

## Necessity, effectiveness and proportionality of extended pre-charge detention of persons arrested under s. 41 of the Terrorism Act, 2000

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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 which is longer than in any other state with high risk of terrorism. While terrorism related offences require prompt and rapid response for prevention them from occurrence there is doubt on necessity, effectiveness and proportionality of the pre-charge detention longer than 4 days. The article considers arguments against and for the pre-charge detention, whether or not it proportionate and necessary for counter-terrorism policy, alternatives to extended pre-charge detention.

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### 1. Introduction

A constable under s. 41 of TA (Terrorism Act, 2000 as amended by the Protection of Freedoms Act, 2012) may arrest without warrant any person who is reasonably suspected of being a terrorist. Once arrested, the suspect may be detained up to 14 days [1, para. 36 (3)] to allow relevant evidence against him/her to be obtained, preserved, analysed and examined [1, para 32 (1a)]. The warrant of further detention after 48 hours is issued by a court, which may shorten the period of detention if satisfied that there are circumstances that would make it inappropriate for the specified period to be as long as seven days [1, para. 29 (3a)].

The pre-charge detention has been subject to two extensions (from 7 to 14 and then to 28 days) and a reduction (from 28 to 14 days). In the aftermath of the 9/11 attacks, the period was doubled and grounds for the extension remained the same [2, s 306]. After the 07 July London bombings, 14 days increased to 28 days of detention [3, s 23]. Finally, the period reverted to 14 days whilst introducing a power for the Secretary of State to increase the limit up to 28 days for a period of three months in circumstances where Parliament is dissolved [4, s 57].

The latest figures [5] show that since the 9/11 attacks the total number of arrests for terrorism-related offences is 2291 (under s. 41 of TA and other related legislation [6]), among which 1230 (or 54% approx.) suspects were released without charge [5], 512 (22%) were charged with terrorism-related offences, 322 (14%) were charged with non-terrorism related offences and 227 (10%) were released on alternative actions (include cautions for non-terrorism offences, transfers to immigration authority, transfers to Police Service for Northern Ireland, those bailed awaiting charge and those dealt with under mental

health legislation). Of the 512 charged with terrorism related offences 312 have been convicted [5]. The majority among 930 released (arrested under s. 41 of TA) without charge were held in custody during one day (509). Eight suspects were detained for up to 14 days and three suspects up to 28 days. Among those released only Mohamed Raissi's appeal against his arrest followed by detention (41 hour) succeeded [7] on the grounds that there was no reasonable suspicion for arresting him under s. 41 of TA, yet no compensation was awarded. Among 559 charged after detention, 136 (the largest number) were charged after the first day of detention, 13 suspects on the fourteenth day, three after 20 days and three by the twenty eighth day of detention [5].

The data suggest that there is no urgent need for pre-charge detention for more than 14 days. The most (701 out of 1623) have been either released without charge or charged with terrorism-related offences on the first day of the detention. Of only 11 suspects since 9/11 who were held beyond 14 days, three were released without charge and eight charged with terrorism related offences as a result of Operation Overt [8].

There is no doubt that prevention, detection and investigation of terrorist-related offences are complex and require prompt and rapid response from the police to avoid any chance of terrorism to occur. But, the pressure of a high-profile crime may lead to overreaction and abuse of power conferred on the police. For example, on 22 July 2005, at Stockwell underground station, an innocent Brazilian electrician was shot by the police. He “was wearing a light denim jacket and was not carrying a bag of any description and who was under surveillance by undercover officer, but was neither challenged nor stopped” [9]. However, The Independent Police Complaints

Commission found that “Operation Kraton had not been deployed with respect to shooting of Menezes” and “The Kratos code words were not used” [10].

The purpose of this article is to consider whether or not extended pre-charge detention is necessary for the counter-terrorism strategy in the UK, proportionate and effective.

## **2. Necessity, arguments against and for extended detention without charge, alternatives to it**

At the outset (since 1974), detention of a terrorism suspect without charge for up to five days did not involve judicial supervision. According to Prevention of Terrorism Act 1984 (Temporary Provisions), the Secretary of State could authorise the extension of detention up to five days. As a result, in *Brogan v UK* [11, paras 61-2,135-36], ECtHR (European Court on Human Rights) found a violation of Article 5(3) ECHR (European Convention on Human Rights) according to which “everyone arrested or detained has to be brought promptly before a judge or other officer authorised by law to exercise judicial power and is entitled to trial within a reasonable time or to release pending trial” [12, Art 5(3)]. The UK government, instead of introducing judicial oversight, chose to derogate with respect to Article 5(3) of ECHR as it was necessary [13], and there was a public emergency “threatening the life of the nation” [12, Art 15]. In *Brannigan and McBride v UK*, 1994 ECtHR demonstrated a quite flexible position in accepting the derogation; the detention of *Brannigan and McBride* without charge under PTA (Prevention of Terrorism Act 1984) for over six and four days respectively, was necessary within the meaning of Article 15 of the Convention as there was a “public emergency” in Northern Ireland [14, para 47]. Equally, in *A v UK*, ECtHR accepted that there was a “public emergency” [15, para 181, 190], but the indefinite detention of foreign citizens suspected of international terrorism without trial was disproportionate. Similarly, in *Aksoy v Turkey*, despite the existence of public emergency in the South East of Turkey, 14 days of detention was not proportionate, nor were adequate safeguards against arbitrary interference with the detainee’s rights provided (judicial supervision and ignorance of Turkish criminal code’s provisions at the time of emergency) [16, Supra Note 3, 855]. This suggests that the Convention grants a wide margin of appreciation to a state on whether or not there is “public emergency”, but it is accompanied by ECtHR’s supervision. ECtHR, in the final instance [16, Supra Note 3, 854], decides whether or not the measure adopted by the state at the time of public emergency is strictly required by the exigencies of the situation [12, Art 15]. Therefore, although the Convention preserves a state’s right to derogate from

its ECHR’s obligation at the time of public emergency, the pre-charge detention in the form it existed before introduction of judicial oversight in the UK was in violation of Article 5(3) ECHR. As a result, TA 2000 aimed to strengthen anti-terrorism law against international threat introduced judicial oversight [1, s. 29 (3a)] thereby harmonising the provision with Article 5 (3) of ECHR’s obligation. According to s. 29 (3a) of Schedule 8 of TA, a judge after 48 hours of arrest under s. 41 of TA, followed by detention, issues the warrant of further detention if satisfied that it is necessary for obtaining, preserving and analysing evidence, and prosecution is carried out expeditiously and with due diligence.

However, the judicial supervision does not provide sufficiently strong and adequate safeguard against arbitrary detention [17]. To date, three people held more than 14 days have been released without any charge [5]. For instance, P. who was arrested by the police on suspicion of involvement in an aircraft liquid bomb plot was released on the fourteenth day without charge with no disclosure of materials against him, explanation or apology [18, p. 1577]. The police, to carry out an arrest and further detention, are required to have only reasonable suspicions, which is certainly less reliable than evidence. However, the Court of Appeal in *Raissi* established higher requirements regarding reasonable suspicions than those under PTA, which certainly provide extra safeguards against arbitrary detention [19]. Inter alia, for arrest under s. 41 of TA, the Court of Appeal in *Raissi* [7] rejected the state of mind test (applied in *O’Hara*) [20] and instead established a stricter test compared with that under s. 12 the PTA. Nonetheless, a strict test for reasonable suspicions might not prevent the detention of the innocent as a judge is only required to be satisfied that further detention is necessary for gathering, analysing and preserving evidence and that an investigation is carried out expeditiously and diligently [1, s 32 (1)(b)]. In most cases, “it can be established even if a detainee is innocent” [18]. In Operation “Overt”, for instance, five persons detained up to 28 days without charge were subsequently “cleared of any involvement of terrorism” [20. p. 1578]. Therefore, there is a need for both thorough judicial scrutiny when the warrant of further detention is authorised and compensation to be granted if a person is released without charge or on alternative actions, otherwise anyone is potentially under risk of being detained up to 14 days – particularly vulnerable are Muslims [21; 22].

The reasons for extension beyond the traditional maximum 96 hours [6, s 44 (3a)] relates to the specificity of investigation, the complexity of gathering and obtaining evidence with respect to terrorism offences. Unlike “terrorist acts perpetrated

by the Irish Republican Army who made efforts to minimize the number of casualties” [23], “nowadays” terrorists seek to maximize casualties [24]. Therefore, prompt and earlier response, including the arrest of suspects of terrorism, is absolutely indispensable for the prevention of the terrorism act [25]. For this reason, the police at the stage of an arrest may not possess sufficient evidence for charging a detainee. In such cases, release of a detainee after 96 hours may pose a risk to the national security – a detainee may abscond or destroy evidence. Ninety six hours may not be sufficient to gather evidence [26] as the gathering and obtaining of evidence is time-consuming involving considerable resources [27; 28], including enquires to be taken in different jurisdictions (the terrorist network is often international and enquiries taken in different jurisdictions are time-consuming as this involves translation and time to await response), establishment of a suspect’s identity (terrorists often use forged or stolen identity documents for the purpose of conspiracy) [29], examination and decryption of vast data (terrorists use sophisticated encryption methods, such as steganography and cryptography) [30] and forensic examinations (the forensic requirements in modern terrorist cases are far more complex and time consuming than in the past, particularly where there is the possibility of chemical, biological, radiological or nuclear hazards) [24]. Although in most cases “arrests are likely to follow months of investigation and surveillance” [31, para 35], and thus sufficient evidence for charge without delay should be available and figures demonstrate that since 9/11 only eight [5] have been charged after 14 days, public safety and difficulties associated with gathering, analysing, preserving and obtaining the evidence remain the main justifications for extended pre-charge detention. In addition, 14 days pre-charge detention maintained by the PFA (Protection of Freedoms Act 2012) reflects anticipation of further development of terrorist threat as in the future 14 days detention might not be sufficient [32].

The other reason why the extended pre-charge detention has not yet been abolished despite massive critique [33; 34; 35; 36] is to ensure that at a “time of terror” effective means for public safety are available [37, p. 289]. At a “time of peace” the extended pre-charge detention serves mainly to allow for time to gather, obtain and analyse evidence sufficient for a charge [34, p. 275], while during “time of terror” the purpose is to prevent further attacks [38;39]. The Home Office’s statistics confirm that in the period following the 9/11 and 7/7 attacks, the number arrested under s. 41 of TA was considerably higher than at other periods [40]. That is to say, the emergency provision provides extra safeguards

against a threat of terrorism [18, p. 1580] and on this ground can be justifiable [41]. However, there is no data on whether or not the extended detention at the time of “public emergency” is an effective measure.

On the other hand, if the prosecution can use a “threshold test” [42] which unlike a “full code test” [43] sets a lower threshold for evidence and does not require a reasonable prospect of conviction [44], then there is no need for extended detention as the gathering of evidence can be completed after a charge. In the absence of sufficient evidence for charge, reasonable suspicions [45], which are required for arrest under s. 41 of TA, satisfy the evidential stage of a “threshold test”. However, at the second stage of the test, a prosecutor must be satisfied that “continuing investigation will provide further investigation within reasonable period of time” [42]. This is not always the case in terrorism investigations; since 9/11, 11 out of 930 released without charge have been held up to 28 days (up to 14 days, eight suspects; up to 28 days, three suspects) [6]. Although the number of released may not be considerable, a prosecution prefers not to proceed with a case [43] if there is uncertainty on a real prospect of conviction [32, para 17]. The statutory provision, permitting detention without charge, therefore, appears convenient for both the police and the CPS (Crown Prosecution Service). The police, on the one hand, without time pressure may gather sufficient evidence for charge; the CPS, on the other hand, makes a better decision on whether to prosecute than it would if a “threshold test” has been applied.

Opponents of the extended pre-charge detention suggest different alternatives that may ensure the observance of HR (Human Rights) and prevent the abuse of power. A detainee can be “charged with minor offence and deny bail where appropriate” instead of extension of detention [46]. However, not charging with a realistic offence does not appear to be “more human rights-compatible” [32] than extended detention. Liberty insists on bail [23] or reduction of the detention because 14 days of detention is “unprecedentedly” higher than in any other Western democracy [47]. Awan, inter alia, argues that in Pakistan where the threat of terrorism is no less serious than in the UK, the period of detention is not as long as in the UK despite that Pakistan’s counter-terrorism units do not have sophisticated tools of investigation, such as “technological advancements in DNA profiling, facial recognition, community policing models”, and mostly rely on interrogation technique [34, p. 276; 48]. The similar position is held by the Equality and Human Rights Commission suggesting the reduction of extended detention up to four days [48]. However, the comparison provided by these organisations did not consider particularities of the national counter-terrorism law and differences in

the criminal justice systems; for example, counter-terrorism law in the USA, which instead of extended detention provides for indefinite detention without charge in Guantanamo Bay [32, para 12; 49], which is undoubtedly worse [50] than 14 days detention. Recommendations by HR organizations [48], such as strict time limits, observance of rights enshrined in Article 5 and 6 of ECHR express their position but are not based on thorough and detailed analysis of the necessity of extended pre-charge detention. Another alternative, such as police bail, unlike extended detention, cannot prevent commission of an offence by a suspect or him from absconding [32, para 19]. Nor is post-charge questioning likely to make much, if any difference to the need for extended [32, para 15] detention. Therefore, alternatives suggested are not as effective as the extended detention, which can simultaneously provide public safety and facilitate investigation. However, extended detention must be proportionate [18; 33 para 26], and subject to thorough judicial scrutiny [51] and compensation to be paid if an individual is released without charge. Inter alia, according to TA, Schedule 9 para. 9 (2), the right to compensation is only enforceable if a person has not been convicted. It is unclear whether or not the right to compensation extends to the pre-charge stage as para 9 (2) states that a person has the right to compensation in respect of proceedings brought against him. In this sense, proceedings start when the person has been charged. Therefore, there is need for clarification on this matter so as to provide compensation at the pre-charge stage.

### Conclusion

The Convention preserves the Contracting party's right to legislate and determine the level of protection it deems appropriate provided that the rights enshrined in ECHR are observed. Therefore, the Convention does not specifically define the period of time within which a detainee can be held without charge, nor does the Strasbourg jurisprudence provide clear reference, thereby preserving a state's margin of appreciation. While TA provides for substantive and adjective rights for the detainee as is required under ECHR these rights are not sufficient as the detention of innocent people has had place.

To date, five persons detained between 14 to 28 days in Operation "Overt" were subsequently "cleared of any involvement of terrorism" [20]. In this regard the judicial involvement (supervision) does not provide 100% protection against the detention of the 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 [1, s 32 1(b)]. In most cases, "it can be established even if a detainee

is innocent" [18]. 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. However, the detention of the innocent is unavoidable, particularly in respect to terrorism, when prompt and rapid detention is vital for the prevention of the act of terrorism from occurrence in the name of national security at the expense of individuals' liberty even if suspicions are not sufficient. In this respect, there must be compensation paid if a person is released without charge; otherwise, the door is open for the abuse of power by the police.

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