking to see what decision the UK takes on this question of pre-charge detention. If the limit is extended, some states will see this as a green light for them to take more severe action against groups and individuals they consider a threat. Surely, established democracies like the UK should be setting a positive example, demonstrating to newly emerging democracies and non-democratic states that the best way to counter our even the gravest threats should be tackled without sacrificing our basic rights and freedoms.

Are Worthwhile Comparisons Possible?

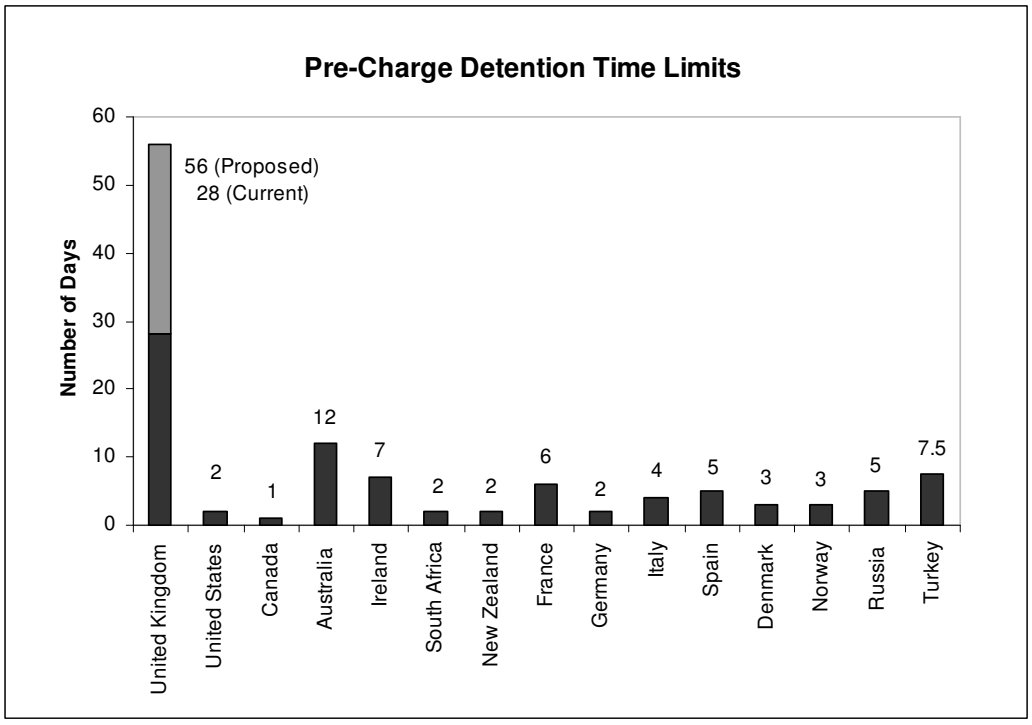
Liberty has obtained legal advice from qualified lawyers and academics in all of the jurisdictions covered in this report. We asked for short notes of advice on how long a person suspected of committing a terrorist offence can be detained before they are either charged or released without charge. The analysis contained and the conclusions reached in the report are based on this advice. Details of the law firms and individual practitioners and academics that provided this advice and assistance are contained in **Annex 2**.

It is, of course, true that no two legal systems are exactly the same and drawing comparisons between the laws in different countries inevitably poses some difficulties. These difficulties can, however, be overplayed. It should for example be remembered that the British common law system has been exported around the world and forms the basis of the legal systems in a number of other countries including the United States, Canada, Australia, New Zealand and Ireland. Some of these countries have exact equivalents to pre-charge detention making comparisons relatively straight-forward.

And the message should go out to anyone facing persecution anywhere from Burma to Zimbabwe: human rights are universal and no injustice can last forever." In response to Prime Minister Brown's attempts to encourage the EU to take action against the Mugabe regime Zimbabwe has, for example, commented: ""Gordon Brown is not even qualified to talk to us on human rights and as you can see he failed his own country's internal democracy in Britain." ("Zimbabwe urges EU to tell Brown to "shut up" on rights", *Daily Mirror,* 15th October 2007)

Comparisons are, however, more difficult with some of the UK's geographically closest neighbours. A number of European countries like France, Italy, Germany and Spain have inquisitorial civil law systems with no concept of "pre-charge detention". Notwithstanding this, it is possible to make some meaningful comparisons by identifying the closest equivalent to pre-charge detention in these jurisdictions. At what point does the suspect learn the precise nature of the allegations against them, when are prosecutions formally initiated, and at what point does the test for detention change from police suspicion to evidence and proof considered by a judge? Liberty did not itself seek to identify the closest equivalent to pre-charge detention in other countries. Instead, we asked lawyers qualified in those jurisdictions to judge this for themselves. To enable them to do this we explained the significance of "charge" in the UK system and described how this fits within the UK's criminal justice process (note reproduced in **Annex 1**).

OVERVIEW OF FINDINGS



The graph above provides a visual overview of the maximum number of days a person can be detained without charge in the 15 countries surveyed. A detailed description of our findings is contained in Part 2 of this report. The following are brief summaries of those findings:

United Kingdom

In the UK the maximum period of pre-charge detention in terrorism cases is 28 days. It is currently proposed to increase this, perhaps to 56 days.

United States

Under U.S. Federal law, the maximum period of pre-charge detention is 48 hours. This limit derives from the Fourth Amendment to the US Constitution.

Canada

In Canada, arrests are generally made pursuant to a warrant. Charges are laid before the arrest warrant is even issued and the arrest warrant must include details of the charges. Arrest without warrant is available in limited circumstances. A person arrested without warrant must be charged within 24 hours.

Australia

In Australia the maximum period of pre-charge detention for the purposes of investigating a terrorism offence is 24 hours. “Dead time” (including time taken to transport a suspect) is not included within this 24 hour period but during “dead time” no questioning is permitted. The first and only case in which an extended period of “dead time” was authorised by a magistrate, it led to a person being detained for a total of 12 days without charge. In practice we understand that this is likely to be the longest that would be permitted and have, therefore, treated this as the legal maximum. Preventative detention is also permitted in Australia for up to 14 days. These preventative detention powers have not, however, been used and differ from pre-charge detention as questioning is not allowed. Finally, although not part of the criminal justice process, the Australian Security Intelligence Organisation has the power to detain people for up to 7 days without charge for the purposes of questioning.

Ireland

In general the maximum period of pre-charge detention is one day. In the terrorism context the maximum is three days. In the context of gangland-type offences (which could cross over into terrorism) the maximum is seven days.

South Africa

In South Africa the maximum period of pre-charge detention in terrorism cases is 48 hours.

New Zealand

In New Zealand persons arrested must be charged “promptly”. There is no fixed definition of “prompt” but case law on this question indicates that pre-charge detention of more than 48 hours would not be considered “prompt”.

France

In France, the maximum period of pre-charge detention in terrorism cases is six days.

Germany

The closest equivalent to pre-charge detention in Germany is provisional police custody, the period prior to a formal “warrant of arrest” being issued by a court. A person held in provisional police custody must be set free at the end of the day following the day on which s/he was arrested. The longest possible period of provisional police detention would, therefore, be 48 hours.

Italy

In Italy the maximum period of pre-charge detention is four days.

Spain

The closest equivalent to pre-charge detention in Spain is preventative arrest. In relation to suspected terrorist offences, the maximum period for which a person can be detained under these powers, before being released or handed over to the judicial authorities, is five days.

Denmark

In Denmark the maximum period of pre-charge detention in terrorism cases is three days.

Norway

In Norway the maximum period of pre-charge detention in terrorism cases is three days.

Russia

In Russia the maximum period of pre-charge detention is five days.

Turkey

The maximum period of pre-charge detention in terrorism cases in Turkey is seven days and 12 hours. The 12 hour period is the maximum that is permitted for the transfer of the suspect.

CONCLUDING OBSERVATIONS

All of the Government's arguments for longer pre-charge detention apply equally to the other countries surveyed in this report. Many other countries around the world face real and severe threats from Al-Qaida-inspired terrorism. Other countries have, like us, suffered horrific loss of life and injury in suicide bombings. Like the 7/7 London bombers, those responsible for the 9/11 attacks on the US and the Madrid train bombings in 2004 caused mass casualties and gave no prior warning. It is not only the British police which have a duty to protect the public from these threats and to intervene early to limit the risk of attacks taking place. Neither are the UK police alone in having to deal with the challenge of increasingly complex terror plots, huge amounts of evidence, international networks and the use of false identities.

The UK Government's response has been to argue that the police should be given the power to hold suspects for over a month without any charge. But do the UK's police really need these powers? This report presents further

evidence that they do not. None of the other countries surveyed have found lengthy pre-charge detention necessary in order to deal with the threats and challenges from international terrorism. Indeed, none allows their police to hold suspects for anywhere near the 28 days currently permitted in the UK. Despite being a major terrorist target the United States, for example, allows only two days' pre-charge detention. Spain, another recent target of terrorist attacks, only allows its police to detain suspects for five days before the equivalent of charge. These significantly shorter pre-charge detention periods have not prevented the successful charge and conviction of terrorists as the recent conviction of 21 individuals, involved in the 2004 Madrid train bombings, illustrates. How can our Government sustain the argument that the UK police need over a month when so many other countries manage with pre-charge detention periods of less than a week?

No extension beyond 28 days can be justified. Indeed, the police have themselves stated that the existing limit has not hampered their investigations and that more time is not currently needed.[4] Liberty has identified better ways of meeting all of the arguments for longer pre-charge detention. These include offences of preparing to commit an act of terrorism, lifting the bar on the use of intercept evidence in criminal trials, allowing post-charge questioning under close judicial supervision and giving the police greater resources. These alternatives should be tried out before Parliament is asked to consider new laws allowing the police to hold a person without any charge for over a month. A brief summary of these alternatives is contained in **Annex 3** to this report.

Liberty has also shown how existing emergency powers could be used to deal with the kind of nightmare scenario, involving multiple terror plots and large numbers of suspects, sometimes used to argue for more than 28 days. The chillingly broad powers in the Civil Contingencies Act 2004 would allow longer

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[4] Instead, it is argued by some that Parliament should agree to a period of longer than 28 days as a precautionary measure (cf Evidence by Sir Ian Blair to the Home Affairs Select Committee on 19th October 2007). After the last attempt to increase pre-charge detention in 2005, the Home Affairs Select Committee in fact noted that the police had failed to provide an evidence-based case for detention beyond 28 days (See House of Commons Home Affairs Select Committee – *Terrorism Detention Powers: Fourth Report to Session 2005-2006, Volume 1*, 20 June 2006, Section 4, pg.45, Paragraph 143)

pre-charge detention as a temporary and urgent response to a specific emergency like this. These powers could only be triggered when and if the need really arose and would be subject to parliamentary and judicial scrutiny.

Longer pre-charge detention is not only unnecessary; it is also unjust and potentially counter-productive. Allowing suspects to be held for over a month without charge would inevitably lead to injustice and would fly in the face of our basic democratic principles of justice, fairness and liberty. It would have significant implications for the individuals affected and would certainly not help to win hearts and minds. Even if released without charge, after over a month in police custody the suspect may well have lost their job, home and the trust of their community. After such treatment it would be no surprise if the suspect and their friends and family were less willing to assist the police and intelligence services with their investigations. Some may even be more vulnerable to radicalisation.

PART 2
DETAILED ANALYSIS

This section provides a more detailed explanation of the law relating to pre-charge detention in each of the countries mentioned above. This provides a more detailed description of how the final figures for each country have been calculated.

1. UNITED KINGDOM

Summary

In the United Kingdom the maximum period of pre-charge detention in terrorism cases is 28 days.[5]

The Current Law

Schedule 8 of the Terrorism Act 2000 governs the pre-charge detention of those arrested on suspicion of being a terrorist.[6] Legal limitations on the period of time a terrorist suspect can be detained prior to charge run from the time of arrest.[7]

After arrest, the suspect must be taken to a police station as soon as possible. On arrival at the police station, the detention of the suspect must be reviewed by a police officer that is not directly involved in the investigation. Reviews must also take place at 12 hourly intervals thereafter. At the review the officer may only authorise a suspect's continued detention if, inter alia, s/he is satisfied that this is necessary: (i) to obtain relevant evidence (i.e. by

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[5] Terrorism Act 2000 (TA), Schedule 8, para 36(3)(b)(ii) as amended by Terrorism Act 2006, S.23

[6] As amended by the Terrorism Act 2006. For other criminal investigations pre-charge detention is governed by Police and Criminal Evidence Act 1984 allowing detention of up to 96 hours.

[7] TA, S.41(3) and Schedule 8, para 36(3B). The police have the power to arrest anyone they suspect of being a terrorist without a judicial warrant (TA, S.41)

questioning the suspect), (ii) to preserve relevant evidence or (iii) to make a decision about the deportation or charging of the suspect.[8] Notes must be kept of the reviews and suspects and their lawyers have the right to make representations.[9]

After 48 hours, a judicial warrant is required to keep a suspect in detention without charge.[10] A judge can only issue a warrant if satisfied that there are reasonable grounds to believe that (a) it is necessary, *inter alia*, to obtain or preserve relevant evidence and (b) that the investigation is being conducted diligently and expeditiously.[11] The first judicial warrant would normally authorise detention for up to a maximum of seven days.[12] Further judicial warrants may then be issued, each extending the period by up to seven days. Warrants authorising detention beyond 14 days can only be made by a senior judge. A judicial warrant may not authorise detention for more than 28 days from the time of arrest, meaning that at this point a suspect must be either charged or released.[13] Suspects have the right to be notified of the application for a warrant of extended detention and the right to make representations to the judge.[14]

Background and Developments

The power to hold terror suspects for up to 28 days has only been in place since 26th July 2006.[15] Parliament must vote to renew this power on an annual

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[8] TA, Schedule 8, para 23

[9] TA, Schedule 8, paras 26 & 28

[10] TA, S.41(3).

[11] TA, Schedule 8, para 32

[12] TA, Schedule 8, para 29(3)

[13] TA, Schedule 8, para 36(3)(b)(ii)

[14] TA, Schedule 8, paras 31 & 33. It should, however, be noted that this is not the equivalent of a true adversarial hearing as the suspect does not have any charges to answer and may well not know the evidence against them.

[15] As a result of the Terrorism Act 2006, S.23(1)&(3)(a). Prior to this the maximum was 14 days.

basis and has done so in 2007.[16] 28 days' detention replaced 14 days' detention, which itself had been increased from 7 days by the Criminal Justice Act 2003.

Four days' detention remains the limit in the UK for any criminal offences unrelated to terrorism.[17]

The power to hold people for up to 28 days has been used in connection with recent terrorist investigations. Between the time the power came into force and October 2007, there were been 204 arrests under the Terrorism Act. 11 suspects were detained for more than 14 days. Eight of these were charged and three were released without charge.[18]

The current legal regime in the United Kingdom is not subject to any challenges in the courts at present. The Government has, however, recently announced its intention to extend the maximum period of detention beyond 28 days.[19] It is expected to bring forward new legislation this autumn.

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[16] Terrorism Act 2006, S.25. Renewed by the Terrorism Act 2006 (Disapplication of Section 25) Order 2007, SI 2007/2181

[17] Section 44 Police and Criminal Evidence Act 1984

[18] Oral Evidence to Home Affairs Select Committee, 19th October 2007, Q 7 (Mr Peter Clarke CVO OBE QPM)

[19] Cf: http://security.homeoffice.gov.uk/news-publications/news-speeches/new-ct-strategy

2. UNITED STATES

Summary

Under U.S. Federal law the maximum period of pre-charge detention for criminal suspects, including those suspected of committing terrorist offences, is 48 hours.

The Current Law[20]

The U.S. Supreme Court has held that the Fourth Amendment to the Constitution imposes certain limits on the detention of persons prior to a formal charge.[21] In County of *Riverside v. McLaughlin*[22], the Court determined that detention, without a specific charge on the basis of probable cause, was constitutionally permissible for less than 48 hours.[23] Thus, a judicial charge on the basis of probable cause within 48 hours of arrest would not constitute an "unreasonable" seizure period under the Fourth Amendment to the Constitution.[24]

As a general rule, a person brought in for questioning may therefore leave custody after 48 hours if that person is not charged within that period. The delineation of 48 hours was made to provide a degree of certainty for law enforcement officers and state courts desiring to establish procedures safely within constitutional bounds.[25] However, the Constitution does not expressly compel a specific time limit and the Court recognized that a probable cause

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20 We have provided an overview of key U.S. laws and statutes pertinent to this question. However, for a more detailed comparative analysis of U.S. law concerning pre-charge detention periods, see Ari D. MacKinnon, *Counterterrorism and Checks and Balances: the Spanish and American Examples*, 82 N.Y.U. L. Rev. 602 (May 2007).

21 See *Gerstein v. Pugh*, 420 U.S. 103, 125 (holding that States "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty…by a judicial officer either before or promptly after arrest.").

22 *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

23 Ibid at 56

24 Ibid

25 Ibid

hearing may be permissible after 48 hours due to "bona fide emergency or other extraordinary circumstance".[26]

Other Powers

In the wake of the terrorist attacks on 9/11 the U.S. Congress granted the US Executive specific statutory authority to extend pre-charge detention periods for aliens suspected of terrorism. The USA PATRIOT Act allows the U.S. Attorney General to detain such aliens without charge for a period of seven days.[27] At the expiration of the seven days, the person must be either charged or removal proceedings must be commenced.[28] We do not consider detention under these powers to be equivalent to pre-charge detention in the UK as it is restricted to foreign nationals.

Executive authorities have also detained persons suspected of terrorism under the auspices of immigration law and executive "war powers" privilege.[29] These powers are not, however, equivalent to pre-charge detention in the UK as they are not part of the criminal justice system. Under the material witness statute law enforcement authorities may detain persons, without a criminal charge, who possess information material to criminal proceedings and who may otherwise flee the country.[30] The detention period under this statute is ten days.

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26 Id. at 56-57.

27 8 U.S.C. § 1226(a)(5).

28 8 U.S.C. § 1226(a) (6)-(7). (Sup. III 2003) However, the Attorney General's decision is reviewable every six months.

29 82 N.Y.U. L. Rev. 602, 623, fns 99 and 100 (citing the Bail Reform Act of 1984 § 203(a), 18 U.S.C. § 3144(a) (2000). Both immigration law and executive "war powers" privilege were used prior to 9/11 conflict to detain persons for periods longer than 48 hours (e.g. Supreme Court Hears Arguments in Indefinite Detention Cases, 78 Interpreter Releases 397, 397 (2001) (noting that 3000 no citizens were in indefinite preventative detention in 2001 prior to 9/11))

30 18 U.S.C. § 3144 (2000).

3. Canada

Summary

In Canada arrests are made pursuant to a warrant and that warrant is only issued by a judge after an "information" is sworn. Through this process charges are laid before the arrest warrant is issued and the arrest warrant itself must also include details of the charges. Arrest without warrant is available in limited circumstances, most notably where a peace officer has reasonable and probable cause to believe a person is guilty of an indictable offence. Because a person arrested with or without warrant must be brought before a judge without unreasonable delay and no later than 24 hours after the arrest (unless a judge is unavailable), a person arrested without warrant will be charged within that period. Police may continue their investigation after an arrest but the obligation to bring the person before a judge as soon as possible and no later than 24 hours after the arrest persists.

The Current Law

Under the Criminal Code, peace officers may make arrests pursuant to a warrant or, in limited circumstances, without a warrant. Warrants are typically issued by a judge in response to an "information" – a complaint of criminal conduct about a person.[31] They are, in other words, retrospective, concerning a completed crime and designed generally to forestall a failure by the accused to appear before a court. Charges are laid prior to the issuance of a warrant. Indeed, the warrant must "set out briefly the offence in respect of which the accused is charged".[32]

Warrant-less arrest is also possible in limited circumstances. For instance, under the Criminal Code, peace officers who witness a breach of the peace may arrest persons they find "committing" a breach of the peace or who, on

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[31] Criminal Code, R.S.C. 1985, c. C-46, s. 504 *et seq*.

[32] Criminal Code, s.511.

reasonable grounds, "the peace officer believes is about to join in or renew the breach of the peace."[33] Because, on the express terms of this section, there must be a breach of the peace before the arrest power arises, the arrest here is only modestly pre-emptive. A peace officer may also arrest without warrant a person s/he finds committing a crime. There is a pre-emptive aspect to this power: the officer may arrest a person who has committed an indictable crime or who, on reasonable (and probable) grounds, the officer believes is about to commit an indictable offence.[34]

A person detained by a peace officer must be brought before a justice without unreasonable delay and no later than within 24 hours of the arrest.[35] Where a justice is not available in that period, the Criminal Code specifies that the "person shall be taken before a justice as soon as possible".[36] An accused arrested without a warrant (and thus, for whom no information would generally have been sworn) will be formally charged prior to this court appearance.

Once before the justice, control over the accused shifts to the courts, and the regular criminal law arraignment and bail provisions apply. An accused denied bail is detained pending the outcome of the criminal proceedings. In practice, this may be a lengthy incarceration, but it arises from the inevitable time it takes to complete a judicial process that adjudicates the guilt of the individual

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33 Criminal Code, s. 31. Some courts have held that a pre-emptive common law arrest power also persists in parallel to the *Criminal Code* to prevent breaches of the peace. *Brown v. Regional Municipality of Durham*, (1998), 43 O.R. (3d) 223 (Ont. CA).

34 Criminal Code, s. 495 (emphasis added). The Supreme Court's constitutional jurisprudence grafts on an objective test to this subjective belief by the peace officer: "objectively there must exist reasonable and probable grounds for the warrantless arrest to be legal." *R. v. Feeney*, [1997] 2 S.C.R. 13 at para. 24. Note that there is a concept in Canada of investigative detention short of arrest – basically a stopping of a suspect for the purpose of an incidental search. The Supreme Court has concluded that this sort of detention may be constitutional depending "on the 'totality of the circumstances' underlying the officer's suspicion that the detention of a particular individual is 'reasonably necessary'. If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. …[S]earches will only be permitted where the officer believes on reasonable grounds that his/her safety, or that of others, is at risk." *R. v. Clayton*, 2007 SCC 32 at para. 30. This power of investigative detention has been confined in practice to checkpoint style and other types of street stops.

35 Criminal Code, s. 503 *et seq*.

36 Criminal Code, subs. 503(1).

in question and this detention is taken into account as time-served in any subsequent criminal sentence.

In sum, the concept of "pre-charge detention" in Canada exists only in warrant-less arrests and will be less than 24 hours, except in the unusual circumstances in which a judge is unavailable within that period. The police are entitled to continue their investigation during this period to confirm the reasonable and probable suspicion that justified a warrantless arrest. However, this investigative objective does not vitiate the obligation to bring the accused before a judge without unreasonable delay within 24 hours of the arrest. Whether a delay generated by a continuing investigation is "unreasonable" will depend on all the circumstances and the police cannot assume an automatic entitlement to 24 hours of additional time for investigation after an arrest.[37]

Special Law between December 2001 and March 2007

Between 2001 and March 2007 Canadian law permitted a limited form of preventative detention in terrorism cases. This system lowered the threshold for an initial arrest. However, even this power did not truly constitute an attenuated form of pre-charge detention since even when the person was detained without warrant the peace officer was obliged to swear an "information" as soon as possible after the detention. Parliament allowed this provision to sunset in March 2007 despite the objections of the Canadian Government.

Prior to the expiry of this provision the Canadian Criminal Code permitted a peace officer (with the consent of the federal attorney general) to lay an information before a judge if that peace officer believed on reasonable grounds that a "terrorist activity" would be carried out and suspected on reasonable grounds that the imposition of recognizance with conditions (known colloquially as a peace bond) or arrest on the person was needed to

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[37] See, *e.g.*, *R. v. Storrey*, [1990] 1 S.C.R. 241.

prevent that terrorist activity.[38] Terrorist activity is a carefully (but broadly) defined term. The judge could then require that the person named in the information appear in court.

In exigent circumstances, a person could be arrested without warrant. Subsequently an "information" was to be laid and then the person was to be brought before a judge without delay and within 24 hours, unless a judge was unavailable. In the latter instance the person was to be brought before a judge "as soon as possible."

Whether arrested with or without warrant when the person ultimately appeared before the judge the judge was to order the person's release unless the peace officer showed cause for the detention. Among the grounds for continued detention was the likelihood that a terrorist activity would be carried out if the person was released. The judge could then adjourn a full hearing on the peace bond issue but if the person was not released this adjournment could be for no longer than 48 hours.

The effect of these provisions was theoretically to enable a preventative detention on suspicion of terrorist activity for an initial period of up to 24 hours (and perhaps longer if a judge was not available within that period) in warrantless arrest cases and then, where the judge agreed to an adjournment but did not release the detainee, detention for another 48 hours. Preventative arrest could endure, in other words, for some three days (in warrantless cases) and 48 hours (in warrant cases).

When a full hearing was held the judge was to consider whether the peace officer had reasonable grounds for his/her suspicion. If so the judge could order the person to enter into a peace bond of up to 12 months' duration, a

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[38] Criminal Code, s. 83.3.

limitation on liberty equivalent to the still existing peace bond power found elsewhere in the Criminal Code.[39]

Prior to its expiry in March 2007 this preventative detention power had never been used. In October the Canadian Government introduced a bill in Parliament that, if passed, would restore the preventative detention power.

[39] Criminal Code, s.810.01. Recognizance with conditions/peace bonds are the closest approximation to UK "control orders" in Canadian criminal law.

4. AUSTRALIA

Summary

In Australia the maximum period of pre-charge detention for the purposes of investigating a terrorism offence is 24 hours. “Dead time” (discussed below) is not, however, included within this 24 hour period. During “dead time” no questioning is permitted. The first and only case in which an extended period of dead time was authorised by a magistrate it led to a person being detained for a total of 12 days without charge. We consider this to be the maximum period of pre-charge detention that would in practice be allowed in Australia.

Pre-Charge Detention under Criminal Law

A person arrested for a terrorism offence can be detained for no more than four hours from the time of arrest for the purpose of investigating whether the person committed that offence, or another terrorism offence the investigating official reasonably suspects the person to have committed.[40] The detainee must be released within the period or brought before a judicial officer.

In terrorism cases the pre-charge detention period can be extended a number of times to a total of 24 hours on application by the investigating official to a judicial officer, normally a magistrate.[41] The application can be made by telephone and the detainee or their lawyer can make representations to the judicial officer. The judicial officer can extend the period if satisfied that:

- the offence is a terrorism offence;
- further detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence;

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[40] s23CA, Crimes Act 1914. Two hours for a minor or Aboriginal person or Torres Strait Islander.

[41] s23DA Crimes Act 1914. The limit 12 hours for other serious offences: s23D Crimes Act 1914

- the investigation into the offence is being conducted properly and without delay; and
- the person or their lawyer has been given the opportunity to make representations about the application.

"Dead time" is not included in the periods referred to above. Accordingly, dead time can allow a person to be detained longer than 24 hours but the total amount of time spent questioning the person cannot be longer than 24 hours.[42] There is no statutory cap on the maximum amount of "dead time" that can be authorised. Such "dead time" includes time:

- for reasonable transportation time from place of arrest to investigation place;
- for the detainee to communicate with a lawyer, friend, relative, interpreter, or to allow the time for such a person to arrive at the investigation place;
- for medical attention, because the detainee is intoxicated or to allow reasonable time for detainee to rest or recuperate;
- for an ID parade;
- for prescribed procedures to determine age;
- for applying for extensions of questioning time ;
- for applying for forensic procedures, informing detainee of matters prior to consenting to a forensic procedure, or carrying out forensic procedures; and
- for any reasonable time:
    - during which the questioning of the person is reasonably suspended or delayed; and
    - that is approved by a magistrate under s 23CB, that is where the magistrate is satisfied that:
        - it is appropriate to do so, having regard to the application, representations made by the detainee or legal representative and any other relevant matter; and
        - the same four points for extension of period set out above apply.

[42] s 23CA Crimes Act 1914)

To our knowledge there has only been one case in which "dead time" was authorised by a magistrate under s 23CB: Dr Mohamed Haneef was detained for a total of 12 days without charge using this provision.[43] This period was far greater than the maximum anticipated by the Australian Government during the passage of the relevant legislation. In response to calls for an absolute limit of 48 hours, Attorney-General's Department staff assured the Senate inquiry into an earlier version of the law that such a limit was not necessary and it would be surprising if the powers were used to detain anybody for even a period of that duration.[44] In Parliament, the Minister for Justice and Customs indicated that the provision would also be limited by case law interpreting a "reasonable time" to be a "limited time". [45] Given these statements of intention in the Australian Parliament and relevant case-law, the fact that "dead time" has only been authorised in a single case (for 12 days), and the controversy surrounding that case, we have taken the 12 day period authorised in that case to be the maximum period of pre-charge detention that would in practice be allowed in Australia.

Other Powers

The Australian Federal Police may obtain a "preventative detention order" to substantially assist in preventing an imminent terrorist attack or to preserve related evidence after a terrorist attack.[46] This allows preventative detention for an initial period of 24 hours, extendable by a further 24 hours. This time can be augmented by State law so that, for instance, the New South Wales Terrorism (Police Powers) Act 2002 enables detention for a maximum of 14 days. In practice no preventative detention orders have been issued.

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43 Dr Haneef was arrested on 2 July 2007 in connection with the failed bomb attacks in the UK. He was charged 12 days later with supporting a terrorist organisation but the Director of Public Prosecutions withdrew the charges on 27 July 2007 because there was insufficient evidence to establish the elements of the offence.

44 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) para 3.25

45 *Pollard v R* (1992) 176 CLR 177 cited in Commonwealth, *Parliamentary Debates*, Senate, 18 June 2004, 24228-29 (Chris Ellison, Minister for Justice and Customs)

46 Cf Criminal Code s 105.4 and, eg, Terrorism (Police Powers) Act s 26D

Under a preventative detention order the detained person may not be questioned other than to verify his/her identity or to ensure his/her well-being. Indeed, it is an offence for a police officer to question a detainee under a preventative detention order.[47] If the police or intelligence agency wishes to question the detainee under other questioning powers[48] the police must release the person from preventative detention. After questioning the person could then be taken back into detention under the same order but the 14 day period would not be extended and would include any time taken for questioning under other powers.[49]

In a recent response to a report by the Joint Committee on Human Rights, the British Government stated:

> In Australia, for example, the 14 day limit can be extended by use of 'stand down time'. This is where the suspect remains in pre-charge detention but is not questioned. Where this happens, the detention does not count towards the 14 day limit so, in effect, suspects can be detained pre-charge for far longer than 14 days.[50]

This is a misunderstanding of the law in Australia. Government has confused preventative detention and pre-charge detention. The 14 day limit refers to preventative detention but in that context 'stand down time' or 'dead time' does not exist. As explained above, 'stand down time' or 'dead time' of the sort referred to by the UK Government does play a role in the pre-charge questioning and detention powers under the criminal law.[51]

Separate powers for the Australian Security Intelligence Organisation provide for a maximum of 7 days pre-charge detention to enable questioning (though no more than 24 hours may be used for questioning, 48 hours if an interpreter

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47 Criminal Code, sections 105.42 and 105.45 and, eg, Terrorism (Police Powers) Act s 26ZK

48 Such as the pre-charge questioning powers in the Crimes Act 1914 (Cth)

49 Criminal Code section 105.26 and e.g. Terrorism (Police Powers) Act s 26W

50 The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights, Session 2006-07, HL Paper 157, HC 394, para 11

51 Sections 23CA and 23DA of the Crimes Act 1914

is used).[52] These powers are not, however, used as part of the criminal justice process and are not, therefore, equivalent to pre-charge detention.

52 Australian Security Intelligence Organisation Act 1979

5. IRELAND

Summary

In general the maximum period of pre-charge detention is 24 hours. In the terrorism context the maximum is three days. In the context of gangland-type offences (which could cross over into terrorism) the maximum is seven days.

The Current Law

The powers of pre-trial detention in terrorist-type cases in Ireland are based on statute. The best-known power of detention is that contained in section 30 of the Offences against the State Act 1939, as amended. This allows for an initial detention in a police station or prison or other place for 24 hours, to be extended by another 24 hours where an officer not below the rank of Chief Superintendent so directs. There is a further provision permitting a District Court application to permit a further 24 hours' detention. This power of detention is for the purpose of investigating the alleged commission of a crime by the person arrested.[53] This Act is designed to cover a range of offences related to terrorist-type activities.

There are also more general statutes that are designed to combat either drug-trafficking or gangland-related crime. These may be used in appropriate cases in a terrorist context. Thus section 50 of the Criminal Justice Act 2007 applies (among other things) to:

- murder involving the use of a firearm or an explosive;
- murder of a policeman;
- possession of a firearm with intent to endanger life; and
- false imprisonment involving the use of a firearm.

The initial arrest can be for six hours, which can be extended by the police by 18 hours and then by a further 24 hours, where there are reasonable grounds

[53] See *People (DPP) v Quilligan* (1987), ILRM 606

for believing that such further detention is necessary for the proper investigation of the offence concerned. Thereafter the person can be taken before a District Court judge and an application made for an extension of detention for a further 3 days on the same grounds as those set out above but with the additional requirement that the judge be satisfied that the investigation is being conducted diligently and expeditiously. A final application can be made to a District Court judge for a further extension of another 48 hours, again where the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for believing that the detention is necessary for the proper investigation of the offence to which the detention relates s/he must be released from custody forthwith unless s/he is charged with an offence and is brought before a court as soon as may be.

Another power of pre-charge detention for general cases is section 4 of the Criminal Justice Act 1984, as amended. This permits a policeman to detain a person whom s/he has reasonable cause to suspect has committed certain serious offences where that is necessary for the proper investigation of the offence. The initial detention is for six hours from the time of the arrest but that can be extended to 12 hours under certain conditions. A further amendment introduced by section 9 of the Criminal Justice Act, 2006 permits a further 12 hours' detention.

6. SOUTH AFRICA

Summary

In South Africa the maximum period of pre-charge detention in terrorism cases is 48 hours.

The Current Law

The legislation dealing with terrorist and related activities is the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004 ("the Counter Terrorism Act").[54]

The Counter Terrorism Act does not make specific or particular provision for detention in respect of terrorist and related activities. It creates offences and penalties in respect of terrorism and offences associated or connected with terrorist activities.[55] Accordingly, legislation providing for detention concerning terrorist activities is to be found in the laws relating to criminal conduct in general.

The starting point for determining the length of pre-charge detention in terrorism cases is the supreme law, the Constitution of the Republic of South Africa, 1996. Section 35 provides for arrested, detained and accused persons. Section 35(1) provides:

> Everyone who is arrested for allegedly committing an offence has the right
>
> (a) …
>
> (d) to be brought before a Court as soon as reasonably possible, but not later than:

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54 The Counter Terrorism Act was assented to on 4 February 2005 and came into operation on 20 May 2005. See Proc R. No. 18 in *Government Gazette* No. 27502 of 15 April 2005 and *Government Gazette* No. 27266 of 11 February 2005.

55 Chapter 2 (ss. 2 – 14) make certain conduct in respect of terrorism offences for purposes of South African Law. Chapter 3 (ss. 15 – 21) makes provision for jurisdiction, evidential matters and penalties in respect of offences defined under the Act.

- 48 hours after the arrest; or
- the end of the first Court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary Court hours or on a day which is not an ordinary court day; …

(f) To be released from detention if the interests of justice permit, subject to reasonable conditions.

All rights contained in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors.[56]

The Criminal Procedure Act, 51 of 1977 provides for the process that is to be followed after the arrest of a person for allegedly committing an offence, including an offence set out in the Counter Terrorism Act. Section 50 of the Criminal Procedure Act deals with procedure after an arrest. It states that an arrested person shall be brought before a Magistrate's Court as soon as reasonably possible, but not later than 48 hours after the arrest.[57]

Thus, arrested persons must be brought before a Court within a prescribed period of time, which is 48 hours. Once a person is brought before a Court s/he is formally charged with the offence s/he is alleged to have committed, and is entitled to apply for bail.[58]

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[56] See section 36 of the Constitution. The factors to be taken into account by a Court in deciding whether the limitation is justifiable, are:
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

[57] Section 50(1)(c). If the period of 48 hours expires outside ordinary Court hours or on a day which is not an ordinary Court day the arrested person shall be brought before a lower Court not later than the end of the first Court day after the expiry of 48 hours.

[58] Section 60 of the Criminal Procedure Act. Section 60(ii) provides that where an accused is charged with an offence referred to in Schedule 6, which includes the offences set out in the Counter Terrorism Act, the Court shall order that the accused be detained in custody unless he or she, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that exceptional circumstances exist which in the interests of justice permit his/her release.

7. NEW ZEALAND

Summary

In New Zealand persons arrested must be charged "promptly" – there is no fixed time limit for pre-charge detention. The New Zealand courts have held that spending five hours in a holding cell after arrest and prior to charge was not "prompt" and so was unlawful. It is therefore unlikely that, whatever the circumstances, any period of pre-charge detention of more than 48 hours would be considered "prompt".

The Current Law

New Zealand does not have an equivalent of the UK law (Schedule 8 PACE) allowing terrorism suspects to be detained without charge for an extended period of time. Neither the Terrorism Suppression Act 2002 nor the amendments made to various Acts by the Counter-Terrorism Bill 2003 allow for extended detention as allowed under the UK legislation. Thus, any person suspected of terrorism in New Zealand has the same rights as any other crime suspect. That is, to be either charged promptly or released.[59]

There is no definition of "charge" in New Zealand legislation. However, Goddard J in *R v Gibbons* defined "charge" as "an intermediate step in the prosecutorial process when the prosecuting authority formally advises an arrested person that s/he is to be prosecuted and gives him/her particulars of the charges s/he will face."[60]

The police have no common law power of arrest.[61] A person can be arrested without a warrant only pursuant to the provision of the Crimes Act 1961 or some other enactment expressly giving power to arrest without warrant.

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59 New Zealand Bill of Rights Act 1990, s 23(2).

60 *R v Gibbons* [1997] 2 NZLR 585, 595 (HC).

61 *Blundell v Attorney-General* [1968] NZLR 341 (CA); *Taka v Police* [1996] 2 NZLR 449.

Section 32 of the Crimes Act 1961 gives the police the power to arrest any person they believe has committed an offence. Furthermore, for example, section 40(2) of the Arms Act 1983 allows arrest without warrant if a person persistently fails to give his/her details.

Section 23(2) of the New Zealand Bill of Rights Act 1990 states that everyone who is arrested for an offence has the right to be charged promptly or to be released. "Prompt" implies urgency without requiring immediate action by the police.[62] Some time may necessarily elapse between arrest and the decision to charge.[63] For example, a person arrested by police may be searched by the police.[64] However, the right will be contravened if charging is delayed in order to obtain sufficient evidence of the arrested/suspect's involvement in the offence.[65] In *R v Rogers*[66], five hours spent detained in a holding cell after arrest and prior to charge was found to be a breach of the appellant's right to be charged promptly. An arrested person must be brought before a court as soon as possible.[67]

Some legislation allows for extended periods of detention by police. For example, police may detain intoxicated persons in a police station for up to 12 hours if other options are not reasonably practicable.[68] The police also have the power to detain a person up to four hours under the Customs and Excise Act 1996 for the purpose of various inquiries under that Act.[69]

As in the UK the police are under a continuing obligation to determine whether there is enough evidence to charge a person that has been arrested.[70]

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62 *R v Gibbons* [1997] 2 NZLR 585 (HC)

63 *R v Te Kira* [1993] 3 NZLR 257 (CA)

64 Police Act 1958, s 57A(1) and (4)

65 *R v Rogers* (1993) 1 HRNZ 282 (CA)

66 (1993) 1 HRNZ 282 (CA)

67 Crimes Act 1961, s 316(5)

68 Alcoholism and Drug Addiction Act 1966, s 37A

69 Customs and Excise Act 1996, s 148

70 *Wiltshire v Barrett* [1966] 1 QB 312 (CA)

Section 24(a) of the New Zealand Bill of Rights Act 1990 stipulates that everyone who is charged with an offence shall be informed promptly and in detail of the nature and cause of the charge. The level of detail required will vary with the circumstances of the case and the state of the prosecutorial process.[71]

As in the UK a person who is arrested for an offence and is not released must be brought as soon as possible before a court. Section 24(b) of the New Zealand Bill of Rights Act 1990 demands that a person charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention. "Unless" has been held by the Court of Appeal to place an onus on the state to demonstrate why it is that the person that has been charged should be denied release.[72] At common law[73] and under section 8(1) of the Bail Act 2000 there are three principal grounds for the denial of bail at the pre-trial phase:

- to ensure the attendance of a defendant at trial when there is a genuine and specific flight risk;
- to avert interference with witnesses or evidence when there is a genuine and specific risk of such; or
- to prevent the commission of further offences.

The complainant's potential fear of the offender[74] and the seriousness of the offence[75] are not a legitimate basis to deny bail on their own.

However, where an immigrant is deemed to be a threat to national security or a suspected terrorist and has been arrested the case is referred to the Minister of Immigration who then has to determine whether or not to make a deportation order.[76] Every person who is arrested must be brought before a

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71 *R v Gibbons* [1997] 2 NZLR 585, 596 (HC).

72 *B v Police (No 2)* [2000] 1 NZLR 31, 34 para 8 (CA).

73 *Hubbard v Police* [1986] 2 NZlR 738 (HC); *Police v Simeon* [1990] 2 NZLR 116 (HC).

74 *P v Superintendent Rimutaka Prison Trentham* (High Court Wellington, CP 258/99, 5 November 1999, Durie J), [2000] BCL 74.

75 *B v Police (No 2)* [2000] 1 NZLR 31, 34 (CA).

76 Immigration Act 1987, s 75(1).

District Court Judge as soon as possible, and must in no case be detained for more than 48 hours unless, within that period, a District Court Judge issues a warrant of commitment under section 79 of that Act for the detention of that person in custody.[77] If in respect of any person who is so placed in custody and in respect of whom no warrant of commitment has been issued, the Minister decides not to make a deportation order, the person must be released from custody immediately.[78] If the Minister of Immigration either decides not to make a deportation order or fails to make such an order with 14 days of the arrest, the person has to be released from custody immediately.[79]

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[77] Immigration Act 1987, s 75(2)

[78] Ibid, s 75(3)

[79] Ibid, s 79(9)(a)

8. FRANCE

Summary

In France the maximum period of pre-charge detention in terrorism cases is six days.

The Current Law

The normal time limit for ordinary pre-charge detention cannot exceed two days. A judicial police officer may detain a person "against whom there is one or more plausible reasons to suspect that s/he has committed or attempted to commit an offence".[80] The initial time-limit for pre-charge detention is 24 hours. It may be extended by another 24 hours under the written authorisation of a District Prosecutor.

The time limit for pre-charge detention for a person suspected to have committed or attempted to commit a terrorist offence cannot exceed four days. There is no general definition of a terrorist offence. Offences which constitute acts of terrorism are listed in article 421-1 to 421-6 of the French criminal Code. These offences are characterized as acts of terrorism when "they are committed intentionally in connection with an individual or collective undertaking and aim to seriously disturb public order through intimidation or terror".[81] When a person is suspected of having committed or having attempted to commit a terrorist offence, the ordinary 48 hour pre-charge detention time-limit (discussed above) may be extended twice, by 24 hours each time.[82] However, the liberty and detention judge or the investigating

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80 Articles 63 (*enquête de flagrance*), 77 (*enquête préliminaire*) and 154 (*commission rogatoire*) of the French Code of Criminal Procedure.

81 E.g: wilful attacks on life, wilful attacks on the physical integrity of persons, abduction and unlawful detention and also the hijacking of planes, vessels or any other means of transport, theft, extortion, and also computer offences, offences committed by combat organisations and disbanded movements.

82 Article 706-88 al 2 provides that "these extensions are authorised by a written and reasoned decision, at the request of the District Prosecutor, by either the liberty and detention judge or the investigating judge"; article 706-88 al 3 provides that "the person so held must be

judge may directly require an additional extension of 48 hours if justified by the foreseeable length of the investigation.[83]

The time limit for pre-charge detention for a person suspected to be involved in the organization of an imminent terrorist attack cannot exceed six days.[84] When "the first elements of the investigation or of the detention itself show that there is a serious risk of an imminent terrorist attack in France or abroad or that the necessities of international cooperation require it imperatively"[85] the ordinary time-limit for detention (i.e. 48 hours) can be extended:

- by four days, based on the rules expressed above on terrorist offence pre-charge detention; and
- by two days (an initial 24 hours renewable by a further 24 hours) based on the liberty and detention judge's exceptional decision.[86]

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brought before the judge ruling on the extension before this decision is taken. The second extension may however, in exceptional cases, be authorised without the person's prior appearance".

83 Article 706-88 al 5 of the French Code of Criminal Procedure.

84 Minors aged under 18 benefit from a waiver provision in accordance with the Order of 2 February 1945 relating to delinquency of minors. Pre-charge detention time-limits are shortened for minors. However, it seems that minors above 16 could be held in detention for a period not exceeding six days in case of the imminence of a terrorist attack.

85 Article 706-88 al 7 of the French Code of Criminal Procedure, implemented by the 23 January 2006 Statute on measures to fight against terrorism.

86 Article 706-88 al 7 of the French Code of Criminal Procedure states that the guarantees provided for by article 706-88 al 2, above mentioned, should be respected

9. GERMANY

Summary

There is no exact equivalent of “charge“ in Germany and therefore no exact equivalent of “pre-charge detention“. The closest equivalent is provisional police custody prior to a formal judicial “warrant of arrest“ being issued. A person held in provisional police custody must be set free at the end of the day following the day s/he was arrested. A person could therefore be held in provisional police detention for up to 48 hours.

Analysis

When comparing the way suspected terrorists are dealt with in Germany and in the UK one has to bear in mind that the legal proceedings generally differ. There are no exact equivalents to terms such as “charge” in Germany.[87]

Article 104 of the German Constitution constitutes the essential prerequisite for any detention and safeguards the fundamental right of personal freedom.[88] Accordingly, personal freedom of a suspect may be restricted solely on the basis of a formal law. Formal laws for these purposes would include the German Criminal Procedure Act (*Strafprozessordnung*, StPO) as well as the laws of the different Federal States of Germany on public safety and the protection of the public.

The powers to detain a suspect prior to his/her conviction are:

- provisional police custody, pending a judicial hearing;
- detention upon remand, following the issue of an arrest warrant by a judge and pending the trial; and

[87] After the preliminary investigations which are conducted by the state prosecutor and assisted by police there is either an indictment in court or the proceedings are suspended. The German rules on the detention upon remand do not distinguish between “before and after indictment”, but cover the whole period up until the final conviction by a criminal court.

[88] Art. 2 para. 2 GG

- under laws of the Federal States of Germany, detention for public safety reasons.

These detention powers are considered below. As we explain, provisional police detention is the closest equivalent to pre-charge detention.

Provisional police custody

Under the StPO a person can be held in provisional custody by the police during a criminal investigation against the person detained. A judicial hearing must, however, be held without delay and, in any case, no later than the day following the day arrest. At the hearing the judge has to either issue an arrest warrant (discussed below). If no warrant, the person must be released without delay, i.e. immediately, unless there are imperative reasons for suspension. Without a judicial warrant of arrest, a suspect cannot therefore be held for more than a maximum of 48 hours from the point of arrest under the StPO.[89]

Judicial Arrest Warrant

In order to keep a person in detention under the StPO for longer period than the period described above, a judicial arrest warrant is required. An "arrest warrant" (permitting detention in remand) may only be issued if there is:

- a ground for detention in remand;
- no violation of the principle of proportionality; and
- strong suspicion that the person in custody has committed an offence.[90]

Grounds for detaining a person in remand are the risk of flight, an actual flight by the suspect or the risk that evidence would be suppressed.[91] For some criminal offences (e.g. severe cases of criminal assault, rioting or sexual abuse) there is an additional ground for detention in remand: the danger of

[89] As an example, a suspect arrested on 1 November 2007 at 00:01 a.m. as well as a suspect arrested on 1 November 2007 at 11:59 p.m. will have to be released on 2 November at 12:00 p.m. at the latest if the arrest has not been confirmed by a judge after an oral hearing.

[90] According to Sec. 112 para. 2 StPO

[91] Sec. 112 para. 2 StPO

repetition.[92] All of these grounds for detention in remand must be evidenced to the satisfaction of the judge.

The requirement of proportionality will be satisfied if the court decides that the intrusion into personal freedom does not outweigh the severity of the offence in question. The requirement of "strong suspicion" means that the court must find it highly likely that the suspect has committed the crime in question.

In cases of severe offences (e.g. preparation of a terrorist act) one needs only establish the "possibility" of a ground for arrest.[93] However, the prerequisites of strong suspicion and the compliance with the principle of proportionality have to be fulfilled in any case. Beyond this, there is no difference between the prerequisites for arrest and detention on remand with regard to terror suspects and other criminal suspects in Germany.

The following factors suggest that the issue of a judicial "arrest warrant" in Germany is the closest equivalent to "charge" in the UK: the level of suspicion that is needed and the requirement that evidence to support this suspicion is presented to a court. Accordingly, provisional police custody, prior to the issue of an "arrest warrant", is the closest equivalent to pre-charge detention.

Detention in Remand

Following the issue of an arrest warrant by a judge a person can be detained in remand pending the trial.[94] Detention in remand is generally limited to 6 months. However, in cases in which the detention is based on the danger of repeated specific severe offences, such as offences against the sexual or physical integrity of the victims or riots, the detention period is generally limited to one year.[95]

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[92] Sec. 112a StPO

[93] Sec. 112 para. 3 StPO

[94] Detention upon remand does not require that the prosecution has already decided to initiate a trial on the merits. Instead, a detention is possible, and frequently ordered, during the fact-finding phase of the investigation.

[95] The offences contained in section 112a StPO,

A competent Court of Appeal may exceptionally extend a suspect's detention in remand beyond these periods if it is satisfied that grounds for detention in remand (discussed above) persist.[96] The German courts apply strict standards when reviewing this. They will not, for example, extend the detention period if they find that the investigation was delayed in any way by the fault of the prosecution. Due to the strict standards of review applied by the courts a detention of more than six months is exceptional.

During the detention period the prosecution has to monitor the situation and to release the suspect if the grounds for detention in remand no longer exist. The suspect may also request a judicial investigation and a judge automatically reviews detention after 3 months. In these proceedings the judge verifies whether the detention has to be continued or not.

Detention for Public Safety Reasons

The laws in the German Federal States allow suspects to be detained for public safety reasons, irrespective of whether formal criminal investigations are pending. In these cases suspects may be detained if there is an imminent risk that a crime will be committed (including a terrorist offence).[97] Different states permit different periods of this kind of detention for public safety reasons. The State of Hessen, for example, has provided for a detention period of up to six days with a court order. The longest period that is permitted is two weeks, e.g. in Bavaria.

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[96] Section 121 StPO

[97] Section 32 (1) no. 2 of the Act on Public Safety and Public Order of Hessen

10. ITALY

Summary

In Italy the maximum period of pre-charge detention is four days.

The Current Law

The freedom of a person is a constitutional principle set out in article 13, paragraph 2 of the Italian Constitution and can be limited only in exceptional cases of necessity and urgency expressly provided by law.[98]

In this respect, it should be noted that the Italian code of criminal procedure specifies that the freedom of a person can be limited only by provisional measures ("*misure cautelari*"). Such measures can be taken if there is serious evidence of guilt and only in order:
a) to prevent the person under investigation from interfering with the evidence and the investigation of the offence;
b) to prevent the person under investigation from running away;
c) to prevent the person under investigation from committing an offence.[99]

The police have the power to arrest anyone they suspect of having committed a crime for which a sentence of five years or more can be imposed[100] (so including terrorist offences).[101]

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98 Italian Constitution Law, entered into force 1 January 1948.

99 Art. 274, Italian Code of criminal procedure.

100 Art. 380-381, Italian Code of criminal procedure.

101 It should be noted that Law no. 438, 15 December 2001, has amended the Italian Code of criminal procedure with the introduction of art. 270 bis "terrorist offence" which provides that:

"*Anybody who promotes, creates, organizes, leads or finances an association that aim to carry out acts of violence with terrorist finalities (…) is punished with the detention from 7 to 15 years.*

Anybody who participate to these associations is punished with the detention from 5 to 10 years (…)".

In doing so, the authorities have to comply with the provisions guaranteeing the freedom of a person, contained in Article 13, paragraph 2 of Italian Constitution[102] and also in the Italian Code of Criminal Law, as described below.

The police must take the suspect to a police station as soon as possible, must immediately inform the public prosecutor (*Pubblico Ministero*, hereinafter the "PM") and within 24 hours must put the person arrested at the PM's disposal.[103]

The PM can question the detainee. During the police interrogation the prosecuting authority must inform the suspect of the reason and grounds why s/he is being prosecuted and the criminal allegations which s/he faces.[104]

Within 48 hours (measured from the initial time of the arrest) the PM should either: release the person if the person was mistakenly arrested or the arrest was not included in the exceptional cases indicated in Art. 13, Italian Constitution (see above); or ask the judge for the preliminary investigations (*Giudice per le indagini preliminary*, hereinafter the "GIP") to validate the arrest.[105]

The GIP must fix the hearing for the validation of the arrest as soon as possible, and in any case, within 48 hours.[106] It is at the point that the arrest is validated in the hearing in front of the GIP that the suspect formally knows the charges against him, and the decision is formally made to prosecute the suspect. Therefore under Italian law a person suspected of committing a crime for which an arrest is mandatory, such as is the case for "terrorist

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102 Art. 13, paragraph 2 of the Italian Constitution states that, as a guarantee for the individual, each provisional measure shall be communicated within 48 hours to the judicial authority which within 48 more hours shall validate it. If the deadlines above are not complied with, the measure is intended to be revoked and therefore without effects.

103 Art. 386, Italian Code of criminal procedure

104 Ibid Art. 388

105 Ibid Art. 390

106 Ibid, paragraph 2

offences", can be detained for no more than four days (48+48) before either being charged or released without charge.

Following the hearing to validate the arrest, the GIP may in addition, if the criteria for the application of provisional measures are met,[107] adopt coercive measures, such as pre-trial detention.

Pre-trial detention can be adopted only for crimes for which a sentence of four years or more can be imposed (and therefore can be adopted for "terrorist offences").[108]

The aim of the detention is to allow the prosecuting authority to gather sufficient evidence during the preliminary investigation phase (which can last for no more than two years).

Article 303, paragraph 1(a), point 3 in conjunction with article 407, paragraph 2(a), point 4 of the Italian Code of Criminal Procedure states that the maximum period for pre-trial detention is one year. This one year period runs from the hearing in which the GIP decides to order pre-trial detention in order to safeguard the investigation and the course of the criminal trial. However, the judge has the authority to grant an extension to the above mentioned period if so requested by the PM under certain circumstances, most notably when there are serious precautionary needs.[109]

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107 See Art. 273 and 274, Italian Code of criminal procedure as described above.

108 Art. 280, Italian Code of criminal procedure.

109 Art. 305, Italian Code of criminal procedure.

11. SPAIN

Summary

The closest equivalent to pre-charge detention in Spain is preventative arrest. In general, the maximum period for which a person can be detained under these preventative arrest powers, before being released or handed over to the judicial authorities, is three days. In relation to suspected terrorist offences, the maximum is five days.

The Current Law

The purpose of preventative arrest is to investigate events that could be considered as a criminal offence. Section 17.2 of the Spanish Constitution[110] provides that preventative arrest cannot last longer than the time necessary to investigate the events that may result in a criminal offence. In any event, the person arrested must be set free or handed over to the judicial authorities within three days. Section 55 does, however, permit longer preventative arrest if the Government declares a "state of emergency" or "siege" or if the activities of armed gangs or terrorist groups are under investigation.[111]

According to section 16 of the Spanish Law 4/1981 on the State of Alarm, Emergency and Siege (*Estados de Alarma, Excepción y Sitio*), when the

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110 Preventative arrest may last no longer than the time strictly necessary to carry out the relevant investigations; in any event the person arrested must be set free or handed over to the judicial authorities within a maximum period of 72 hours.

111 The rights recognized in sections 17 and 18, subsections 2 and 3, sections 19 and 20, subsection 1, paragraphs a) and d), and subsection 5; sections 21 and 28, subsection 2, and section 37, subsection 2, may be suspended when a state of emergency or siege (martial law) is declared under the terms provided in the Constitution. Subsection 3 of section 17 is excepted from the foregoing provisions in the event of the declaration of a state of emergency.

2. An organic act may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognized in section 17, subsection 2, and 18, subsections 2 and 3, may be suspended for specific persons in connection with investigations of the activities of armed gangs or terrorist groups. Unwarranted or abusive use of the powers recognized in the foregoing organic act shall give rise to criminal liability as a violation of the rights and freedoms recognized by the laws.

“state of emergency” or “siege” is declared, the preventative arrest can last a maximum of 10 days. However, the judicial authorities must be informed of the arrest within the first 24 hours.

If it is suspected that the person in custody is a member of an armed gang or terrorist group section 520 bis of the Spanish Law on Criminal Procedure allows a 48-hour extension of the preventative arrest. This, therefore, extends the maximum total period of detention to five days in relation to individuals suspected of terrorist offences. However, in order to be effective, this must be immediately communicated to the judicial authorities and authorised by them.

Therefore, according to the relevant Spanish Law, the preventative arrest cannot last more than the period required to clarify the events that are being investigated. As a general rule, three days is the maximum period of the provisional arrest, unless either there is a declaration of “state of emergency” or “siege” (in which case provisional arrest could last a maximum of 10 days) or a member of an armed gang or terrorist group is arrested (in which case provisional arrest could last a maximum of five days).

The power for terror suspects to be held in incommunicado detention for up to 13 days has been subject to particular criticism.[112] This should not, however, be confused with pre-charge detention.

[112] Cf Human Rights Watch, “Setting and Example? Counter-Terrorism Measures in Spain”, January 2005, Vol. 17 No. 1(D), p.31. The JCHR has referred to this power in a recent report and, in Liberty’s view, mistakenly confused this issue with the question of pre-charge detention (Twenty-Fourth Report: Counter-Terrorism Policy and Human Rights – 1 August 2006, HL 240/HC 1586, Section 2, Paras 45-76).

12. DENMARK

Summary:

In Denmark the maximum period of pre-charge detention in terrorism cases is three days – as in other criminal cases.

The Current Law:

There is no specific legislation in Denmark on the detention of terrorism suspects. Thus, the normal criminal procedure code on arrest and detention on remand of persons suspected of having committed a crime would be used for terror suspects.[113]

Anyone who is arrested by the police must be released as soon as the grounds for the arrest are no longer present. The arrested person shall be brought before a judge within 24 hours after the arrest.[114]

If the arrest has been made for an offence for which detention on remand cannot take place, the arrestee shall be released immediately.

If the arrest has been made for an offence for which detention on remand can take place and it is found that the arrestee cannot be released immediately (i.e. due to insufficient information), the court can authorise that the arrest is continued for a further two days, renewed at 24 hour intervals. This, therefore, allows a total period of pre-charge detention of three days.

A terrorism suspect can be detained on remand (i.e. after the person has been charged) when there is a substantiated suspicion that s/he has committed an offence if the offence can result in imprisonment for one year and six months or more, and:

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113 Administration of Justice Act (AJA), chapter 69 and chapter 70.

114 AJA, para. 760.

- There are specific reasons to presume that s/he will abscond from the prosecution or the enforcement,
- There are specific reasons to fear that, if at large, s/he will commit another offence of the above described kind, or
- There are specific reasons to presume that the accused will impede the prosecution of the case, particularly by removing evidence or warning or influencing others.[115]

[115] AJA, para. 762.

13. NORWAY

Summary

In Norway the maximum period of pre-charge detention in terrorism cases is three days.

The Current Law

Pre-charge detention in terrorism cases is regulated by the Criminal Procedure Act of 22 May 1981[116] with subsequent amendments. This states that arrested persons must appear before the district court no later than the third day after their detention (i.e. a maximum time limit of three days), at which point the police must present the charge(s) and the reason(s) for keeping the person in custody.

The presiding judge will decide whether there is just cause for keeping the person in custody and may normally order a person be kept in custody for no longer than four weeks before a new court order is needed. However, the time limit may be extended if "the nature of the investigation or other special circumstances indicate that a review of the order after four weeks will be pointless".

Section 222d of the Criminal Procedure Act, which regulates the "use of coercive measures to prevent serious crimes", stipulates that the prosecuting authority may in extraordinary circumstances issue an order enabling the police to employ coercive measures in order to prevent serious crime. Normally, the court will issue an order empowering the police. An order from the prosecuting authority "shall be submitted to a court approval as soon as possible and no later than 24 hours after the coercive measure has been applied". However, the "coercive measures" listed in 222d do not include

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[116] The Criminal Procedure Act of 22. May 1981, http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf. See chapters 14 and 17B, especially sections 183 – 185.

making arrests or detaining persons as investigative tools or in order to prevent serious crimes.

Currently, the Ministry of Justice is considering the introduction of a chapter in the Penal Code related to punishing terrorist acts and the issue of ratifying the Council of Europe's Convention on the Prevention of Terrorism, but these proposals do not deal with investigative tools, preventative measures or other procedural matters.

14. RUSSIA

Summary

In Russia the maximum period of pre-charge detention is five days.

The Current Law

The Criminal Procedure Code of the Russian Federation No. 174-FZ of 18 December 2001 (the Code) establishes the general terms of detention.[117] In accordance with the Code, detention of a suspect by the interrogation body, the interrogator, the investigator or the prosecutor is permitted for no more than 48 hours from the moment of the actual detention of the suspect (criminal or terrorist).[118] The moment of the actual detention is the moment when the suspect is actually deprived of his/her freedom of movement.[119]

The interrogation body, the interrogator, the investigator or the prosecutor have the right to detain a person on suspicion of him/her having committed a crime which is punishable by deprivation of freedom if one of the following grounds exists:

- the person is caught red-handed when committing a crime or immediately after having committed it;
- the victims or the witnesses point to the person as the perpetrator of the crime;
- on this person or his/her clothes, near him/her or in his/her premises undoubted traces of the crime are found; and
- If there are other grounds for suspecting the person of having committed a crime s/he may be detained if attempting to flee; if s/he does not have a permanent place of residence; if his/her identity has not been

[117] The assumption for the purposes of this note is that the term pre-charge detention that is used in your request is analogous to the term detention of a suspect under the Russian laws.

[118] Item 11 of Article 5 of the Russian Criminal Procedure Code

[119] Item 15 of Article 5 of the Russian Criminal Procedure Code

identified; or if the interrogator or investigator, with the consent of the prosecutor, has asked the Court to order the suspect to be remanded in custody.[120]

The suspect must be released by a decision of the interrogator, the investigator or the prosecutor if:

- the suspicion of criminality has not been confirmed;
- there are no grounds for taking him/her into custody; or
- the suspect was detained in violation of the requirements of Article 91 of the Code (described above).

After 48 hours from the moment the suspect was initially detained s/he shall be released unless the Court has remanded him/her in custody pending trial or has extended the term of his/her detention.[121]

The Court may extend the term of detention for a maximum of a further three days. The Court's decision to do so must be based on additional evidence presented by the interrogation body, the interrogator, the investigator or the prosecutor, establishing that the detention is rightful and reasoned.[122] The date and time up to which the term of detention is extended shall be indicated in the Court's writ. The term of detention shall not, therefore, exceed five days.

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[120] Article 91 of the Russian Criminal Procedure Code

[121] Article 94 of the Russian Criminal Procedure Code

[122] Item 7 of Article 108 of the Russian Criminal Procedure Code

15. TURKEY

Summary

The maximum period of pre-charge detention in terrorism cases in Turkey is seven days and 12 hours. The 12 hour period is the maximum that is permitted for the transfer of the suspect.[123]

The Current Law

The Code of Criminal Procedure ("CMK") governs the pre-charge detention of those arrested on suspicion of being a terrorist or of committing an act of terrorism.[124] Legal limitations on the period of time a terrorist suspect can be detained prior to charge run from the time of arrest.

In accordance with article 91.1 CMK[125] the period of pre-charge detention is 24 hours with an additional 12 hours permitted for the transfer of the suspect. Under article 91.3 CMK, where a number of people were suspected of involvement in the offence, this 36 hour period can be extended by further periods of 24 hours, up to a maximum of an additional three days (i.e. four days in total with 12 hours for transfer). The detained person has to be notified each time the detention period is extended.[126]

Proceedings for certain offences are instigated in a special criminal court, established in accordance with article 250 CMK. In such cases, the initial pre-charge detention period of 24 hours can be prolonged to 48 hours under article 251.5 CMK. The same powers to extend the period of detention by up to three further days could also apply in this context. Accordingly, in cases before the special criminal court, the maximum period of pre-charge detention is five days and 12 hours for transfer.[127]

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123 http://www.egm.gov.tr/temuh/insanhaklari4.htm

124 The CMK was amended in June 2005 but no changes were made regarding pre-charge detention.

125 http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.htm

126 http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.htm

127 http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.htm

The CMK includes different rules for “emergency regions” (article 251.5). The same basic limit of one day and 12 hours for the transfer of suspects applies. Under these rules the periods specified under article 91.3 CMK (i.e. the additional time permitted where a number of people are suspect of involvement in the offence) can, however, allow pre-charge detention to be extended for 24 hour periods, up to a maximum of six additional days (i.e. not the normal three days). In such cases, the maximum period of pre-charge detention would, therefore, be a total of seven days and 12 hours for the transfer of the suspect.[128]

Related Issues

From 1987 to 2002 under the State of Emergency, authorities in the Southeast Region of Turkey had the power to issue circulars which were considered to have the force of law. Under these emergency circulars pre-charge detention periods could be prolonged for as long as required by the security forces. The State of Emergency is no longer in force. Similar state of emergency circulars do, however, remain in place in limited areas in the Southeast Region of Turkey. For example; the Siirt, Hakkari and Şırnak provinces were announced as Temporary High Security Zones (*Geçici Güvenlik Bölgesi*) by the General Staff of Turkey.

Jago Russell, Policy Officer

[128] One day under CMK Art 91/1, six days under CMK Art 251/5, and 12 hours for transfer of the suspect .

Annex 1
Note Requesting Advice

PRE-CHARGE DETENTION TERRORISM CASES
COMPARATIVE LAW

Advice Required

A short note of advice on how long a person suspected of committing a terrorist offence can be detained before they are either charged or released without charge. If the concept of "charge" (discussed below) does not exist in your jurisdiction, please describe the closest equivalent and explain any applicable time limits.

The note should ideally be no longer than one page of A4 and should fully cite all sources. The advice is to be used by Liberty (one of the UK's leading human rights and civil liberties organisations) in its campaign against proposals to further extend the maximum period of pre-charge detention in terrorism cases.

Background

Under UK law persons suspected of committing terrorist offences can be detained for 28 days (increased from 14 days in 2006) before they must be either charged or released without charge.[129] The Government has recently announced its intention to extend the maximum period of detention beyond 28 days.[130]

Liberty is opposed to further extensions to the maximum time limit of pre-charge detention. In outline, we have three major concerns:

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[129] Terrorism Act 2000

[130] Cf: http://security.homeoffice.gov.uk/news-publications/news-speeches/new-ct-strategy

1) the injustice of detaining a person for more than a month on the basis of mere suspicion and without providing details of the case against them;
2) the fact that the proposals are not necessary as the reasons cited for longer periods of pre-charge detention can be met in more proportionate ways;[131] and
3) the fear that the proposals could make us less safe because the injustice will be used to radicalise young Muslims.

The purpose of this research is to demonstrate that the current time-limit in the United Kingdom is already significantly longer than in many other jurisdictions.

Charge

In outline, "charge" is the point between arrest and criminal trial when the prosecuting authority formally advises the suspect that s/he is to be prosecuted and gives him/her the particulars of the criminal allegations s/he will face.

If the concept of charge does not exist in your jurisdiction, we hope that the following brief overview of the point in the UK's criminal justice process when "charge" occurs will assist you in identifying the closest equivalent.

Arrest:

The police have the power to arrest anyone they suspect of having committing a serious crime including terrorist offences.[132] Judicial authorisation is not required for the arrest. The arrest can be made for a number of reasons, most

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[131] For more information on Liberty's position on the proposals, please see: http://www.liberty-human-rights.org.uk/pdfs/policy06/hac-terrorism-detention-powers.PDF

[132] Section 24 Police and Criminal Evidence Act 1984 (PACE). There is also the power to arrest someone who the police suspect of being in the act of committing or about to commit an offence.

notably to allow the prompt and effective investigation of the offence.[133] At the point of arrest the suspect must be told in very broad terms of the reason for the arrest.[134] The suspect must be taken to a police station as soon as possible.

Detention at the police station prior to charge:

A suspect may only be detained at the police station without being charged if the police have reason to believe that this is necessary: (a) to secure or preserve relevant evidence; or (b) to obtain such evidence by questioning him/her.[135] This is the stage at which the suspect is usually questioned by the police.

In general a person cannot be detained for more than 24 hours without being charged.[136] A senior police officer may, however, authorise the suspect's continued detention without charge for up to a further 12 hours if s/he has reason to believe that this is still necessary to preserve or obtain relevant evidence and the investigation is being conducted diligently and expeditiously.[137]

A judicial warrant is required to continue to hold the suspect without charge for longer than 36 hours. In most cases a judicial warrant can only authorise a person to be detained for up to a total of 96 hours[138] but in terrorism cases the maximum is a total of 28 days.[139] The court may only issue a warrant if it is satisfied that (i) detention without charge is necessary to preserve relevant

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133 Section 24 Police and Criminal Evidence Act 1984

134 Code G: Code of Practice for the Statutory Power of Arrest by Police Officers i.e. the relevant circumstances of the arrest in relation to that person's involvement, suspected involvement or attempted involvement in the commission of an offence and in relation to the reasonable grounds for believing that that person's arrest is necessary

135 Section 37(2) PACE

136 Section 41(7) PACE

137 Section 42 PACE

138 Section 44 PACE

139 Schedule 8 PACE

evidence or to obtain evidence by questioning the suspect and (ii) that the investigation is being conducted diligently and expeditiously.[140] In general the suspect has the right to attend the hearings for warrants of detention and has the right to make representation.

Charge:

The police are under a continuing obligation to determine whether there is enough evidence to charge a person in detention.[141] If they decide they have enough evidence (i.e. sufficient evidence to provide a realistic prospect of the detainee's conviction) they must pass the evidence to the state's prosecution service (the CPS).[142] The CPS then makes its own assessment of the evidence, decides whether it is in the public interest to charge the person and determines the most appropriate offence with which to charge the suspect.

When a detainee is charged with an offence s/he must be given a written notice showing particulars of the specific offence(s) with which s/he is charged and including the name of the officer in the case. So far as is possible, the charge must be stated in simple terms and must show the precise offence in law with which the detainee is charged. The notice must begin: "you are charged with the offence(s) shown below". A record must be made of anything a detained person says when charged.

After-Charge:

A person must be released from custody after s/he has been charged unless, inter alia, the officer has reason to believe that continued detention is necessary:
(a) to prevent him/her from committing an offence;

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[140] Section 43 PACE

[141] Section 37 PACE

[142] The Crown Prosecution Service

(b) to prevent him/her from interfering with the administration of justice or with the investigation of offences or of a particular offence; or
(c) for his/her own protection.[143]

If a person is not released from custody after charge s/he must be taken to court as soon as possible.[144] At the initial hearing the court sends the case to trial (in terrorism cases will also involve committing the case to the Crown Court) and decides whether to remand the defendant in custody (i.e. keep them in detention pending the trial) or release the defendant on bail (with or without conditions).[145] In terrorism cases it would not be unusual for a person to be detained for the entire period between charge and the conclusion of the trial.

The need to obtain more evidence, for example by questioning the suspect, is not a valid reason for detention post-charge. Indeed suspects are not in general interviewed by the police after charge.[146] Nevertheless, the police can and do continue to gather evidence between charge and trial. During this period prosecution and defence lawyers prepare for the trial.

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143 Section 38 PACE

144 Section 46 PACE

145 Section 50(3) Crime and Disorder Act 1998

146 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, para 16.5. There are limited exceptions i.e. where necessary for the purpose of preventing or minimising harm or loss to some other person or to the public, for clearing up an ambiguity in a previous answer or statement; or where it is in the interests of justice that the detainee should have put to him, and have an opportunity to comment on, information concerning the offence which has come to light since he was charged.

Annex 2
Acknowledgments

Liberty has obtained legal advice from qualified lawyers and academics in all of the jurisdictions covered in this report. The analysis contained and the conclusions reached are based on this advice. We would like to thank the following for providing us with their advice and assistance on a *pro bono* basis:

- Freshfields Bruckhaus Deringer, for providing advice on the law in the United States, France, Russia, Italy, Germany and Spain. Two trainee solicitors from Freshfields (David Howe and Ashley Dunford) also assisted with the compilation of this research. Freshfields Bruckhaus Deringer is a leading international law firm with over 2,400 lawyers in 27 offices around the world.

- Edwina MacDonald, for providing advice on the law in Australia. Edwina MacDonald is Senior Research Director at the Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales. Her research at the Centre has focused on legal responses to terrorism, indigenous governance and charters of rights. She is the author of a number of journal and media articles, and has also made numerous submissions and given evidence to parliamentary and government inquiries into counter-terrorism laws. Edwina has previously worked in the development of domestic and international criminal law policy in the Australian Attorney-General's Department. She has also worked in community legal organisations and as a legal editor.

- Craig Forcese, for providing advice on the law in Canada. Craig Forcese is an associate professor in the Faculty of Law, Common Law Section, University of Ottawa, where he teaches public international law, national security law, administrative law, and public law and legislation and runs the annual foreign policy practicum. Much of his present research and writing relates to international law, national security, and democratic accountability. Prior to joining the law school faculty, he practiced law with

the Washington D.C. office of Hughes Hubbard & Reed LLP, specializing in international trade law. Craig has law degrees from Yale University and the University of Ottawa, a B.A. from McGill, and an M.A. in international affairs from the Norman Paterson School of International Affairs, Carleton University. He is a member of the bars of Ontario, New York, and the District of Columbia.

- Peter Vedel Kessing, of the Faculty of Law (Copenhagen University) and the Danish Institute for Human Rights, for advising on the law in Denmark. He is currently working on a project on terrorism and human rights with a specific focus on the right to freedom from torture and arbitrary detention. He has been working with international cooperation on prevention of torture for several years; in the Ministry of the interior and as a deputy judge in a district court in Copenhagen.

- Conor Power, for advising on the law in Ireland. Conor Power is a long-standing member of the Irish Council for Civil Liberties' Executive and is a barrister specializing in family law and human rights. He has been deeply involved in many of ICCL's campaigns over the years, including ICCL's current work on partnership rights.

- Petra Butler, for advising on the law in New Zealand. Dr Butler is a Senior Lecturer and Associate Director of the NZ Centre for Public Law at Victoria University of Wellington, New Zealand. Petra is a member of the New Zealand Association for Comparative Law; Wellington Women Lawyers Association; German-Australasian Lawyers Association; Deutscher Juristinnenbund; Deutsche Gesellschaft fuer Rechtsvergleichung; and Freundeskreis des Deutschen Akademischen Austauschdienstes.

- Aage Borchgrevink, for advising on the position in Norway. He is an adviser in the Norwegian Helsinki Committee for Human Rights (NHC), Oslo. The NHC monitors and reports on human rights issues in the area covered by the Organization for Security and Cooperation in Europe (OSCE) -- North America, Europe and the former Soviet Union. Aage has

been affiliated with the NHC since 1992 as a researcher. Areas of responsibility have included the election observation program, the Balkan program and currently the Russia program.

- Anton Katz for advising on the law in South Africa. Advocate Katz is a member of the Bars in Cape Town and New York. He is a graduate of the University of Cape Town (B.Sc LLB) and Columbia University in New York, School of Law (LLM). His practice as an advocate (since 1991) concerns predominantly international and constitutional law, with a specific focus on extradition, mutual legal assistance and refugee matters. He has acted as a consultant to the United Nations in extradition and mutual legal assistance and to the African Union in respect of the African Union Convention on the Prevention and Combating of Terrorism (Algiers, 1999).

- Emrah Şeyhanlıoğlu, for providing advice on the law in Turkey. Emrah Şeyhanlıoğlu is a lawyer and one of the executive board members of the Turkish Human Rights Association (IHD). He is currently doing an MA on the Turkish Criminal Code and graduated from the law faculty in Ankara University, one of the leading universities of Turkey.

Annex 3

An Overview of Alternatives to Longer Pre-Charge Detention

Liberty has suggested better ways of meeting all the Government's arguments for longer pre-charge detention. We are urging the Government to consider these measures as alternatives to extending detention without charge – not in addition to it:

- Lifting the ban on intercept evidence in criminal trials.
- Reviewing how people who have already been charged might, with proper judicial oversight, be re-interviewed and recharged as further evidence is uncovered.
- Providing the police and intelligence services with more resources – for example, the estimated £6 billion being spent on the ID card scheme could instead be given to the police, intelligence and security services.
- Emergency powers in the Civil Contingencies Act 2004 already provide the Government with the option to temporarily extend pre-charge detention for suspects in a terror emergency. Liberty believes politicians should look at the powers they already have before introducing more legislation and taking Britain into a permanent state of emergency - the most certain way of letting the terrorists win.