

Terrorism detention without charge: How many days is enough?

Gareth Crossman questions the government's claim that longer periods of detention without charge are a necessity.

In the political arena, certain issues become totemic. Their importance is such that they represent something more than a policy decision impacting upon a limited number of individuals. Instead, they become a defining feature of societal attitudes towards fundamental issues of the day.

The period of time that those suspected of terrorist actively can be detained without facing charge is such an issue, and rightly so. The right to freedom from arbitrary detention is one of the central tenets of any democracy. Historically, the United Kingdom has frequently been measured by adherence to the rule of law, favourably comparing itself against those nations more willing to use oppressive means against their populations.

And so the recent and continuing debates over terrorism detention take place in a wider context of how British traditions of freedom are faring in the current security climate. An over-simplistic assessment of competing views sets up two opposing camps. On the one side are those who believe that the state is obliged to take drastic steps to ensure the safety of those in its jurisdiction. On the other are those who believe that rights and freedoms must be protected whatever the threat a nation faces. Such an approach fails to take into account the fact that the human rights framework allows for states to take appropriate and proportionate measures to address threats to security. It also discounts the fact that over-severe measures might prove counterproductive in

disenfranchising and alienating communities. Previous debates over extension have tended to imply that people are either 'for' or 'against' security. With the Counter Terrorism Bill introducing an extension of up to 42 days, it is to be hoped that more sophisticated debate will prevail.

Even those who support ever-increasing detention would accept that there is no basis in logic for the current period permitted. The process leading to the current 28 days was somewhat haphazard. Between 1974 and 2003, seven days' detention was permitted under various acts of parliament. The Criminal Justice Act 2003 doubled this to 14 days. This was then doubled again in the Terrorism Act 2006 to the current 28 days. The government had in fact sought 90 days' detention when this bill was introduced in 2005. At the time, it was assumed on all sides that 90 days was the opening 'bid' and that a compromise would be later offered. However, the then Prime Minister Tony Blair soon made it clear that no compromise would be considered. The unease and dissatisfaction this caused on the Labour back benches led to the government's first defeat in the House of Commons. David Winnick, an influential Labour backbencher, tabled an amendment of 28 days. The Commons supported this amendment by 323 to 290 votes, despite fierce government opposition.

Gordon Brown indicated his intention to revisit detention even before he took over as Premier. Initially, his new administration soon

began to indicate its intention to seek a further doubling to 56 days. A series of consultation papers were published towards the end of the summer. The tone of these, and of the government generally, was far more conciliatory than the abrasive approach of 2005. Much emphasis was placed on the need to seek consensus. Despite this it remained clear that a substantial extension remained the government's aim. This was despite admissions from the Home Secretary Jacqui Smith in late October that there was no evidence that any extension was needed. Further embarrassment for the government arose in November when the Security Minister Lord West told Radio 4 listeners that he was not persuaded that the case for extension had been made. A hasty retraction following Lord West's summons to the Prime Minister's office convinced few. Suspicions that the consultation process had not particularly influenced government thinking followed Jacqui Smith's admission to the House of Commons Home Affairs Committee that only six out of 71 responses received had been in favour of extension. Despite all these admissions, the Counter Terrorism Bill was published in January with 42 days set as the maximum detention length.

So, if no case has been made for extension, why is the government pushing for one? The argument from the government, and from others such as the reviewer of terrorism legislation Lord Carlile, is that even if extension is not necessary now, it might be in the future. The fact that such exceptional powers are being sought without evidence that there is any need for them is a cause of major concern. Attempts to raise hypothetical examples, such as Lord Carlile's suggestion that more than 28 days might have been needed to interview the alleged Glasgow bomber, Kafeel Ahmed, have made the case for extension seem even more spurious. It does not say much extension justification if the best example available is one involving a person (1) in a coma (who later died), (2) who was not under arrest, and (3) against whom there was presumably a mass of CCTV and

witness evidence allowing him to be charged immediately he was in a suitable condition.

Pointing out that there is no evidence that a longer period is needed is one thing, but opponents of extension need to do more. They need to show why it would be damaging. A useful starting-point is to compare the UK with other countries. In November, Liberty published a report showing precharge detention periods in democracies around the world. The challenge in doing this derived mainly from comparing a common law jurisdiction like the UK to civil code countries like most of those in Europe. We gave independent academics and lawyers based in these countries relevant factors to take into account, such as the time a police investigation is handed over to prosecuting authorities, and asked for their best analysis. The results showed that the UK, at 28 days, had by far the longest period. By comparison, Canada allows one day, the United States two, France six, and the Republic of Ireland seven.

So, the UK already allows detention several times the length of any other state. Why is this a problem? We have already touched upon the vital constitutional importance of a state not relying on oppressive or excessive laws. There are very practical reasons why this is so important. Generally, the UK's claim to be a leading liberal democracy at the forefront of fighting global oppression is undermined by its tendency to pass harsh anti-terrorism laws. More specifically, Liberty argues that the constant extension of detention limits is in fact counterproductive by undermining community relations and trust in the authorities. People will be less likely to cooperate with the police if they

are worried about what might occur if they do. Interestingly this analysis is supported by the Home Office's own Equality Impact Assessment published at the same time as the Counter Terrorism Bill which stated that 'Muslim groups [had] said that pre charge detention may risk information being forthcoming from members of the community in the future.

Liberty has always advocated the state taking appropriate steps to protect the security of the nation. We also believe that if objecting to government plans, we should if possible, offer alternatives. When the extension in the 2005 bill was first proposed, we put together a package of alternative measures we believed would meet concerns raised by the police about the current limit. Our main suggestions were to review the grounds for re-interviewing people who had already been charged with terrorism offences and to remove the bar on intercepted material in criminal trials.

In relation to re-interview, much of the evidence gathering in criminal cases takes place after charge. Re-interview, subject to strict judicial authorisation and oversight, would allow police to act if it emerged that a person's involvement in terrorist activity might be more significant than believed at the time of charge. The new bill does contain provision for re-questioning but neither goes far enough to be useful nor contains any relevant safeguards. As far as intercept material is concerned, it might seem surprising that Liberty has long argued for admissibility. However, the bar is a historical anomaly, and the Republic of Ireland is the only other democracy which has a similar restriction. We maintain that justice is best served by allowing all material, both prejudicial and

exculpatory, to potentially be used in proceedings (subject to normal admissibility rules). Given that approximately 2000 intercept warrants are authorised annually, it is safe to assume that anyone against whom there is suspicion of involvement in terrorist activity will be subject to intercept surveillance. We are, therefore, convinced that removal of the bar would have a significant impact upon the ability to bring charges. This is particularly the case as the Director of Public Prosecution, Sir Ken Macdonald, has said that terrorism cases usually apply a different 'threshold' charging standard to the usual 'reasonable prospect of conviction'. The threshold test is of reasonable suspicion that the offence has been committed *based on evidence that is admissible*. This means that if the bar is lifted, the police would currently have 28 days to bridge the small gap between the arrest standard and the threshold test.

The government has also argued that extension might be needed to cover the 'nightmare scenario of multiple plots overwhelming the authorities' resources. Liberty has pointed out that in such situations, emergency powers legislation already exists in the Civil Contingencies Act 2004. As an opinion from David Pannick QC confirms, the nightmare scenario would allow for extended detention for a limited period. This has now become a highly political issue with, for example, the government suggesting that Liberty now 'supports' further extension. We do not and will oppose any attempt to undermine traditional British values of liberty. ■

Gareth Crossman is Policy Director at Liberty.