

POLICE POWERS IN THE CONTEXT OF TERRORISM

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Abstract

This article looks at the modification of police powers in the context of terrorist threats, and the safeguards which are needed to ensure the protection of civil liberties. The main focus is on the law of the United Kingdom, but considered within a broader European context, looking at the influence of both the Council of Europe and the European Union. The article considers how terrorism is defined, and the responses to Irish terrorism (Prevention of Terrorism (Temporary Provisions) Act 1974 and its successors), and international terrorism (Terrorism Act 2000, Anti-Terrorism Crime and Security Act 2001, Prevention of Terrorism Act 2005, Terrorism Act 2006). The effects of the European Convention on Human Rights and the Human Rights Act 1998 are evaluated, and the difficulties in resolving the tension between 'security' and 'liberty' are analysed.

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1. Introduction

Discussion of the ways in which police powers have been modified to deal with terrorism, or the fear of terrorism, needs to be placed in the context of both the immediate concerns which have led to recent legislation, and the longer historical context. The immediate concerns date back to the attack on the World Trade Centre in New York, in September 2001 ('9/11'). This has been followed by the bombings in Bali in 2002, Madrid in 2004 and London in July 2005. All of these events have been attributed to Al Qa'ida, and have contributed to the fear of unpredictable attacks on the civilian population by suicide bombers. It has been suggested that the situation is one in which the 'rules of the game' have changed,¹ and that this justifies increasing the powers of the police and security services.

The broader historical context requires us to remember that the United Kingdom has over 30 years experience of dealing with terrorism. From the late sixties until the late 1990s there were very real threats on the mainland of the United Kingdom from Irish terrorism, as well as the significant problems in Northern Ireland itself. Our current terrorism legislation has its origins in legislation passed in the 1970s to deal with this area. Other countries within Europe have faced similar problems – for

example Spain has had to deal with the Basque separatist movement, ETA, and France suffered from its colonial legacy in relation to Algeria. Terrorism is not something which started in September 2001, and we should be prepared to learn the lessons of past experience. Two points resulting from the UK's experience of dealing with Irish terrorism are particularly pertinent to the current discussion. First, extended detention without trial is likely to be counterproductive. The use of internment in Northern Ireland is generally regarded as having contributed to recruitment to the IRA.² The use of prolonged detention without trial under the Anti-Terrorism Crime and Security Act (discussed further below), and the continuing detention by the US of those apprehended during the Afghanistan conflict at Guantanamo Bay, are likely to have had similar effects as regards recruitment to 'Islamic' terrorist groups. Secondly, we should not be complacent that our legal system is able to protect the innocent against over-enthusiastic policing. The celebrated 'miscarriage of justice' cases of the latter years of the 20th Century, arising out of the attempts to respond to pressure to find the perpetrators of various bomb outrages related to the Irish conflict (the Birmingham Six, the Guildford Four, the Maguire Seven), show that it is possible for people to end up serving long prison sentences for offences which they did not commit.

It may well be argued that the current situation is different, in that the terrorism is more international, and thus more unpredictable, and that the use of suicide bombers is a particularly insidious threat. IRA bombs were generally preceded by warnings, though these were not always adequate to protect lives; Al Qa'ida attacks without warning. All this is true, but does not in the end detract from the lessons which should have been learnt from earlier experience.

2. The European Context

In looking at the European context of the battle against terrorism, the actions of both the European Union and the Council of Europe need to be considered.

As regards the European Union a Council Framework Decision on Combating Terrorism was issued in 2002.³ The preamble noted that ‘terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development’,⁴ and that

The definition of terrorist offences should be approximated in all Member States, including those offences relating to terrorist groups. Furthermore, penalties and sanctions should be provided for natural and legal persons having committed or being liable for such offences, which reflect the seriousness of such offences.⁵

At the same time, paragraph 10 of the preamble reaffirmed the Union’s respect for

fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law.

As will be seen below, the Framework Decision puts forward a definition of terrorism, but there is nothing in it which requires any particular extension of police powers to deal with this type of activity.

The Framework Decision was followed by a Declaration on Combating Terrorism, of March 2004, issued in response to the Madrid bombings, and an Action Plan, agreed in June 2004.⁶ The Action Plan was directed at improving international co-operation in relation to counter-terrorism measures, and in particular attacking the funding of terrorism.

The Council of Europe has also responded to the increased threat from terrorism by putting forward the Convention on the Prevention of Terrorism in May 2005. This has been signed by the majority of states of the COE, but at the time of writing has not been ratified by any, and so is not yet in force.⁷ The objective of the Convention is set out in Article 2:

The purpose of the present Convention is to enhance the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life, both by measures to be taken at national level and through international co-operation, with due regard to the existing applicable multilateral or bilateral treaties or agreements between the Parties.

As with the European Union, a principal focus is on the improvement on international co-operation, but the Convention does included some commitments in terms of domestic law. Article 5, for example, requires Parties to adopt measures to criminalise “public provocation to commit a terrorist offence”, and Articles 6 and 7 do the same as regards recruitment and training for terrorism.⁸ At the same time, the Convention recognises the need to ensure that human rights continue to be respected. Article 12 requires parties to ensure that the criminalisation of activity under the articles mentioned above is carried out “while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion,” (as set out in Articles 10, 11 and 9, respectively, of the European Convention on Human Rights). Moreover, Article 12.2 of the Convention on the Prevention of Terrorism requires any new laws to be subject to “the principle of proportionality, with respect to the legitimate aim pursued and to their necessity in democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.”

In addition, of course, counter-terrorist actions need to be compatible with various other obligations under the European Convention on Human Rights, including Article 2 (right to life), Article 3 (freedom from torture and inhuman or degrading treatment), Article 6 (right to a fair trial), Article 8 (respect for private life, home and correspondence). In the UK this requirement of compatibility arises not only from the ECHR itself, but also from the Human Rights Act 1998.

The European context thus illustrates the tension that exists between the need to take measures against terrorism and the need to respect human rights. The best approach to resolving this tension is discussed in section 4 of this article, in connection with the specific provisions modifying police powers.

3. Definitions of terrorism

In order to target provisions of the criminal law correctly there is a need to define what is meant by “terrorism”. Two attempts to do this will be considered here – one contained in the European Framework Decision, and the other in the Terrorism Act 2000. They have similarities, in that both attempt to define terrorism in terms of certain types of criminal offence, committed for a specified purpose or range of purposes.

3.1 The Framework Decision

The Framework Decision, lists various specific offences which have the capability of being ‘terrorist offences’ – namely

- assaults (lethal or otherwise)
- kidnapping/hostage-taking
- destruction of property (including ‘information system’)
- seizure of ships, aircraft, etc

- dealing, research in weapons, explosives, etc
- release of dangerous substances
- interfering with water, power supply, etc
- threatening to commit any of the above

These offences become terrorist offences if committed with the aim of

- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political constitutional, economic or social structures of a country or an international organisation.

3.2 The Terrorism Act 2000

As far as English law is concerned, s. 1 of the Terrorism Act 2000 ('TA 2000')

defines terrorism as:

- (1) . . . the use or threat of action where—
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or [an international governmental organisation] or to intimidate the public or a section of the public⁹, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it—
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

If firearms or explosives are used, then the requirement in s. 1(1)(b) does not need to be satisfied (s. 1(3)). The offences are defined more broadly than in the European Framework document, but clearly cover similar areas.

There is a danger that actions taken in connection with a broad range of political protests could come within this definition, though at the time the Act was passed the government was at pains to insist that it would not catch “lawfully organised industrial action in connection with a legitimate trade dispute”.¹⁰ The problem is that demonstrations which may begin peacefully may at times lead to damage to property, and injury to individuals. Should they thereby fall to be treated as “terrorist offences”? There is also the question of how s. 1(2)(d) is interpreted. The phrase “a serious risk to the health or safety of the public or a section of the public” could be taken to cover a wide range of behaviour. Again, an interpretation which takes into account the prime targets of the Act will be needed to avoid the inappropriate use of the extended terrorist powers.

Section 1(1)(e) has similarities to the reference in the Framework definition to the destruction of “information systems”. This is designed to cover interference with computer systems. It would not, presumably, generally cover the hacking of a system owned by a private company, because such action would not be intended to “influence government or to intimidate the public or a section of the public”. It would be otherwise if, for example, the home page of a widely used internet service provider was “taken over” and used to distribute threats of bomb attacks, or other violent action. Where government computer systems are the target, however, much less serious behaviour might be caught. An anti-war group which hacked into the Foreign Office web site and posted notices hostile to the war in Iraq which appeared to emanate from the British government, might well fall within the definition. The action

would be “designed to influence the government” and might well be regarded as seriously disrupting an “electronic system”. Should such behaviour be treated as terrorism?

The conclusion from looking at these definitions must be that it is difficult to formulate a definition which is precisely targeted. Much then depends on exactly how the law is used in practice. Ensuring that it is not used “disproportionately”, as required by both the ECHR and the European Convention on the Prevention of Terrorism, rests in part with the legislature, but also with the police, Crown Prosecution Service, and all other officials concerned with the application of the legal rules.

4. Modification of Police Powers

In a number of areas, the British government has extended police powers in relation to suspected terrorism. The areas that will be considered here are: stop and search; arrest – including the use of (lethal) force; and detention before charge. Before looking the details of these modifications, however, the question of the “balance” between liberty and security is considered.

4.1 The question of “balance”

Where a government is led to take steps to minimise the threat from a terrorist enemy that uses unpredictable means to strike directly at civilian targets, the consequent reduction in freedoms is often discussed in terms of “balance”. We must balance our freedoms against the need for security. As Hayes (2005) has argued, this approach is misleading, and unhelpful.¹¹ It suggests that governments are entitled simply to reduce human rights if it will lead to a more secure society. Freedom and security are regarded as being of equal value, with one being able to be traded off against the

other. This is not acceptable in a society which aspires to democracy, and the human rights' principles which underpin that concept. Rather than "balance", the concept that should be used is one of necessity. The question that should be asked is, given the nature of the threats, what are the minimum steps which are necessary to respond to them. Individual freedom should only be restricted when there is a real and pressing need to do so, not simply when it might be regarded as helpful to the police and security services. Lord Hoffmann in *A v Secretary of State*,¹² considering the exceptional powers of detention without trial which were being challenged in that case, expressed the view that:¹³

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

Maintaining freedom in a stable and unchallenged society is easy. What is more difficult is to maintain respect for freedoms when a society is facing serious challenges, and to ensure that any restriction of those freedoms is at the minimum level necessary for the situation. With those considerations in mind, we turn the particular modifications to police powers which the British government has enacted in order to deal with the perceived terrorist threat, both before and after 2001. Do these modifications affect civil liberties to the minimum extent necessary? Are they compatible with the rights contained in the ECHR?

4.2 Stop and Search

In relation to stop and search, under s. 43 of the Terrorism Act 2000 there is a power in a fairly standard form, of a kind which is found in relation to drugs, offensive weapons, stolen goods, etc. This enables a police officer to stop and search a person

on reasonable suspicion that he or she is a terrorist. The purpose of the search will be to discover whether the person has in his or her possession anything which may constitute evidence of that fact.

A broader set of powers, not based on reasonable suspicion is contained in ss. 44-47 of the TA 2000.¹⁴ These powers permit random and routine searching for limited periods, and within a specified area. The powers cover the stop and search of vehicles and their occupants (s. 44(1)); and the stop and search of pedestrians and anything carried by them (s. 44(2)). The powers are initiated by the issue of an “authorisation”. This must be given by a very senior officer: in London, of the rank of commander or above; outside London, of the rank of assistant chief constable, or above. The grounds for issuing the authorisation are that it appears to the officer concerned that “it is expedient to do so” in order to prevent acts of terrorism. There is on the face of it no need for the officer to show “reasonable grounds” for his belief that the powers are needed but, in *R(Gillan) v Commissioner of Police for the Metropolis*,¹⁵ the House of Lords expressed the view that “it goes without saying” that the officer’s decision must be “reasonable”.¹⁶ The word “expedient” was also considered. The applicant suggested that this meant “necessary”. The House of Lords disagreed. Given the safeguards surrounding the exercise of the power, the word should be interpreted as meaning that the person giving the authorisation considers it likely that the stop and search powers “will be of significant practical value and utility in seeking to” prevent acts of terrorism.¹⁷

An authorisation must be notified to the Home Secretary, who has the power to cancel it, or shorten the period for its operation (s. 46). The period of an authorisation under this Act may be up to 28 days. Moreover, an authorisation may be extended for

further periods of up to 28 days (s. 46). The geographical scope may cover the whole of the relevant police area, or any part of it.

Once in force the authorisation empowers any constable in uniform to stop any vehicle or pedestrian. Any vehicle or person (including the occupants of a vehicle) stopped under these powers may be searched for 'articles of a kind which could be used in connection with terrorism' (s. 45). This is a very broad definition, which in practice imposes no restriction on the type of search which the officer will be able to carry out. A person who refuses to stop, or wilfully obstructs the exercise of these powers, commits a summary offence under s. 47.

As noted above, these powers authorise random and routine searches. There is no need for "reasonable suspicion" for the carrying out of a search (s. 45(1)). The extensive and intrusive nature of these powers is presumably felt to be justified by the threats imposed by terrorist activity. They place, however, very considerable powers in the hands of senior police officers, with very little opportunity for supervision by the courts. The only independent control of the powers comes from the Home Secretary's supervision of authorisations. The powers have been used extensively in London. Authorisations under s. 44 were in place for the whole Metropolitan Police District from the date that the relevant sections of the 2000 Act came into force (19 February 2001), until September 2003. The use of the power in this way was approved by the House of Lords in *R (Gillan) v Commissioner of Police for the Metropolis*. Provided that the proper authorisation procedures have been followed, and informed consideration given to the need for renewal, rather than it being a "routine bureaucratic exercise",¹⁸ then it is permissible for there to be a series of renewals.

The House also considered in *Gillan*, whether the use of the powers involved a potential breach of Art. 5 of the ECHR. The argument here is whether a stop and search involves sufficient deprivation of liberty to engage Article 5. The House, relying on the principles set out by the European Court of Human Rights in *Guzzardi v Italy*,¹⁹ recognised that each situation must be judged on its merits, but took the view, as Lord Bingham put it, that:²⁰

the procedure will ordinarily be relatively brief. The person stopped will not be arrested, handcuffed, confined or removed to any different place. I do not think, in the absence of special circumstances, such a person should be regarded as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of kept from proceeding or kept waiting. There is no deprivation of liberty.

This does not mean that a stop and search could never engage Article 5 – just that there would have to be some factor which went beyond the normal routine for it to do so. The facts of *Gillan* were that one applicant had been stopped and searched while on the way to attending a demonstration outside an international “arms fair” being held in East London. The second applicant had been a journalist on her way to take photographs of the demonstration, and was also stopped and searched under the terrorism powers. They both sought judicial review of this use of the power, which did not seem to be directly linked to terrorism. The Court of Appeal expressed concerns at the lack of evidence that the police had been properly briefed on the use of terrorism powers, and that they should only be used in relation to terrorism.²¹ The House of Lords, however, refused to deal with the facts of the individual cases, on the basis that these issues were inappropriate for consideration in the type of action which the applicants had brought (that is, judicial review). The focus of this type of action was the legality of the authorisation, rather than the particular use of the power in

individual circumstances. The use of the power was better challenged via a civil action for assault or false imprisonment.²²

The facts of *Gillan* show the potential for the misuse of these powers, with their employment outside the area of suspected terrorism. The decision of the House of Lords, however, also shows the courts' reluctance to intervene in a general way, so as to find that what could be very useful and appropriate powers, were always going to be incompatible with Convention rights. Each case will have to be looked at on its merits to see whether the use of the power was or was not disproportionate. This puts a considerable burden on the police officer on the street, and this is a point to which further reference will be made later.

4.3 Arrest

Since 1974, when the Prevention of Terrorism (Temporary Provisions) Act 1974 was enacted in response to the problems of Irish terrorism as it affected the British mainland, English law has contained special arrest powers to deal with terrorism. The latest version of these powers is to be found in the Terrorism Act 2000.

By virtue of s. 41(1) "a constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist". Section 40 of the Act defines a terrorist as a person who either (a) has committed an offence under certain sections of the Act, or (b) "has been concerned in the commission, preparation or instigation of acts of terrorism". To the extent that arrest is based on reasonable suspicion of having committed an offence there is no need for the power under s.41. Under the Police and Criminal Evidence Act, s. 24,²³ a police officer may arrest on reasonable suspicion relating to any offence. It is where the suspicion relates to behaviour falling within (b), that s. 41(1) becomes important, and extends the normal arrest powers. . Although acts of "terrorism" will almost certainly involve the commission of an offence, what

is unusual here is that the police need have no particular offence in mind; nor need they worry overmuch about the level of involvement of the person arrested. "Being concerned in" is wider than being actively involved in the commission of a terrorist act, or being a conspirator, or attempting to commit such an act. In particular, it allows police to arrest on the basis of intelligence information that a person has links with terrorist organisations, or with other individuals who are themselves suspected of being involved in terrorism. It is important to remember that this may be the first stage of up to 28 days' detention without charge, during which time the police may question the person arrested with a view to obtaining valuable information about terrorist activities, and activists, rather than acquiring the evidence necessary for a charge to be brought. That this is the way the power has been used seems to be confirmed by figures showing that over 80 per cent of those detained under this power, or one of its predecessors, between 1980 and 1990 in connection with Northern Ireland terrorism, were released without charge. In more recent years, the percentage of detentions which result in further action has been even smaller. During the years 1991 to 1995, 560 people were detained, but only 49 (8.75 per cent) were charged, and another 19 (3.4 per cent) excluded or deported.²⁴ In 2000 only seven people were arrested under s. 41 in connection with Irish terrorism, of whom only one was charged with an offence. Thirty-nine people were arrested in connection with international terrorism, of whom 25 were charged with offences (but only eight with offences under the terrorism legislation).²⁵ These figures seem to confirm that the main use of the terrorism powers is now moving from Irish to international terrorism. This is likely to have continued post-9/11. The Home Office has not, however, published the relevant figures in subsequent years.

It is up to the police and prosecutors to ensure that only behaviour which really merits the use of this special arrest power provided by s.41 is brought within its scope. The power of arrest under s. 41 is an exceptional one, and should only be exercised where it is really necessary to do so.²⁶ Could its use be challenged under the Human Rights Act 1998? In *Lawless v Ireland*,²⁷ the European Court of Human Rights emphasised that the purpose of arrest under Art. 5(1)(c) of the ECHR must be to bring the arrested person before a competent judicial authority. This was confirmed in *Brogan v United Kingdom*,²⁸ which was concerned with the equivalent of s. 41 of the 2000 Act under the Prevention of Terrorism (Temporary Provisions) Act 1984. In *Brogan*, however, the Strasbourg Court stated that the fact that those arrested are not charged, nor brought before a court, does not necessarily mean that the purpose of the arrest was out of line with Art. 5(1)(c). There was no need for the police to have, at the time of the arrest, sufficient evidence to bring charges. As the Court then commented:²⁹

There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming, or dispelling, the concrete suspicions which, as the Court has found, grounded their arrest.

This approach by the Court makes it harder for a person arrested under s. 41 of the 2000 Act to argue that the arrest falls outside the scope of what is permitted under Art. 5(1) because it is being used to gather intelligence. As has been suggested above, the figures indicate that this is the common way in which this particular power is used.

4.4 Use of force in relation to arrest

The particular problem of the suicide bomber has brought to the forefront of discussion the issue of the amount of force which the police or security services may use in arresting a suspected terrorist. The Metropolitan Police has been reported as adopting a “shoot-to-kill” policy.³⁰ The killing of an innocent young Brazilian man, Juan Carlos Menenez, on 22 July 2005 illustrated the problem to tragic effect. He was shot by members of the police as he sat on a tube train. He had apparently been suspected of being a suicide bomber. At the time of writing the events are still under investigation by the Independent Police Complaints Commission.

The legal position as to what the police may or may not do in such a situation is governed by the common law, two provisions in British statutes, and Article 2 of the ECHR.

4.4.1 British Law

The first statutory provision to note is s. 117 of the Police and Criminal Evidence Act 1984. This empowers a police officer to use “reasonable force” in the exercise of any of the powers under the Act, including the power of arrest for any offence. The question that immediately arises is “what is reasonable?”, and in particular can it ever be reasonable to use lethal force. The answer must presumably be “no”, in that if the intention of the officer is to kill the suspect, then this cannot be said to be part of the exercise of a power of arrest, the object of which is to detain a live suspect. The position would be different if the suspect was unintentionally killed as a result of force which was genuinely used with the intention of apprehending the person, rather than killing them. The question as to whether the force used had been reasonable would then be a real issue. This has no relevance to a “shoot-to-kill” policy.

The second statutory provision is s. 3 of the Criminal Law Act 1967, which allows the use of reasonable force in the prevention of crime. This overlaps with the common

law defence of self-defence, which again permits the use of reasonable force by a person who fears that he or she is under attack. In relation to both s. 3 of the Criminal Law Act and the common law defence, English law adopts a mixed “subjective” and “objective” approach to what is reasonable. The subjective element is that the circumstances are viewed through the eyes of the person using the force. In the situations we are considering, the question should be “What did this police officer believe to be happening? Did he or she genuinely think that this person was going to set off a suicide bomb?” In answering this question, reasonableness is irrelevant. The police officer may have made a mistake – for example, thinking that a person carrying a bag of books was actually carrying a bomb³¹ – but as long as that mistake is genuinely made, it does not have to be shown to have been a reasonable mistake.³² Once the circumstances, as believed to exist by the officer, have been established, then the next part of the test is objective. The question is: “Given the circumstances that the officer genuinely believed to exist, was the force used reasonable?” If it was reasonable to use lethal force, then the officer will be protected. English law thus operates in a way which is generally helpfully to the officer faced with a difficult situation, requiring an immediate decision, and possibly immediate action. If, with hindsight, the situation was not as serious as the officer believed it to be, then this will not be held against him or her. Provided the officer’s reaction to the threat which he or she perceived to exist was reasonable, then the law provides protection for these actions.

4.4.2 Article 2 of the European Convention on Human Rights

Alongside the provisions of domestic law, however, the requirements of Article 2 of the ECHR must be considered. Article 2 is concerned with the right to life. It imposes an obligation on the State, and on agents of the State (such as police officers), to have

respect for the right to life of all those within its jurisdiction. In the UK this obligation is reinforced by the Human Rights Act 1998, which imposes an obligation on “public authorities” – and this will include the police – to act compatibly with the Convention rights.

Article 2 is not absolute, however. Paragraph 2 recognises that there may be some situations where it may be justifiable to take a life, namely:

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection.

As with s.117 of the Police and Criminal Evidence Act 1984, sub-paragraph b. cannot legitimise a “shoot-to-kill” policy, though it would legitimise force which incidentally, but unintentionally, causes death. Sub-paragraphs a. and c., however, might be used to provide a defence in relation to the use of such a policy. Article 2 appears to be more restrictive than the domestic provisions we have considered, in that it refers to the force being “no more than absolutely necessary”, rather than what is “reasonable”. How has this been interpreted in practice? The most relevant case for our purposes is *McCann v United Kingdom*.³³ This case arose out of a military operation in Gibraltar, in relation to a suspected bomb plot being carried out by members of the IRA. Three suspects who were thought to be about to set off a bomb, were killed by British soldiers, operating under cover. It transpired that none of the three was carrying a bomb, or any device for setting-off a bomb, though they were all part of an IRA active service unit, which was involved with plans for planting of car

bombs. Their families took action against the British government, alleging a breach of Article 2. The European Court of Human Rights held that the soldiers who had actually fired the shots had not acted in breach of Article 2. They had acted on the basis of information which suggested that the suspects were about to set off a bomb by remote control. The use of lethal force to prevent them doing so was justified, even though it turned out that in the event the information was inaccurate. The Court did, however, find that there was a breach of Article 2 as a result of actions higher up the chain of command. The suspects had been under surveillance for a period, and it would have been possible to intervene to neutralise any threat without need to resort to killing them. There were also deficiencies in the intelligence assessments, and the training given to the soldiers. Overall, the killings did not constitute the use of force which was no more than absolutely necessary in defence of persons from unlawful violence.³⁴

On the issue of “mistake” the Court had this to say about the situation of the soldiers who fired the shots:³⁵

The Court accepts that the soldiers honestly believed, in the light of the information which they had been given...that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life.

This appears to be adopting the same subjective approach as used in English law in relation to the soldiers’ state of mind – an honest belief is enough. However, later in the same paragraph the Court in restating the position in more general terms said that:

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, *for good*

reasons, to be valid at the time but which subsequently turns out to be mistaken.
[emphasis added]

This version effectively makes the test objective, by requiring the agent to have reasonable grounds for his or her belief. That this is the approach of the Court has been confirmed in two subsequent cases. In *Andronicou and Constantinou v Cyprus*,³⁶ the facts involved a police action to terminate a siege involving a hostage. The Court ruled that:³⁷

The Court cannot with detached reflection substitute its own assessment of the situation for that of the officers who were required to act in the heat of the moment in what was for them a unique and unprecedented operation to save life. The officers were entitled to open fire for this purpose and to take all measures which they honestly and reasonably believed were necessary to eliminate any risk either to the young woman's lives or their own lives.

The Court thus recognises the difficulties for those put in a situation involving very quick decisions, but nevertheless requires that their assessment of the situation must be reasonable. Similarly in *Gül v Turkey*,³⁸ which concerned an operation against a suspected terrorist, the Court found that "the firing of at least 50-55 shots at the door was not justified by any reasonable belief of the officers that their lives were at risk".³⁹ Once again, the test is stated objectively, in terms of "reasonableness".

It seems, then, that the European Court of Human Rights, in interpreting Article 2, is imposing a higher standard on those who use lethal force in an attempt to deal with terrorist situations than is the case in English law. The approach under English law is that the person's view of the situation needs only to have been "honest", and does not need to be based on reasonable grounds; the force that can be used in that situation must be reasonable. Under Article 2 of the ECHR, however, the view of the situation must be based on reasonable grounds, and the force that is used must only be what is

“necessary”. Given that the Human Rights Act 1998 requires English courts to pay attention to the case law of the European Court of Human Rights (though not necessarily to follow it),⁴⁰ it would seem that in assessing a situation where a member of the police or the armed forces has killed a suspected terrorist, the English courts should apply the European tests. They should ask, in other words, whether the officer’s assessment of the situation was based on reasonable grounds, and then, whether the force used was necessary in that situation. This would involve a departure from established prior authority, and it remains to be seen whether English courts will be prepared to take that step.

Whichever approach is taken, however, it is clear that there cannot, under English law or under the European Convention, be a legitimate “shoot-to-kill” *policy*, if this is taken to mean that anyone who is a suspected terrorist may be subject to lethal force. Each situation must be assessed on its merits: only if the particular circumstances justify lethal force will its use be legitimised.

4.5 Detention before charge

Where a person has been arrested for an ordinary criminal offence, no matter how serious, the maximum period for which the person may be detained without charge is 96 hours. Where a person is held in relation to terrorism, different procedures apply, and much longer periods of detention are possible. The rationale for this is not entirely clear, but is discussed below, following consideration of the powers themselves.

The detention of people arrested under the terrorism provisions is now governed by the provisions of s. 41 of the Terrorism Act 2000 and sch. 8 to that Act. Section 41(3) allows an initial period of up to 48 hours from the time of arrest on the authority

of the police. By virtue of s. 41(7) and sch. 8, as amended by the Terrorism Act 2006, a further period of detention, up to 28 days from the time of arrest, may be granted by an appropriate judge. The period under the TA 2000 as originally drafted was 7 days, as it had been under the previous legislation; this was extended to 14 days by the Criminal Justice Act 2003. Following the bombings in London of 7 July 2005, the police advised the government that an even longer period of detention would be desirable. The government sought to extend the period to 90 days, but was defeated in the Commons – with a period of 28 days being approved.

Under the pre-2000 terrorism legislation the power to permit extended periods of detention was given to the Home Secretary. This led to problems with compliance with Art. 5 of the ECHR, which are discussed below.

The grounds for authorising continued detention are that the review officer is satisfied that it is necessary in order to preserve or obtain evidence which relates to an offence under the sections of the Act mentioned in s. 40(1)(a), or which indicates that the detained person is or has been concerned with the commission, preparation or instigation of acts of terrorism. The obtaining of evidence may be by questioning or otherwise. In all cases the review officer, having given the detainee and the detainee's solicitor the opportunity to make representation,⁴¹ must be satisfied that the relevant investigation or decision-making process is being conducted diligently and expeditiously.⁴²

During the first 48 hours the position of the detainee is very comparable to that of a suspected criminal detained under the provisions of the Police and Criminal Evidence Act 1984. The big change comes at the end of the 48-hour period. At that point, the decision about continued detention passes to a judge. Under the 1989 Act, the power to extend detention rested with the Home Secretary, and appeared to be entirely at his

or her discretion. The lack of any judicial review of this extended period brought the British government into conflict with the European Court of Human Rights, in the case of *Brogan v United Kingdom*.⁴³ There were four applicants who had been detained, on the authorisation of the Home Secretary, for periods of between four days and six hours, to six days and sixteen and a half hours.

The European Court of Human Rights recognised the particular problems presented by terrorist offences. It also acknowledged that these difficulties might have the effect of prolonging the period during which a person suspected of terrorist offences may, without violating Art. 5(3), be kept in custody before being brought before a judge. They might also result in special procedures in relation to judicial control.⁴⁴ Presumably the Court was referring here to possibilities such as the court sitting in camera, or dealing with the matter “without notice” (that is, hearing the police case for detention but not giving the detainee an opportunity to rebut it at that stage).

In the end, however, it had to be recognised that Art. 5(3) called for 'promptness' in bringing the detainee before a judge. This meant that the scope for flexibility was very limited. It was the view of the Court, by a vote of 12 to 7, that even the shortest period of detention under consideration, that is four days and six hours, was too long to fit with the notion of promptness. All four applicants had therefore been unlawfully detained, in breach of Art. 5(3), and should have had an enforceable right to compensation under Art. 5(5).

The British government's initial response to this was to use the power under Art. 15 of the ECHR to derogate from the provisions of Art. 5(3) on the grounds of the public emergency in Northern Ireland. The legitimacy of this was confirmed by the European Court in *Brannigan and McBride v United Kingdom*,⁴⁵ and the derogation

was continued by the HRA 1998. The Terrorism Act 2000, however, while continuing to provide for extended detention of up to seven days, provided for judicial approval for any detention over 48 hours. This met the requirements of Art. 5(3), so that once the new provisions were in force, there was no need for the derogation to continue. It was, therefore, lifted on 19 February 2001. The current position, following the amendments contained in the Criminal Justice Act 2003 and the Terrorism Act 2006, is that an extension up to 14 days from arrest can be approved by a district judge; up to 28 days can be approved by High Court judge. In each case, the extension should be for no more than seven days at a time. Although the period of detention is now potentially very long, it may well be that the ECtHR would not find any breach of Art. 5, because of the requirement for regular judicial approval of the extensions.

What is the rationale for extended detention in terrorist cases? It cannot be simply that such cases are more complex: serious fraud cases, for example, may be equally involved, and contain international elements. When the latest extension to the period for detention was being debated in connection with the Terrorism Act 2006 the government seemed to rely mainly on the argument that since the police had requested the extension (to a maximum of 90 days) then it should be granted. The issue was considered by the parliamentary Joint Committee on Human Rights, which took evidence from the police and other interested groups.⁴⁶ Its conclusion was that the main reason behind the request for an extension of the powers was that:⁴⁷

now so completely different, particularly in the magnitude of the potential harm and the indiscriminate nature of the targets, that public safety demands earlier intervention, with the result that there is less time available for investigation and evidence gathering prior to arrest. This means that in some extremely complex cases 'evidence gathering effectively begins post-arrest'. A longer period of precharge detention is therefore required in order to enable that evidence-gathering to take place.

In other words, the need to arrest early justifies the use of extended detention before charge. There were also some other factors to which the police drew attention,⁴⁸ such as the international nature of modern terrorism, requiring enquiries to be undertaken in many jurisdictions, and

the frequent use of false identities, the need to employ interpreters, the need to decrypt large numbers of computer hard drives and to analyse the product as well as disclose prior to interview, the need to make safe premises where extremely hazardous material may be found, the need to obtain and analyse communications data from service providers, the need to allow time for religious observance by detainees, and the fact that suspects often use one firm of solicitors which causes delay in the process.

Although all these factors may justify a longer period of detention pre-charge than for “ordinary” crimes, the position prior to the Terrorism Act was that a terrorist suspect could in any case be held for 10 days longer than any other detainee. The Joint Committee did not feel that a case had been made for any longer period of detention, and certainly not the 90 days that the police had been seeking.

5. Conclusions

Earlier in this article it was suggested that rather than trying to “balance” the demands for increased security against those of human rights, the approach should be to adopt the minimum restrictions which are necessary. How does the United Kingdom’s response match up to that standard? As regards the area of stop and search, the special powers under s.44 of the Terrorism Act 2000 have received approval in principle (though not necessarily in relation to the manner of their use in particular cases) by the House of Lords in *R(Gillan) v Commissioner of Police for the Metropolis*. It does seem that it may be necessary in some situations to allow police officers to stop and search people without needing to base their actions on “reasonable

suspicion”. It is acceptable, for instance, that those wishing to use public transport may in some cases be asked to allow their bags to be searched in a routine manner. We already accept this in relation to air travel; the principles are no different in relation to buses, trains, or underground systems. It is up to the police, however, to ensure that they do only make use of these powers in situations where it is necessary to do so. The circumstances that arose in *Gillan* suggest that this has not always been the case.

In relation to arrest, the nature of terrorist activities is used to justify allowing arrest on the basis of broader suspicion, and at an earlier stage in the process, than is the case with other crime. Once again, the arguments of principle are persuasive – the problems lie in the lack of safeguards to ensure that these powers are only used when really necessary. As with stop and search, much depends on the individual police officers taking the decision. The same is true to a large extent in relation to the use of lethal force. Here, however, as we have seen, there is no justification for a “shoot-to-kill” *policy*, though lethal force may be justified by particular situations. It is only where the circumstances mean that killing the suspect is the *only* way of averting a threat that such force can be regarded as necessary. Moreover, the way in which the courts deal with the defence of prevention of crime may need to be modified in order to make it compliant with the European Convention case law on Article 2. Doing so will make the law operate slightly less favourably towards the officers exercising the power.

Detention before charge is the area where the recent changes to the law in the UK appear to have least justification. While the arguments put to the Joint Committee on Human Rights may well be sufficient to justify a longer period of pre-charge detention for terrorist suspects, the case for the extension beyond 14 days has not been

made out with any strength. Despite the requirement of regular judicial supervision, which provides some protection for the detainee, it cannot be said that this extension of powers meets the “necessity” criterion.

It is understandable that the government has taken steps in relation to various aspects of police powers to increase their scope in situations involving terrorism. In doing so, however, it is often placing a very heavy responsibility on the individual police officer. There is little evidence that there is adequate training and support available to ensure that the officer uses the powers only where they are necessary, and not merely because they are convenient, or even reasonable. As regards detention before charge, the criticism goes further; the length of detention itself is open to challenge, and not simply the use that may be made of it in particular cases.

In all these areas, once the immediate terrorist threat has become less pressing, reconsideration should be given as to the extent to which they are “necessary in a democratic society” – it is to be hoped, though without much confidence, that a government will feel able to amend or repeal some of them without the fear of seeming to be “weak on terrorism”. A strong government makes sure that it protects its citizen’s fundamental rights, even when it is facing new and challenging threats, such as those posed by terrorism in the early 21st Century.

¹ The British Prime Minister, Tony Blair, has used this metaphor to justify measures which restrict civil liberties: Press Conference, 5 August 2005, accessible at <http://www.number10.gov.uk/output/Page8041.asp>.

² See, eg, Hillyard, P. (2005) “The War on Terror: lessons from Ireland”, <http://www.ecln.org>.

³ 2002/475/JHA.

⁴ Ibid, para 2.

⁵ Ibid, para 6

⁶ Council of the European Union, 10586/04. This drew on a previous Action Plan issued in 2001.

⁷ 6 ratifications, including 4 members of the COE are required for it to come into force.

⁸ These obligations may be argued to be met by some of the provisions of the UK’s Terrorism Act 2006.

⁹ The reference to “an international governmental organisation” was added by the Terrorism Act 2006, which at the time of writing was not in force. The inclusion is presumably intended to harmonise the UK definition with that contained in the Framework document.

¹⁰ Lord Bassam, HL Debates, vol. 614, col. 1449

¹¹ Hayes, B. (2005) “There is no ‘balance’ between security and civil liberties – just less of each”, <http://www.ecln.org>.

¹² [2004] UKHL 56, [2005] 3 All ER 169.

¹³ Ibid, para. 97.

¹⁴ They are similar to powers to be found in s. 60 of the Criminal Justice and Public Order Act 1994.

¹⁵ [2006] UKHL 12, *The Times* 9 March 2006.

¹⁶ *Ibid*, para. 14

¹⁷ *Ibid*, para. 15.

¹⁸ *Ibid*, para. 18

¹⁹ (1980) 3 EHRR 333.

²⁰ [2006] UKHL 12, para. 25.

²¹ [2004] EWCA Civ 1067, paras. 52-56.

²² The applicants had, apparently, also begun such actions in the County Court.

²³ As amended by Part 3 of the Serious Organised Crime and Police Act 2005.

²⁴ Home Office Statistical Bulletin, 2/96

²⁵ Home Office, Statistics on the Operation of Prevention of Terrorism Legislation, Issue 16/01

²⁶ See the comments to this effect by Lord Jellicoe in his 1983 Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976, Cmnd 8803 (London: HMSO), at p.23.

²⁷ (1961) 1 EHRR 1.

²⁸ (1989) 11 EHRR 117

²⁹ *Ibid*, para. 53.

³⁰ See, for example, *The Independent*, 25 July 2005, available at <http://news.independent.co.uk/crime/article301477.ece>.

³¹ As in the non-terrorist case where police officers thought that a man carrying a chair leg was carrying a gun – see, eg, *R (Stanley) v HM Coroner for Inner North London* [2003] EWHC 1180; *The Times*, 12 June 2003.

³² *R v Williams* (1984) Cr App Rep 276; *Beckford v The Queen* [1988] AC 130.

³³ (1995) 21 EHRR 97.

³⁴ Ibid, para 213.

³⁵ Ibid, para 200.

³⁶ (1998) 25 EHRR 491.

³⁷ Ibid, para 192.

³⁸ (2002) 34 EHRR 28.

³⁹ Ibid, para 82.

⁴⁰ HRA 1998, s. 2.

⁴¹ Ibid, para 26

⁴² Ibid, para. 23(3).

⁴³ (1989) 11 EHRR 117.

⁴⁴ Ibid, para. 61.

⁴⁵ (1993) 17 EHRR 539.

⁴⁶ *Counter Policy and Human Rights: Terrorism Bill and related matters*, 3rd Report of Session 2005-06, HL Paper 75-I, HC 561-I.

⁴⁷ Ibid, para 78.

⁴⁸ Ibid, para 79.