Public / Human rights

Terrorising the innocent

The government should heed advice to reduce terrorism detention, **Ali Naseem Bajwa** & **Beth O'Reilly**

The last decade has seen investigators being granted a wave of new and wide-ranging powers to counter the modern terrorism threat. Among the expansion of powers was a significant increase in the terrorism pre-charge detention limit. However, a case study of Operation Overt, the "Heathrow" or "airline liquid bomb case", graphically illustrates the flaws in extended terrorism detention and the danger it poses to innocent suspects.

When the Terrorism Act 2000 was introduced, the limit on terrorism pre-charge detention was seven days. This was increased in 2003 to 14 days. In 2006, a government proposal to increase it to 90 days was defeated but a compromise of 28 days was passed. In 2008, the government sought yet again to increase the limit to 42 days but was forced to abandon its plans following a heavy defeat in the House of Lords. Not to be deterred, the government shifted the 42-day provision to the Counter-Terrorism (Temporary Provisions) Bill, which lies in the Library of the House of Commons awaiting introduction "should a terrorist plot overtake us and threaten our investigatory capabilities."

Operation Overt

The 28-day limit came into force on 25 July 2006. A little over a fortnight later, the Operation Overt arrests were made and the powers used for the first time. The investigation concerned an alleged Al-Qaida conspiracy to murder thousands of people by detonating liquid-based bombs on board a number of trans-Atlantic aeroplanes. A total of 24 persons were arrested and detained for varying periods before being either charged or released without charge.

The bare facts are these: eight of the alleged "main players" in the case were charged fairly quickly, within 11 days of their arrest. Of these eight persons, five have been convicted of a terrorist conspiracy to murder. At the other end of the spectrum, five were detained right up to the 28-day limit; three were released without charge and two charged. The latter two charged persons, whom we shall refer to as the "Overt Two", were subsequently cleared of any involvement in terrorism.

The Overt Two

In 2008, the government, in making its case for 42 days, relied heavily on the fact that the Overt Two were only charged after the full 28-day limit had been exhausted. Time and again, government ministers and advocates for 42 days argued that investigators had been "up against the buffers" in relation to the Overt Two. It was suggested first, that the evidence upon which the charges were based did not become available until very late in the 28-day period and second, two dangerous terrorists very nearly evaded justice by reason of what might well have proved to be an inadequate detention limit.

The facts in relation to the Overt Two are illuminating:

- Disclosure as to the basis for their arrest for the first 14 days was no more than the bare minimum and there were remarkably few interviews conducted during the first four days and the last 14 days of detention.
- The evidence upon which the charges were based was in the possession of the investigators within the first six to 12 days of detention; no material evidence came to light towards the end of the 28-day period.

IN BRIEF

- In Operation Overt, all five persons detained pre-charge for the maximum of 28 days were cleared of any involvement in terrorism.
- 28 days pre-charge detention is too long; the government's case for 42 days has collapsed.
- The procedures for extending pre-charge detention are grossly deficient and unfair.

- A psychiatrist saw one of the two detainees on the 27th day of detention. Despite there having been no previous mental history, the finding was that he was starting to "develop psychiatric symptoms due to the circumstances of his confinement," including "insomnia, mood disturbance, thoughts of self-harm and hallucinations." The psychiatrist expressed concern for his health if detention continued for much longer.
- Each of the two was charged with the somewhat nebulous offence of preparation of terrorist acts, contrary to s 5 Terrorism Act 2006 under an alternative and lower charging standard known as the Threshold Test ("a reasonable suspicion that the suspect has committed an offence"), yet, at no time were they, their legal representatives or the court informed that the Threshold Test, and not the usual Full Code Test, had been applied.
- Both were cleared of any involvement in terrorism, one by unanimous verdict of a jury on 7 September 2009 and the other when a judge upheld a submission of no case to answer on 2 February 2010.

Operation Overt not only demolishes the government's case for 42 days but, when five guilty persons are charged within 11 days and five innocent persons are detained for the maximum of 28 days, it provides strong support for the view that 28 days is unnecessarily and dangerously long.

Terrorism investigators tend to pace the investigation according to the available detention time limit. Operations Crevice (the "Fertiliser Case"), Rhyme (the "Dirty Bomb Case") and Vivace (the "21/7" failed London bombings) were all serious and complex investigations, yet entirely reliable charging decisions were made within the then-14 day limit. In fact, no one can point to a single erroneous charging decision made in any terrorism investigation because of an inadequate pre-charge detention limit.

Extending terrorism detention

In Operation Overt, how can innocent persons have been detained for the longest periods when pre-charge detention is judicially supervised? The answer lies in part in the procedures for extending terrorism detention, which first, do not require the investigators to show that there is any evidence against the detainee and second, permit closed hearings between the investigators and judge only.

In considering whether to permit detention beyond two days, para 32 of sch 8 of the Terrorism Act 2000 (TA 2000), sets out the only two questions that initially a District Judge (up to 14 days) and then a High Court judge (14 to 28 days) must answer:

- Are there reasonable grounds for believing that further detention is necessary to obtain or preserve relevant evidence or pending the result of an examination or analysis of any relevant evidence"?
- Is the investigation being conducted diligently and expeditiously?

The vital missing question is this: "Is there sufficient evidence against the detainee to justify the decision to arrest and detain him or her?" Without this question, a manifestly innocent person could be detained for 28 days on the basis that the investigators are working their way through a great deal of evidence seized from the detainee and the investigation is being conducted diligently and expeditiously. That cannot be right.

Paragraphs 33 and 34 of schedule 8 of the TA 2000 state that the detainee and his legal representative may be excluded from any part of the further detention hearing and investigators may withhold information on which they rely from the suspect and his representative. In our experience, closed hearings are routine in terrorism cases. No special advocate (a security cleared lawyer) is present to protect the detainee's rights and interests. The detainee has no control over what is said at closed hearings about the allegation, the state of the investigation or the evidence against him or her. Again, that cannot be right.

The Joint Committee on Human Rights (JCHR) in its report, *Counter-Terrorism Policy and Human Rights: 42 days*, published on 14 December 2007 (HL Paper 23, HC 156) recommended that the TA 2000 be amended:

- "[T]o introduce an additional express requirement that a court authorising extended detention must be satisfied that there is a sufficient basis for arresting and questioning the suspect" [at para 96] and
- "[T]o ensure that the hearings are truly adversarial by, for example: … defining more closely the power to withhold information from the suspect and their lawyer; providing for special advocates to represent the interests of the suspect at any closed part of the hearing for more time [to detain]; [and] … providing expressly that any restrictions on disclosure or participation are subject to the overriding requirement that the hearing of the application be fair" [at para 89].

The JCHR, also recommended in its report, "Counter Terrorism-Policy and Human Rights (Eighth Report): Counter-Terrorism Bill", published on 7 February 2008 (HL Paper 50, HC 199), that the Crown Prosecution Service be required to disclose to the defendant and the court when it has charged on the basis of the Threshold Test [at para 81]. This is to ensure that the defence will be in the best position to make representations about bail, the timetable for the service of the Crown's evidence, any application for dismissal and keep a close eye on whether the further evidence required to satisfy the Full Code Test materialises.

To date, not one of the above JCHR recommendations has been implemented.

Summary

In an article published in this journal on 20 October 2006 (Vol. 156 (No. 7245), p. 1578), Bajwa and Duke warned of the danger that the longest periods of pre-charge detention would be reserved for those persons against whom there is the least evidence, in other words: those most likely to be innocent. Now that we know that all 5 persons detained in Operation Overt for 28 days have been cleared of any involvement in terrorism, that warning appears to be borne out by the facts. The experience of the Overt Two should be a source of embarrassment to those who sought, wholly prematurely, to rely on their charge as support for an extension of terrorism detention to 42 days. In our view, there must be an independent inquiry into the pre-charge detention stage of Operation Overt to ascertain what changes are necessary to avoid a repeat of the sorry events outlined in this piece. We are of the opinion that unless the current 28-day limit is reduced to no more than 14 days and, at the very minimum, the changes recommended by the JCHR to the procedures for extending terrorism detention and to the use of the Threshold Test are implemented as a matter of urgency, the current system serves not to convict the guilty but to terrorise the innocent. NLJ

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