

Developments in counter terrorism law and practice in the United Kingdom

History

- Northern Ireland (Emergency Provisions) Act 1973-1998
- Prevention of Terrorism Act (Temporary Provisions) Act 1974
- Prevention of Terrorism Act (Temporary Provisions) Act 1984
- Terrorism Act 2000
- Anti-terrorism, Crime and Public Security Act 2001
- Prevention of Terrorism Act 2005
- Terrorism Act 2006
- Counter Terrorism Act 2008

- Lord Rooker for the UK Government said (in the context of detention without trial under the 2001 Act) ‘our first priority is to prosecute alleged terrorists; secondly, if we cannot prosecute them, to remove them; and thirdly, failing the opportunity and appropriate circumstances to remove such people, to detain them’
- prosecution argument for lack of prosecutions relates to the lack of insufficient admissible evidence (intercept evidence is not admissible at trial)

recent law and practice

- introduced a very wide definition of terrorism
- introduced detention without trial
- introduced use of special advocates
- introduced control orders
- increased investigatory powers of police and intelligence services
- increased custody time limits
- increased range of criminal offences
- increased use of expulsion and deportation-use of diplomatic assurances

- Definition introduced by Terrorism Act 2000 and amended by 2006 Act covers use or threat of action that meets 3 elements
- 1st element: action must involve serious violence against a person or serious damage to property; or endanger life; or create a serious risk to the health or safety of public or a section of the public; or is designed to interfere with or seriously disrupt an electronic system
- 2nd element: use or threat is designed to influence the Government, an international governmental organisation or to intimidate the public or a section of the public (no need to satisfy this element if firearm or explosives are used)
- 3rd element: threat must be made for purpose of advancing a political, religious or ideological cause
- breadth of this definition has been challenged

Anti-Terrorism, Crime and Security Act 2001

- introduced detention provisions for foreign nationals suspected of involvement in terrorism-amounted to indefinite detention without trial
- extended use of special advocate procedure which had been used in national security deportation appeals-*Chahal v UK*
- In *A v SSHD* House of Lords considered that the detention provisions in the 2001 Act were disproportionate and discriminatory and in breach of the European Convention on Human Rights – provisions repealed by Prevention of Terrorism Act 2005
- In *A v UK* the ECtHR did not consider that the United Kingdom Government's policy of keeping the possibility of deporting the applicants "under active review" had been sufficiently certain or determinative to amount to "action ... being taken with a view to deportation".

Prevention of Terrorism Act 2005

- 'to provide for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity' – known as 'control order'
- civil order which can last for 12 mths- can be renewed indefinitely- alternative to a criminal prosecution-appeals require lower standard of proof
- Home Secretary applies to the court for a 'non-derogating control order' if reasonable grounds for suspecting person is involved in terrorism-related activity based on an assessment of intelligence information
- Home Secretary may impose a provisional order in emergency; reviewed by ct
- breach of control order without reasonable excuse is a criminal offence punishable with a prison sentence of up to five years
- reliance on closed material and use of special advocate procedure essential to control order regime-appeal heard by special division of High Court
- control orders reviewed by H of L in *JJ v SSHD* [2007] UKHL 45 issue for court limited to whether restrictions are deprivation of liberty

Terrorism Act 2006

- increases range of offences which implements Art 5 of the Council of Europe Convention on the Prevention of Terrorism which requires states to have an offence of 'public provocation to commit a terrorist offence'
- new offences include:
 - (1) direct or indirect encouragement of terrorism (includes 'glorification')
 - (2) preparation of terrorist acts
 - (3) dissemination of terrorist publications
 - (4) terrorist training
 - (5) offences relating to radioactive material and nuclear facilities
- extends powers of Secretary of State relating to banning of groups which glorify terrorism
- extends detention periods for terrorist suspects with judicial approval for up to 28 days

Counter Terrorism Act 2008

- Provides new powers relating to the removal of documents for examination in the context of a search under existing terrorism legislation.
- Terrorist suspects may be questioned after they have been charged.
- Terrorism offences committed anywhere in the UK can now be tried in any part of the UK.
- Makes provision for notification of information to the police by certain individuals convicted of terrorism or terrorism-related offences. When in the community, such individuals must provide the police with certain personal information, must notify any subsequent changes to this information and confirm its accuracy annually.
- Imposes a foreign travel restriction order on an individual subject to the notification requirements, restricting that person's overseas travel.
- Confers powers on the Treasury to direct persons operating in the financial sector to take certain actions in respect of transactions or business with persons in a country of money laundering, terrorist financing or proliferation concern.

Control orders

- restricting place of residence
- requiring the person to be at specified places or in a particular area at certain times or days
- restricting work or business
- restricting association or communication with individuals
- restricting movements within the UK or international travel
- 24-hour ban on movements
- surrender of a passport
- allowing officials search and remove items for tests
- monitoring by electronic tagging or other means
- providing information to an official on demand
- banning possession of specified articles or substances
- prohibiting use of services, such as internet or phones

Special Advocates

- security vetted lawyers appointed by A-G to represent interests of defendant in cases involving sensitive material
- given access to sensitive material not seen by defendant or legal representative
- cross-examines witness on behalf of defence in closed hearings and provides advice to the court in closed hearings on the relevance of this material to the case against the defence
- unable to take full instructions from defence because special advocates cannot normally discuss closed material with defendant or legal representative
- ability of special advocates to challenge material without taking instructions described by Lord Bingham as 'taking blind shots at a hidden target'
- special advocate procedure limits defendants' right to know case against them, be present at adversarial hearing, examine witnesses, be represented by counsel of own choosing and to equality of arms
- In MB v SSHD (control order case) the House of Lords rejected the Government's argument that using the special advocate procedure was a sufficient safeguard to prevent unfairness- fair trial has a 'core irreducible minimum'

- In *A v UK* the ECtHR noted that SIAC, which was a fully independent court and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. The special advocate provided an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure.
- The ECtHR noted that the open allegations in respect of some applicants had been of a general nature, principally that they had been members of named extremist Islamist groups linked to al'Qaeda. SIAC observed in its judgments dismissing each of these applicants' appeals that the open evidence had been insubstantial and that the evidence on which it relied against them had largely to be found in the closed material. The Court found therefore that those applicants had not been in a position to effectively challenge the allegations against them, in violation of Article 5 § 4.