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ARTICLES

THE DETENTION OF SUSPECTED TERRORISTS IN NORTHERN IRELAND AND GREAT BRITAIN

Brice Dickson *

I. INTRODUCTION

I approach this topic from the perspective of someone who has lived most of his life in Northern Ireland. At an early age, as most children do, I developed a commitment to fairness and justice, but just as I was going through university in the early 1970s my homeland was convulsed by politically motivated violence. In the course of six years (1971–76), no fewer than 1660 people were killed and 17,720 injured, all in an area about the size of Connecticut.¹ It was a destabilising and disorientating experience, even though my home was in a small (predominantly Protestant) town which did not itself experience much trouble. I would watch the television news about what was going on just ten or fifteen miles away and feel that it might as well have been happening in some far distant land. None of my friends or relations, except a distant cousin, was caught up in the conflict, nor did I have any strong political views as to whether Northern Ireland should be British or Irish—like all people born in Northern Ireland, I was entitled to both nationalities and to me this seemed an advantage over being just one or the other. What I could not readily comprehend was the point of the violence. Whatever the discrimination

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1. See Police Service of Northern Ireland, *Deaths Due to the Security Situation in Northern Ireland 1969–2008*, http://www.psni.police.uk/deaths_cy.pdf; Police Service of Northern Ireland, *Persons Injured as a Result of the Security Situation in Northern Ireland 1968–2008*, http://www.psni.police.uk/persons_injured_cy.pdf.

practised by the Unionist government, how could anyone justify the killing of completely innocent men, women and children? Could the perpetrators really believe that such violence would lead to a political victory? Did the Irish Republican Army ("IRA")² honestly think it could drive the British out of Northern Ireland by military might alone? Did the Loyalist paramilitaries, in turn, think they could make matters better by shooting people whom they took to be Republican sympathizers? Yet, what also puzzled me was why the authorities could not control the unrest. Why could the legal system not firmly come to grips with the situation by ensuring that those responsible for the violence, from whichever side they came, were processed through the courts and given appropriate sentences?

It was only after I started lecturing in law at Queen's University in 1979 that I began to appreciate the real difficulties facing the authorities. How does a democratic society "legitimately" track down those who have committed violence for political ends, or prevent such violence from being committed in the first place? Indeed, can the phenomenon of politically motivated violence be dealt with at all within the framework of the rule of law? This article attempts to tell the story of how the authorities responsible for governing Northern Ireland went about these tasks by using the process of detention. It explains how the steps taken in Northern Ireland related to those taken in Great Britain (i.e. England, Wales, and Scotland),³ and also how developments within the United Kingdom ("UK") as a whole significantly impacted Northern Ireland. It tells the story mainly with reference to the human rights of terrorist suspects, in particular their rights as guaranteed by the European Convention on Human Rights ("European Convention").⁴ The story is one of increasing

2. The Irish Republican Army was the main paramilitary organisation fighting to "liberate" the whole of Ireland from British rule. See MARIE-THERESE FAY ET AL., NORTHERN IRELAND'S TROUBLES: THE HUMAN COSTS 11 (1999).

3. The UK consists of Great Britain and Northern Ireland, although "Britain" is sometimes used as a synonym for the UK. 29 THE NEW ENCYCLOPEDIA BRITANNICA 1 (15th ed. 2002).

4. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. The UK became bound by the European Convention at the international level in September 1953, but it did not allow individuals to lodge applications under the Convention until January 1966. See Roger Kerridge, *Incorporation of the European Convention on Human Rights into United Kingdom Domestic Law*, in THE EFFECT ON ENGLISH DOMESTIC LAW OF MEMBERSHIP OF THE EUROPEAN COMMUNITIES AND OF RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 247, 247-48 (M.P.

inventiveness on the part of the authorities as they sought to tackle terrorism in an effective manner while at the same time not abusing human rights. They did not always succeed in striking that balance in a way which satisfied the European Commission and European Court of Human Rights,⁵ but by and large they kept within the constraints of the European Convention as far as detention is concerned. Today, the problem of terrorism in Northern Ireland is much less serious than it was in the 1970s and 1980s,⁶ but the UK as a whole is under a threat from those sympathetic to Al-Qaeda that is just as great as, if not far greater than, that ever presented by the IRA or the Loyalist paramilitaries.

The Variety of "Detentions"

Over the years, a number of different forms of detention have been used to combat terrorism in Northern Ireland. Not all of them were accompanied by arrests and those that were did not always result in prosecution and trial. Those that were not accompanied with an arrest resulted in either fairly prompt release from detention or indefinite detention without trial. When judging whether detention is justified in human rights terms, we need to be clear about the exact form of detention we have in mind. We also need to know what the features of the particular form of detention are—not just how long it may last, but also what conditions the detainees will be kept in; what kind of questioning they

Furmston et al. eds., 1983). The Convention did not become part of the domestic law of the UK until October 2000, when the Human Rights Act 1998 came fully into force. See CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE: *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* xiii (3d ed. 2002).

5. These are the bodies based in Strasbourg, France, which were mandated to deal with applications made by individuals and others against state governments under the European Convention. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, arts. 19, 25, & 45. Formerly, the Commission dealt with the applications alleging violations of the Convention first, and only some were then referred to the Court, but in 1998 the Commission was abolished and the Court, which became a full-time body, took over complete responsibility for processing applications. See P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* ix (3d ed. 1998).

6. Dissident Republicans still shoot at police officers and plant bombs, but fortunately, no member of the security forces has been killed since 1998. However, at least 135 civilians have been killed (by Republicans and Loyalists) since 1998, when the Belfast (Good Friday) Agreement was signed. See Police Service of Northern Ireland, *Deaths Due to the Security Situation in Northern Ireland 1969–2008*, http://www.psn.police.uk/deaths_cy.pdf.

will face; what kind of evidence will be admissible resulting from that questioning; what right of access to lawyers and visitors such detainees will have; and what opportunities they will be given to have the legality of their detention reviewed. For the purposes of exposition, this article examines five kinds of detention, moving from the most serious to the least serious: (1) detention without trial (internment); (2) detention pending trial but after charge; (3) detention pending charge but after arrest; (4) detention at ports or airports; and (5) detention elsewhere in order to conduct questioning or searching.⁷ Each kind of detention gives rise to its own legal difficulties, depending on its attendant features.

II. INTERNMENT

Detention without trial, or internment, is the most notorious of the various kinds of detention. It was used intermittently in Northern Ireland and in the Irish Free State, later the Republic of Ireland, from partition onwards (i.e., after 1921).⁸ Internment was resorted to when the authorities felt that they could not deal with civil unrest through the “ordinary” processes of law and order because, for example, they could not gather enough evidence from witnesses or informers (on account of the risk of intimidation), or they believed that if the person was not interned he or she would almost certainly become involved in the commission of violent acts. This is also the justification for internment that is maintained during times of war when people are often summarily locked up because of the risk that they might assist the enemy. The UK interned people during both World Wars, and the United States infamously interned Japanese residents of California during World War II.⁹ The grounds for such internment were often very easy to satisfy. In the well-known English case of *Liversidge v. Anderson*, the House of Lords held, by a vote of four to one, that the Home Secretary’s power to detain someone whom he had “reasonable cause to believe . . . to be of hostile associations” was

7. Some of the material is drawn from the author’s forthcoming book. See BRICE DICKSON, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CONFLICT IN NORTHERN IRELAND* (forthcoming 2009).

8. See JOHN MCGUFFIN, *INTERNMENT* 37–78 (1973) (describing the use of internment in the Republic of Ireland and in Northern Ireland).

9. See, e.g., *id.* at 26–37 (describing the English use of internment from 1916–1945); LAST WITNESS: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE (Erica Harth ed., 2003) (reflecting on the use of internment by the United States).

lawful.¹⁰ Only Lord Atkin dissented.¹¹ The Supreme Court of the United States, by a vote of six to three, was equally illiberal in *Korematsu v. United States*.¹²

A. Internment in Northern Ireland

In Northern Ireland, under one of the regulations issued pursuant to the Civil Authorities (Special Powers) Acts (Northern Ireland), 1922, a police officer, a soldier, or any other person authorised by the Minister for Home Affairs could arrest, without warrant, any person whom he or she suspected of acting, or of having acted, or of being about to act, in a manner prejudicial to the preservation of the peace or maintenance of order.¹³ Regulations 11(2) and (5) provided that persons so arrested could then be detained indefinitely without trial.¹⁴ Following the outbreak of politically motivated violence in 1969, the government of Northern Ireland invoked this power to intern on 9 August 1971, when it felt that the civil unrest was too serious to be dealt with through the ordinary criminal justice process.¹⁵ Getting witnesses to testify in open court against alleged terrorists was proving extremely difficult, if not impossible, and special courts, where the accused would not have had to face their accuser in person, would not have been courts of law at all. The decision was made to strike as severe a blow as possible against the IRA, putting not just its leaders out of circulation but also many of its rank and file members. Some 500 men were therefore targeted on the first day, rather than just the 100 or so leaders and organizers.¹⁶ In his statement to the press, the Prime Minister of Northern Ireland, Brian Faulkner, said: "I ask those who will quite sincerely consider the use of internment powers as evil to answer honestly this

10. [1942] A.C. 206, 213 (H.L.) (appeal taken from Eng.) (U.K.).

11. *Id.* at 225–26.

12. 323 U.S. 214, 223–24 (1944) (holding the internment of Japanese citizens constitutional).

13. Civil Authorities (Special Powers) Acts (Northern Ireland), 1956 S.R. & O. 1956/191, 11(1) (N. Ir.).

14. *Id.* para. 11(2), (5).

15. BRIAN FAULKNER, MEMOIRS OF A STATESMAN 120–21 (John Houston ed., 1978). Faulkner, then the Prime Minister of Northern Ireland, stated: "I have had to conclude that the ordinary law cannot deal comprehensively or quickly enough with such ruthless viciousness." *Id.* at 121.

16. THE SUNDAY TIMES INSIGHT TEAM, ULSTER 263–67 (1972).

question; is it more of an evil than to allow the perpetrators of these outrages to remain at liberty?"¹⁷

It was well nigh impossible to challenge internment under Regulation 11. Nothing in the legislation conferred on persons detained a right to have their detention reviewed.¹⁸ While they could make representations to a non-statutory Advisory Committee, whatever the Advisory Committee said about their case was not binding on the government.¹⁹ After the suspension of the Northern Ireland Parliament in March 1972,²⁰ Westminster authorised new secondary legislation governing the processing of internees. The Detention of Terrorists (NI) Order 1972 allowed the Secretary of State for Northern Ireland to make an "interim custody order," which permitted detention for twenty-eight days.²¹ But, the Chief Constable could, during that period, refer the case to a Commissioner requesting the issuance of a "detention order" permitting indefinite detention.²² Before issuing such an order, the Commissioner had to offer the detainee an oral hearing, where he or she would hear the nature of the case to be answered and could be represented by a lawyer if so desired.²³ The Commissioner also had to be satisfied not only that the detainee was involved in the commission of acts of terrorism, but that detention was necessary for the protection of the public.²⁴ The detainee could then refer the order to a Detention Appeal Tribunal within three weeks.²⁵

On their face, these safeguards against arbitrary deprivation of liberty might seem satisfactory, even "quite sophisticated,"²⁶ but a moment's thought reveals that they fall far short of what the European Convention requires for such deprivation to be "lawful."

17. FAULKNER, *supra* note 15, at 121.

18. See Civil Authorities (Special Powers) Acts (Northern Ireland), 1956 S.R. & O. 1956/191, (N. Ir.).

19. See *id.* para. 12(1).

20. Northern Ireland (Temporary Provisions) Act, 1972, c. 22.

21. Detention of Terrorists (Northern Ireland) Order, 1972, SI 1972/1632 (N. Ir. 15), art. 4.

22. See *id.* art. 4(3), 5.

23. *Id.* art. 5(5), sched., paras. 12(2), 13(2). The right to be represented by counsel was expressly conferred after the High Court of Northern Ireland had ruled in *In re Mackey* that it did not then exist. See *Notes of Cases*, 23 N.I.L.Q. 111, 113-14 (1972) (describing the outcome of *In re Mackey*).

24. Detention of Terrorists Order 1972, art. 5(1).

25. *Id.* art. 6(1).

26. See DAVID BONNER, EMERGENCY POWERS IN PEACETIME 154 (1985).

The nearest Article 5 of the Convention comes to permitting such detentions is in paragraph (1)(c), which allows detention “effected for the purpose of bringing [the person] before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent [the person] committing an offence.”²⁷ But the Commissioner and Detention Appeal Tribunal would not have had the independence and security of tenure required for a legal authority to be “competent” in this context, and detentions based on mere suspicion would not have objectively satisfied the criterion of “reasonable suspicion.” This latter point was implicitly recognized by the High Court of Northern Ireland in two decisions, *Re McElduff*²⁸ and *Kelly v. Faulkner*,²⁹ which effectively held that the only way a detention order could be challenged in a court of law was by showing that it had been made in bad faith.³⁰

Internees could not complain to the European Commission of Human Rights about these breaches of Article 5 of the European Convention because the UK had validly derogated from the application of that Article. On 27 June 1957, the UK had lodged a notice with the Council of Europe declaring that there was a “public emergency within the meaning of Article 15(1) of the Convention.”³¹ This notice had never subsequently been withdrawn, even during the years when internment was not practised. From time to time, the UK government notified the Secretary General of the Council of Europe of relevant developments. On 25 September 1969, for example, it informed the Secretary General thus:

27. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (as amended by Protocol No. 11, Nov. 1, 1998), art. 5(1)(c) [hereinafter European Convention on Human Rights].

28. [1972] N. Ir. L.R. 1. Justice McGonigal, relying on *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.) (appeal taken from Eng.) (U.K.), held it was not open to the court to inquire into the reasonableness of the belief or decision of a minister of the Crown when making a detention order. *Id.* at 17–19. For a discussion of *Liversidge*, see *supra* note 10 and accompanying text. In both the UK and Ireland, this was the era of profound judicial deference to executive discretion.

29. [1973] N. Ir. L.R. 31.

30. *In re McElduff*, [1972] N. Ir. L.R. at 20 (per McGonigal, J.); *Faulkner*, [1973] N. Ir. L.R. at 35 (per Gibson, J.).

31. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND, 1977, Cmnd. 7009, at 103 [hereinafter STANDING ADVISORY COMMISSION OF HUMAN RIGHTS]. For all of the UK’s notices of derogation from 1957 to 1975, see *id.* at 103–07.

Serious civil disturbances have occurred in various parts of Northern Ireland in the month of August this year as a result of which the Government of Northern Ireland has found it necessary to exercise certain of such emergency powers, to the extent strictly required by the exigencies of the situation. In the course of that month twenty-four persons were detained in custody without judicial process. Four of such persons have been charged with criminal offences, and the remainder were released from detention within, at most, 14 days of their being first detained.³²

Likewise, on 20 August 1971, the UK government informed the Secretary General as follows:

Over recent months in Northern Ireland there has been a series of acts of terrorism, including murders, attempted murders, maimings, bombings, fire-raising and acts of intimidation, and more recently violent civil disturbances. The Government of Northern Ireland has therefore found it necessary since 9 August for the protection of life and the security of property and to prevent outbreaks of public disorder, to exercise, to the extent strictly required by the exigencies of the situation, powers of detention and internment.³³

Part of the European Court's function is to ensure that derogation notices are justifiable and that the measures taken under them are, in the terms provided in Article 15(1), "strictly required by the exigencies of the situation" and "not inconsistent with [the state's] other obligations under international law."³⁴ But when the government of Ireland controversially brought a case against the British government on this point in Strasbourg, both the European Commission and the European Court rejected its arguments.³⁵ The Court said that the existence of the public emergency was "perfectly clear from the facts"³⁶ and that the UK authorities "were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty,

32. *Id.* at 103.

33. *Id.* at 104.

34. European Convention on Human Rights, *supra* note 27, art. 15(1), *see also id.* art. 19 (establishing the European Court of Human Rights).

35. *See* Republic of Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 28-29, 93-94 (1978) (Court decision); Ireland v. United Kingdom, App. No. 5310/71, 95-99 (Jan. 25, 1976) (Commission report), available at <http://www.echr.coe.int> (follow "Case-Law" hyperlink; then follow the "HUDOC" icon; then check the box "Reports" under "ECHR Document Collections"; then search "Application Number" for "5310/71").

36. *Republic of Ireland*, 2 Eur. H.R. Rep. at 91.

was called for.”³⁷ This decision was issued in January 1978, more than six years after the detention power had been authorised.³⁸ The last internee had actually been released more than two years earlier, in December 1975.³⁹ So, it was not as if an adverse finding by the European Court against the UK’s use of internment would have driven a coach and horses through current UK practice in relation to the control of terrorism in Northern Ireland. The fact that the European Court upheld the use of internment is greatly to be regretted.

B. *Internment in England*

The decision to end detention without trial in Northern Ireland did not mean, however, that the UK could then withdraw its notice of derogation. The derogation had to be kept in place because other “emergency” powers of arrest enacted by the British Parliament still applied, and these powers authorised arrests on grounds of mere suspicion, rather than reasonable suspicion.⁴⁰ When this anomaly was mostly corrected in 1984, Parliament withdrew the derogation notice.⁴¹ But in 1988, it became clear that the detention provisions were still in breach of Article 5 because they allowed arrested persons to be held for up to seven days before being brought before a judge.⁴² Therefore, Parliament almost immediately reimposed the derogation, and it was not until the seven-day detention scheme was altered by the Terrorism Act 2000—which Parliament passed in July 2000⁴³—that the UK government was able to notify the Council of Europe that it was at last withdrawing its notice of derogation in relation to terrorism connected with Northern Ireland.⁴⁴

37. *Id.* at 93–94.

38. *Id.* at 25.

39. See CAIN Web Service, Internment-A Chronology of the Main Events, <http://cain.ulst.ac.uk/events/intern/chron.htm> (last visited Feb. 20, 2009).

40. See Northern Ireland (Emergency Provisions) Act, 1973, c. 53, §§ 10(1), 11(1), 12(1).

41. See Prevention of Terrorism (Temporary Provisions) Act, 1984, c. 8, § 12(1). A comparable change was eventually made to section 13 of the Northern Ireland (Emergency Provisions) Act 1978. See Northern Ireland (Emergency Provisions) Act, 1987, c. 30, § 25(1), sched. 1, para. 1.

42. See Prevention of Terrorism (Temporary Provisions) Act 1984, §§ 12(4)–(5).

43. See Terrorism Act, 2000, c. 11, § 41(3).

44. Human Rights Act (Amendment) Order, 2001, S.I. 2001/1216, art. 4 (U.K.).

Within a year, however, the UK government again contacted the Council of Europe with a fresh notice of derogation because it had decided, in the wake of the events in the United States on 11 September 2001, to reintroduce internment for a certain category of person anywhere in the UK.⁴⁵ Section 23 of the Anti-terrorism, Crime and Security Act 2001 authorised internment for non-British nationals in the UK who were reasonably suspected of involvement in terrorism, but against whom there was not enough admissible evidence to convict them in court.⁴⁶ The UK government actually blamed the European Court of Human Rights for leaving it with no alternative but to introduce internment.⁴⁷ In *Chahal v. United Kingdom*, the European Court had ruled that, if a state were to deport a person to a country where there was a substantial risk that the person would be subjected to treatment contrary to Article 3 of the European Convention, the deportation itself would be a breach of Article 3.⁴⁸

The compatibility of section 23 with the UK's obligations under the European Convention came before the country's highest court, the House of Lords, in December 2004.⁴⁹ For only the third time in its history, the House convened a bench of nine Lords of Appeal, rather than the more common five or seven, thus indicating the importance of the case.⁵⁰ With only one dissent, the House held that section 23 was not compatible with the European Convention because denying people their liberty indefinitely was "disproportionate" to the threat faced, and limiting indefinite de-

45. Human Rights Act 1998 (Designated Derogation) Order, 2001, S.I. 2001/3644, sched. (U.K.).

46. See Anti-Terrorism, Crime and Security Act, 2001, c. 24, § 23(1) (U.K.).

47. See Prime Minister Tony Blair, Press Conference (Aug. 5, 2005), available at <http://www.number10.gov.uk/Page8041>.

48. *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413, 446 (1996) (Court decision). Article 3 imposes an absolute ban on torture and inhuman or degrading treatment or punishment. See European Convention of Human Rights, *supra* note 27, art. 3. The UK government has been lobbying to have the ruling in *Chahal* reversed and meanwhile has adopted the tactic of striking "Memoranda" with particular countries (such as Jordan and Libya) whereby persons deported to these countries from Britain will be assured that they will not be ill-treated. See JOINT COMMITTEE ON HUMAN RIGHTS, THE UN CONVENTION AGAINST TORTURE (UNCAT), 2005-6, H.L./H.C.-19, at 10-13, 35-36.

49. *A v. Sec'y of State for the Home Dep't* [2004] UKHL 56, [2005] 2 A.C. 68, 90, 95 (appeal taken from Eng.) (U.K.).

50. The two previous occasions were *Attorney General's Reference* (No. 2 of 2001) [2003] UKHL 68, [2004] 2 A.C. 72, 72 (appeal taken from Eng.) (U.K.), and *R v. Ball*, [1911] A.C. 47 (H.L.) (appeal taken from Eng.) (U.K.).

tention to non-British people was racially discriminatory.⁵¹ The decision was a hammer-blow to the government's anti-terrorism strategy and must have been a shock to the Home Secretary because there was a good chance that even the European Court of Human Rights would not have gone so far in questioning the legitimacy of the government's stance on this matter. In February 2005, the government allowed section 23 to lapse and in its place provided for "control orders" to be issued in relation to persons (whether British or non-British) suspected of international terrorism who could not otherwise be tried or deported.⁵² The House of Lords considered examples of these control orders in 2007: two were confirmed as compliant with European Convention rights while one was not.⁵³ One of the crucial factors was the number of hours per day the controlee in question was required to stay inside his or her home. The House suggested that up to sixteen hours was probably acceptable, but longer than that was not.⁵⁴

Most commentators agree that the use of internment in Northern Ireland was a disaster because it ensured continuous enlistment in the IRA.⁵⁵ The amount of violence also rose during the period of its use, but, of course, no one can say how high the level of violence might have reached had there not been internment.⁵⁶ The safeguards in place to ensure that no one was interned without a genuine and reasonable suspicion of involvement in terrorism were inadequate, and the rights given to internees as regards contact with family and friends were negligible. Some men were interned for more than three years and must have been marked by the experience for life.⁵⁷ Likewise, most would agree that resorting to internment in the wake of 9/11 was a public relations

51. A, [2005] 2 A.C. at 127; see Brice Dickson, *Law Versus Terrorism: Can Law Win?*, 2005 EUR. H. RTS. L. REV. 1 (2005); David Dyzenhaus, *An Unfortunate Outburst of Anglo-Saxon Parochialism*, 68 M.L.R. 673 (2005); Adam Tomkins, *Readings of A v. Secretary of State for the Home Department*, [2005] Pub. L. 259 (U.K.).

52. Prevention of Terrorism Act, 2005, c. 2, §§ 1–4.

53. See Sec'y of State for the Home Dep't v. E [2007] UKHL 45, [2008] 1 A.C. 499, 553 (appeal taken from Eng.) (U.K.) (control order compliant); Sec'y of State for the Home Dep't v. JJ [2007] UKHL 45, [2008] 1 A.C. 385, 406, 415–16 (appeal taken from Eng.) (U.K.) (control order not compliant); Sec'y of State for the Home Dep't v. MB [2007] UKHL 46, [2008] 1 A.C. 440, 469–70 (appeal taken from Eng.) (U.K.) (control order compliant).

54. See *JJ*, [2008] 1 A.C. at 437–38 (opinion of Lord Brown of Eaton-under-Heywood).

55. See, e.g., KEVIN BOYLE, ET AL., *LAW AND STATE: THE CASE OF NORTHERN IRELAND* 75–77 (1975).

56. See, e.g., MERLYN REES, *NORTHERN IRELAND: A PERSONAL PERSPECTIVE* 232, 245 (1985).

57. See DENIS FAUL & RAYMOND MURRAY, *THE SHAME OF MERLYN REES* 5 (1975).

disaster, notwithstanding the revulsion felt throughout the country at the mindless violence of Al-Qaeda. It is not unlikely that such internment radicalised a further cohort of terrorists, some of them home-grown. In July 2005, it was four young British Islamists who killed themselves and fifty-two other people with bombs they set off on London's public transport system.⁵⁸

III. PRE-TRIAL DETENTION

Throughout the conflict in Northern Ireland, there was little controversy about how long people were kept in custody pending their trial. In the 1970s and 1980s, the norm was that any person charged with a serious offence would be unlikely to be released on bail pending his or her trial. But with the advent of a more human rights-aware judiciary, the practice regarding bail began to change in the 1990s, and since the Human Rights Act 1998 came into force, the onus of showing why bail should *not* be granted has been placed on the prosecution.⁵⁹ There has not, however, been any significant case law in relation to bail decisions regarding persons charged with terrorist offences, but one analogous case did go as far as the European Court of Human Rights.

In *McKay v. United Kingdom*, the court addressed the provision in the Northern Ireland (Emergency Provisions) Act 1973—and in all subsequent incarnations of that Act—whereby a person charged with a “scheduled” offence (i.e. one likely to have been committed by a member of a paramilitary organization) could be admitted to bail only by a High Court judge, not a magistrate.⁶⁰ The rationale behind this rule, which was introduced following the report of the Diplock Commission in 1972,⁶¹ was that allowing magistrates to make such decisions would expose them to too much danger—they could be targeted by Republican paramilitaries and, given the number of magistrates, they could not be easi-

58. Britain “Defiant” as Bombers Kill 52 in Attack on the Heart of London, *TIMES* (London), July 8, 2005, at Home News 2.

59. JOHN WADHAM ET AL., *BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998* para. 8.136 (4th ed. 2007).

60. 44 Eur. H.R. Rep. 827, 831 (2007) (Court decision); see Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 3(1).

61. REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185.

ly protected against such attacks.⁶² Because there were only a few High Court judges, and these received round-the-clock personal protection, it was deemed wiser to task them with the responsibility of deciding whether or not to grant bail to terrorist suspects.

Mark McKay, having been arrested on 6 January 2001 on suspicion of having carried out a robbery of a petrol station, admitted his guilt the next day and was officially charged with the offence.⁶³ On 8 January 2001, he appeared in a magistrates' court and applied for release on bail.⁶⁴ The police gave evidence that the robbery was not connected with terrorism and that they would have no objection to bail being granted.⁶⁵ The magistrate, however, indicated that he did not have the power to order Mr. McKay's release because the offence in question was a scheduled offence.⁶⁶ Later that same day, Mr. McKay applied to the High Court for bail, which was granted the next day.⁶⁷ He immediately applied for judicial review, seeking a declaration that the anti-terrorist legislation was incompatible with Articles 5 and 14 of the European Convention.⁶⁸ On 3 May, three weeks after McKay had been sentenced—to two years detention in a young offenders' institution followed by a year of probation—Justice Kerr rejected his judicial review application.⁶⁹ The judge, the Divisional Court, and the House of Lords all refused leave to appeal any further.⁷⁰

62. See *McKay*, 44 Eur. H.R. Rep. at 831. A magistrate was, in fact, murdered in 1973, and another in 1974. See Brice Dickson, *Northern Ireland's Troubles and the Judges*, in *NORTHERN IRELAND: POLITICS AND THE CONSTITUTION* 135 (Brigid Hadfield ed., 1992). Three other more senior judges were also killed in the Northern Ireland conflict (in 1974, 1983, and 1987). *Id.*

63. *McKay*, 44 Eur. H.R. Rep. at 829.

64. *Id.*

65. *Id.*

66. *Id.* (citing Terrorism Act, 2000, c. 11, § 67(2) and Northern Ireland (Emergency Provisions) Act, 1996, c. 22, § 3(2)). The Terrorism Act 2000, section 67(2), replaced section 3(2) of the Emergency Provisions Act 1996. See Terrorism Act 2000, § 67(2). McKay's crime, robbery, was only a scheduled offence if it involved the use of any explosive, firearm, imitation firearm, or weapon of offence. See Northern Ireland (Emergency Provisions) Act 1996, sched. 1, para. 10(b) & Note 3(a). This section was also replaced by the Terrorism Act 2000. See Terrorism Act 2000, sched. 9, para. 10(b) & Note 3(a). The Terrorism Act 2000, section 67(2), replaced section 3(2) of the Emergency Provisions Act 1996. See Terrorism Act 2000, § 67(2).

67. *McKay*, 44 Eur. H.R. Rep. at 830.

68. *Id.* at 830.

69. See *In the Matter of an Application by Mark McKay for Judicial Review*, [2002] NIQB 31 (N. Ir.), available at http://www.courtsni.gov.uk/en-gb/judicial+decisions/janune02/j_j_kerc3700.htm. (follow "kerc3700" hyperlink).

70. *McKay*, 44 Eur. H.R. Rep. at 830.

After the application was held admissible by the European Court, it was deemed important enough to be referred to a Grand Chamber of seventeen judges rather than to a mere Chamber of seven judges.⁷¹ The Grand Chamber then held by sixteen votes to one that there had been no breach of Article 5(3) of the European Convention.⁷² Citing its earlier decision in *TW v. Malta*,⁷³ the Court acknowledged that Article 5(3) conferred two distinct rights which were “not on their face logically or temporally linked.”⁷⁴ On the facts of the case before it, the Court stressed that “[n]o element of possible abuse or arbitrariness ar[ose] from the fact that it was another tribunal or judge” that considered whether to release the applicant, nor from the fact that considering release of the applicant depended on the applicant himself requesting it.⁷⁵ In addition, the Court stated, it did not appear that the system prevented weak or vulnerable people from taking such an initiative.⁷⁶ Even though the applicant was in effect detained for a day longer than he otherwise would have been, “the procedure in this case was conducted with due expedition, leading to his release some three days after his arrest.”⁷⁷

Five of the judges, while concurring in the ultimate result, differed from the majority in that they placed more emphasis on “the principle laid down in Art. 5(1) of the European Convention, read in conjunction with Art. 5(3): at the pre-trial stage an arrested person has the right to prompt and full judicial control and the right to be set free immediately unless there are still sufficient grounds to keep him [or her] in custody.”⁷⁸ These five judges concurred in the result only because Mr. McKay had been released less than thirty-six hours after his arrest, which was within the maximum period of four days allowed for pre-charge detentions by the European Court.⁷⁹ Under the circumstances, there-

71. *See id.* at 827.

72. *Id.* at 839.

73. 29 Eur. H.R. Rep. 185 (1999) (Court decision).

74. *McKay*, 44 Eur. H.R. Rep. at 834 (citing *TW*, 29 Eur. H.R. Rep. at 205). The two rights were, first, to be brought promptly before a judge or other officer authorised by law to exercise judicial power and, second, to be tried within a reasonable time or to be released pending trial. *Id.* at 834, 837.

75. *Id.* at 838.

76. *Id.*

77. *Id.* at 838–39.

78. *Id.* at 839, 841 (joint separate opinion of Judges Rozakis, Tulkens, Botoucharova, Myjer, and Ziemele).

79. *Id.* at 841–42; *see Brogan v. United Kingdom*, 11 Eur. H.R. Rep. 117, 135–36

fore, the requirements of promptness and speediness had been satisfied.

The only judge who fully dissented was Judge Jebens from Norway.⁸⁰ In his view, the speedy release of the applicant made no difference: McKay had instructed his solicitors to apply for release on bail, and a request to that effect was actually put before the magistrate.⁸¹ “Furthermore,” Judge Jebens argued, “the police officer who appeared in the magistrates’ court had no objection to bail, provided that proper conditions were set.”⁸²

Alongside the move towards a presumption in favour of bail, there has been a trend towards devising time limits for the pre-trial period. In England and Wales, under regulations issued pursuant to section 22 of the Prosecution of Offences Act 1985, trials of indictable offences should take place within 182 days (i.e., six months) of the defendant’s first appearance before a magistrate.⁸³ But, the time limit can be extended if the prosecution can show that there is good and sufficient cause for doing so and that it has acted with all due diligence and expedition to date.⁸⁴ In Northern Ireland, however, no such time limits have been set, and Crown Court trials frequently begin much longer than six months after the defendant’s first appearance before a magistrate. But the European Convention is not very demanding on this front—it simply says in Article 6(1) that any person charged with a criminal offence is entitled to a trial “within a reasonable time.”⁸⁵ Indeed, it might be in the defendant’s best interests not to be tried too quickly, and Article 6(3)(b) recognizes this by conferring on everyone who is charged with a criminal offence the right “to have adequate time and facilities for the preparation of his [or her] defence.”⁸⁶ Article 5(3) also confers the right to be tried within a reasonable time, but posits as an acceptable alternative

(1988) (Court decision) (finding four days and six hours to violate the European Convention). For a discussion of *Brogan*, see *infra* notes 114–31 and accompanying text.

80. *McKay*, 44 Eur. H.R. Rep. at 843 (Jebens, J., dissenting).

81. *Id.* at 844.

82. *Id.*

83. Prosecution of Offences (Custody Time Limits) (Amendment) Regulations, 2000, S.I. 2000/3284, para. 2 (U.K.).

84. Prosecution of Offences Act, 1985, c. 23 § 22(3); Crime and Disorder Act 1998, c. 37, § 43(2).

85. European Convention on Human Rights, *supra* note 27, art. 6(1).

86. *Id.* art. 6(3)(b).

the release of the defendant pending trial, an action that Article 6(1) does not envisage.⁸⁷

On the basis of the discussion of the two issues examined in this part, we can conclude that the European Convention on Human Rights allows European states considerable leeway concerning the allocation to special judges of the power to grant bail to terrorist suspects and delays in the trial of terrorist suspects. In a recent case involving the German legal system, the European Court of Human Rights emphasised that when the accused is a suspected terrorist, the Court is prepared to tolerate longer delays than in other cases.⁸⁸ In the case before it, the applicant had been accused of having prepared, with others, a bomb attack at the "La Belle" discotheque in Berlin on 5 April 1986, aimed at members of the American armed forces.⁸⁹ The bomb killed three people and seriously injured 104 others.⁹⁰ The applicant's pre-trial detention lasted five years and almost six months, but the European Court found this to be reasonable because, amongst other reasons, his case was "extremely complex," there were four co-defendants and 169 witnesses, and there were "difficulties intrinsic to the prosecution of offences committed in the context of international terrorism."⁹¹ The Court did not specify, however, why terrorism is any more likely than, say, serious organized crime, to require lengthier pre-trial detention.

IV. PRE-CHARGE DETENTION

A. *Legislating for Pre-Charge Detention*

Article 5(3) of the European Convention states that everyone who has been arrested or detained for the purpose of being brought before a competent legal authority on reasonable suspicion of having committed an offence (or because arrest or detention was reasonably considered necessary to prevent commission of an offence or subsequent flight) has the right to be brought promptly before a judge or other legally authorised judicial offi-

87. *See id.* art. 5(3).

88. *See Chraidi v. Germany*, 47 Eur. H.R. Rep. 47, 54–55 (2006) (Court decision).

89. *Id.* at 50.

90. *Id.*

91. *Id.* at 54, 56.

cer.⁹² Two main questions arise from this provision: what does “promptly” mean and how soon must a defendant be charged or released after first appearing before a judicial officer?

As we have seen, the Special Powers Acts that applied in Northern Ireland from 1922 to 1973 allowed for internment to be introduced by ministerial regulation.⁹³ But it did not otherwise extend the time during which people arrested on suspicion of having committed specific offences could be detained prior to being brought before a judge.⁹⁴ The so-called “ordinary” law applied in such situations. Until 1990, by virtue of section 132 of the Magistrates’ Courts Act (NI) 1964, the ordinary law allowed detention after arrest for just twenty-four hours, but that period could be extended to forty-eight hours at the discretion of a senior police officer.⁹⁵ Only then did the arrested person have to be brought before a court.⁹⁶ The Northern Ireland (Emergency Provisions) Act 1973 (“EPA 1973”), which replaced the Special Powers Acts, authorised the detention of persons arrested under section 10(1) for a maximum of seventy-two hours.⁹⁷ The rationale was that it might take longer than forty-eight hours for the Secretary of State to decide to make an interim custody order in relation to the person arrested—the first step in the formal internment process.⁹⁸ The EPA 1973, in section 11(1), conferred a further arrest power on the police, but it did not extend the maximum period during which an arrested person could be detained without being brought before a court, so in these circumstances that period remained at forty-eight hours.⁹⁹

While internment was phased out two years after the EPA 1973 came into force, the power of arrest conferred by section 10 remained in effect.¹⁰⁰ It was a much more general power than that

92. European Convention on Human Rights, *supra* note 27, art. 5(3).

93. See *supra* notes 13–14 and accompanying text.

94. See Civil Authorities (Special Powers) Acts (Northern Ireland), 1956 S.R. & O. 1956/191 (N. Ir.).

95. Magistrates’ Courts Act (Northern Ireland) 1964, c. 21, § 132.

96. *Id.*

97. Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 10(3).

98. See *id.* sched. 1, para. 11.

99. *Id.* § 11(1) (authorising the warrantless arrest of a person suspected of “committing, having committed or being about to commit a scheduled offence or an offence under this Act which is not a scheduled offence”).

100. See REES, *supra* note 56, at 246–48 (discussing end of internment); see also Northern Ireland (Emergency Provisions) Act 1973, § 10.

conferred by section 11, so police officers resorted to it as a matter of course.¹⁰¹ But this meant that the section 10 power was being used for a purpose for which it was never intended and people were being arrested without the police having to show that they were suspected of any specific offence—suspicion of being a terrorist was enough. It also meant that people who were arrested could be detained for up to seventy-two hours prior to being brought before a court.¹⁰² Almost by stealth, the ordinary law's standard on being brought "promptly" before a court was thereby subverted.

In the wake of a series of pub bombings by the IRA in England in 1974,¹⁰³ Westminster enacted the Prevention of Terrorism (Temporary Provisions) Act 1974 ("PTA 1974"), which conferred a further arrest power on the police.¹⁰⁴ For some reason, this power was included in a part of the Act that extended to the whole UK, not just England, Wales and Scotland.¹⁰⁵ This meant that the police in Northern Ireland had a third arrest power at their disposal, one which was really an amalgam of the two existing powers in terms of the grounds which could be used to justify the arrest.¹⁰⁶

101. See Northern Ireland (Emergency Provisions) Act 1973, §§ 10, 11. Section 10 allowed a police constable to arrest "without warrant any person whom he suspects of being a terrorist." See *id.* § 10. Section 11 allowed arrest without warrant of "any person whom he suspects of committing, having committed or being about to commit a scheduled offence or an offence under this Act which is not a scheduled offence." *Id.* § 11.

102. See *id.* § 10(3).

103. In October 1974, five people were killed in a Guilford bombing. See DAVID MCKITTRICK ET AL., *LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED AS A RESULT OF THE NORTHERN IRELAND TROUBLES* 479–82 (1999). In November of that same year, two were killed in Woolwich and twenty-one in Birmingham. See *id.* at 490, 496–500, 504.

104. See Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56, § 7. Section 7 authorised warrantless arrests of persons reasonably suspected of: 1) being guilty of an offence under section 1 of the Act (dealing with proscribed organisations) or section 3 of the Act (dealing with exclusion orders); 2) being "concerned in the commission, preparation or instigation of acts of terrorism"; or 3) being subject to an exclusion order. See *id.*

105. Part I of the Act, dealing with proscribed organisations, did not apply to Northern Ireland. See *id.* § 13(2).

106. Compare *id.* § 7, with Northern Ireland (Emergency Provisions) Act 1973, § 11(1) (granting the power to arrest those suspected of "committing, having committed, or being about to commit a scheduled offence"), and Civil Authorities (Special Powers) Acts (Northern Ireland), 1956 S.R. & O. 1956/191, 11(1) (N. Ir.) (granting the power to arrest those suspected of "acting or of having acted or of being about to act in a manner prejudicial to the preservation of the peace or maintenance of order").

In addition to providing an additional power of arrest, the PTA 1974 altered the permitted length of detention. Section 7(2) said that a person arrested under section 7(1) could not be detained for more than forty-eight hours, but it allowed the police to apply to the Secretary of State for permission to extend the detention period by up to five days.¹⁰⁷ This meant that arrested persons could be held in police custody for a total of seven days before having any right to appear before a court. While this was not as bad as the internment provisions that still operated in Northern Ireland at that time (though only for another twelve months), it was otherwise a draconian step to take within Great Britain. It authorised a form of “mini-internment.”¹⁰⁸

Given the panic to enact the PTA, it is perhaps understandable that little attention was paid to the provisions which allowed executive detention for up to seven days. In the debates in Parliament, no one mentioned the requirement in Article 5(3) of the European Convention that arrested persons must be brought “promptly” before a judicial officer.¹⁰⁹ Instead, Parliament assumed that a seven-day delay would not breach this requirement. At the same time, the British government failed to consider that a derogation notice, similar to those lodged with the Council of Europe some years earlier in relation to the emergency in Northern Ireland, was needed to “excuse” the PTA provisions.¹¹⁰ The first three of those notices—submitted in 1957, 1969 and 1971—had referred to actions taken by the government of Northern Ireland, while the last four—submitted in 1973 and 1975, two in each year—had referred to laws passed at Westminster which applied only in Northern Ireland and not elsewhere in the UK.¹¹¹ No notice of derogation, however, was issued when the PTA 1974 was enacted. The UK government, in failing to issue such a notice, may have been relying on earlier findings by the European Commission of Human Rights. First, in a 1966 case concerning

107. Prevention of Terrorism (Temporary Provisions) Act 1974, § 7(2).

108. See 204 PARL. DEB., H.C. (6th ser.) (1992) 725 (statement of Mr. McGrady discussing the use of prolonged detention). The reports of this, and all, Parliamentary debates—from both the House of Commons and the House of Lords—are available at the Parliament’s webpage. See UK Parliament, Publications, <http://www.parliament.uk/publications> (last visited Feb. 20, 2009).

109. See European Convention on Human Rights, *supra* note 4, art. 5(3).

110. See *supra* notes 31–33 and accompanying text.

111. See STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, *supra* note 31 at 103–07.

ordinary criminal offences, the Commission found that a period of four days satisfied the requirement of promptness in Article 5(3).¹¹² Then, in a 1972 case, it found that a period of five days was acceptable.¹¹³

B. *Challenging the Pre-Charge Detention System*

A challenge to the PTA detention system was nevertheless lodged by four men who had been detained in Northern Ireland in 1984 for periods ranging from four days and six hours to six days and sixteen-and-a-half hours.¹¹⁴ They applied to Strasbourg just a few weeks after being released from detention without charge.¹¹⁵ At the level of the European Commission, a majority drew the dividing line somewhere between four days and eleven hours, which they said was acceptable, and five days and eleven hours, which they said was not.¹¹⁶ Consequently, they upheld by ten votes to two the applications of two of the men but rejected by eight votes to four the applications of the two others.¹¹⁷ Four prominent members of the Commission thought that all of the applications should have been upheld.¹¹⁸

The case was then considered by the European Court, which on 29 November 1988 held by twelve votes to seven that Article 5(3)

112. *X v. Netherlands*, App No 2894/66, 1966 Y.B. Eur. Conv. on H.R. 564, 568 (Eur. Comm'n on H.R.).

113. *See Brogan v. United Kingdom*, App. Nos. 11209/84, 11234/84, 11266/84, 11386/85, para. 103 (1987) (Commission report) [hereinafter *Brogan Commission report*], available at <http://www.echr.coe.int> (follow "Case-Law" hyperlink; then follow the "HUDOC" icon; then check the box "Reports" under "ECHR Document Collections"; then search "Case Title" for "Brogan") (citing *X v. Belgium*, 42 Collection of Decisions 49 (Commission Decision, July 19, 1972)).

114. *See Brogan v. United Kingdom*, 11 Eur. H.R. Rep. 117, 120-21 (1988) (Court decision) [hereinafter *Brogan Court decision*].

115. *See id.* at 120-21, 127. The applicants had been released between 22 September and 7 October 1984. *Id.* at 120-21. They lodged their applications between 18 October 1984 and 8 February 1985. *Id.* at 127.

116. *Brogan Commission report*, *supra* note 113, paras. 105-07.

117. *Id.* para. 108. There were corresponding findings regarding whether Article 5(5) (the right to compensation) had been breached, although one of the Commissioners who held that Article 5(3) had been breached in relation to Brogan and Coyle then held that Article 5(5) had not been breached. *See id.* paras. 119, 124.

118. *Id.* (Comm'rs Frowein, Trechsel, Schermers, and Thune, partly dissenting). On the other hand, the UK Commissioner, Sir Basil Hall, felt unable to join his fellow Commissioners in condemning the UK government in any way. *Id.* (Comm'r Hall, partly dissenting).

had been breached in relation to all four applicants,¹¹⁹ a rare example of the European Court going further than the Commission in protecting human rights.¹²⁰ Like the Commission, the Court acknowledged that the investigation of terrorist offences undoubtedly presented the authorities with “special problems.”¹²¹ It took “full judicial notice of the factors adverted to by the [UK] government” in this regard and noted that in Northern Ireland, “the referral of police requests for extended detention to the Secretary of State and the individual scrutiny of each police request by a Minister do provide a form of executive control.”¹²² The Court also took into account that the UK Parliament constantly monitored the need for the continuation of the special powers and their operation was regularly subjected to independent reviews.¹²³ The Court even accepted that “the context of terrorism in Northern Ireland [had] the effect of prolonging the period during which the authorities [could]... keep a person suspected of serious terrorist offences in custody before bringing him [or her] before a judge or other judicial officer.”¹²⁴ Nevertheless, despite all these “concessions,” the European Court held that

To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word “promptly.” An interpre-

119. See Brogan Court decision, *supra* note 114 at 136 (majority opinion); *id.* at 139 (Vilhjálmsón, Bindschedler-Robert, Gölcüklü, Matscher, Valticos, JJ., dissenting); *id.* at 43 (Evans, J., dissenting); *id.* at 146 (Martens, J., dissenting). By a vote of 13 to 6, the Court held that article 5(5) had also been breached in relation to each applicant. See *id.* at 138 (majority opinion); *id.* at 146 (Martens, J., dissenting) (dissenting only from holding under article 5(3)); *id.* at 141 (Vilhjálmsón, Bindschedler-Robert, Gölcüklü, Matscher, Valticos, JJ., dissenting); *id.* at 146 (Evans, J., dissenting).

120. On this phenomenon see Adam Tomkins, *Civil Liberties in the Council of Europe: A Critical Survey*, in EUROPEAN CIVIL LIBERTIES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMPARATIVE STUDY 1, 23 (C.A. Gearty ed., 1997) (“If all the cases where the Court and Commission have come to different conclusions as to whether or not there has been a violation of the Convention are listed, up to the end of 1990 that list would contain 52 cases. In only 12 of these 52 cases did the Court find a violation where the Commission did not, and in the remaining 40 the Court found no violation whereas the Commission did.”). Tomkins lists the 12 cases, only two of which were against the UK—*Brogan and Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989) (Court decision). See *id.* n.50. The author is unaware of any study of the number of occasions on which the Court differed from the Commission in the period from 1990 until the Commission’s abolition in 1998.

121. Brogan Court decision, *supra* note 114, at 135.

122. *Id.*

123. *Id.*

124. *Id.*

tation to this effect would import into Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences . . . impairing the very essence of the right protected by this provision.¹²⁵

Seven judges dissented from the ruling in *Brogan*.¹²⁶ Six of them wrote a joint dissenting opinion saying that “[i]n view of the exceptional situation in Northern Ireland,” and given that a period of four days was acceptable in normal situations, it seemed reasonable to regard periods of detention for less than a week as acceptable.¹²⁷ According to these judges, “Such a view fits in with the case law and is justified by the wholly exceptional conditions obtaining in Northern Ireland.”¹²⁸ Sir Vincent Evans, the UK judge, delivered a separate dissenting opinion in which he pointed out that “more than 30,000 persons [had] been killed, maimed or injured [in Northern Ireland] as a direct result of terrorist activity in the [previous] twenty years.”¹²⁹ He also noted that in the preceding year, 1987, thirty-nine of the eighty-three persons detained in excess of five days had been charged with serious terrorist offences.¹³⁰ Judge Evans added that Viscount Colville QC, in his 1987 report on the operation of the PTA 1984, had concluded that if a High Court judge (as opposed to a government minister) were asked to grant extensions to detention, it would have to be done *in camera* without any effective representation of the detainee—a procedure that “could lead to unanswerable criticisms of the judiciary.”¹³¹

The Court’s decision in *Brogan* undoubtedly came as a surprise to the British government, and it quickly had to decide how to react. It opted again for officially derogating from the European

125. *Id.* at 135–36. In a separate judgment, delivered on 30 May 1989, the Court held unanimously that no compensation should be awarded to any of the applicants. *Brogan v. United Kingdom*, 13 Eur. H.R. Rep. 439, 439–40 (1989) (Court decision). By way of exemplary damages, they had each claimed £2,000 per hour of excess detention. *Brogan* Court decision, *supra* note 114 at 139.

126. *Brogan* Court decision, *supra* note 114, at 139 (Vilhjálmsón, Bindschedler-Robert, Gölcüklü, Matscher, Valticos, JJ., dissenting); *id.* at 143 (Evans, J., dissenting); *id.* at 146 (Martens, J., dissenting).

127. *Id.* at 140 (Vilhjálmsón, Bindschedler-Robert, Gölcüklü, Matscher, and Valticos, JJ., dissenting).

128. *Id.*

129. *Id.* at 144 (Evans, J., partly dissenting).

130. *Id.* at 145.

131. *Id.*

Convention.¹³² It had lifted its previous derogation more than four years earlier, when it made the emergency arrest powers dependent not just on “suspicion” but on reasonable suspicion.”¹³³ The post-*Brogan* derogation was imposed specifically to allow extended detention periods. In a later case, two men—Peter Brannigan and Patrick McBride, both of whom had been detained for more than four days in Northern Ireland—challenged the legality of the government’s derogation notice itself.¹³⁴ However, both the Commission (by eight votes to five) and the Court (by twenty-two votes to four) held that it was valid.¹³⁵ Finding there to be a public emergency in Northern Ireland and that the derogation was required by the “exigencies of the situation,” the Court held that the derogation complied with the European Convention.¹³⁶ In dissent, several of the judges rejected the Government’s arguments that, in the interests of independence and the preservation of secrecy, judges should be excluded from determining the length of detention.¹³⁷ However minimal the judicial safeguards, they said, some judicial control is better than none.¹³⁸

There matters rested for the remainder of the 1990s, even though the level of violence in Northern Ireland declined considerably during that decade. From 1993 to 1999, annual reviews of the operation of the PTA 1989 were conducted by John Rowe

132. See Human Rights Act, 1998, c. 42, sched. 3, pt. I (repealed by Human Rights Act 1998 (Amendment) Order, 2001, S.I. 2001/1216 (U.K.)).

133. In August 1984, the UK withdrew its derogation from the European Convention. See Council of Europe, *Information Bulletin on Legal Activities Within the Council of Europe and in Member States*, vol. 21, p.2 (1985). By bringing itself back under article 5(1)(c) of the European Convention, the UK agreed to require reasonable suspicion. See European Convention of Human Rights, *supra* note 27, art. 5(1)(b); see also *supra* notes 40–41 and accompanying text.

134. *Brannigan & McBride v. United Kingdom*, 17 Eur. H.R. Rep. 539, 567–68 (1993) (Court decision) [hereinafter *Brannigan* Court decision].

135. *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89, 14554/89, at 20 (1991) (Commission report), available at <http://www.echr.coe.int> (follow “Case-Law” hyperlink; then follow the “HUDOC” icon; then check the box “Reports” under “ECHR Document Collections”; then search “Case Title” for “Brannigan”); *Brannigan*, 17 Eur. H.R. Rep. at 577.

136. *Brannigan* Court decision, *supra* note 134, at 570–71, 576.

137. *Id.* at 579, 581–82 (Pettiti, J., dissenting) (arguing that British tradition contradicts the government’s argument that the independence of a judge would be compromised by such a determination); *id.* at 584–86 (Walsh, J., dissenting) (arguing that the secrecy the government wished to preserve could also be jeopardized by the habeas corpus proceedings that the government proposed as a remedy for the applicants).

138. *Id.* at 584 (Pettiti, J., dissenting); *id.* at 586 (Walsh, J., dissenting).

QC.¹³⁹ In his 1994 review of the Act's operation, he concluded thus: "I cannot recommend that a judicial element be introduced."¹⁴⁰ But, by the time he came to review the operation of the Act in 1999, his view was that "there should be judicial decisions in the process of extension."¹⁴¹

In *Marshall v. United Kingdom*, Marshall, having been held in Castlereagh Holding Centre in East Belfast for six days and two hours in February 1998 before being released without charge, argued that at the time of his detention the security situation in Northern Ireland had improved beyond recognition since the days when the derogation notice was imposed.¹⁴² Marshall urged the European Court to apply a "strict scrutiny test" with regard to the government's claim of an existing public emergency and the legality of the measures taken thereunder.¹⁴³ However, the Court unanimously held that the application was "manifestly ill-founded" because the detention was justified under the derogation notice.¹⁴⁴ The judges did not think the security situation in Northern Ireland had sufficiently improved in the almost nine years since the detentions in *Brannigan and McBride* to justify a holding that there was no longer a public emergency threatening the life of the nation.¹⁴⁵ The court deferred to the assessment made by the national authorities on this point and on the dangers of involving Northern Ireland's judiciary in decisions on extending detention.¹⁴⁶

However, by the time the decision in *Marshall v. United Kingdom* was issued, the derogation notice of 1988 had actually been

139. See John Rowe, *Review of the Operation in 2000 of the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996*, para. 9, <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/terror2000.pdf?view=Binary> (indicating years annual reviews were completed). These reports were submitted to Parliament and to those whom Mr. Rowe had consulted, but they were not otherwise made easily available.

140. John Rowe, *Report on the Operation in 1994 of the Prevention of Terrorism (Temporary Provisions) Act 1989*, para. 43.

141. John Rowe, *Report on the Operation in 1999 of the Prevention of Terrorism (Temporary Provisions) Act 1989*, para. 77.

142. *Marshall v. United Kingdom*, App. No. 41571/98, at 2, 6 (2001) (Court decision), available at <http://www.echr.coe.int> (follow "Case-Law" hyperlink; then follow the "HUDOC" icon; then check the box "Decisions" under "ECHR Document Collections"; then search "Application Number" for "41571/98").

143. *Id.* at 6.

144. *Id.* at 14.

145. *Id.* at 11-12.

146. *Id.* at 12-13.

withdrawn.¹⁴⁷ The British government had issued a Consultation Paper on the matter in December 1998, at last proposing judicial participation in applications for extending detention.¹⁴⁸ These provisions were eventually included in the Terrorism Act 2000 and came into force in February 2001.¹⁴⁹ Since then, a person detained under anti-terrorism legislation anywhere in the UK has had to be brought before a judge no later than forty-eight hours after being arrested.¹⁵⁰ To obtain an extension beyond forty-eight hours, the police have to satisfy a judge of the following: “(a) [T]here are reasonable grounds for believing that the further detention of the person . . . is necessary to obtain . . . or to preserve relevant evidence, and (b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.”¹⁵¹ The permitted length of the extensions has since been a matter of great controversy. As far as the ordinary (non-terrorist) law was concerned, the Police and Criminal Evidence Act 1984 had already provided that the police could detain an arrested person for a maximum of thirty-six hours.¹⁵² If police wanted that period to be extended, they had to go to a magistrate who could then extend it, in stages no longer than thirty-six hours, to a maximum of ninety-six hours provided he or she was persuaded that there were reasonable grounds for believing this to be necessary in order to secure evidence.¹⁵³ The ordinary and terrorist laws were, therefore, mostly aligned as far

147. The derogation notice had been specifically set out in the Human Rights Act 1998. See Human Rights Act, 1998, c. 42, sched. 3, pt. 1. The Human Rights Act 1998 also contains a supplementary notice sent to the Council of Europe on 23 March 1989 to take account of the replacement of the PTA 1984 by the PTA 1989. See *id.* The decision in *Marshall* was issued on 10 July 2001. See *Marshall*, App. No. 41571198, at 1. As of 1 April 2001, the 1988 derogation was repealed. See Human Rights Act (Amendment) Order, 2001, S.I. 2001/1216, art. 4 (U.K.).

148. SECRETARY OF STATE FOR THE HOMELAND DEPARTMENT, LEGISLATION AGAINST TERRORISM, 1998, Cm. 4178, paras. 8.7–8.9, available at <http://www.archive.official-documents.co.uk/document/cm41/4178/4178.htm>.

149. See Terrorism Act, 2000, c. 11, § 41(2); *id.* sched. 8, para. 29.

150. *Id.* § 41(3).

151. *Id.* sched. 8, para. 32.

152. Police and Criminal Evidence Act, 1984, c. 60, § 42 (Eng.). The equivalent legislation in Northern Ireland is the Police and Criminal Evidence (Northern Ireland) Order, 1989, SI 1989/1341 (N. Ir. 12), art. 43. This Order replaced the Magistrates’ Courts Act (Northern Ireland), 1964, c. 21, § 132. See *supra* notes 95–96 and accompanying text.

153. See Police and Criminal Evidence Act 1984, § 44 (1)–(3) (allowing detention up to ninety-six hours); *id.* § 42(1) (authorising extension of detention for the preservation of evidence). See generally L.H. Leigh, *The Police and Criminal Evidence (Northern Ireland) Order 1989: Powers of Arrest and Detention*, 40 NILQ 363 (1989).

as the detainee's right to be brought before a judge was concerned. It was just that in terrorist cases the police had a further twelve hours in which to question the arrested person before needing to seek a judicially authorised extension.¹⁵⁴

The Terrorism Act 2000 had been in force for just seven months when the terrible events of 9/11 occurred, but the Anti-terrorism, Crime and Security Act 2001, passed soon after 9/11, contained no provisions altering the seven day maximum pre-charge detention period.¹⁵⁵ In 2003, however, the government quietly doubled the permitted maximum through a provision in the Criminal Justice Act.¹⁵⁶ After the bombings in London in July 2005, the police lobbied the government for an even longer permitted maximum, citing the difficulties involved in investigating international terrorist networks, de-encrypting numerous computer files and translating documents from Arabic and other languages.¹⁵⁷ Then-Prime Minister Tony Blair was in favour of extending the permitted maximum to no fewer than ninety days, which certainly comes close to internment in anyone's eyes.¹⁵⁸ In the end, Parliament accepted only a twenty-eight-day maximum, providing for it in the Terrorism Act 2006, which was applicable throughout the UK.¹⁵⁹ In 2008, the government—this time under Gordon Brown as Prime Minister—attempted once again to lengthen the maximum permitted pre-charge detention period from twenty-eight to forty-two days.¹⁶⁰ But, after losing heavily in Parliament's Upper Chamber, the House of Lords, the government withdrew the proposal from the Counter-Terrorism Bill.¹⁶¹ Supporters of this further extension pointed out that in countries such as France,

154. See Terrorism Act 2000, § 41(3) (extending permissible detention period to forty-eight hours).

155. See Anti-terrorism, Crime and Security Act, 2001, c. 24, § 23.

156. See Criminal Justice Act, 2003, c. 44, § 306.

157. Letter from Andy Hayman, Assistant Comm'r of the London Metro. Police, to Charles Clarke, the Home Sec'y (Oct. 6, 2005) available at <http://www.privacyinternational.org/issues/terrorism/library/ukterrorbillmetreport.pdf> (lobbying for an extension up to three months).

158. See Andrew Grice & Nigel Morris, *Blair Retreats on 90-Day Limit 'At Cost of Security'*, INDEPENDENT (U.K.), Nov. 8, 2005, at 9.

159. Terrorism Act, 2006, c. 11, § 23(7). But, as under the 2003 Act, no particular extension can be for longer than seven days. *Id.* § 23(3).

160. Nicholas Watt, *Brown Abandons 42-Day Detention After Lords Defeat* (Oct. 14, 2008), <http://www.guardian.co.uk/politics/2008/oct/13/terrorism-uksecurity1> (last visited Feb. 20, 2009).

161. *Id.* The forty-two day extension, however, would be held in reserve for a terrorist emergency. *Id.*

where the concept of a “charge” is not really known, pre-trial detention of a terrorist suspect can endure for up to four years.¹⁶² Those who were against it, such as Parliament’s Joint Committee on Human Rights and the independent Equality and Human Rights Commission, relied on dicta in European Court jurisprudence to suggest that the Court would not tolerate such lengthy pre-charge detentions in common-law countries.¹⁶³ The Joint Committee believes that hearings at which applications for extensions are considered are not properly adversarial, as required by Article 5(4) of the European Convention, because the suspect can be excluded and denied access to information that goes before the judge.¹⁶⁴ However, the only European Court authority cited for this is *Garcia Alva v. Germany*, where the issue was the legality of the original arrest and detention on remand, not whether extended detention was justified.¹⁶⁵ In addition, the Court in *Garcia Alva* conceded that not all information had to be disclosed to the suspect.¹⁶⁶

For the time being, one can only guess the attitude likely to be adopted by the European Court regarding lengthy pre-charge detentions. On its face, the wording of the European Convention suggests that the European Court will not find it easy to impose time limits in the way that it has done for the Article 5(3) obliga-

162. FOREIGN AND COMMONWEALTH OFFICE, COUNTER-TERRORISM LEGISLATION AND PRACTICE: A SURVEY OF SELECTED COUNTRIES 9–10 (2005), <http://www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-Oct05>.

163. See JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (TWELFTH REPORT): ANNUAL RENEWAL OF 28 DAYS 2008, 2007–8, H.L. 132/H.C. 825, at 13–17; Equality and Human Rights Commission, Counter-Terrorism Bill: House of Commons, Report Stage, 10 June 2008, <http://www.equalityhumanrights.com/en/policyresearch/briefings/Pages/CounterTerrorismBillamendments.aspx> (last visited Feb. 20, 2009) (announcing opposition to the extension). The Equality and Human Rights Commission relied on the advice of Rabinder Singh QC and Professor Aileen McColgan, who relied heavily on European Court cases. See RABINDER SINGH & AILEEN MCCOLGAN, IN THE MATTER OF PRE-CHARGE DETENTION UNDER THE COUNTER-TERRORISM BILL, 22–40 (2008), <http://www.equalityhumanrights.com/Documents/Legislation/CTBamend.pdf>.

164. JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (THIRTEENTH REPORT): COUNTER-TERRORISM BILL, 2007–8, H.L. 172/H.C. 1077 at 18.

165. *Id.* at 18; see *Garcia Alva v. Germany*, 37 Eur. H.R. Rep. 335, 350, 353 (2001) (Court decision); see also *Nikolova v. Bulgaria*, 31 Eur. H.R. Rep. 64, 69–72, 83–87 (1999) (Court decision) (challenging detention on remand); *Lamy v. Belgium*, 11 Eur. H.R. Rep. 529, 530–33, 540 (1989) (Court decision) (challenging arrest and detention on remand). These decisions, because they concern remands in custody within civil law systems, are not necessarily applicable to situations involving pre-charge detention within common law systems.

166. *Garcia Alva*, 37 Eur. H.R. Rep. at 353.

tion to bring a detained person promptly before a judge.¹⁶⁷ If the Court follows the approach it has adopted regarding pre-trial detentions, outlined in Part II of this article, it may well hesitate to set limits to pre-charge detention in terms of the permitted maximum number of days. Rather, it may prefer to allow states to take account of contextual factors such as the nature of the alleged offence, the complexity of the attendant investigation, and the other safeguards which are traditional features of the legal system under examination.

V. DETENTION AT PORTS AND AIRPORTS

Article 5 of the European Convention permits detention in a number of situations other than when a person is reasonably suspected of involvement in a criminal offence.¹⁶⁸ Article 5(1)(b) lists one such permissive detention as a detention "in order to secure the fulfilment of any obligation prescribed by law."¹⁶⁹ Under one reading, this authorises detention in any situation where a person does not comply with the law. Fortunately, the European Court has stressed that the key words in the sub-paragraph are "to secure the fulfilment" of any obligation: the arrest must occur to enable the obligation to be carried out, not to punish a person for not carrying it out.¹⁷⁰ With regard to the conflict in Northern Ireland, Article 5(1)(b) was relevant in relation to the obligation, under the PTA 1974, to submit oneself to an "examination" if requested to do so by officials at a port or airport.¹⁷¹ The PTA 1974 originally imposed this requirement but it was first considered in Strasbourg when the relevant Act was the 1976 successor to that Act.¹⁷² The Prevention of Terrorism (Supplemental Temporary Provisions) Order 1976 empowered "examining officers" to exam-

167. Compare European Convention on Human Rights, *supra* note 27, art. 5(4), with *id.* art. 5(3).

168. See, e.g., *id.* art. 5(1)(b), (d)-(f).

169. *Id.* art. 5(1)(b).

170. See *Nowicka v. Poland*, App. No. 30218/96, para. 60 (Eur. Ct. H.R. Dec. 3, 2002), available at <http://www.echr.coe.int> (follow "Case-Law" hyperlink; then follow the "HUDOC" icon; then check the box "Judgments" under "ECHR Document Collections"; then search "Case Title" for "Nowicka").

171. See Prevention of Terrorism Act, 1974, c. 56, § 8 & sched. 3; see also Prevention of Terrorism (Supplemental Temporary Provisions) Order, 1974, S.I. 1974/1975, art. 4 (U.K.); Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order, 1974, SI 1974/2038, art. 4 (N. Ir.).

172. See Prevention of Terrorism (Temporary Provisions) Act, 1976, c. 8, § 13 sched. 3.

ine persons for the purpose of determining three things: (1) whether they appeared to be or to have been concerned in the "commission, preparation or instigation of acts of terrorism"; (2) whether they were the subject of an "exclusion order"; and (3) whether there were grounds for suspecting that the persons had committed one of a number of offences listed elsewhere in the PTA 1976.¹⁷³ "Examining officers" were usually police officers working in the "Special Branch," or customs and excise officers.¹⁷⁴ Article 6 of the Order went on to impose a duty on persons being examined to furnish the examining officer with all such information as he or she may require.¹⁷⁵ Article 7 permitted the searching of people being examined, and Article 10 permitted their detention (pending their examination or pending consideration of whether they should be issued with an exclusion order) for a period of up to two days on the authorisation of an examining officer and for up to five more days if the Secretary of State so directed.¹⁷⁶ Another provision in the PTA 1976 stated that where a person was detained under Article 10, any examining officer, constable, or prison officer could take "all such steps as may be reasonably necessary for photographing, measuring or otherwise identifying [him or her]."¹⁷⁷

An attempt was made in the English courts to challenge the use of these port powers in *In re Boyle, O'Hare, and McAllister*, but it failed.¹⁷⁸ The Divisional Court admitted that the wording of the legislation was quite explicit; the only basis for a successful

173. Prevention of Terrorism (Supplemental Temporary Provisions) Order, 1976, S.I. 1976/465, art. 5 (U.K.) [hereinafter Prevention of Terrorism Order (U.K.)]; Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order, 1976, SI 1976/466, art. 5 (N. Ir.) [hereinafter Prevention of Terrorism Order (N. Ir.)]. An "exclusion order" excluded someone from Northern Ireland or the United Kingdom, or excluded someone from entering or leaving Northern Ireland from, or to go to, the Republic of Ireland. See Prevention of Terrorism Order (U.K.), art. 2; Prevention of Terrorism Order (N. Ir.), arts. 2, 5(2). A full discussion of exclusion orders is beyond the scope of this article.

174. See Prevention of Terrorism Order (U.K.), *supra* note 173, art. 4; Prevention of Terrorism Order (N. Ir.), *supra* note 173, art. 4.

175. Prevention of Terrorism Order (U.K.), *supra* note 173, art. 6; Prevention of Terrorism Order (N. Ir.), *supra* note 173, art. 6.

176. Prevention of Terrorism Order (U.K.), *supra* note 173, arts. 7(2), 10; Prevention of Terrorism Order (N. Ir.), *supra* note 173, arts. 2, 5(2).

177. Prevention of Terrorism (Temporary Provisions) Act, 1976, c. 8, sched. 3, para. 5(3).

178. See EARL JELlicoe, HOME DEPARTMENT, REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1976, 1983, Cmnd. 8803, at 46-47 [hereinafter JELlicoe].

challenge against these port powers, said the Court, would be a showing of bad faith on the part of the examining officer—a very difficult thing to prove.¹⁷⁹

A challenge to the detention powers was then mounted in Strasbourg. In *McVeigh, O'Neill, and Evans v. United Kingdom*, the European Commission addressed the position of three men who, returning to Liverpool by ferry from a 1977 holiday in Ireland, were detained for forty-five hours for the purposes of examination under the 1976 Order.¹⁸⁰ During that time, they were questioned, searched, photographed and fingerprinted, but were ultimately not issued with an exclusion order or charged with any offence.¹⁸¹ The European Commission declared the applications admissible after finding that exhaustion of other domestic remedies would not have offered any chance of redress.¹⁸² But, in its report on the merits of the applications, adopted on 18 March 1981, the Commission expressed the opinion, almost unanimously, that there had been no breach of Article 5.¹⁸³ The only part of the complaint that was upheld—as a breach of Article 8 and by twelve votes to two—was the alleged failure to allow two of the applicants to contact their wives while they were detained.¹⁸⁴ The British government contested that these two applicants had in fact requested that their wives be contacted¹⁸⁵ but to avoid future doubt the government enacted section 62 of the Criminal Law Act 1977 to ensure that there would be a full record of all requests for notification of detention (and also a full record of the reasons for any refusal of such immediate notification).¹⁸⁶

The Commission stated that it found “much force” in the applicants’ argument that Article 5(1)(b) could be invoked as a justification for detention only if a person had voluntarily refused to

179. *See id.* at 47.

180. *See* *McVeigh v. United Kingdom*, App. Nos. 8022/77, 8025/77, 8027/77 5 Eur. H.R. Rep. 82–83 (1981) (Commission report).

181. *Id.* at 82–84.

182. *X v. United Kingdom*, App. Nos. 8022/77, 8025/77, 8027/77 (Dec. 8, 1979) (Commission decision), available at <http://www.echr.coe.int> (follow “Case-Law” hyperlink; then follow the “HUDOC” icon; then check the box “Decisions” under “ECHR Document Collections”; then search “Application Number” for “8022/77”).

183. *McVeigh*, 5 Eur. H.R. Rep. at 99.

184. *Id.* at 106–08.

185. *Id.* at 85.

186. *Id.* at 81; *see* Criminal Law Act, 1977, c. 45, § 62.

comply with the obligation in question.¹⁸⁷ In the Commission's opinion, Article 5(1)(b) "is primarily intended . . . to cover the case where the law permits detention as a coercive measure to induce a person to perform a specific obligation which he has wilfully or negligently failed to perform hitherto."¹⁸⁸ But it went on to observe that the wording of the sub-paragraph "does not expressly require that there should have been such deliberate or negligent failure on the part of the detainee."¹⁸⁹ In addition, there must be "specific circumstances such as to warrant the use of detention as a means of securing the fulfilment of an obligation before detention on this ground can be justified."¹⁹⁰ On the facts of this case, the Commission thought that the provisions in the PTA 1976 and the Order made thereunder "create[d] an overall obligation, arising in specified circumstances, to submit to 'examination'" and that it was "a specific and concrete obligation."¹⁹¹ The Commission added:

The importance in present-day conditions of controlling the international movement of terrorists has been widely recognised in Western Europe, in particular by the Parliamentary Assembly of the Council of Europe. In the particular context of the United Kingdom there is also evident importance in controlling and detecting the movement of terrorists not only between the United Kingdom and the Republic of Ireland but also between Great Britain and Ireland as a whole, including Northern Ireland. The necessary checks must obviously be carried out as the person concerned enters or leaves the territory in question and there is a legitimate need to obtain immediate fulfilment of the obligation to submit to such checks.¹⁹²

Following the production of the Commission's report, neither the Commission nor the British government referred the case to the European Court, so the Committee of Ministers at the Council of Europe considered it instead.¹⁹³ The Committee endorsed all the Commission's views and, based on changes introduced by section 62 of the Criminal Law Act 1977, decided that no further ac-

187. *McVeigh*, 5 Eur. H.R. Rep. at 92.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 93. The requirement of a "specific and concrete obligation" derives from *Engel v. Netherlands*, 1 Eur. H.R. Rep. 647, 672 (1976) (Court decision).

192. *McVeigh*, 5 Eur. H.R. Rep. at 97 (internal citation omitted).

193. At the time of *McVeigh*, if a case was not referred to the European Court, the Committee of Ministers heard the case. See EUROPEAN CONVENTION ON HUMAN RIGHTS, TEXTS AND DOCUMENTS art. 32 (Herbert Miessler & Herbert Petzold eds., 1982).

tion needed to be taken in the case.¹⁹⁴ An official review of the PTA 1976 published in 1978 had endorsed the continued use of the port powers,¹⁹⁵ as did a second review published in 1983.¹⁹⁶ In response to a recommendation in the 1983 review, however, the Order made under the PTA 1984 provided that a person could not be examined at a port for longer than twelve hours unless an examining officer had "reasonable grounds for suspecting that the person examined is or has been concerned in the commission, preparation or instigation of acts of terrorism," in which case the person could be required to submit to further examination.¹⁹⁷

While the *McVeigh* case concerned three men who were trying to enter Great Britain, a man later challenged the port powers after being detained while trying to leave Great Britain.¹⁹⁸ In 1985, police held Paul Lyttle in the Scottish port of Stranraer for thirty-one hours.¹⁹⁹ Not surprisingly, the European Commission adopted exactly the same approach as it had done in *McVeigh* and ruled the application inadmissible.²⁰⁰ The Commission pointed out that Lyttle could have challenged his detention by bringing habeas corpus proceedings.²⁰¹ There had not, therefore, been a breach of Article 5(4) of the European Convention, which guarantees everyone deprived of his or her liberty by arrest or detention the right to challenge the lawfulness of that detention.²⁰²

The *McVeigh* and *Lyttle* cases raise fundamental questions about the degree to which, in practice, the European Convention can protect people against arbitrary arrest. For that reason alone,

194. *McVeigh*, 5 Eur. H.R. Rep. at 111-13 (Committee of Ministers Resolution, Mar. 24, 1982).

195. LORD SHACKLETON, REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACTS 1974 AND 1976, Cmnd. 7324, at 46-47.

196. JELlicoe, *supra* note 178, at 55.

197. Prevention and Suppression of Terrorism (Supplemental Temporary Provisions) Order, 1984, S.I. 1984/418, art. 4(2) (U.K.); Prevention and Suppression of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order, 1984, art. 4(5) (N. Ir.). Earl Jellicoe's 1983 review recommended that "[a]n examining officer should lose the right to examine (and detain) a passenger twelve hours after the start of examination unless he has by that time formed a reasonable suspicion of one of the matters in section 12(1) of the Prevention of Terrorism Act." JELlicoe, *supra* note 178, at 93.

198. *Lyttle v. United Kingdom*, App. No. 11650/85, 9 Eur. H.R. Rep. 381, 381 (1987) (Commission decision).

199. *Id.* at 382.

200. *Id.* at 384.

201. *Id.* at 385.

202. *Id.*; see European Convention on Human Rights, *supra* note 27, art. 5(4).

it is regrettable that neither case benefited from consideration by the European Court. The legal position in the UK was left internally inconsistent: while people could not be arrested on the streets unless there was some reasonable suspicion that they were involved in terrorism, they could be arrested at ports and airports even though they were full UK citizens and were not initially suspected of anything. To its credit, the European Commission stressed in *McVeigh* that the detention in that case had lasted forty-five hours, thereby leaving open the question whether detentions for longer periods would be justifiable.²⁰³ If the European Court, as we saw in *Brogan*,²⁰⁴ views four days as the maximum permitted period of detention under Article 5(3), which uses the term “promptly” in relation to detentions falling under Article 5(1)(c), it should not tolerate a longer maximum for detentions falling under Article 5(1)(b), even though the term “promptly” is not used there.²⁰⁵ Article 5(1)(c) is about detention on “reasonable suspicion of having committed an offence.”²⁰⁶ Article 5(1)(b), on the other hand, is about detention intended to “secure the fulfilment of any obligation prescribed by law.”²⁰⁷ The reasons for imposing strict time limits on the former kind of detention apply every bit as much, if not more so, to the latter kind of detention.

The port powers remained in place until February 2001, when sections 53 and 97 of, and Schedule 7 to, the Terrorism Act 2000 came into force.²⁰⁸ These permitted examining officers to question a person at a port or airport, or near the border between Northern Ireland and the Republic of Ireland, to determine whether he or she appeared to be someone who is or has been concerned in the commission, preparation, or instigation of acts of terrorism.²⁰⁹ A person detained for such questioning can be held for no more than nine hours, and if the questioning takes place at a police station, the detainee has the benefit of the same rights (e.g., as regards the audio- and video-recording of the interview)

203. See *McVeigh v. United Kingdom*, App. Nos. 8022/77, 8025/77, 8027/77, 5 Eur. H.R. Rep. 71, 98 (1981) (Commission Decision).

204. See *Brogan* Court decision, *supra* note 114, 135–36.

205. See European Convention on Human Rights, *supra* note 27, arts. 5(3), 5(1)(b).

206. See *id.* art. 5(1)(c).

207. See *id.* art. 5(1)(b).

208. See Terrorism Act, 2000, c. 11, §§ 53, 97, sched. 7.

209. *Id.* sched. 7, paras. 2–4; *id.* § 40(1)(b) (defining terrorist). Under the Act, “port” includes any airport. See *id.* sched. 7, para. 1(2).

as someone who is questioned on suspicion of terrorism.²¹⁰ If the examining officer wants the person detained for longer than nine hours, the conditions applicable to all terrorist suspects must be satisfied.²¹¹

VI. DETENTION TO QUESTION OR SEARCH

Emergency legislation in Northern Ireland again brought into focus detention for the purpose of securing the fulfilment of an obligation prescribed by law by conferring stop and question powers on the police and army.

Starting with section 16 of the EPA 1973, a person could be arrested in Northern Ireland for failing to answer certain questions when stopped (whether on foot or in a vehicle) by a police officer or soldier.²¹² The provision was re-enacted several times throughout the period of the civil unrest in Northern Ireland and was ultimately enacted as section 89 of the Terrorism Act 2000.²¹³ This section did not cease to have the force of law in Northern Ireland until 31 July 2007²¹⁴ and it was replaced on 1 August 2007 by the similarly worded section 21 of the Justice and Security (Northern Ireland) Act 2007, which is still in force.²¹⁵ Section 89 allowed a police officer or soldier to stop a person

for so long as is necessary to question him to ascertain (a) his or her identity and movements, (b) what he [or she] knows about a recent explosion or another recent incident endangering life; [and] (c) what he [or she] knows about a person killed or injured in a recent explosion or incident.²¹⁶

210. See *id.* sched. 7, para. 6(4); *id.* sched. 8, para. 3.

211. See *id.* sched. 8, para. 32(1). A judicial authority may only extend detention if he or she is satisfied that "there are reasonable grounds for believing that the further detention of the person . . . is necessary to obtain relevant evidence whether by questioning him or otherwise or to preserve relevant evidence." *Id.*

212. Northern Ireland (Emergency Provisions) Act, 1973, c. 53 § 16.

213. Terrorism Act 2000, § 89.

214. Terrorism (Northern Ireland) Act, 2006, c. 4, § 1(1)–(2).

215. See Justice and Security (Northern Ireland) Act, 2007, c. 6, §§ 21, 53(1). The main difference between this and section 89 of the Terrorism Act 2000 is that the 2007 provision allows only soldiers (not police officers) to ask questions relating to the matters listed under subsections (b) and (c) in section 89. See *id.* § 21(2); Terrorism Act 2000, § 89(1). As soldiers are not currently deployed in Northern Ireland this in effect means that such questions are no longer posed when people in Northern Ireland are stopped in the street.

216. Terrorism Act 2000, § 89(1).

It was an offence, punishable in 2000 (and up until the section's repeal) with a fine of up to £5,000, to refuse to stop when required to do so under this section, to refuse to answer questions addressed under the section, or to refuse to answer questions to the best of one's knowledge and ability.²¹⁷

Despite the very extensive use of this power throughout the years of conflict in Northern Ireland, its compatibility with Article 5(1)(b) of the European Convention was never fully tested in either the domestic courts or the European Court. It is arguable that the obligation in question is not "specific and concrete," as required by *Engel v. Netherlands*, because terms such as "movements" and "recent" are so vague.²¹⁸ Whether there were specific circumstances in Northern Ireland justifying the use of the power is also dubious, since it applied in all places and at all times, without reference to any particular goal other than the unstated one of disrupting the movements of terrorists within Northern Ireland. In retrospect, it is difficult to make any assessment of whether the existence and/or use of the power did in fact appreciably assist the security forces in their fight against the terrorists; no official statistics were ever published on how often information obtained by use of this power led to someone being convicted of a crime associated with terrorism. There is some anecdotal evidence on the other side of the line, however, showing that excessive use of the power, in a manner which was harassment to some, so alienated parts of the community in Northern Ireland that it made the security forces' efforts to defeat terrorism more difficult.²¹⁹

The Terrorism Act 2000 contained a new power, going beyond anything then present in Northern Ireland's law, that allowed police officers anywhere in the UK to stop a person or vehicle and carry out a search "for articles of a kind which could be used in connection with terrorism."²²⁰ The Act explicitly states that the

217. See *id.* § 89(2) (imposing a level 5 fine); Criminal Justice (Northern Ireland) Order, 1994, SI 1994/2795, art. 3(2) (N. Ir. 15) (setting level 5 fines at £5,000). Failure to comply with section 21 of the Justice and Security (Northern Ireland) Act 2007 is still punishable with a level 5 fine. *Id.* § 21(4).

218. See *Engel v. Netherlands*, 1 Eur. Ct. H.R. 647, 672 (1976) (Court decision).

219. See ROBBIE MCVEIGH, "IT'S PART OF LIFE HERE . . .": THE SECURITY FORCES AND HARASSMENT IN NORTHERN IRELAND 192 (1994) (stating that "there is little evidence that [emergency legislation] contributes to effective policing").

220. Terrorism Act 2000, § 45(1)(a); see also *id.* § 44(1)-(2).

power may be exercised “whether or not the constable has grounds for suspecting the presence of articles of that kind.”²²¹ The furthest the law in Northern Ireland had gone prior to this was to allow any police officer or soldier on duty to search without suspicion any premises other than a dwelling-house for explosives, firearms, ammunition or wireless apparatus.²²² However, the 2000 Act did require the use of the new power to be authorised in advance for a particular area by a senior police officer who “considers it expedient for the prevention of acts of terrorism.”²²³ The authorisation has to be confirmed by the Secretary of State within forty-eight hours and may not last for longer than twenty-eight days.²²⁴ Unknown to most people (because it was given no publicity), the use of the power was authorised for the whole of London by the Assistant Commander of the Metropolitan Police immediately after the 2000 Act came into force and this authorisation was continuously renewed every twenty-eight days thereafter with the Secretary of State’s approval.²²⁵

In September 2003, two people who were stopped and searched under the power sought declarations that the authorisations were unlawful, but they failed in every court, including the House of Lords.²²⁶ The Lords recognized the significance of the police power but said that Parliament had subjected it to enough constraints to make it a lawful and proportionate interference with people’s rights to a private life, freedom of speech, and freedom of association.²²⁷ Moreover, the power did not engage the right to liberty because the brief detention involved did not amount to a deprivation of liberty.²²⁸ This power manifests a very realistic approach to a real-life problem. As the Lords made clear, although a police officer did not need to have any suspicion before stopping and

221. *Id.* § 45(1)(b).

222. *See id.* § 84, sched. 10, para. 2 (requiring reasonable suspicion only for entering dwellings). These provisions, with the rest of the Terrorism Act 2000, lapsed on 31 July 2007. *See* Terrorism (Northern Ireland) Act, 2006, c. 4, § 1(1)–(2). However, similar language is found in the Justice and Security (Northern Ireland) Act 2007, in force from 1 August 2007. *See* Justice and Security (Northern Ireland) Act, 2007, c. 6, §§ 24, 53(1), sched. 3, para. 2.

223. Terrorism Act 2000, § 44(3).

224. *Id.* § 46(1)–(4).

225. *See* R v. Comm’r of Police of the Metropolis [2006] UKHL 12, [2006] 2 A.C. 307, 339 (appeal taken from Eng.) (U.K.).

226. *Id.* at 332, 309–10.

227. *Id.* at 344–45.

228. *Id.* at 343.

searching a member of the public, the officer could not stop and search people “who [were] obviously not terrorist suspects.”²²⁹ Yet, worry remains that such an approach may legitimate racial or religious profiling, a point Lord Bingham specifically refused to address.²³⁰ Such profiling led to accusations of harassment in Northern Ireland.²³¹

VII. CONCLUSION

During the last forty years, there has been no shortage of imagination applied to devising forms of terrorism-related detention in Northern Ireland and the rest of the UK. For four shameful years (1971–75), detention without trial occurred in Northern Ireland,²³² and for three more (2001–04) it occurred in London.²³³ The European Court of Human Rights held the former to be legitimate,²³⁴ but the House of Lords ruled the latter to be contrary to the European Convention.²³⁵ Denied the luxury of locking suspects up without trial, the authorities were instead given other tools to prevent and punish terrorism. In Northern Ireland one of the main arrest powers required the police to have only “suspicion,” not “reasonable suspicion,” and this did not fully change until the entry into force of the relevant sections of the Northern Ireland (Emergency Provisions) Act 1987 in June 1987.²³⁶

Throughout the UK, from 1974 until 2001, the police could hold those arrested on suspicion (or, from 1984, reasonable suspicion) of terrorism for up to seven days without bringing them before a

229. *Id.* at 346–37 (per Lord Bingham). The learned judge added, perhaps with some degree of circularity, that the lack of any requirement to premise the stop and search on suspicion “is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion.” *Id.* at 347.

230. *Id.* at 347 (“I prefer to say nothing on the subject of discrimination.”). Lord Hope, however, did address discrimination and, while not discounting the risk, concluded that discriminatory use was not inevitable. *Id.* at 347–49 (per Lord Hope).

231. See McVEIGH, *supra* note 219, at 138–44.

232. See *supra* Part II.A.

233. See *supra* Part II.B.

234. Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 93–94 (1978) (Court decision).

235. A v. Sec’y of State for the Home Dep’t [2004] UKHL 56, [2005] 2 A.C. 68, 127 (appeal taken from Eng.) (U.K.).

236. See Northern Ireland (Emergency Provisions) Act, 1973, c. 53, §§ 10(1), 11(1), 12(1); Northern Ireland (Emergency Provisions) Act, 1987, c. 30, § 25(1), sched. 1.

judge or charging them.²³⁷ A government minister authorised the last five days of such detention—a sort of mini-internment.²³⁸ When, in 1988, the European Court of Human Rights ruled that Article 5 of the European Convention normally required pre-charge detention to last no longer than four days, the UK government immediately issued a notice derogating from that Article.²³⁹ Five years later, the European Court held that this was a valid derogation.²⁴⁰ The government eventually withdrew the derogation in 2001 when the UK government enacted a system (even in Northern Ireland) whereby persons arrested on reasonable suspicion of involvement in terrorism had to be brought before a judge within forty-eight hours.²⁴¹ Then, a judge—not a government minister—could extend the detention up to seven days total.²⁴² In 2003, the government doubled the maximum pre-charge detention period to fourteen days and, three years later, again doubled it to twenty-eight days.²⁴³ In 2008, the government attempted to increase the permitted maximum to forty-two days but withdrew the proposal after strong opposition in Parliament.²⁴⁴

As regards post-charge detention, trials in England and Wales have to take place within fairly strict time limits unless the prosecution can persuade a judge to extend those limits.²⁴⁵ No such time limits exist in Northern Ireland.²⁴⁶ Throughout the UK, however, if the prosecution wishes to keep the suspect in custody pending the trial, the prosecution bears the burden of showing why the court should not grant bail.²⁴⁷ There is, in practice, an assumption that the court will grant bail.²⁴⁸

237. See Detention of Terrorists (Northern Ireland) Order, 1972, SI 1972/1632 (N. Ir. 15), art. 4.

238. See *supra* notes 103–07 and accompanying text.

239. See Brogan Court decision, *supra* note 114, at 136; Human Rights Act, 1998, c. 42, sched. 2, pt. I (repealed by Human Rights 1998 (Amendment) Order, 2001, S.I. 2001/1216 (U.K.)).

240. See Brannigan Court decision, *supra* note 134, at 577.

241. See Terrorism Act, 2000, c. 11, § 41(3).

242. See *id.* sched. 8, para. 36.

243. See Criminal Justice Act, 2003, c. 44, § 306(4); Terrorism Act, 2006, c. 11, § 23(7).

244. See *supra* notes 160–61 and accompanying text.

245. See *supra* notes 83–84 and accompanying text.

246. See Prosecution of Offences Act, 1985, c. 23, § 31(7).

247. See *supra* note 59 and accompanying text.

248. *Id.*

In addition, other types of detention remain available. The police may detain people on the streets to search them or their belongings, provided only that the requisite police authority for such measures has been given.²⁴⁹ Before 31 July 2007, the police could stop and question people on the streets of Northern Ireland about terrorist incidents, and the police can still stop people to ask them to identify themselves and to give an account of their movements.²⁵⁰ The House of Lords has held that such short-term detentions do not amount to “a deprivation of liberty” for the purposes of Article 5 of the European Convention.²⁵¹ The police also may detain people at ports or airports without any suspicion at all, albeit for just nine hours.²⁵² Finally, where a person who is reasonably suspected of involvement in terrorism cannot be prosecuted because there is not enough admissible evidence to put before a court, or cannot be deported because he or she would be at substantial risk of being subjected to torture or inhuman or degrading treatment in his or her home country, a UK government minister can, with the approval of a judge, issue a “control order” which may severely restrict the movements of the controlee.²⁵³ If the restrictions are so severe as to amount to a deprivation of liberty, the minister can apply to a court for a “derogating” control order, which would require a derogation notice to be lodged with the Secretary General of the Council of Europe.²⁵⁴ To date, no government minister has applied for any such derogating orders. If and when they do, judges will certainly scrutinize the derogating order carefully, both domestically and in Strasbourg. As the Council of Europe itself has recently devised new Conventions in the realm of terrorism,²⁵⁵ the European Court, when faced with challenges to control orders on human rights grounds, will no doubt bear in mind the very real difficulties governments face

249. See *supra* notes 172–76 and accompanying text.

250. See *supra* notes 212–17 and accompanying text; see also Justice and Security (Northern Ireland) Act, 2007, c. 6, § 21(1) (allowing a constable to stop persons to question to ascertain identity and movements).

251. See *supra* notes 226–29 and accompanying text.

252. See *supra* notes 208–11 and accompanying text.

253. See Prevention of Terrorism Act, 2005, c. 2, §§ 1–4.

254. See *id.* § 4.

255. See, e.g., Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. 196; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, May 16, 2005, C.E.T.S. 198.

in preventing terrorism in the modern world. The European Court's experience in handling many cases from Northern Ireland will stand it in good stead in that regard.