

The Compatibility of Extended Pre-charge Detention with the European Convention on Human Rights

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Abstract: In the UK a person reasonably suspected of terrorism can be arrested and detained without charge up to 14 days. While the Terrorism Act 2000 provides for rights for a detainee as it required by the European Convention on Human Rights 1950 these safeguards are not sufficient to prevent arbitrary detention and abuse of power. The article considers whether or not extended pre-charge detention compatible with European Convention on Human Rights.

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1. Introduction

The pre-charge detention introduced in the UK (United Kingdom) has received strong criticism in the light of ECHR (European Convention on Human Rights 1950) and HRA (Human Rights Act 1998). Breaches of fundamental human rights vary from the delay of being brought before a judge (article 5(3) of ECHR requires everyone arrested or detained to be brought promptly before a judge or other officer authorised by law to exercise judicial power) to the unprecedentedly long period of pre-charge detention compared with states with high risk of terrorism (USA, Russia, Turkey, Pakistan) as in the UK [1]. Although it might be argued that Article 5 of ECHR does not define the period within which the person may be detained without charge, Strasbourg jurisprudence suggests that detention followed by prompt release does not entail violation of Article 5(3) of ECHR [2, para 52]. Thus, the pre-charge detention, which is not accompanied by prompt charge or release, is incompatible with Article 5(3) of ECHR.

Furthermore, the high percentage of releases (57%) without charge speaks for itself. A judge authorising extension of detention up to 14 days is required only to be satisfied that the investigation is conducted “diligently and expeditiously”, and there is reasonable belief that further extension is necessary for preserving, obtaining and examining evidence [3, s. 32 (1)(b)]. These requirements are weak in terms of providing adequate safeguards against arbitrary detention because a judge’s authorisation entirely depends on material provided by the police and CPS (Crown Prosecution Service) [4] and not on evidence which a detainee could provide if he/she had known a charge was to be brought against him/her. At this stage, a suspect is deprived of the opportunity to organize a defence capable of disproving the allegations. For instance, 10 August 2006, P. was arrested on suspicion of involvement in terrorism.

During the detention no evidence regarding an aircraft liquid bomb plot was disclosed to him. On the fourteenth day, he was released without charge and no explanation or apology [5]. Had a detainee been informed immediately after the arrest about the allegations against him/her, the number of released without charge would have been considerably fewer as the detainee would be able to provide evidence against his/her alleged involvement in terrorism-related offences.

On the other hand, a person arrested under s. 41 of TA (Terrorism Act, 2000 as amended by the Protection of Freedoms Act, 2012) knows the grounds of his/her arrest, detention and its extension [3, para 31]. In Ward [6, para 20], for example, the police notified in advance W. that his further detention was required for questioning regarding five topics, but without revealing the questions as it could prejudice these inquiries. A detainee is entitled to representation in hearings regarding further extension of the detention and to “make oral or written representations to the judicial authority about the application” [3, para 31 (1)(a,b)]. Although a judge may authorise withholding of specified information from a detainee, the non-disclosure is compatible with Article 5 (4) [6] ECHR as there is a certain type of information the revealing of which may be contrary to the public interests, for example, “the apprehension, prosecution or conviction of a person who is suspected of falling within section 40(1)(a) or (b) would be made more difficult as a result of his being alerted” [3, para 34 (2)(d)]. A judge assesses this information on whether or not its disclosure may prejudice public interests and its non-disclosure is necessary for preserving, obtaining or analysing evidence. This decision has been reinforced in Duffy [7], acknowledging compatibility of extended pre-charge detention with ECHR [8].

This article considers whether or not extended pre-charge detention is compatible with ECHR. The article focuses on compatibility of extended pre-charge detention with Article 5 (1)(c), (3), (4) and 6 (1), (3)(c) of ECHR.

2. Compatibility of extended pre-charge detention with ECHR

In *Duffy*, the domestic court ruled that extended pre-charge detention is compatible with the Convention [7] as Schedule 8 of TA ensures that substantive and adjectival rights of a detainee enshrined in ECHR regarding his detention and further extension are observed. A detainee, firstly, must be released within 48 hours [3, s 41 (3)] after arrest under s. 41 of TA unless his further detention is necessary to preserve, gather, obtain and analyse evidence [3, para. 36 (3)]. Secondly, a detainee prior to the hearing regarding extension of his detention must be notified about the grounds and the time when the hearing takes place [3, para 31], and he, in this respect, has an opportunity to make “oral or written representations to the judicial authority about the application and to be legally represented at the hearing” [3, para 33(1)]. Although a detainee or a person representing him may be excluded from the hearing regarding “sensitive materials” [3, para 33(3)], a judge critically assesses whether closed materials [6] should not be disclosed, what impact non-disclosure has on a detainee and public interests [3, para 34 (1)]. In the absence of a detainee, there are various tools available for a judge to ensure adversarial procedure and equality of arms is preserved [7, para 35]. It can be achieved “by the supervision of the process by the court in the detained person's interest as occurred in *Ward*” [6]. Sometimes it may be possible to ensure that the gist of information is disclosed so as to ensure the necessary procedural protection. In exceptional cases the appointment of a special advocate may be appropriate [9]. Finally, there is no authority that expressly supported that a detainee must be charged before 28 days [3, para 36]. ECtHR (European Court on Human Rights), for instance, in *Wemhoff* [10], did not rule against his detention without charge in excess of two years, thereby confirming that there is no relation between charging and the length of detention [7, para 36]. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, despite “serious doubts” about compatibility of extended pre-charge detention, acknowledged [11] that “the Convention does not require a formal charge to be taken within a specific time, but only sets out procedural requirements that must be fulfilled during any detention prior to conviction” [12]. In addition, the comparison provided

by Liberty criticising “unprecedented” length [13] of pre-charge detention among other states with similar threats of terrorism did not consider particularities of their national counter-terrorism law [7, para 36] and thus cannot make a strong argument against extended pre-charge detention. Although the domestic court did not find issues of incompatibility of extended pre-charge detention with the Convention, there is need for more detailed assessment on compatibility with relevant Articles of ECHR.

Article 5(1) of ECHR prohibits deprivation of liberty except in certain cases and in accordance with due process prescribed by the national law. Article 5(1)(c) of ECHR permits the detention of a person if there is reasonable suspicion that he has committed a crime, or it is necessary to prevent him from doing so. In this respect, the detention of a person reasonably suspected of being a terrorist followed under s. 41 of TA without sufficient evidence necessary for charging is lawful. In *Brogan*, ECHR clarifies “Article 5(1)(c) does not presuppose that the police should obtain sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody” [14, para 2]. Thus, the arrest and subsequent detention under Article 41 of TA is compatible with Article 5 (1)(c) of ECHR.

In the light of Article 5(2) of ECHR (everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him), the police are required to inform a detainee of the reasons for his detention, about any charge if it is forthcoming [11]. Strasbourg jurisprudence clarifies that the detainee must be told “the essential legal and factual grounds for his arrest” [15; 16], allowing thereby for scant reasons provided to be sufficient [11, p. 236]. While being notified that the reason for detention is suspicion of involvement in terrorism might not be sufficient [11; 17] itself as no detail is provided, full disclosure is not required and the Domestic court [6] and ECtHR [16, paras 76-7; 18, para 56] are unanimous on that, particularly regarding terrorist offences [19]. In *Chraidi*, for instance, ECtHR took into account “difficulties intrinsic to the prosecution of offences committed in the context of international terrorism”, and partly for this reason did not rule against pre-trial detention for more than five years [11, p. 236].

Although Article 5 (3) of ECHR does not clarify how long a detainee may be held without being brought before a judge or other officer authorised by law [14, para 58; 10; 20], Strasbourg jurisprudence suggests that detention exceeding four days is incompatible with the requirement of “promptness” of Article 5 (3) of ECHR [21] even if there is need for extension due to difficulties associated with the

investigation of terrorist offences. In *Sinan, Yasar and others v Turkey*, inter alia, ECtHR found that detention of more than six days in custody without being brought before a judge was a breach of Article 5(3) ECHR “notwithstanding...the special features and difficulties of investigating terrorist offences” [22; 23]. However, the ECtHR has not yet stated that “a delay in charging the detainee is itself a ground for finding the detention to be unjustifiable” [11, p. 237]. Anyway, in the case of the extended detention, warrant of further detention is authorised by a judge after 48 hours of arrest [3, para. 29 (3a).], which is in line with Article 5(3) of ECHR.

Although the extended detention is compatible with Article 5(1), 5(3) of ECHR, the issue of incompatibility may arise due to non-disclosure of materials against a detainee. This challenge derives from the “sole and decisive rule” introduced by the Strasbourg Court in *Doorson* [24] in the light of A’s Grand Chamber decision [25]. Although the application of “sole and decisive rule” is not appropriate for the common law system, the violation of ECHR might arise because there are insufficient procedural rights for a detainee to challenge closed materials. In A [25], the ECtHR (the Grand Chamber) ruled that the detention [26, s. 23] solely or to a decisive degree based on closed materials when the detainer is deprived an opportunity to challenge allegations against him/her within the meaning of Article 5 (4) of ECHR [27] is in breach of Article 5 (4) of ECHR. However, if a detainee had been given access to closed materials (specifically reflected on open materials) without revealing detail or sources of evidence on which allegations were based, he would have been able to challenge effectively reasonableness of suspicion against him [25]. This is the same position the House of Lords has taken in *AF v Home Secretary* [28] by ruling against non-derogating control orders solely based on closed materials. The decision appears reasonable not only because the decision to impose order on those suspected of terrorism was based on closed material, but also because the participation of the Special Counsel was not sufficiently effective to challenge allegation without instructions of a detainee who had no access to evidence and hence was not able to refute them [25]. However, although safeguards against arbitrary detention might not be sufficient, the non-disclosure of specified information in hearings regarding extension of pre-charge detention is compatible with Article 5 (4) of ECHR [6; 29; 30; 31]; firstly, because a detainee is notified in advance about reasons for his/her further detention with or without revealing sensitive information which for instance may make apprehension, prosecution and conviction more difficult if a person is alerted [3, para. 34 (2)(d).], and

thus a person by knowing grounds for extension of his/her detention can “make oral or written representations to the judicial authority about the application” [3, para 33(1)(a)]; secondly, although a detainee or his/her representative on application made by the police or CPS in accordance with Paragraph 34 Schedule 8 of TA may be excluded from the hearing regarding the extension of detention, a judge ensures that the withholding of information is absolutely necessary and an extension of detention should be granted [6, para 22]. In the light of *Rowe and Davis v UK* [32], judicial assessment procedure adopted in the UK as regards the necessity of the non-disclosure of “sensitive materials” provides sufficient procedural safeguard to ensure fairness and protection of the right of detainee.

Although the extension of detention after 48 hours is subject to judicial assessment and authorization [3], it is likely that the judge’s discretion only conditioned by necessity of further detention for obtaining, preserving, analysing or examining evidence tends to be against a detainee. This is because a judge is just required to be satisfied that further detention is necessary and an investigation is carried out diligently and expeditiously [3, s. 32 (1)(b)]. A judge relies on the warrant for detention applied mainly by the police [33], which is naturally biased towards a detainee [34] and reasonable suspicions which do not always provide reliable evidence. For example, five persons detained between 14 to 28 days in Operation “Overt” were subsequently “cleared of any involvement of terrorism” [35]. In addition, a judge due to the high profile of the terrorist offences and possibly fearing that a released suspect might commit a terrorist act or abscond, prefers to authorise the warrant. Therefore, although a judicial oversight provides safeguards and in line with the Convention’s requirements [7], it does not provide protection at a level that could prevent detention of an innocent person.

Finally, the issue of incompatibility may arise if a detainee has been delayed access to legal advice in the interests of the investigation. According to TA Schedule 8 para. 8(1)(b), “an officer of at least the rank of superintendent may authorise a delay in permitting a detained person to consult a solicitor only if he has reasonable grounds for believing that exercise of the right to legal assistance will have following consequences: interference with or harm to evidence of a [serious offence], interference with or physical injury to any person, the alerting of persons who are suspected of having committed a [serious offence] but who have not been arrested for it, the hindering of the recovery of property obtained as a result of a [serious offence] or in respect of which a forfeiture order, interference with the gathering of

information about the commission, preparation or instigation of acts of terrorism, the alerting of a person and thereby making it more difficult to prevent an act of terrorism, and the alerting of a person and thereby making it more difficult to secure a person's apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism" [3, para. 8(1)(b)]. Although the Convention provides for legal assistance after charge [36, Art 6(3)], ECtHR accepts an application of Article 6 at the stage of the "preliminary investigation into offence" [16, para 2] including police interrogation [37]. For instance, in *Murray v UK* [16, para 1], delay of legal advice for 48 hours from the moment of detention authorised pursuant to s. 15 of the Northern Ireland (Emergency Provisions) Act 1987 "on the basis that the detective superintendent had reasonable grounds to believe that the exercise of the right of access would, inter alia, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent an act of terrorism" [38, s. 15], was a violation of Article 6(1) in conjunction with 3 (c) of the Convention. While admitting the necessity of statutory power to delay access in order to "limit the risk of interference with the vital information-gathering process and the risk that a person involved in an act of terrorism or still at large may be alerted" [16, para 60], ECtHR held that denial of access to a lawyer – whatever the justification for such denial – when according to The Criminal Evidence (Northern Ireland) Order 1988 adverse inferences could be drawn from the applicant's failure to answer questions by the police at the pre-trial stage [16, para 72], is incompatible with Article 6 of ECHR [16, para 66]. Consequently, if silence by the detainee prior to receiving the advice of a solicitor is exempted from drawing inference, then delay of access to a lawyer in the interest of the investigation does not affect fairness [16, para 72] and thus is compatible with Article 6. Therefore, in the light of s. 34 (2a) of the CJPOA (Criminal Justice and Public Order Act 1994) (also applicable in relation to terrorism cases) [39], this excludes silence (failure to mention facts) by the accused from drawing adverse inference when "he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed" [40, s 34 (2a)]. Delay of access to a solicitor is compatible with Article 6. However, the disapplication of the adverse inference with respect to silence (failure to mention facts) does not render "inadmissible the answers given by the detainee during questioning" [41, para 77]. Although ECtHR found breach of Article 6 (1), 6(3)(c) of the Convention in *Murray v UK*, it nevertheless did not affect conviction of Murray as there was "a formidable case" against him [41, para

26] and therefore conviction for "aiding and abetting unlawful imprisonment" was safe and only the compensation was granted [41, para 1]. This means that the conviction, which is not solely or to a decisive extent based on an adverse inference drawn from silence (failure to mention facts) prior to being assisted by a solicitor due to a delay of legal assistance in the interests of the investigation, is safe provided there is a cogent case against the accused.

3. Conclusion

The detailed analysis of extended pre-charge detention in the light of its compatibility with the Convention, revealed arguments against and for extended pre-charge detention. Disproportionality and lack of adversarial procedure in terms of granting the extension are the main arguments against. Those criticising "unprecedented" length of extended pre-charge detention do not take into account that the Convention is not concerned with the law itself rather how the law is applied [15, para 31], whether or not the applicant's rights in the light of ECHR are observed and guaranteed by the law [11]. TA provides for substantive and adjective rights for the detainee as is required under ECHR. The detainee is informed about grounds for his detention (Article 5(2)) [11], he is brought before a judge or other officer authorised by law within 48 hours after arrest (promptly as it is required by Article 5(3)) and he has the right to "make oral or written representations to the judicial authority about the application" [3, para 33(1)(a)] regarding the allegation against him and the extension of the detention. Although a judge may order withholding of "sensitive" information [3, para 34] which might undermine adversarial procedure of hearing regarding the extension of the detention and thus the detainee's right to a fair trial (Article 6(1)), he ensures that withholding is absolutely necessary and the extension of detention should be granted. In this respect, ECtHR acknowledged that judicial assessment of necessity of non-disclosure ensures fairness and guarantees protection of the detainee's (accused) rights [32]. In addition, a detainee, according to TA, Schedule 8, has a right to legal advice [3, para 6 (2)(c)] as it is required by Article 6 (3)(c) of ECHR. Although an officer at rank of superintendent may authorise delay of access to a solicitor [3, para 8 (1) (b)], in the interests of the investigation, not drawing adverse inference from silence (failure to mention facts) by an accused prior to being legally assisted in accordance with the CJPOA guarantees fairness at the trial.

On the other hand, safeguards against the arbitrary detention are not sufficient as the judicial supervision does not protect against detention of an innocent as a judge is only required to be satisfied that further detention is necessary for gathering, analysing

and preserving evidence and an investigation is carried out expeditiously and diligently [3, s. 32 (1)(b)]. In most cases, “it can be established even if a detainee is innocent” [5]. A judge relies on information provided by the police based on reasonable suspicions, which are not the same as reliable evidence and might be proved wrong after thorough examination and analysis.

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