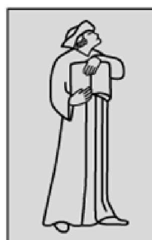
THOMAS · MORE · CHAMBERS

"GRIT IN THE MACHINE" PROCEDURAL POINTERS ON REPRESENTING SUSPECTS CHARGED UNDER THE TERRORISM ACT 2000 & 2006

Thursday 21st June 2007

6pm to 7pm

CRIMINAL PRACTICE GROUP



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TOPICS AND ORDER OF SPEAKERS

1. Introduction/Opening remarks – David Gottlieb.

2. Overview of Statutory Framework – Ben Walker-Nolan.

3. From Arrest to Trial, “Grit in the Machine” – David Gottlieb.

4. Case Study – Undertakings – Ben Walker-Nolan.

THE STATUTORY FRAMEWORK – AN OVERVIEW

1. The current Statutory framework in relation to offences of terrorism is spread across the Terrorism Act 2000 and Terrorism Act 2006. The original 2000 Act has been heavily amended by Anti-terrorism, Crime and Security Act 2001, Crime (International Co-operation) Act 2003, the Serious Organised Crime and Police Act 2005 and the Terrorism Act 2006.

2. The Statutory framework in relation to offences is supplemented by the Prevention of Terrorism Act 2005, which concerns the Secretary of State's ability to make Control Orders and the powers of the Courts to regulate them and The Extradition Act 2003.

Terrorism Act 2000

3. The Act received Royal Assent on 20th July 2000. It is divided into 8 parts with 131 sections and 16 schedules.

Meaning of "Terrorism"

4. The definition of "terrorism" is contained in section 1 of the 2000 Act.

1. –(1) In this Act terrorism means 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 public 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 act.*
- *(d) creates a serious risk to the health or safety of the public or a section of the public*
- *(e) is designed to seriously interfere with the or seriously disrupt an electronic system.*

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section –

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person or to any property wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

5. Amnesty International Report EUR/45/004/2006 on UK Terrorism Legislation expresses the following view, "*Amnesty International have repeatedly expressed concern about the vagueness and breadth of the definition of "terrorism", which leaves scope for political bias in making a decision to bring a prosecution*".

Offences

Proscribed Organisations

6. Schedule 2 of the Act contains a list of "proscribed organisations" and Section 3 allows the Secretary of State by order to remove or add organisations "concerned in terrorism" to the Schedule 2 list.

7. Section 5 allows for an appeal by a proscribed organisation to the Proscribed Organisations Appeal Commission (POAC). However, the POAC may exclude any Appellant or his representatives from any proceedings and may appoint a Special Advocate to represent the Appellants interests.

Challenges to Proscription

8. The proscription and offences in relation to proscription have been challenged on the basis that they give rise to substantial interference with the rights under Articles

8 (respect for private life), 10 (freedom of expression), 11 (freedom of assembly and association) and 14 (prohibition of discrimination). In the case of R (Kurdistan Workers Party v Secretary of State for the Home Department *[2002] A.C.D. 99*, the complainants argued under those Articles that the procedures under the 2000 Act constituted; (i) arbitrary and discriminatory treatment, (ii) lack of due process and procedural unfairness, (iii) lack of proportionality, (iv) failure to comply with the requirements of legal certainty, (v) failure to adopt clear criteria, (vi) inadequacy of Appeal to the Proscribed Organisations Appeal Commission (under section 5 of the Act). Richards J. refused the application for judicial review made in that case on the basis that the matters were for the Proscibed Organisations Appeal Commission to review, rather than a matter for judicial review, but made the observation that the grounds raised were arguable.

Effects of Proscription

9. Sections 11, 12 and 13 provide for criminal liability for:
   - (11) membership or professed membership of,
   - (12) inviting support for, or arranging, assisting, managing a meeting of or addressing a meeting to encourage support of,
   - (13) wearing an item of clothing or displaying an article in such circumstances to arouse reasonable suspicion that he is a member of

   a proscribed organisation.

Section 11 (membership or professed membership of a proscribed organisation)

10. The enactment of section 11 contradicted the express recommendation of Lord Lloyd of Berwick in the Report of his *Inquiry into Legislation against Terrorism* (Cm 3420, October 1996) who had observed that only a minority of states seek to penalise nominal membership of a proscribed organisation.

11. Section 11 is an incredibly wide offence. It might, for example cover the accused who joined an organisation before it became a proscribed organisation, or the accused who joined before he realised what the organisation was. It would cover the accused who joins as an immature youth, or who having earlier joined an organisation wished

to disassociate himself, but had no means of doing so without risk of serious injury.

12. Incredibly, by virtue of section 17 of the 2006 Act the offence under section 11 is extended to persons and countries outside the UK! Seemingly then, all non UK citizens, resident in any other country in the world who have ever been members of organisations proscribed in the UK are guilty of offences in the UK. This applies even where the organisation is not proscribed in the home country of the non UK resident!

Section 11 Defence

13. It is a defence to a charge under section 11 (membership of a proscribed organisation) to prove that the organisation was not proscribed on the last occasion when the accused became a member or professed membership, or that the accused has not taken part in any activities of the organisation at any time while it was proscribed. Section 118 of the 2000 Act makes provision for and lists those defences under the Act which are to be read as providing an evidential burden only. Section 11 is not listed in section 118 as being a defence to which only an evidential burden applies. It is therefore clear from the legislation that Parliament intended the section 11 defence to impose a legal burden on the accused to prove the defence on the balance of probabilities.

Challenge to Section 11 Defence

14. The House of Lords considered the section 11 defence in the case of *Sheldrake v DPP; AG's ref. (No. 4 of 2002) [2005] 1 A.C. 264*. The AG had referred the case following the acquittal of, "A", who had allegedly, "professed" to be a member of Hamas IDQ. The Court of Appeal had held that the section 11(2) defence provided a legal burden. Lord Bingham of Cornhill called the section 11 offence, "*a provision of extraordinary breadth*" (para. 47) and commented that, "*'profess', is a strange expression to find in a criminal statute*" (para. 48). He said, "*if section 11 is read on its own, some of those liable to be convicted and punished for belonging to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions*". He found that the section 11(2) defence should be read down under section 3 of the Human Rights Act 1998 as placing only an

evidential burden on the accused.

Fund-raising/Possession of Money or Property

15. Section 15 provides that it is an offence to provide or to invite another person to provide money or property knowing or having reasonable cause to suspect that it will or may be used for the purposes of terrorism.

16. Section 16 provides that it is an offence to possess money or other property intending or having reasonable cause to suspect that it will or may be used for the purposes of terrorism.

17. Section 17 provides that it is an offence to become concerned in an arrangement as a result of which money or other property is or is to be made available to another knowing or having reasonable cause to suspect that it will or may be used for the purposes of terrorism.

Disclosure of Information

18. A person who is acting in the course of a trade, business, or profession who believes or suspects that an offence has been committed under section 15 to 18 must disclose the information which upon which he bases that suspicion (Section 19(1). Failure to disclose that information to a constable as soon as is reasonably practicable is a criminal offence (Section 19(2). Section 19(5) protects disclosure where information is obtained in privileged circumstances.

Information about Acts of Terrorism

19. Section 38B reads as follows:

"*-(1) This section applies where a person has information which he knows or believes might be of material assistance-*

- *(a) in preventing the commission by another person of an act of terrorism, or*
- *(b) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation, or instigation of an act of terrorism.*

(2) The person commits an offence if he does not disclose the information as soon as reasonably practicable in accordance with subsection 3.

(3) Disclosure is made in accordance with this subsection if it is made –

(a) in England and Wales to a constable…

(4) It is a defence for a person charged under subsection (2) to prove that he had reasonable excuse for not making the disclosure.

(5) A person guilty of an offence under this section shall be liable –

(a) on conviction on indictment to imprisonment for a term not exceeding five years…

(6) Proceedings for an offence under this section may be taken, and the offence may for the purposes of those proceedings be treated as having been committed, in any place where the person to be charged is or has at any time been since he fist knew or believed that information might be of material assistance as mentioned in subsection (1).”

20. The defence in section 38B still currently imposes a legal burden, by virtue of the fact that it is not listed in section 118 as a defence providing an evidential burden only.

21. Section 39 provides that it is an offence to disclose information which is likely to prejudice a police investigation, or interfere with material likely to be relevant to an investigation. It is a defence for the accused to prove that he had no knowledge or reasonable cause to believe that the disclosure or interference was likely to affect the investigation, or to show he had reasonable excuse for the disclosure or interference. Section 39 is listed in section 118 as conferring only an evidential burden upon the accused.

Weapons Training

22. Section 54 provides that it is an offence to provide, receive or invite another to receive instruction or training in the making or use of firearms, radioactive material, explosive, chemical, biological or nuclear weapons. It is a defence under for a person charged under section 54 to prove that his action or involvement was wholly for a purpose other than assisting, preparing of or participating in terrorism. The defence imposes only an evidential burden within section 118.

Possession/Collection of Information

23. Section 57 of the Act provides as follows,

> *"57. –(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.*
>
> *(2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.*
>
> *(3) In proceedings for an offence under this section, if it is proved that an article –*
>
> > *(a) was on any premises at the same time as the accused, or*
> >
> > *(b) was on premises of which the accused was the occupier, or which he habitually used otherwise than as a member of the public,*
>
> *the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it"*

24. Section 58 of the Act provides as follows,

> *"58. -(1) A person commits an offence if –*
>
> > *(a) he collects or makes a record of information of a kind likely to be useful to a person preparing or committing an act of terrorism.*
> >
> > *(b) he possesses a document or record of that kind.*
>
> *(2) In this section "record" includes a photographic or electronic record.*
>
> *(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession".*

25. Section 57 is incredibly wide in that it imposes, "reasonable suspicion" as a basis for criminal liability. Section 118 does apply to the section 57 defence and therefore the defence under this section imposes only an evidential burden on the defendant.

26. Likewise, section 58 is incredibly wide in scope. It is easily conceivable that anyone with a map, tube map, or a timetable for public transport, or anyone taking or with photographs of a public place could be in possession of or making of information of a

kind likely to be useful to a person preparing or committing an act of terrorism

Extra-territorial Jurisdiction

27. Sections 63A – 63E were inserted into the 2000 Act by the 2006 Act. They effectively provide for criminal liability within the United Kingdom for conduct occurring outside the United Kingdom. The conditions are:
    - that the person committing the action outside the United Kingdom is a United kingdom National or resident,
    - That the offence is one of those listed in Sections 63A-63E.

28. Section 63A specifically includes offences under sections 57 and 58 of the 2000 Act (possession/collection of information). Section 63B includes doing any act of terrorism constituting an offence of murder, manslaughter, rape or an offence under the Offences against the person Act 1861, or under sections 1-5 of the Forgery and Counterfeiting Act 1981.

Consent to Prosecution

29. Section 117 requires that proceedings for most of the offences under the 2000 Act (and all of those mentioned above) shall not be instituted without the consent of the DPP.

Terrorism Act 2006

30. The 2006 Act received Royal Assent on 30th March 2006 after its sixth reading in the House of Lords. It was introduced for its first reading in October 2005. The common perception was that it was a direct response to the July 2005 attacks, although the Home Office claimed that was not the case and that new terrorism legislation had already been planned.

Encouragement of Terrorism

31. Section 1 of the 2006 Act provides as follows

"*1. – …*

(2) A person commits an offence if-

(a) he publishes a statement to which this section applies…

(b) at the time he publishes it…, he

(i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

(ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced to commit, prepare or instigate such acts or offences.

(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which –

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which members of the public could be reasonably expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances.

(4) …

(5) It is irrelevant for the purposes of subsections (1) to (3)-

(a)

(b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.

(6) In proceedings for an offence under this section against a person in whose case it is not proved that he intended the statement to directly or indirectly to encourage or otherwise induce the commission, preparation or instigation of terrorism or of Convention offences, it is a defence for him to show –

(a) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and

(b) that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not give his endorsement."

32. Concern has been expressed by Liberty that the new offence mean that those calling

for the overthrowing of the regime in Zimbabwe, or expressing solidarity with Palestinians, or dissidents from North Korea calling for the overthrow of the dictatorship there might be criminalised. Certainly those who in the past supported figures such as Nelson Mandela and the ANC's struggle against apartheid-era South Africa, which used violence would be caught by section 1. Figures such as Irish taoiseach, Bertie Ahern, who commemorated the Irish uprising of 1916 may be caught by section 1.

33. If a University professor giving a politics class, reviews material and quotes Osama Bin Laden inciting others to commit acts of terrorism, he is potentially within section 1(3). He would then have to rely on the defence under 1(6). It is not yet established whether that defence confers a legal or evidential burden upon the defendant.

Extra-territorial Jurisdiction

34. Section 17 of the 2006 Act concerns the commission of offences abroad and effectively provides that in respect of the section 1 offence, it is made out where the publication occurs outside of the United Kingdom.

Preparation of Terrorist Acts

35. Section 5 provides as follows

"*5. – (1) A person commits an offence if, with the intention of –*

(a) committing acts of terrorism, or

(b) assisting another to commit such acts,

he engages in any conduct in preparation for giving effect to his intention.

(2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.

(3) A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for life."

36. Again, this is plainly an incredibly broad offence. It stands in contrast to the law in relation to preparation for other types of criminal offences which require, "*an act which is more than merely preparatory to the commission of the offence*" (section 1 of the

Criminal Attempts Act 1981, see also, *R v Khan [1998] Crim.L.R. 828, CA*, "*attempt begins at the moment when the defendant embarks upon the crime proper, as opposed to taking steps rightly regarded as merely preparatory*"). It captures **any** lawful conduct as long as the requisite intention exists.

Prevention of Terrorism Act 2005 (Control Orders)

37. As at 16th January 2007 there were 18 control orders in existence (Second Report of the Independent Reviewer Lord Carlile of Berriew Q.C., 19th February 2007).

Challenge to Control Orders, no contravention of Article 6

38. The initial challenge under Article 6 looked promising. The High Court reviewed the position in the case of RE MB [2006] EWHC 1000 (QBD, Admin, April 2006, Sullivan J). In an impressive 45 page Judgement Sullivan J said that the court would be failing in its Statutory duty under the Human Rights Act 1998 were it not to say "*loud and clear*" that the process of review under section 3 of the Act was, "*conspicuously unfair*". He concluded by saying, "*standing back and looking at the overall picture there can be only one conclusion. To say that the Act does not give the Respondent in this case…a fair hearing would be an understatement…The thin veneer of legality which is sought to be applied by section 3 of the 2005 Act cannot disguise the reality. Controlees rights under the Convention are being determined, not by an independent Court in compliance with Article 6.1, but by executive decision making untrammelled by any prospect of effective judicial supervision*" [para 103]. A declaration of incompatibility was made pursuant to section 4 of the Human Rights Act 1998. In the later Court of Appeal Judgement in RE MB [2006] EWCA Civ 1140 Lord Phillips CJ, delivering the more succinct 26 page Judgement of the court found that Sullivan J had erred and that section 3 of the Act was compatible with Article 6.

Article 5 (Right to Liberty) challenge on a case by case basis

39. The most successful challenges made to this legislation have been made on a case by case basis under Article 5 of The European Convention of Human Rights. The court will decide whether in the particular circumstances of the case the physical restraints imposed amount to a deprivation of liberty (see *Secretary of State for The Home*

Department v (1) E (2) S [2007] EWCA Civ (CA), control order for an individual requiring electronic tag, curfew (19.00-07.00), restricted visitors to home and restricted communications did not breach his Convention rights under Article 5).

FROM ARREST TO TRIAL: "GRIT IN THE MACHINE"

INTRODUCTION

1. The Terrorism Act 2006 was introduced to criminalize conduct, which previously, it was thought, fell outside the scope of existing statutes and the common law.

2. Importantly, the 2006 Act extended the period for which terrorist suspects might be detained for questioning without charge. In addition, Police powers of stop[1], search, and seizure were enlarged.

3. The speed with which the Terrorism Act 2006 was implemented in the wake of the London bombings in July 2005 has been frequently criticized. At one extreme, a commentator described it thus:

> "The Terrorism Act 2006 is a hurried piece of legislation. Many of its provisions are a direct consequence of the London bombings in July 2005[2]. The new offences it creates are complex and in parts obscure. They appear to add little to the range of existing criminal offences available in UK law for terrorist cases.
>
> The Act now permits the detention of suspected terrorists without charge for 28 days. It is a measure of the change to the British way of life produced by terrorism, or the fear of terrorism, that the reduction from the 90-day period first proposed by the Government

[1] As exercised in relation to Mr Walter Wolfgang (aged 82) detained at the 2005 Labour Party Conference, after heckling the Foreign Secretary with shouts of "That's a lie".
[2] An allegation vehemently disputed by the Labour government, given that the Draft Bill had been scheduled for legislative scrutiny in the Autumn of 2005.

and senior police officers was regarded in the House of Commons as a mark of good sense and restraint.

The 2006 Act also demonstrates the piecemeal but rapid fortification of the powers of law enforcement agencies over individuals and property, characteristic of so much recent legislation"[3].

REPRESENTATION AT THE POLICE STATION

4. Statistics suggest that very few of the duty solicitors who represent those suspected of terrorist offences at the Police Station, retain the suspect as a client through to the end of trial.

5. In a recent multi-handed case involving 7 Defendants charged with offences under the Terrorism Act, all 7 were initially represented by duty solicitors at the Police Station. None of the Defendants were still represented by the same duty solicitors at the date of trial. This begs the question, why?

DETENTION

6. By s.41 of the Terrorism Act 2000, a constable may arrest without warrant a person whom he reasonably suspects of being a terrorist. A suspect may then be detained and questioned for a total of 28 days[4].

[3] 'Blackstone's Guide to the Terrorism Act 2006'.
[4] s.23-25 Terrorism Act 2006 and Sch 8 Terrorism Act 2000.

7. It is of note that the power of arrest does not require that the police have a specific offence in mind[5]. Further, the usual rules relating to pre-interview disclosure of the allegations made, do not apply.

8. After arrest, a review officer independent of the enquiry must review the detention of a suspect[6]. Before the review officer determines whether to authorize a person's continued detention, he must give either the detained person or his solicitor the opportunity to make representations[7].

9. The procedure for continued detention is as follows:

(a) If the officer does not give authorization[8] for continued detention the suspect must be released after a maximum of 48 hours in custody. That is, unless he is detained by virtue of s.41(5) or (6) Terrorism Act 2000[9];

(b) A warrant of further detention may be issued by a 'judicial authority'[10] (designated District Judge) to extend the period of detention to a maximum of 7 days from the time of arrest[11]. The suspect may be detained pending the making and outcome[12] of that application (s.41(5) & (6) Terrorism Act 2000);

[5] This is not in breach of Art 5.1(c) ECHR for lack of certainty, a similar point having been taken in Brogan v UK (1989) 11 EHRR 539, para.50.
[6] Part II of Sch 8 to the Terrorism Act 2000.
[7] para 26(1) of Sch 8 Terrorism Act 2000.
[8] See paras 21-25 Sch 8, Part II Terrorism Act 2000 and H:14 Code H for the process of review, delaying review, and the grounds for continued detention.
[9] s.41(4) Terrorism Act 2000.
[10] Part III of Sch 8 to Terrorism Act 2000 for 'judicial authority'.
[11] para 29, Sch 8 to the Terrorism Act 2000. Also, see para 32 for the grounds upon which the Judge may issue the warrant and para 30 for time limits.
[12] See s.23(2) Terrorism Act 2006 for those individuals entitled to make such an application.

(c) Further extensions can be made to an absolute aggregate maximum of 28 days from the time of arrest[13]. An application for detention to continue beyond 14 days must be made to a 'senior Judge'[14] (High Court Judge).

10. It was recently determined in R (on the application of Hussain) v CPS[15] that a High Court Judge's decision to extend detention is not amenable to Judicial Review. Lord Justice Richards found that this was not a breach of Article 5(3) or (4) ECHR[16].

11. This decision creates a situation where initial decisions (by a District Judge) to extend detention may be reviewed, but those extending that detention for a significant period (made by a High Court Judge) may not.

12. However, Lord Justice Richards felt that it was 'perfectly intelligible and reasonable' for a High Court Judge to be entrusted with the responsibility of making a final decision on the issue of 28 day detention[17].

INTERVIEWS

13. Code of Practice H (Police and Criminal Evidence Act 1984) applies to those suspects arrested under s.41 and Sch 8 Terrorism Act 2000. The main differences between Code H and the Codes of Practice in relation to non-terrorism offences are:

(a) fewer details as to the grounds of arrest are required;

[13] para 36 Terrorism Act 2000, as inserted by s.25(3) Terrorism Act 2006.
[14] s.23 Terrorism Act 2006.
[15] [2006] EWHC 2467.
[16] para 26.
[17] para 25.

(b) the grounds for delaying access to legal advice [Code H:6 and Annex B] [Note particularly H:6.5 a suspect may only consult a solicitor within the sight of hearing of a qualified officer in certain circumstances[18]];

(c) the detainee is to be transferred to Prison [from which time Code H will no longer apply] and dealt with under Prison Rules 1999 where a warrant has been issued providing for detention beyond 14 days [Code H:14];

(d) more detailed provisions for visiting rights and a demarcation between those from friends and family, and official visits [Code H:5];

(e) specific provision for the allocation of reading material [Code H:5];

(f) the detainee to receive daily healthcare visits [Code H:9];

(g) guidance on the process of applications to extend the period of detention [Code H:14].

14. Code H provides that the interview of a suspect must cease when:

(a) the officer in charge of the investigation is satisfied that all questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect;

(b) the officer has taken account of any other available evidence;

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[18] However, this can be negotiated with Police given that it will inevitably mean that a solicitor can only provide very limited advice; almost certainly that a no comment interview is appropriate. Therefore, the Officer may be persuaded that a private consultation would potentially be more beneficial for all parties – See Anthony Edwards 'Advising a Suspect in the Police Station', 6th edn, p.99-100.

(c) the officer reasonably believes that there is sufficient evidence to provide a realistic prospect of conviction[19].

15. However, the 2000 Act is silent about the timing of any charge. Paragraphs 23(1) and 32(1) of Sch 8 provide that continued detention is necessary 'to obtain further evidence whether by questioning him or otherwise'.

16. This condition is not limited to the necessity of finding evidence in order to charge however, or evidence relevant to the offence for which the suspect was arrested. Therefore, detention could still be considered 'necessary' even if there was an abundance of evidence against a suspect.[20]

BAIL APPLICATIONS

17. Bail applications may be listed and heard by a Judge in Chambers, as a matter of course. However, if the defence apply for the application to be heard in open court, the Judge must approach this application from the position that a fundamental presumption exists in favour of open justice:

"the hearing in open court of an application directly affecting personal liberty is in the first instance a matter not of private or individual right, and certainly not of judicial discretion, but of public obligation.

The role of private or individual right, which will be prominent in bail applications, lies in the court's obligation to consider whether it is

[19] Code H, 11.7.
[20] 'Blackstone's Guide to the Terrorism Act 2006', p.75.

necessary to depart from the ordinary rule of open justice in the interests of justice itself"[21].

18. Therefore, the Judge must consider the presumption in favour of the application being heard in open court and provide reasons why that presumption should be departed from. In cases of this nature, the sensitivity of the material which the Crown may refer to is likely to provide such reasons[22].

19. A Defendant in custody has no automatic right to be produced at the hearing of his bail application. The defendant has the burden of persuading the court that he should be physically produced[23].

20. It is submitted that a defence team should adopt a piecemeal approach to the issue of a defendant's bail. It is inevitable that the court will require large sums in surety and initially impose very stringent bail conditions.

21. Further bail applications, made after a period in which a defendant has complied with his conditions of bail, are more persuasive. In this way the stringent conditions may be gradually relaxed.

CASE MANAGEMENT

22. Sir Igor Judge issued a protocol for the case management of terrorism cases[24]. The following matters contained in the protocol are of note:

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[21] R (on the application of Malik) v Central Criminal Court and another [2006] 4 All ER 1141, para 30; considering Scott v Scott [1913] AC 417, at 437; Hodgson v Imperial Tobacco Ltd [1998] 2 All ER 673; Assenov v Bulgaria 1999 28 EHRR 652; Nikolova v Bulgaria (2001) 31 EHRR 64 and r.16.11 Criminal Procedure Rules 2005.

[22] R (on the application of Malik) v Central Criminal Court and another [2006] 4 All ER 1141, para 9 and 33.

[23] R (on the application of Malik) v Central Criminal Court and another [2006] 4 All ER 1141, para 36-39; and see r.19.18(5) Criminal Procedure Rules 2005.

(a) A preliminary hearing should normally be ordered by the magistrates' court in a terrorism case, this should take place 14 days after charge;

(b) The ordinary s.51 case progression form should not be used. Instead, directions should be made that the Crown serve 3 days prior to the preliminary hearing:

- a preliminary summary,
- the names of those representing the Crown,
- an estimate of trial length,
- a provisional timetable,
- a statement of disclosure issues, and
- information in relation to bail and custody time limits.

In response, the defence should serve 1 day prior to the preliminary hearing:

- the names of those representing the defendant,
- observations on the prosecution timetable, and
- an indication of plea and the general nature of the defence.

(c) All hearings prior to trial to be conducted via video link with the defendants;

[24] Archbold 2007 Supplement, N-33, p.542.

(d) Cases of real complexity issued to a specific trial Judge at an early stage – prior to the PCMH.

23. Clearly, the courts are seeking to manage the vast amount of evidence which is relied upon by the Crown in the majority of terrorism trials. Sir Igor Judge's protocol aims to have prosecution, defence counsel and the trial Judge involved very early on in proceedings. This is to ensure that a tight reign is maintained on the case.

INTERLOCUTORY HEARINGS

24. As referred to above, a preparatory hearing will normally be ordered. This should be conducted by the trial Judge, save in exceptional circumstances[25].

25. At the preparatory hearing the Judge may determine:

s.9(3) Criminal Justice Act 1987 ("CJA")

(a) Any question as to the admissibility of evidence;

(b) Any other question of law relating to the case;

(c) Any question as to the severance or joinder of charges;

26. Appeal lies to the Court of Appeal from any order or ruling made by the Judge pursuant to (a) to (c) above[26]. However, at a preparatory hearing a Judge may only exercise those powers set out in s.9 CJA 1987.

[25] R v Southwark Crown Court, ex parte Customs and Excise Commissioners 157 JP 648.
[26] s.9(11) CJA 1987.

27. However, it is convenient for the Judge to consider other matters too, such as disclosure, at the hearing. Therefore, the House of Lords recently held that there is another form of hearing going on at the same time as a preparatory hearing[27].

28. Matters not provided for in s.9 are considered at this simultaneous hearing. These matters are not susceptible to appeal in the way provided for by s.9(11) CJA 1987.

29. In this way, parties will gain nothing from delaying applications, outside the scope of those detailed in s.9 CJA 1987, until the preparatory hearing in order to take advantage of the s.9(11) right to appeal. Any rulings or orders made outside the scope of s.9 CJA 1987 may only be considered on appeal after the determination of the trial.

30. s.31(11) Criminal Procedure and Investigations Act 1996 ("CPIA") provides:

An order or ruling made under this section shall have effect throughout the trial, unless it appears to the judge on application made to him that the interests of justice require him to vary or discharge it.

31. The Court of Appeal held recently that s.31(11) provided that orders or rulings made at preparatory hearings were not immutable[28]. An appeal against the Judge's ruling in R v M was initially allowed[29]. However, this

[27] R v H [2007] UKHL 7 in which the Lords held that an application for disclosure was not a question of law relating to the case.
[28] R v M, Z, I, R and B [2007] EWCA Crim 970.
[29] R v M, Z, I, R and B [2007] EWCA Crim 298.

appellate decision was held to have been made per incuriam in R v Rowe [2007] EWCA Crim 635.

32. The Recorder sitting in R v M determined to vary his previous order to follow the decision in Rowe. On appeal from the Recorder's decision, the Court of Appeal held that his approach had been correct.

33. Therefore, the trial Judge's power contained in s.31(11) does not expire merely because he initially follows a decision made by the Court of Appeal, which subsequently, a differently constituted Court of Appeal then holds to have been made per incuriam.

34. The Court of Appeal emphasized, when considering the continuing effect of s.31(11), that any rulings of law made at a preparatory hearing should reflect the law that will govern the trial.

THE ABSENT DEFENDANT

35. In the case of R v Jones (Anthony) [2003] 1 AC 1, HL it was held that a Judge has the discretion to commence a trial in the absence of a Defendant. This discretion should be exercised with 'the utmost care and caution' however[30].

Lord Bingham urged lawyers to continue to represent the absent client in these circumstances:

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[30] Lord Bingham, para 13. See R v Hayward; R v Jones; R v Purvis [2001] QB 862 and Archbold 2007, 3-197-3-199 for a non-exhaustive list of the matters a Judge ought to consider before exercising his discretion.

"it is generally desirable that a defendant be represented even if he has voluntarily absconded. The task of representing at trial a defendant who is not present, and who may well be out of touch, is of course rendered much more difficult and unsatisfactory…

…but the presence throughout the trial of legal representatives, in receipt of instructions from the client at some earlier stage, and with no object other than to protect the interests of that client, does provide a valuable safeguard against the possibility of error and oversight.

For this reason trial judges routinely ask counsel to continue to represent a defendant who has absconded during the trial, and counsel in practice accede to such an invitation and defend their absent client as best they properly can in the circumstances"[31].

36. In the recent case of R v AD [2007][32], the Defendant was charged with 3 separate breaches of his Control Order. Prior to trial, the Defendant escaped from a psychiatric hospital.

37. At a preliminary hearing the prosecution applied to try the Defendant in his absence. The defence objected to the application in principle and on medical grounds.

38. In addition, the times at which the Defendant had to report to the Police Station as part of his Control Order had been set by a Police Officer. The

[31] Lord Bingham, para 15.

[32] The case has only been reported in the national press, and so far, only in part – "AD's" true identity has been revealed as Zeeshan Siddiqui, as has the fact that he breached his Control Order.

defence argued that only the Secretary of State had the power to do this and that he could not delegate this power.

39. The Judge held at the preliminary hearing that he could read in to the Prevention of Terrorism Act 2005 that the Officer could set the reporting times. On appeal under s.33 and s.35 CPIA the Court of Appeal agreed[33].

40. The case against AD in relation to breach has been adjourned until such time as the Defendant is apprehended. Thus, defence arguments in relation to trial in absence were successful. This case reflects the importance of lawyers following Lord Bingham's advice and continuing to represent a Defendant who has absconded.

CONCLUSION

41. It is submitted that those representing Defendants charged with offences under the Terrorism Act should take a note of these procedural pointers. Maintaining an early focus on the case, particularly on pre-trial hearings and the best methods of challenging the Crown's case can be rewarding. In this way, solicitors can ensure that those clients picked up in the Police Station remain clients through to trial.

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[33] The Times 18th May 2007, R v D (Control Orders) 3rd May 2007.

CASE STUDY

UNDERTAKINGS REQUIRED FROM DEFENCE SOLICITORS

1. In a recent terrorism case Defence Solicitors were required to agree the following undertakings:

    i. To keep the served material in a locked, secure container when not in use.
    ii. Not to make or permit any other person to copy the material.
    iii. Not to release the material to the defendant.
    iv. Not to take the material into any prison establishment without prior notification to the governor thereof.
    v. When taking the material into a prison establishment to show it to the client only during a legal visit and not to leave it with the defendant.
    vi. To return the material to the CPS CTD if instructions are withdrawn.
    vii. To return the material at the end of proceedings.

A pragmatic approach

What disclosure has already been made?

2. Have the Crown already disclosed the material in respect of which they are asking for undertakings? If the undertakings are a prerequisite for disclosure is the material required urgently by the defence, e.g. to make representations as to defendants role/strength of case in a bail application. Is it worth initially agreeing to the undertakings and then listing the matter for review before a Judge?

What is the nature of the material the undertakings cover?

3. Every case will have core statements and exhibits. Terrorism cases by their very nature can give rise to issues in relation to disclosure concerning material that the CPS consider to be highly sensitive, but which is material they need to or wish to rely on in court, or is plainly relevant and discloseable.

4. Examples of material that might be sensitive but discloseable are:
    i. Material that appears to incite others to commit terrorist acts, such as sermons, speeches, publications condoning or advocating suicide bombing.
    ii. Material that appears to instruct others on how to go about perpetrating acts of terrorism, "encylopaedia of jihad" type material.
    iii. Material that might suggest the type of equipment or persons involved in surveillance operations, undercover police officers, location of listening devices etc.
    iv. Material that tends to incriminate merely because of its extremist nature, e.g., videos of insurgent attacks on allied forces, of soldiers or civilians being executed by extremist factions.

5. Considerations of Fairness

    i. Is the evidence so central to the case that the ability of the defendant to enjoy a fair trial might be prejudiced if he is not able to analyse his own copy of material?

    ii. Has a PII application been made and disclosure ordered, in which case was the Judge asked to consider requirements as to defence undertakings?

6. Practical Considerations:
    i. Is it practical for the defence to undertake not to copy material? Counsel might for example like to have a copy of the material and the practicalities with experts are such that they might need to keep their own copy of material.
    ii. Is it feasible to obtain proper instructions without the defendant being able to keep a copy of the evidence to be deployed against him?
    iii. Are defence solicitors and counsel able to comply with the logistics of keeping material locked in a secure container?
    iv. When are instructions withdrawn? What if a defendant absconds? What if in those circumstances solicitors withdraw, but counsel remains for the trial?

v. When does the "case" end, what are the status of confiscation hearings under the Proceeds of Crime Act 2002? What are the status of criminal appeals? Or appeals by the Criminal Cases Review Commission where Solicitors are asked to comment on allegations or complaints made by the defendant?

Relevant Law

First Principles

7. The Crown have a statutory duty to make proper disclosure.

Section 17 CPIA

8. Unused material is disclosed subject to section 17 of the CPIA and is received by the defence subject to a prohibition not to use or disclose the material for any purpose which is not connected with the proceedings for which purposes it was disclosed.

9. The Crown are always able to ask the Judge to rule the material non-disclosable as material subject to PII.

10. The undertaking is made to the CPS and not to the court or pursuant to an order of the court. What is the consequence of breaching the undertaking?

11. It is well established that it is not acceptable for the Crown to disclose material to counsel against an undertaking not to disclose to their solicitors or client (*R v Davis, Johnson and Rowe (1993) 97 Cr.App.R. 110*.

12. The case of *R v G: R v B (2004) 2 Cr.App.R.37*, involved inadvertent and "*grossly negligent*" disclosure by the Crown of material that the trial Judge had ruled non-disclosable for reasons of PII. The PII material was disclosed to leading and junior counsel for 2 out of 5 defendants. The trail Judge made an order preventing those lawyers, "*in the know*" from disseminating the material to anyone including their clients. The Court of Appeal found that once the material had been disclosed, the Judge ought not have restrained further use and disclosure. The rational of the court included consideration of the damage likely to be caused between a lawyer and client

where there is material the lawyer has which he cannot disclose or discus with his client. The Court of Appeal also took account of the fact that it would be, "*virtually impossible*" to police the behaviour of lawyer and client which had the benefit of occurring within a privileged relationship.