Home Office

HOME SECRETARY
2 Marsham Street, London SW1P 4DF
www.homeoffice.gov.uk

The Rt Hon Charles Clarke MP
House of Commons
London SW1A 0AA

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Dear Charles

Thank you for your letter of 8 June about pre-charge detention and for your continuing support on this issue. I hope that the following will go some way to address your remaining concerns.

Process for extending pre-charge detention more difficult than derogating from ECHR. Definitions similar in practice

You suggest that the proposed process for extending pre-charge detention will be more difficult than derogating from the ECHR itself. You also say that the definition of 'grave exceptional terrorist threat' that we are proposing is similar to the wording in Article 15 of ECHR.

As you point out, Article 15 of ECHR allows derogation from a number of articles of the Convention in 'time of war or other public emergency threatening the life of the nation' but only to the extent that it is strictly required by the exigencies of the situation. There are a number of reasons why we would not want to go the derogation route. First, it is simply not required. The proposal for extending pre-charge detention is fully compatible with the ECHR (because the suspect is brought promptly before a judge – within 48 hours – and any continued detention is judicially authorised) and derogation is not required to enable the reserve power to be activated. Second, derogation is an extraordinary step to take and it would attract considerable opprobrium from the international community and give fuel to those who criticise our legislation for being draconian and contrary to the ECHR.

The definition of 'grave exceptional terrorist threat' that is now proposed is intended to cover events or situations similar to the bombings in July 2005 or a plot to blow up a shopping centre or a plot to commit terrorist atrocities overseas involving serious loss of life. Any extension beyond 28 days could therefore only happen in the most serious terrorist cases. The pre-charge detention provisions which we think we need to deal with these threats doesn't require a derogation from Article 15 ECHR even, as now, where we would and have argued that there persists an emergency facing the life of the nation.

Report from police/DPP

You highlight the possible risk that the DPP/police report will become public. Under our proposals, the report would be sent only to the Home Secretary. She would then give the report to the Chairs of the Home Affairs Committee, the Joint Committee on Human Rights and the Intelligence and Security Committee in cases where she made an order. The report would be sent to the Chairs of the committees on Privy Council terms and would not therefore be circulated more widely or form part of the parliamentary debate on extension. The purpose of sending it to the committee Chairs is to provide them with all the appropriate background information so that they might contribute fully to the parliamentary debates (without of course disclosing any sensitive or prejudicial information). Given this, I do not believe it would inhibit the DPP/police from making a report.

The requirement for the DPP/police report to state that the investigation is being conducted 'diligently and expeditiously' should cause little difficulty. The court must already be satisfied (in relation to detention of suspects beyond 48 hours) that an investigation is being carried out diligently and expeditiously before it can authorise any warrant for the continued detention of a suspect. The application of these words has not caused any difficulties in the extension hearings that have been conducted so far and both the police and prosecutors are familiar with the terminology.

Independent legal advice

I believe Parliament should have the fullest practicable information, including its own source of legal advice, to enable it to exercise effective scrutiny of any decision to invoke the reserve power.

Parliament will receive this advice as part of a package of information the Home Secretary must lay before Parliament within two days after the order itself is made (or as soon as practicable).

This will not take the place of, or detract from, the normal processes by which a Home Secretary obtains independent legal advice. As you know, independent legal advice to Ministers may come from a variety of sources, including from lawyers in the Government Legal Service, the Law Officers and also from outside Counsel in some circumstances. Government lawyers and the Law Officers are quite clear that they give independent legal advice in accordance with their professional obligations. But these sources of advice are not available to Parliament. All the amendment does is to say the advice given to Parliament in this situation will come from another source.

This might be from Treasury Counsel or suitable Queen's Counsel with the right expertise.

The question of how Parliament can be given access to legal advice has been raised for debate in the context of the Constitutional Renewal consultation of the last few months. In the consultation document on the role of the Attorney General it was suggested [para 3.13] that one option might be for Parliament to have its own source of legal advice when it is being asked to take key decisions so it could better scrutinise the basis for the Government's decision. The amendment we have tabled on independent legal advice can be said to be an expression of this idea.

In the event of an order being made, the legal advice that will be published (in redacted form to protect sensitive information) will be the advice obtained specifically for the purpose of informing Parliament and the chairs of the committees. The Government remains convinced that it would not be right for the advice of the Attorney General, where it is given, or for the fact that it has or has not been sought, to be made public. It is clearly in the public interest and in the interests of good governance for the Government to seek and receive authoritative legal advice in confidence to ensure that Ministers and their officials can be completely frank and open with the Attorney General and that the Attorney General can be similarly frank and open in the advice that is given.

Notification to Chairs of Committees

I think it is important that Parliament can have as an informed debate as possible on making the reserve power available. Providing information to the Chairs of the relevant parliamentary committees will help provide an assurance that the power has been properly and responsibly exercised and will help inform any reports that these committees publish in support of the debates in Parliament. This is different, however, from providing information to all committee members or indeed to MPs and Peers more generally. . Briefing on privy councillor terms happens regularly to help inform debate on security matters.

Where any of the Committee chairs were unavailable for any reason, the Home Secretary would of course make all feasible efforts to contact them, but no legal consequences would flow from it being impossible to comply with this statutory duty in such circumstances.

Statement to be laid before Parliament

The requirements on the Home Secretary under the new proposal are more rigorous than those needed for derogation but as explained earlier derogation is not required. I believe it right that there should be substantial and real checks on use of the reserve power including limiting its availability to just 30 days. The requirement for a written statement to Parliament is one of those checks. I think it will be perfectly possible to make such a statement without including any material that will prejudice and investigation or any subsequent trial. That does not mean, however, that the parliamentary debates on the reserve power will be nugatory. Although they will not be able to discuss the details of individual suspects, Parliament will be able to fully discuss and, if so minded, approve the order commencing the reserve power. In

doing so, Parliament could debate (as they have done following previous terrorist incidents) the general security threat, the progress of the investigation, the police numbers involved, the number of suspects detained, the outline of the plot, the number of countries involved and whether the Home Secretary's decision was properly founded and all the statutory requirements had been met.

Obviously any decision to recall Parliament during recess will require careful consideration but we only envisage the reserve power being needed in exceptional circumstances and in such circumstances I believe it would be right for Parliament to be able to debate the power. I think a decision in these circumstances that Parliament be recalled is unlikely to be subject to a successful legal challenge.

The statement by the Home Secretary to Parliament and the prospect of judicial review are separate matters. It is for the Home Secretary to make the reserve power available and for Parliament to approve that decision (or not) within 7 days of the order being laid. If Parliament does not approve the reserve power, any individual suspect held beyond 28 days at the point 7 days after the order was laid would be released and no further applications could be made for detention beyond 28 days.

There is no prospect of judicial review proceedings being brought against the Home Secretary's statement; this is not a matter for the courts and indeed may constitute a breach of Article IX of the Bill of Rights 1689, under which freedom of speech in debates and proceedings in parliament may not be questioned in the courts.

Amendment to Civil Contingencies Act

We have not tabled amendments removing terrorism from the scope of the Civil Contingencies Act. The amendment would make it clear that the Civil Contingencies Act cannot be used to extend the detention period for terrorist suspects under Schedule 8 to the 2000 Act. We believe this is necessary to put it beyond doubt that the Civil Contingencies Act could never be used to extend detention to 58 days and that only the reserve power in the Counter-Terrorism Bill could be used to increase the detention limit.

Other matters

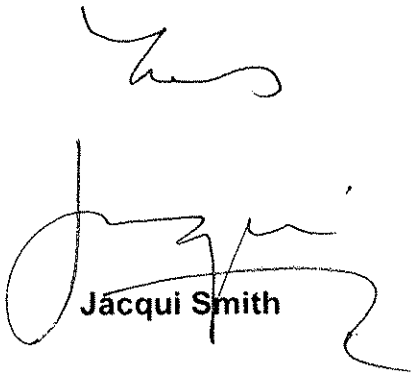
The process for judicial authority for any extensions beyond 28 days is very similar to that which currently applies for extensions beyond 14 days. The main difference between this and what was proposed for 90 days, is that extension hearings will be able to be heard by a circuit judge designated by the Lord Chief Justice as well as by a High Court judge. This change has been made at the request of the judiciary. The other change, is that any applications for an extension beyond 28 days will require the consent of the DPP or a designated Crown Prosecutor in England and Wales.

Under the Government's proposal, the independent reviewer of terrorism legislation will be required to produce a report on whether the decision by the Home Secretary to make the reserve power available was reasonable and on whether the procedures for any detaining individual suspects for more than 28 days was in accordance with the relevant legislation and codes of practice. This report would be separate from the

report produced annually by the independent reviewer on the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006.

I believe that a report by the independent reviewer, and the accompanying parliamentary debate, are an important addition to parliamentary oversight of the reserve power as they will enable Parliament to consider in some detail how the power has operated in practice.

If you would like to meet to discuss any of these issues please let me know



Jacqui Smith