Terrorism Legislation and The Human Rights Act
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Human Rights Act

- Introduced in 1998

- Incorporated into English law key elements of the European Convention on Human Rights including:

- Article 2: Right to life
- Article 3: Prohibition of torture
- Article 4: Prohibition of slavery and forced labour
- Article 5: Right to liberty and security
- Article 6: Right to a fair trial
- Article 7: No punishment without law
- Article 8: Right to respect for private and family life
- Article 9: Freedom of thought, conscience and religion
- Article 10: Freedom of expression
- Article 11: Freedom of assembly and association
- Article 12: Right to marry
- Article 14: Prohibition of discrimination
Terrorism Legislation

- Terrorism Act 2000
- Anti Terrorism Crime and Security Act 2001
- Prevention of Terrorism Act 2005
- Terrorism Act 2006
- Counter Terrorism Act 2008
**Terrorism Act 2000**

- Widened the definition of terrorism to apply to domestic terrorism and include any "political, religious or ideological" cause that uses or threatens violence against people or property;
- Created new offences of inciting terrorism;
- Enhanced police powers, including stop and search and pre-charge detention for seven days;
- Outlawed terrorist groups, including al-Qaeda.
Terrorism Act 2000 contd

- Arose from Lloyd Report
- Took 4 years
- 131 sections and 16 schedules
- Government claimed, pursuant to section 19 of the Human Rights Act 1998, that it was compatible with European Convention Rights
- R v DPP ex parte Kebilene [2000] 2 AC 326:
  
  “Society has a strong interest in preventing acts of terrorism before they are perpetrated – to spare the lives of innocent people and to avoid the massive damage and dislocation to ordinary life....”
Section 57 Terrorism Act 2000

- Possession of an article in circumstances which give rise to a reasonable suspicion that the possession is for a purpose connected with terrorism.

- R v Zafar [2008] EWCA Crim 184

D alleged breaches of
  Article 9 – Freedom of thought
  Article 10 – Freedom of expression

Court of Appeal: There must be proven “a direct connection between the objects possessed and the acts of terrorism. The section should be interpreted as if it reads…..he intends it to be used for the purpose…”.
Section 58 Terrorism Act 2000

- Collecting, recording or possessing information in a document or record of a kind likely to be useful to a terrorism.

- R v K [2008] EWCA Crim 185

- D alleged breach of Article 7 – section 58 insufficiently certain

- Court of Appeal: The information (without regard to its surrounding circumstances, unlike under section 57) must be of an intrinsic kind which gives rise to a reasonable suspicion on its face that it is likely to provide practical assistance to a person committing or preparing terrorism rather than simply encouraging the commission of terrorism.
R v G and J [2009] UKHL 13

Aim was to “catch the possession of information which would typically be of use to terrorists, as opposed to ordinary members of the population...the information must, of its very nature, be designed to provide practical assistance”.

It is a defence to show that a person had a reasonable excuse in possessing the information. The excuse could not be based on an “illegitimate reason”.
Initially enabled the Home Secretary to indefinitely detain, without charge or trial, foreign nationals who were suspected of terrorism (a system now replaced with control orders after the House of Lords ruling in A and Others);

Extended executive powers over freezing bank accounts and assets of suspected terrorists.
Followed in response to the attacks on the 11th September 2001: “a terrorist threat that is quite different from anything we have previously faced” (Lord Goldsmith);

Bill outlined to Parliament on 15th October 2001, introduced on the 12th November 2001 and Royal Assent on the 14th December 2001;

Compatibility with the Human Rights Act could only be invoked by derogation because of non-compliance with Article 5 – detention without trial
Derogation

Article 15 allows contracting states to derogate from certain rights guaranteed by the Convention in time of "war or other public emergency threatening the life of the nation". Permissible derogations under article 15 must meet three substantive conditions:

- there must be a public emergency threatening the life of the nation;

- any measures taken in response must be "strictly required by the exigencies of the situation"; and

- the measures taken in response to it, must be in compliance with a state's other obligations under international law.
[Chahal v UK: expulsion of a terrorist suspect to a jurisdiction where torture was a substantial possibility would contravene Article 3 of the ECHR]

House of Lords:

Public emergency existed sufficient to warrant a derogation notice under Article 15

Detention without trial was incompatible with measures which could be said to be strictly necessary on the grounds of disproportionality and discrimination because:

1. It applied only to deportable aliens (breach of Article 14);
2. Allowing foreign terrorists to plot abroad made no security sense.
A v United Kingdom [App no 3455/05 19.2.09]

- The UK Government:
  - acted properly in resorting to derogation;
  - the measures adopted could not be strictly necessary in view of the features noted by the House of Lords.
Prevention of Terrorism act 2005

- Introduced control orders, which allowed the government to restrict the activities of individuals it suspected of "involvement in terrorist–related activity", but for whom there was insufficient evidence to charge.
Control Orders

- Extend to citizens as well as foreigners;
- Defined as:
  - “an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism”.
Human Right Challenges to Control Orders

- Case of MB and AF [2007] UKHL 46

- Material justifying MB’s CO was in the closed and open material. The open material was “relatively thin” so that it was difficult to see how he could mount an effective challenge.

- Material justifying AF’s CO was in the closed material.

- House of Lords:
  - the proceedings fell within the less demanding civil limb of Article 6(1) since they did not involve the determination of a criminal charge;
  - found a breach of Article 6 but made no declaration of incompatibility

- Whether a CO breaches Article 6 depends on severity of accusations and obligations and the nature of the process.
Human Rights Challenges to Control Orders contd.

- AF (No 3) [2009] UKHL 28:
  - House of Lords: The case of MB had not set any “core irreducible minimum” for the level of disclosure.

A v United Kingdom:

- There can be restrictions upon the adversarial process in the interests of national security, but it sustained breaches of Article 6 where disclosure had been insubstantial or non-existent.
Terrorism Act 2006

- Extended the pre-charge detention period from 14 to 28 days (the Criminal Justice Act 2003 had increased it from seven to 14 days);

- Introduced a prohibition on the publication of statements likely to be understood as direct or indirect encouragement (including “glorification“) of terrorism.
Article 5(1)(c) – no absolute time limit is set, therefore, length of detention not in breach?

Article 5(2) – requires prompt disclosure of the reasons for arrest and the charges against a detainee.

Article 5(3) – everyone shall be brought promptly before a judge:

- Brogan & others v UK – 4 days and 6 hours fell outside the requirement to being “brought promptly before a judge”.

- McKay v UK – need for a review which is prompt, automatic and not requiring action by the detainee, conducted by an independent officer who can order release, and examining the lawfulness of the detention as well as due diligence.
Counter Terrorism Act 2008

- Enabled post-charge questioning of terrorist suspects;
- Allowed constables to take fingerprints and DNA samples from individuals subject to control orders;
- Amended the definition of terrorism by inserting a racial cause.
A police officer can stop and search if expedient for the prevention of acts of terrorism.

Gillan and Quinton v United Kingdom 4158/05 [2010] ECHR 28 (12 January 2010):

- This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 of the Convention.

- The Court considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life.

- There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention.

- In conclusion, the Court considers that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, “in accordance with the law” and it follows that there has been a violation of Article 8 of the Convention.
8th July 2010 Home Secretary announced:

– that she had taken urgent legal advice and consulted the police since the Strasbourg ruling was confirmed as final and "In order to comply with the judgment, but avoid pre-empting the review of counter-terrorism legislation, I have decided to introduce interim guidelines for the police,"

– "I am therefore changing the test for authorisation for the use of section 44 powers from requiring a search to be 'expedient' for the prevention of terrorism, to the stricter test of it being 'necessary' for that purpose. And, most importantly, I am introducing a new suspicion threshold."
Section 44 Terrorism Act 2000: Stop and Search contd.

Home Secretary’s Review of Terrorism Legislation (26th January 2011):

- On the use of section 44 stop and search powers, I have concluded that the current provisions, which were found unlawful by the European Court of Human Rights, represented an unacceptable intrusion on an individual's human rights and must be repealed. But the evidence, particularly in Northern Ireland, has demonstrated that where there is a credible threat of an imminent terrorist attack, the absence of such powers might create a gap in the ability of the police to protect the public.

- We therefore propose to repeal section 44 and to replace it with a tightly-defined power which would allow a senior police officer to make an authorisation of much more limited scope and duration for no-suspicion stop and search powers to prevent a terrorist attack where there is a specific threat. This targeted measure will also prevent the misuse of these powers against photographers, which I know was a significant concern with the previous regime.
Future Battles

- Schedule 7 Terrorism Act 2000
- R v Terence Roy Brown
Schedule 7 Terrorism Act 2000

- An “examining officer” may:
  - at a port or border area
  - question and detain a person
  - for the purpose of determining whether he appears to be a person who is or has been concerned in the CPIA
  - the person may be detained for up to 9 hours
  - the person must give information and comply
  - wilful failure to comply is an offence
Portsmouth man jailed for publishing 'terror handbook'