20 April 2011

Lord Armstrong of Ilminster
Joint Committee on the Draft Detention of
Terrorist Suspects (Temporary Extension) Bills
House of Lords
SW1A 0PW

Dear Lord Armstrong

Section 78 of the Police and Criminal Evidence Act 1984

Thank you very much for the opportunity to give evidence to your committee on 29 March 2011. Further to the request of Lord Davies of Stamford, I have taken the opportunity to write further concerning section 78 of the Police and Criminal Evidence Act 1984 ('PACE') and the proposed use of the Civil Contingencies Act 2003 ('CCA') to extend the maximum period of pre-charge detention under the Terrorism Act 2000 ('the 2000 Act').

Section 78(1) of PACE provides as follows:

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of evidence would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it.

There are other exclusionary rules of evidence but section 78 is the primary means by which otherwise admissible evidence may be excluded in criminal proceedings in order to secure a fair trial. For example, evidence obtained as a result of inhuman or degrading treatment would very likely be excluded under section 78 of PACE (see e.g. *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 at para 53 per Lord Bingham of Cornhill).

In his evidence to the Joint Committee on 29 March, Lord Carlile of Berriew QC described the proposal to use the CCA to extend the maximum period of pre-charge detention under the 2000 Act as 'idiosyncratic and illogical' and a 'non-starter' because of the likelihood that any evidence obtained as a result of such an extension would be liable to be excluded under section 78 of PACE:

> The Civil Contingencies provisions enable material to be obtained, but material which would be likely to be excluded as evidence under section 78 of the Police and Criminal Evidence Act. That is to say, evidence obtained under compulsory provisions which did not have the integrity of fairness that makes it acceptable evidence before a jury. That has always seemed to me to be the weakness of a civil contingencies proposal, and I have never seen an answer to that point (Q93).

More generally, he suggested that a criticism of the CCA was that 'it allows detention to take place without the protections that are provided under existing counter-terrorism law, including the strong protection of judges' (Q95).

We are at a loss to understand this criticism of the CCA or the relevance of section 78 in this context. It is certainly true that one of the potential problems of extended pre-charge detention is the increased risk of oppressive questioning of suspects. This was something that we first highlighted in our June 2006 response to the Home Office consultation on a draft Code of Practice for the detention, treatment and questioning of persons arrested under the 2000 Act. As we later noted in our House of Commons Committee stage briefing on the Counter-Terrorism Bill in 2008, 'unrestricted police

questioning of a detained suspect for weeks or months on end is likely to be oppressive in any event, no matter how mild the treatment of the detainee is in other respects'.

However, the possibility of oppression seems to us the same whether 28-days pre-charge detention was implemented by way of the CCA, by way of the draft Bills, or by reenactment of the relevant provisions of the Terrorism Act 2006. As we noted in our oral evidence to the Joint Committee (Q125), Lord Carlile appears to take as a premise that extension of pre-charge detention under the CCA would not be on similar terms to pre-charge detention under the draft Bills or the 2000 Act. We see no reason for this assumption, however, nor do we understand Lord Carlile's reference to an extension under the CCA involving 'evidence obtained under compulsory provisions' or the absence of 'the protections that are provided under existing counter-terrorism law'. In short, there is no obvious reason why an extension to the maximum period of pre-charge detention using emergency regulations under the CCA would not simply amend the provisions in schedule 8 of the 2000 Act *mutatis mutandi*.

Another difficulty with Lord Carlile's analysis of section 78 is his claim that 'the aim of [pre-charge detention] is to produce evidence' (Q93). Again, while it is certainly true that the primary purpose of such detention is to allow the police and the CPS sufficient time to gather admissible evidence against a suspect, that does not mean that the evidence has to come from questioning the suspect. Indeed, we are not aware of any evidence to show that terrorists have been successfully prosecuted as a result of inculpatory statements made during extended periods of pre-charge detention. Accordingly, the possibility that use of the CCA in such cases would result in the subsequent exclusion of evidence under section 78 seems to us to be far-fetched.

I hope that this letter adequately addresses the Committee's concerns but we would be happy to provide further information if required.

Yours sincerely,

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