PREVENTATIVE DETENTION – LATEST DEVELOPMENTS IN THE UK

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Introduction

For any society to function properly, its citizens must feel protected from crime. This is only possible where the public has respect and confidence in its criminal justice system.

But confidence does not just come from the delivery of an efficient and effective trial process that brings offenders to justice. In modern democracies, our citizens demand that we deliver safe convictions through due process, while always protecting the rights of individuals.

How our systems handle pre-trial issues is important for confidence in our systems as a whole. Confidence is damaged when suspects abscond or further offend whilst on bail; or if an individual is acquitted having spent a considerable period in custody awaiting trial.

The last few years have seen unprecedented challenges to our criminal justice systems.

One of the greatest challenges that face governments is to respond proportionately to the increased threat of global terrorism. The right

balance must be struck between protecting the state whilst preserving fundamental individual freedoms.

But striking precisely this balance is also at the heart of wider considerations of pre-trial issues, particularly pre-trial bail.

I will describe how the UK has sought to maintain this balance in legislating for a more robust approach to preventative detention in the sphere of terrorism.

Many of you will know, I am sure, something of our 'anti-terror' laws. You may know that 'control orders' and pre-trial detention of defendants in criminal proceedings have been the subject of much attention.

But first, I would like to outline a number of important recent developments in the system for England and Wales concerning pre-trial bail and custody.

These represent a new robust approach to absconders; linking treatment for drug addiction to the grant of bail; and a more focused multi-agency approach to proactive pre-trial management of cases.

Before touching on these, I should provide an overview of our approach to bail.

Background regarding bail – law and procedure.

There is a presumption that a person before the courts shall be granted unconditional bail. This stems from the presumption of innocence that lies at the very heart of the English criminal justice system.

This presumption of liberty can be rebutted if a court is satisfied that one or more statutorily defined circumstance apply in any given case. If this is so, consideration must be given to initially placing conditions on the person's bail as an alternative to custody.

The presumption to bail is not absolute. English law recognises that in certain circumstances, there is a clear public interest in removing this right. An example is when a suspect further offends whilst already on bail.

Our domestic legislative scheme mirrors Article 5 of the ECHR. Article 5 provides that everyone has the right to liberty and security of the person. A person can be detained if there are relevant and sufficient grounds for

believing that certain circumstances, as defined in European jurisprudence, apply.

Ultimately, it is the court's decision whether to release a defendant on bail. But the prosecutor has crucial role in ensuring that decisions are fair.

Prosecutors are under a professional duty to make specific recommendations to the court regarding bail. They must ensure that the court has all the information needed to make an informed decision.

Prosecutors must consider whether the interests of justice and fairness in a particular case are met by immediate disclosure of information to the defence. This includes any material that may impact on a suspect's application for bail.

How the problem of absconding has been tackled.

It is inevitable that some suspects on bail will fail to attend court. In 2004, 14% of suspects failed to turn up at the magistrates' courts; as did 6% of suspects at the Crown court.

Any level of absconding is intolerable because of its negative impact on the administration of justice and public confidence.

Criminal justice agencies have made it a priority to ensure that suspects understand that they are under a legal obligation to attend court. If a suspect then chooses to ignore this obligation, they must understand that serious consequences will inevitable flow from their failure.

In January 2004, the then Lord Chief Justice issued a Consolidated Practice Direction. This provided general guidance concerning procedure in criminal proceedings. It set out various considerations for a court to consider when faced with someone who has absconded and been re-arrested.

Under this Practice Direction, courts should:

- Consider stiff, separate penalties for the offence of absconding;

- Give serious consideration to revoking bail or adding stringent conditions; and

- Consider hearing a trial in the absence of the defendant if the interests of justice are satisfied. This last point represented something of a sea-change in approach.

Prosecutors are central to creating a culture of bail compliance. They must remind a court of the provisions and underlying rationale of the Practice Direction. The principle of fairness is again paramount, particularly in relation to trials in absence.

When considering whether to apply to proceed without the defendant, prosecutors need to carefully consider fairness not only towards the accused but also the interests of others, such as victims and witnesses. The court must be informed of all the circumstances that may impact on its decision.

Prosecutors must be impartial in the information they disclose to the court. This does not mean that prosecutors cannot make robust, vigorously argued applications.

Similarly, if an application is to hear a case in the defendant's absence is granted, the prosecutor has an important role to play in ensuring that the trial process is fair.

Bail and Drug Treatment

Addressing drug related offending by channelling offenders into treatment has been a crucial element in recent social policy. Offenders who are addicted to drugs are more likely to offend on bail as well as absconding.

Recently, the Government introduced an initiative to reduce drug-related crime by offering treatment to offenders at an early pre-conviction stage.

The 'Drug Interventions Programme' does not only seek to stop drug abuse. It is also aimed at preventing suspects further offending and failing to surrender.

The programme works by using incentives and disincentives. The incentive is the offer of rapid and free access to treatment.

The disincentive is the removal of the right to bail if a suspect refuses or fails to engage with the scheme. In such circumstances, courts should

only grant bail if they are satisfied that there is no significant risk of the suspect re-offending.

The requirement for effective trial management

But our approach is not merely to get tough with those who fail to surrender. Those in custody awaiting trial must not wait longer than is absolutely necessary before their case is heard.

Our legislation provides for a maximum period for which a suspect may be kept in custody while awaiting completion of various stages of proceedings.

If it is not possible to meet this timetable, prosecutors may apply for an extension to extend the period. When considering such applications, courts will scrutinise the conduct of the prosecution closely.

A delay that is unwarranted may result in the suspect being released on bail.

Recently, we have seen the gradual rolling out of what is known as the 'Effective Trial Management Programme'. This aims to cut the number of ineffective trials, whether the suspect is remanded on bail or custody.

There is a published framework that sets out how cases should be managed efficiently from charge to sentence. The various justice agencies now work together in order to actively manage and progress cases.

In the areas where this has been piloted, there has been between 6 – 12% decrease in the number of ineffective trials.

There are dangers in placing too much emphasis in speed. Prosecutors must never sacrifice the principle of obtaining just outcomes and safe convictions in order to achieve fast case throughput.

Delivering safe convictions means that suspects have to be charged with the right offence, that reasonable lines of inquiry are pursued, that disclosure of potentially exculpatory material is made, and that the interests of victims and witnesses are provided for.

Particular challenges presented by anti-terrorism investigations.

Terrorism can produce a substantially different challenge.

Anti-terrorism investigations these days are frequently said to be 'intelligence-led.' By this we mean that intelligence leads the police to intervene in a planned act of terrorism. This is of course the way that it should be as the protection of life and property is paramount.

The threat will often be such that the police cannot delay intervening whilst they gather evidence. They must arrest those involved, then gather sufficient evidence for a successful prosecution whilst the defendants are in custody.

These cases are challenging for prosecutors who must work with the police to build the case, whilst endeavouring to keep appropriate suspects in custody.

General position on pre-charge detention

The general rule in the UK is that after arrest the police can detain a suspect at a police station for up to 24 hours whilst they investigate.

In serious cases this may be extended up to 36 hours by a police superintendent and up to 96 hours by a magistrates' court, provided that the investigation is being conducted 'diligently and expeditiously.'

Position before recent changes to allow 28 days detention

Parliament has recognised this particular challenge presented by many terrorism cases. In the Terrorism Act 2000 constables were given power to arrest a person simply reasonably suspected of being concerned in terrorism.

Once arrested that person can be detained at a police station for up to 48 hours without any other authorisation.

The Terrorism Act also permitted a magistrates' court to extend detention up to a total of 7 days, on the application of the police superintendent. In 2003 that period was itself extended to 14 days.

Recent changes to allow 28 days detention

This trend has continued. Last year's Terrorism Bill proposed a maximum period of pre-charge detention of 90 days.

This measure was the subject of fierce debate and rightly so. Parliament accepted that an increase from 14 days was appropriate, in the end settling upon 28 days as the right period.

Checks and balances of 28 days detention

As previously, applications to extend pre-charge detention for up to 14 days will be heard by a designated district judge in a magistrates' court.

However applications may now be made by a Crown Prosecutor as well as a police superintendent.

We anticipate that in practice the police will probably make only the first application to extend and that otherwise all applications will be made by a Crown prosecutor.

For some time now crown prosecutors have been involved in terrorist cases from the earliest stages, often advising the police prior to arrest.

The benefit of having this additional critical assessment of the investigation was, I think, recognised by Parliament as a significant safeguard to the fairness of this procedure. It provides an alternative to judicial supervision of the investigation that some commentators advocated.

Applications from 14 to 28 days will only be made by prosecutors and will be heard by a high court judge.

In both courts applications are fully adversarial. The detained person is entitled to hear the application and oppose it, either personally or through an advocate.

The only exception is that the court has discretion to withhold part of the prosecutor's application if disclosure would risk interference with the investigation.

The provisions are subject to a sunset clause, requiring renewal after 12 months by statutory instrument and therefore review by parliament.

Control orders.

Extended pre-charge detention is not the first preventative detention measure aimed at enhancing the UK's ability to deal with the threat of terrorism.

The 'control order' was created by the Prevention of Terrorism Act 2005 to replace its predecessor, Part 4 of the 2001 Anti-terrorism, Crime and Security Act, the legislation introduced following 9/11.

This legislation permitted the Home Secretary to detain indefinitely a person he suspected to be an 'international terrorist' and therefore wished to deport but was prevented from doing so.

In December 2005, the House of Lords considered this provision in '***A and others v Secretary State for the Home Department***'. The appellants had been indefinitely detained as suspected terrorists. They could not be deported as there was a real risk that if sent elsewhere they would be tortured or otherwise treated inhumanly.

The House of Lords concluded that indefinite detention, when a person could not be deported because there a consequent risk of torture, breached the detainees right to liberty. The provision was also said to be discriminatory as it only operated against non-nationals.

As with detention, a control order may be made against a person suspected of involvement in terrorism related activity. But unlike detention, an order may be made against such a person, whether a UK national or not.

Overview of control orders

Control orders are made by the Home Secretary. Prosecutors have a limited but nonetheless very important involvement in the process.

The objective of a control order is to secure the safety of the public by the minimum measures needed to prevent terrorist related activity. Breach of an order is punishable by up to 5 years imprisonment.

As a general rule the Home Secretary asks the High Court to make a control order. His case for doing so will be based upon an assessment of all available information, including intelligence.

Procedure

The intended subject of the order can attend the hearing and be represented. The court may consider the application in open or closed session.

Where national security requires a closed session in the absence of the 'controlee' and his chosen advocate his interests will be represented by a special advocate appointed by the Attorney General.

Description of orders

Orders typically restrict movement (excluding the controlee from certain places or imposing a curfew), association (barring contact with individuals or groups) and communications (usually use of the telephone or internet).

Safeguards

By law, control orders are scrutinised annually by an independent reviewer (presently Lord Carlile QC). His first report to parliament concluded that in his view control orders were being used properly and 'as a last resort' were 'a justifiable and proportionate safety valve for the proper protection of society.'

It might be said that Lord Carlile's view of control orders as 'a last resort' echoes that of Parliament when enacting the control order provisions.

Ideally those suspected of being involved in terrorism should be prosecuted in a criminal court with full disclosure of the evidence relied upon by the state.

The legislation reflects the primacy of the criminal justice process and control orders. By law therefore, if a control order is made a chief officer of police must keep under review the possibility of a criminal investigation and criminal proceedings against the controlee. He must consult me where appropriate.

Conclusion

In recent years, we have developed preventative detention as an innovative means to combat the evolving challenges to our communities and country. In so developing these mechansims, we have built upon the existing framework.

The measures I have outlined are aimed at tackling these threats whilst maintaining the fundamental balance between a society's safety and individual rights. This balance is particularly delicate when dealing with terrorism.

Within these new processes, the prosecutor has an important role. It is down to us to ensure that a suspect is prosecuted fairly and that there is no abuse of any power.

We must ensure that a person is detained only when it is absolutely necessary and that due process is complied with. Without the integrity and independence of the prosecutors, the balance between competing rights could be lost.