

## **CAJ's submission no. S315**

# **CAJ's submission to the Joint Committee on the draft Detention of Terrorist Suspects (Temporary Extension) Bills**

**April 2011**

### *What is the CAJ?*

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Joseph Rowntree Charitable Trust and the Oak Foundation.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

**Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills**  
**House of Lords**  
**London**  
**SW1A 0PW**

20 April 2011

**Submission to the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills**

CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

CAJ has made a submission to the Public Bills Committee – Scrutiny Unit on the Protection of Freedoms Bill, which includes a provision to reduce pre-charge detention from 28 to 14 days (clause 57). While CAJ welcomes this provision, we argue that it should go further in order to comply with domestic and international human rights law.

We are thus disappointed that the UK Government has decided to pursue the development of ‘potential pieces of legislation’ to claw back the advances made with the Protection of Freedoms Bill (clause 57). We can only assume that by developing the legislation now, and subjecting it to scrutiny by Parliament and others, the motivation is to produce more balanced legislation than if it was developed in response to a terrorist attack and rushed through Parliament. This approach has its benefits in that the relevant proposals will potentially be more proportionate. However this ignores a number of key issues, including (1) the symbolic danger of having emergency legislation hovering over the democratic arena; (2) the validation that draconian legislation is the correct response to a public emergency; (3) the assumption that this legislation is suitable for the situation for which it is considered; and (4) the denial of more appropriate and currently active legislation such as the Civil Contingencies Act 2004.

## Extending the period of detention<sup>1</sup>

CAJ does not believe that the case for the extension of the period of pre-charge detention has been adequately made. While we acknowledge the complexity of police operations in terrorist cases, particularly where there may be large amounts of data to examine or the investigation may be stretched over several jurisdictions, it does not appear that there is, in reality, any need for the option of extending detention. Bearing in mind the requirement of the International Covenant on Civil and Political Rights (ICCPR Article 9(1)) and similar provisions in the ECHR (Article 5(2)) on the right for individuals to be informed of the reasons for arrest at the moment of arrest and to be promptly informed of charges against them, we remain apprehensive that a person may be detained without reasonable grounds having been established. This would permit the police to have the option of establishing the reason for arrest *after* the individual has been detained and increase the use of pre-charge detention.

CAJ highlights the findings of Lord McDonald of River Glaven in his Review of Counter-Terrorism and Security Powers, in which he noted that the cases had not been made for 28-day detention (para 1) and that where the measure had been used, it 'had not always demonstrated its fundamental utility' (para 4). However, we disagree with his conclusion of the need to put emergency legislation in place to provide the option to temporarily return to 28 days (para 7). We also highlight the findings of the Counter-Terrorism Review which argued for the limit on detention time to be set at 14 days (para 26). We also note that no use has been made of this power since 2007.<sup>1</sup>

The House of Commons Library Standard Note *Pre-Charge in Terrorism Cases* offers background information to the present bills and states

...the Home Office published two detailed documents entitled *Options for pre-charge detention in terrorist cases* and *Possible measures for inclusion in a future counter terrorism bill*. In those 2007 papers, the Labour Government argued that the decision to increase pre-charge detention limits to 28 days had been justified by subsequent events saying that they had 'been able to bring forward prosecutions that otherwise *may* not have been possible'<sup>2</sup> (emphasis added).

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<sup>1</sup> Lord MacDonal of River Glaven QC, *Review of Counter-terrorism and Security Powers*, January 2011. CAJ questions what this in fact means: are the police better at pre-empting and preventing acts of terrorism; is the threat of terrorism diminishing; is the desire of individuals to cause harm through acts of terrorism decreasing? Evidential analysis into the reasons for this bit of statistical information would be useful.

<sup>2</sup> Alexander Horne and Gavin Berman, House of Commons Library, *Pre-charge detention in terrorism cases*, Standard Note SN/HA/5634, 1 March 2001.

We note that the vague term ‘may’ is used rather than ‘would’. The original *Options for pre-charge detention in terrorist cases* is worded slightly differently and states the following:

The 28-day limit has been in operation since 25 July 2006. It has enabled suspects to be charged who may otherwise have had to be released. In the alleged airline plot, for example, 9 people were detained for between 14 and 28 days. 3 were released without charge at the end of that period and 6 were charged, 2 on the 27th day. In an operation led by Greater Manchester police in September 2006, an individual was charged on the 28th day of his detention. Most recently, in relation to Glasgow, where 3 have been charged and 3 released, one of those charged was charged on the 19th day of detention.<sup>3</sup>

We also note that the statistical evidence given in support of the extended length of pre-charge detention does not state how many of the 6 individuals charged after being detained between 14 and 28 days were subsequently convicted. Since that time, the available statistical evidence regarding convictions rates does not offer strong evidence demonstrating the value of extended pre-charge detention.<sup>4</sup>

Drawing on the lessons from Northern Ireland, CAJ has repeatedly voiced our opposition to extended pre-charge detention, drawing attention to a number of issues.<sup>5</sup> These include our concern that the provision of 28 days negatively encroaches on the right to liberty (European Convention on Human Rights (ECHR) Article 5). We have also continually referenced the need to learn the lessons from the application of emergency legislation in Northern Ireland, which have often been counter-productive and contributed to the demonisation and criminalisation of communities. These arguments against extended detention continue to be relevant, particularly in light of the statistical evidence, which show the limitations of the use of extended pre-charge detention.

Similarly, the United Nations High Commissioner for Human Rights has recognised the necessity of upholding human rights whilst trying to combat terrorism as well as addressing the causes of terrorism which may often include

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<sup>3</sup> Home Office, *Options for pre-charge detention in terrorist cases*, 25 July 2007.

<sup>4</sup> Alexander Horne and Gavin Berman, House of Commons Library, *Pre-charge detention in terrorism cases*, Standard Note SN/HA/5634, 1 March 2001.

<sup>5</sup> See for example the CAJ report *War on Terror: Lessons from Northern Ireland*, January 2008; ‘Submission from the Committee on the Administration of Justice to the United Nations Human Rights Committee in response to the Sixth Periodic Report submitted by the government of the United Kingdom’, June 2008; CAJ submission to the Home Office on ‘Possible Measures for Inclusion in a future Counter-Terrorism Bill’, October 2007.

economic, social, cultural, and political conflict (significantly, violations of such rights also may result in the recruitment of terrorism):

It is clear now that terrorism, and measures adopted by States to combat terrorist acts, are both influenced by and have an impact on the enjoyment of the economic, social and cultural rights of affected individuals...It is only by addressing human rights issues, including economic, social and cultural rights, through the lens of the conditions that lead to the spread of terrorism, such as socio-economic marginalization and exclusion, ethnic, national and religious discrimination, political exclusion and lack of good governance, that this goal can be achieved.<sup>6</sup>

The Council of the European Union's *Guidelines for a Common Approach to the Fight Against Terrorism* remind states that

Terrorism must not be answered by disregarding human rights, and the fight against terrorism must be carried out in accordance with international human rights law as defined in the relevant international instruments. Human rights, as defined in these international instruments, apply to all persons, including persons who have committed or are suspected of having committed terrorist acts.<sup>7</sup>

## Challenges to extended detention

CAJ and BIRW were joint interveners in the case of *In The Matter Of An Application By Colin Francis Duffy, C, D1, D2, G And T For Judicial Review and In The Matter Of A Decision Of A Judicial Authority To Grant An Extension Of Detention Under Section 41 Of The Terrorism Act 2000*. This case is currently on appeal to the Supreme Court. Our experience of this case informs our comments below.

## Incompatibility with Article 5 of the European Convention

CAJ advocated that extended pre-charge detention is a breach of the ECHR (Article 5). Under Article 5(3) of the Convention, a person has the right to be brought *promptly* before a court for the purposes set out in Article 5(1) (c), which is lawful detention, and has the right, set out in Article 5(2), to be informed *promptly* of the charge against him. This cannot occur under the extended pre-charge

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<sup>6</sup> Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism. A/HRC/12/22 2 September 2009.

<sup>7</sup> Available at: <http://www.ucm.es/info/terrorismoylegalidadinternacional/eu-council-terrorism-guidelines-pa.pdf> See also: Council of the European Union. EU Annual Report on Human Rights 2004.

detention regime. An individual is unable to challenge the legality of the detention, if they do not know the case against them. Under Schedule 8 of the Terrorism Act, information can be withheld from the defendant; further complicating attempts to challenge the detention.

This view has been supported by Monica McWilliams, Chief Commissioner of the Northern Ireland Human Rights Commission, who said:

Detention for unreasonably long periods runs counter to the requirements of Article 5 of the ECHR and can be ineffective and counter-productive. The Commission is on record as opposing lengthy pre-charge detention and has publicly stated that, at 28 days, the UK's existing pre-charge detention period is considerably longer than in countries that have also suffered terrorist attacks, such as the USA and Spain.<sup>8</sup>

We also draw attention to Article 9 of the Universal Declaration of Human Rights stipulates 'No one shall be subjected to arbitrary arrest, detention or exile.' Similarly, the ICCPR (Articles 9 and 14) require that prisoners must be brought to trial and the proceedings completed within 'a reasonable time', or be released on bail. This also reflects the common law presumption of the right to liberty.

### **The impact of pre-charge detention**

CAJ has consistently advocated the need for the Courts in Northern Ireland to move away from remand and toward a greater commitment to the presumption of bail. The devolved administration, via the Law Commission for Northern Ireland, has recently carried out a consultation on streamlining the bail process. Our submission to this consultation can be found at [www.caj.org.uk](http://www.caj.org.uk). We highlighted the devastating effect that remand can have on an individual, often disproportionate to the crime of which they are accused. This has a particular impact on Article 8 (right to a private and family life), as well as on their employment, financial stability and family and community ties. Our opposition to extended pre-charge detention is built on these concerns.

CAJ draws attention to the absence of suitable accommodation for those subject to extended pre-charge detention. Such individuals are detained in police stations, which do not have the facilities suitable for the detention period under consideration and similar to remand prisoners; they are unable to take advantage of any of the opportunities from which sentenced prisoners may avail benefit.

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<sup>8</sup> Northern Ireland Human Rights Commission Report on a visit to Antrim PSNI Station on Monday 23 March 2009 (July 2009)

Those subject to pre-charge detention do not know the charges against them, leaving them in an extended limbo. This in turn has a psychological impact. This also means that it cannot be judged if the extended pre-charge detention is proportionate to the crime for which they are being investigated.

### **The absence of robust safeguards**

CAJ is concerned at the inadequate provision of safeguards in the Draft Detention of Terrorist Suspects (Temporary Extension) Bill. There is only the option of the review by a senior judge after 14 days. The power to enable bail to be granted is also absent.

### **Appropriateness of the legislation**

CAJ understands that the use of this legislation would occur following an emergency. As such, the gravity of the situation will surely require a reaction more substantive than amendments to criminal procedure, that are more likely to be found in the Civil Contingencies Act 2004.

In light of these ongoing concerns, CAJ is opposed to the Draft Detention of Terrorist Suspects (Temporary Extension) Bills.