HOUSE OF COMMONS
LONDON SW1A 0AA

08 June 2008

Dear Home Secretary

I have made it clear from the outset that, in the interests of national security, I would support the Government's effort to extend the period of pre-charge detention to 42 days. I do not accept many of the 'civil libertarian' arguments which are made against the proposals by the Government's opponents and I do believe that the overall case for extension of the limit from 28 days, with appropriate judicial safeguards, is powerful.

I have taken this view despite the fact that this current Parliament has already debated the matter extensively and settled on 28 days as its preferred upper time limit. When the variation was proposed last summer I saw no reason to believe that any of the key political forces would change their approach but still thought that support was appropriate.

I should also say that I was ready to give my support though I was concerned at the decision to bring Parliament into a quasi-judicial process in a way which I fear seriously confuses the roles of the Executive, the Judiciary and the Legislature.

In normal circumstances I believe it is for the next Parliament to revisit the matter. However, these are not normal circumstances and as both you and the police have pointed out, the terrorist threat is increasing and becoming more complex.

However I have now had time to study the amendments which you published last week and they are giving me considerable concern, as I mentioned to my Whip, Bob Blizzard, last Tuesday evening.

Taken together the impact of the amendments seems to me to make it almost impossible for the police to secure a further 14 days detention in practice, whilst preserving for presentational reasons a theoretical limit of 42 days in place of the current 28.

I have attached a note setting out my specific concerns in detail, with a series of questions which I would be grateful if you could answer before the debate. However, to summarise, my concerns are as follows:-

1. The process for extending pre-charge detention to 42 days seems to be significantly more difficult than that for derogating from the ECHR itself despite the fact that the definitions of emergency seem similar in practice.

2. The amendments clearly envisage that both the Police/DPP Report, and the 'independent' legal advice may well contain confidential and sensitive information which could not be released to Parliament without jeopardizing police and security operations. The Report and advice will be given to 3 Select Committee Chairs, on Privy Council terms, and extensively debated in public. Moreover the Home Secretary's Statement to Parliament is expressly forbidden from including material which might be prejudicial to a prosecution.

   This process would seriously inhibit the police and DPP from making such a report in the first place since they would be bound to have little confidence that those arrangements would guarantee confidentiality. Moreover Parliament's role would effectively be confined to a vote of confidence in the Home Secretary of the day. No serious consideration of the issues could take place since important material information would be lacking or might be leaked in part.

3. The concept of public 'independent legal advice', by-passing the Attorney-General, the Law Officers and the Government Legal Service, seems to me to be a major constitutional departure with potentially very serious adverse consequences.

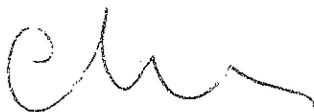
In general, then, the principle and practice of Parliamentary involvement in these operational matters (for example the rapid recall of both Houses of Parliament) seem not to have been thought through. The relationship of Parliamentary scrutiny and judicial review is confused. The effect of these problems will certainly be to seriously inhibit any effort to seek an extension to pre-charge detention. The Summer 2006 threat illustrates that these problems are not notional.

It is quite clear that public opinion supports further changes to the counter-terror legislation, as in principle I do. However it is absolutely essential that legislation in this area does not merely lie on the statute books as a 'dead letter' but becomes a serious and useful tool for the police in their fight against terrorism.

I am sure that the concerns I express about the practicality of this legal change will be expressed forcefully in the Lords and they will certainly lead to protracted and potentially bitter divisions with the Government. The new law is likely to turn out to be entirely academic and the whole process will severely damage the fight against terrorism and will only bring discredit on the Government and the Labour Party.

I look forward to hearing from you.

Best wishes



Charles Clarke

Rt Hon Jacqui Smith MP
Home Secretary

QUESTIONS TO HOME SECRETARY

Definition of a 'grave exceptional terrorist threat' (New Clause 3)

The reserve power you propose would only operate in the event of 'grave exceptional terrorist threat'. All four words seem to me to be susceptible to a good deal of legal argument and New Clause 3 sets out a series of definitions which are very broad in character. To the layperson this definition compares with the wording in Article 15 of the ECHR which permits the UK to derogate from the ECHR to derogate from the ECHR "in time of war or other public emergency threatening the life of the nation". Certainly, the examples you give in your letter ('disruption of energy supplies or transport facilities', or 'serious damage to the security of the UK') are very close to a 'public emergency threatening the life of the nation'.

Under the Human Rights Act, as I understand it, the Secretary of State may by Order derogate from the ECHR, which then has to be confirmed by a Resolution of both Houses within 40 days (excluding prorogation etc).

Would it not be a great deal more straightforward in the circumstances you envisage simply to derogate from the ECHR and seek Parliamentary approval? What types of events do you think might be a 'grave exceptional terrorist threat', but not a 'public emergency threatening the life of the nation'? Could you give some examples?

Report from Police and DPP (New Clauses 4 + 5)

The requirement of NC 5(2)(b) that the DPP and the chief police officer must 'give details of the grounds for their belief' that the extension is necessary would seem to carry the grave risk of bringing into the public domain, through Parliament, some of the most sensitive information which the police and security services possess about a terrorist conspiracy. In almost all circumstances this would seriously inhibit the police from making such a report.

The words of the requirement of NC5(5) that the investigation is being conducted 'diligently and expeditiously' is obviously subject to significant legal argument.

What assurances do you believe could realistically be given to the police and DPP that their report would not be made public? Would Parliament not demand to see the Report? Would the Home Secretary's unwillingness to share the Report not undermine Parliament's confidence in the Home Secretary? What guidance will be given to the DPP and the police about the meaning of a 'diligent' and 'expeditious' investigation?

Independent Legal Advice (New Clause 6)

I find the concept of 'independent legal advice', as set out in NC 6, very strange. On what basis is a lawyer who receives a fee for his or her advice in a different ethical position from an employee of the Government, and in any sense more 'independent'? On what basis do you believe that the advice you receive from a 'government lawyer' is less 'independent' than that from a 'non-government lawyer'? Is it not deeply insulting and outrageous to suggest that the holding of office or employment under the Crown (NC 6(5)) removes professional independence? Why is legal advice from 'government lawyers' excluded?

Is it not a major constitutional departure for legal advice to a Secretary of State to be laid before Parliament? Is it now the Government's intent that all legal advice to the Government be laid before Parliament? If not, how will the lines be drawn, particularly on matters affecting the ECHR?

Why do you believe that doctoring of the advice in the way suggested in NC 6(7) would be acceptable to Parliament? Would not the very process damage the credibility of the Home Secretary in front of Parliament? What steps would you take to reassure operational police officers and crown prosecutors that information threatening their operational effectiveness would not go into the public arena?

And, finally, why cannot the Attorney General provide the advice which Government needs on this matter?

Notification of Chairmen of Certain Committees (New Clause 7)

New Clause 7 seriously confuses the roles of Parliament and the Executive.

The Government's amendments acknowledge that there are elements of both the DPP and police report, and the 'independent' legal advice, which cannot be placed in the public domain without jeopardizing operational policing and security. The proposal that such information be given to the 3 Committee chairs on Privy Council terms would seem to place the three individuals in a quite impossible position. They could not share the information even with their own Committees, let alone Parliament in general. This is not the case now even for the ISC where all members of the Committee are trusted with confidential information.

This process would inevitably erode confidence in the 3 Committee Chairs, and if it were to be followed it would surely be better simply to appoint them all as Privy Counsellors.

Is there any other law on the Statute Book where individual Select Committee Chairmen are named? Or where 'Privy counsellor' briefings are placed on a statutory basis? Would the unavailability for any reason of any of the Committee Chairs give any basis for a legal challenge against the Home Secretary's statement? What steps do you intend to take to ensure that the police and security services have confidence that confidential information would remain confidential under these pressures?

Statement to be laid Before Parliament (New Clauses 8-11)

NC 8(4)(b) prohibits the Home Secretary's Statement to Parliament from including material prejudicial to a prosecution. Particularly in light of the enormous publicity which would inevitably surround such case what guarantee can you offer that the very fact of the Home Secretary making such a Statement would not prejudice a fair trial?

If I have understood the amendments correctly the Home Secretary's Statement must be approved by Parliament within 7 days (whether or not Parliament is sitting at the time of the Order), be subject to judicial review and then be available for just 30 days.

Could you confirm that the requirements on the Home Secretary here are significantly more rigorous than for derogation from the ECHR under the Human Rights Act?

What consideration has been given to practicalities of recalling both Houses of Parliament (in a way which would not be subject to legal challenge) in the recess? The Summer 2006 Terror threat is a good recent example that this might well be necessary.

What is the relationship of the judicial review of the Home Secretary's Statement to Parliament's decision? What happens if the judicial review approves the Home Secretary's Statement, and Parliament does not, or vice versa?

Amendment to Civil Contingencies Act (New Clause 13)

Why is it necessary to amend the Civil Contingencies Act to remove its use for pre-charge detention in terrorist cases? This act, whilst fairly draconian in character, is designed to protect our society in certain extreme circumstances. Why should terrorism be excluded?

Other matters

Could you confirm that the requirement for judicial authority for further detention is broadly the same as was projected in the case of the 90 day-proposal which Parliament rejected?

What is the reason for requiring in Statute a parliamentary debate upon the report of the independent reviewer?

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