These notes refer to the Police (Detention and Bail) Bill as brought from the House of Commons on 7th July 2011 [HL Bill 82]

POLICE (DETENTION AND BAIL) BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Police (Detention and Bail) Bill as brought from the House of Commons on 7th July 2011. They have been prepared by the Home Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The Notes need to be read in conjunction with the Bill.

BACKGROUND AND SUMMARY

3. Part 4 of the Police and Criminal Evidence Act 1984 (PACE) makes provision in respect of the duration and conditions of detention of persons arrested under that Act on suspicion of committing a criminal offence. Amongst other things, the Act places a limit of 96 hours on the period someone may be detained by the police before they have to be either charged or released. PACE also makes provision for the police to release suspects on bail pending further enquiries. Since the provisions of PACE came into force on 1 January 1986, the police have operated the detention provisions on the basis that only the time spent in police detention counts towards the application of the 96-hour limit and that the 'detention clock' is paused when an individual is released on police bail.

4. This interpretation of the way the detention provisions of PACE operated was challenged in the case of Paul Hookway who was arrested by Greater Manchester Police in November 2010 on suspicion of murder and subsequently bailed. On 5th April 2011, a District Judge refused a routine application by Greater Manchester Police for a warrant of further detention of Mr Hookway on the grounds that the maximum detention limit had expired while the suspect was on bail. In effect, the District Judge held that time spent on police bail counted towards the 96-hour limit on detention under PACE. The decision of the District Judge was upheld by an oral ruling of the High Court on 19th May 2011 following an application for judicial review by Greater Manchester Police. The written judgment in the case, *R (Chief Constable of Greater Manchester Police) v. Salford Magistrates' Court and Paul Hookway*, was published on 17th June 2011. On 30th June 2011 in an oral statement in the House of Commons (Official Report, column 1133 to 1141) the Minister for Policing and Criminal Justice (Rt. Hon Nick Herbert MP) announced that, in view of the serious impact of the judgment on the police's ability to investigate crime and protect the public, the

Government intended to bring forward fast-track legislation to reverse the effects of the judgment.

TERRITORIAL EXTENT

5. The provisions of the Bill extend to England and Wales only. In relation to Wales the provisions of the Bill do not relate to devolved matters or confer functions on the Welsh Ministers.

FAST-TRACK LEGISLATION

6. The Government intends to ask Parliament to expedite the Parliamentary progress of this Bill. In their report on *Fast-track legislation: Constitutional Implications and Safeguards*[1], the House of Lords Select Committee on the Constitution recommended[2] that where a Bill is to be fast-tracked, Parliament should be provided with the following information:

Why is the fast-tracking necessary? What is the justification for fast-tracking each element of the Bill?

7. The High Court's decision in the case of *R (Chief Constable of Greater Manchester Police) v. Salford Magistrates' Court and Paul Hookway* overturned the application of the statutory rules governing the time limits on pre-charge detention set out in the Police and Criminal Evidence Act 1984 which have been in use since the Act came into force in 1986. While Greater Manchester Police have been granted leave to appeal the High Court's decision to the Supreme Court, which has listed the case for hearing on 25th July 2011, there is no guarantee that the Supreme Court would restore the position as it was commonly understood to be before the High Court's decision.

8. The police service estimate that there are some 80,000 individuals currently on pre-charge bail whose cases would be affected to a greater or lesser extent by the High Court ruling. The police believe that the judgment will have a serious impact on their ability to investigate crime and protect the public. In some cases, it will mean that suspects who would normally be released on bail are detained for longer. It is also likely that in, for example, multiple or mass arrest situations such as a public order incident, there will not be enough capacity in most forces to detain everybody in police cells and, while the police secure evidence against all offenders, lower-level offenders would be bailed for investigation while officers deal with the ringleaders. Unless there is new evidence, in which case a fresh arrest may be made (see section 47(2) of PACE), those lower-level suspects cannot be detained

[1] http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/116.pdf

[2] Paragraph 186 of Report

when they return on bail and the opportunity to interview at that stage is no longer available and the investigation will have to be stopped because the detention time has run out. New evidence may well not be available in such cases, as the key evidence will be that of the arresting officer.

9. The judgment will also affect the ability of the police to enforce bail conditions. For example, where someone is released on bail for an alleged domestic violence offence, they will typically have bail conditions applied that they must not return to the home address whilst the investigation is ongoing. The High Court ruling means that, while the police can arrest a person for breach of bail and take them to a police station, they are not able to detain a person for the breach unless a new offence has been committed. As a result, victims and the general public are exposed to potential harm.

What efforts have been made to ensure the amount of time made available for Parliamentary scrutiny has been maximised?

10. The Minister for Policing and Criminal Justice made an oral statement in the House of Commons on 30th June 2011 where he announced the Government's intention to bring forward fast-track legislation. This statement afforded the House an initial opportunity to consider the issue addressed by the Bill. A final draft of the Bill was published on 4th July 2011 and a copy sent to, amongst others, the Shadow Home Secretary and the Shadow Home Affairs Spokesman and the Convenor of the Crossbench Peers in the Lords. This is a short Bill with only one substantive clause which addresses a single, specific issue as to the interpretation of PACE. The proposed timetable for the Bill allows for a day's debate in each House, with an interval of some two days between introduction and Second Reading in each House. Given that this is a very short, single issue Bill, this is considered to provide both Houses adequate opportunity for scrutiny.

To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?

11. The Home Office has had extensive discussions with the Association of Chief Police Officers and the Crown Prosecution Service following the High Court judgment and in drafting the Bill.

Does the Bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why do the Government judge that their inclusion is not appropriate?

12. The Bill does not contain a sunset clause. The purpose of the Bill is to restore the law on police detention as it was understood to be for 25 years following the enactment of PACE. As such the Bill does not introduce new law which needs to be subject to further Parliamentary scrutiny at a later date. In addition, when responding to the Government's oral statement on 30 June both the Shadow Home Secretary and the Chair of the House of

Commons Home Affairs Select Committee indicated their support for fast-track legislation on this issue.

Are mechanisms for effective post-legislative scrutiny and review in place? If not, why do the Government judge that their inclusion is not appropriate?

13. The normal procedures for post-legislative scrutiny will apply to this Bill. As the Bill is simply seeking to restore the law on police detention as it was understood to be for 25 years following the enactment of PACE it is not considered that any special procedures are required.

Has an assessment been made as to whether existing legislation is sufficient to deal with any or all of the issues in question?

14. The provisions on police detention in PACE have stood for 25 years. In the light of the High Court's judgment, only fast-track primary legislation afforded the necessary certainty and immediacy in restoring the law as it was understood to operate.

Have relevant Parliamentary committees been given the opportunity to scrutinise the legislation?

15. No relevant Parliamentary committees have been given the opportunity to scrutinise the legislation in advance of introduction of the Bill. The Chair of the House of Commons Home Affairs Select Committee indicated, in response to the oral statement by the Minister of Policing and Criminal Justice on 30th June 2011, that "the Minister is absolutely right that there must be emergency legislation" (Official Report, column 1136). A draft of the Bill was sent to the Chair of the House of Commons Home Affairs Select Committee on 4th July 2011 and the Home Secretary was asked questions on it when she attended a pre-arranged evidence session on 5th July 2011 on the work of the Home Office. The Select Committee also took evidence that day from the Association of Chief Police Officers. A copy of the Government's assessment of the compatibility of the Bill's provisions with the Convention rights has been sent to the Joint Committee on Human Rights. The Bill does not contain any delegated powers and therefore no scrutiny seems to be required by Parliamentary committees responsible for delegated legislation.

COMMENTARY ON CLAUSES

Clause 1: Amendment of Police and Criminal Evidence Act 1984

16. Clause 1 amends provisions in Part 4 of PACE which relate to the detention of suspects prior to charge and after charging. Sections 34 to 45A of PACE, which set out the rules governing detention and bail prior to charge, provide that once a person is arrested and brought to a police station that person must not be detained for longer than 96 hours without being charged with an offence (separate rules, as set out in section 46 of PACE, govern continued detention post-charge). The detention of a person within the overall maximum

permitted 96-hour period is subject to various safeguards which require an on-going detention to be subject to periodic review and for continued detention to be subject to a further authorisation, by a police officer of at least the rank of superintendent after the initial 24 hours, and by a magistrate after the initial 36 hours.

17. The way the relevant time limits on detention operate under PACE, including the application of the safeguards set out in that Act, may be best explained by reference to the following example.

18. If a person were arrested by the police at 11:00 on 1st June and taken to a police station where his detention was authorised at 11:30 the same day, the 'detention clock' would begin at 11:30, which is referred to as the 'relevant time' (section 41(2) of PACE). Pre-charge detention can only be authorised where there is insufficient evidence to charge a person and "the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him" (section 37(2) of PACE).

19. Continuing the example, no later than 17:30, that is six hours after detention was first authorised, the arrested person's detention must be reviewed by a police officer of at least the rank of inspector (section 40(3)(a) of PACE). Subsequent reviews are required no later than nine hours after the first review and then at intervals of no more than nine hours throughout the period of detention (section 40(3)(b) and (c) of PACE).

20. Assuming that reviews have been carried out and detention continues to be authorised, then before 11:30 on 2 June, that is 24 hours total time in custody, a police officer of at least the rank of superintendent may authorise further detention until 23:30 that day, that is up to a maximum of 36 hours (section 42(1) of PACE), still subject to reviews at intervals of no more than nine hours by an inspector.

21. If the police still consider that detention is necessary after 23:30 on 2nd June, the 36-hour point, a warrant of further detention must be sought from a magistrates' court. In order to facilitate the making of applications at a reasonable hour, an application may be made at any time before 36 hours has elapsed or up to 6 hours afterwards (section 43(5) of the PACE). If the court is satisfied by a police officer under oath that there are "reasonable grounds for believing that the further detention of the person to whom the application relates is justified", then a warrant of further detention may be issued for a period of no more than 36 further hours (section 43(1) and (12) of PACE). Applications may be made and granted for further warrants of up to 36 hours each, up to a maximum total time of 96 hours' detention, in this case 11:30 on 5 June (section 44(3) of PACE).

22. However, in order to continue to detain a person until the 96-hour limit is reached, it must remain necessary at all times to detain them under the test in section 37(2) of PACE, as set out in paragraph 18 above. If detention is not necessary, the custody officer (who is independent of the investigation) must release the detainee, and has the choice of doing so

either on bail or without bail. If the release is on bail, the custody officer may only impose conditions where they appear to be "necessary… for the purpose of preventing [the released person] from (a) failing to surrender to custody, (b) committing an offence while on bail, or (c) interfering with witnesses or otherwise obstructing the course of justice…" (section 3A(5) of the Bail Act 1976).

23. Where a person is released from pre-charge detention on bail, they may be arrested under section 46A of PACE if they fail to answer bail at the appointed police station and time (section 46A(1)) or if they breach any conditions imposed (section 46A(1A)). Where a person is arrested under section 46A of the 1984 Act, or they return to the police station in accordance with their bail, they are treated as having been arrested for the original offence (section 34(7)). Both the detention clock and the review clock resume at the point they were 'paused' at on the person's release; as part of the detention clock, the clock that governs the time limits for authorising an extension of the period of detention or applying for a warrant of further detention was also paused when the person was released on bail and resumes when the person comes back into detention. The time limits in question are those in sections 42(4)(a) and 43(5)(a). So, in this example, if the detainee had been released on bail at 21:30 on 1st June, after 10 hours' detention, and reported to the police station to answer his bail at 09:00 on 8th June, there would be 14 hours' further detention available before a superintendent's review was required under section 42 and the next review would be due at 14:00, after 15 hours' total detention (and 9 hours' detention after the first review).

24. *Subsection (1)* is the key provision of the Bill and seeks to reverse the effect of the High Court's ruling. It amends section 47(6) of PACE to make it explicit that, in calculating any period (whether a time limit or a period of pre-charge detention) under Part 4 of PACE, any period(s) spent on bail shall be disregarded. Section 47(6) as amended would read:

> "(6) Where a person who has been granted bail under this Part and either has attended at the police station in accordance with the grant of bail or has been arrested under section 46A above is detained at a police station, any time during which he was in police detention prior to being granted bail shall be included as part of any period which falls to be calculated under this Part of this Act *and any time during which he was on bail shall not be so included*."

25. *Subsection (2)* amends section 34(7) of PACE to make it clear that that provision is not to be read as displacing the rule that the Bill reinforces in section 47(6), that periods of police detention before and after a period of bail are to be treated as if they formed a single continuous period. Section 34(7) as amended would read:

> "(7) For the purposes of this Part a person who—
>
> (a) attends a police station to answer to bail granted under section 30A,
>
> (b) returns to a police station to answer to bail granted under this Part, or

(c) is arrested under section 30D or 46A,

is to be treated as arrested for an offence and that offence is the offence in connection with which he was granted bail.

But this subsection is subject to section 47(6) (which provides for the calculation of certain periods, where a person has been granted bail under this Part, by reference to time when the person is in police detention only)."

26. *Subsection (3)* provides that the amendments to PACE made by subsections (1) and (2) have retrospective effect, that is, they are deemed always to have had effect notwithstanding the High Court's judgment in the *Hookway* case.

Clause 2: Extent and short title

27. This clause provides that the provisions of the Bill extend to England and Wales only. It also sets out the short title of the Bill.

COMMENCEMENT

28. The Bill makes no provision in respect of commencement. Accordingly, by virtue of paragraph (b) of section 4 of the Interpretation Act 1978, the Bill will come into force at the beginning of the day on which the Act receives Royal Assent.

FINANCIAL EFFECTS OF THE BILL

29. The provisions of the Bill are expected to be cost neutral.

EFFECTS OF THE BILL ON PUBLIC SECTOR MANPOWER

30. There are no public sector manpower implications arising from the Bill.

SUMMARY OF IMPACT ASSESSMENT

31. The provisions of the Bill do not require an impact assessment.

EUROPEAN CONVENTION ON HUMAN RIGHTS

32. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1

of that Act). The Minister of State for Crime Prevention and Anti-social Behaviour Reduction, Baroness Browning, has made the following statement:

> "In my view the provisions of the Police (Detention and Bail) Bill are compatible with the Convention rights."

Retrospective effect: Article 5 (right to liberty and security) and Article 1 of Protocol 1 (protection of property)

33. The retrospective effect of the Bill raises issues in respect of Article 1, Protocol 1 (A1P1) and Article 5(5) of the European Convention on Human Rights (ECHR). This is because the effect of the Bill is to extinguish any existing claim for unlawful detention that could be brought up to the time of the commencement of the legislation on the basis of *Hookway*. Such a claim could be brought either as a common law claim for false imprisonment, or under the Human Rights Act 1998 (that is, a breach of A1P1 or Article 5 of the ECHR).

34. A claim under common law may be a possession for A1P1 purposes[3]. Given that the claim would be for unlawful detention and that for the purposes of the tort the cause of action arises at the time there is detention for which there is no lawful authority (and in light of *Hookway* it would be impossible for the police to prove that detention was lawful in the affected cases)[4] the Department considers that it is highly likely that any claims, or right to claims, for unlawful detention flowing from *Hookway* would be considered possessions for the purposes of A1P1.

35. It is possible to interfere with those A1P1 rights provided that is justified. That requires lawful authority to do so, which seeks to achieve a legitimate public interest and that the interference is proportionate to the policy aim.

36. Given that legislation will form the basis of the interference there will be lawful authority. The Home Office is satisfied that there is a legitimate public interest in this interference and that the interference is proportionate to the policy aim, such that the retrospective effect of the legislation would strike a fair balance between the interests of the affected persons and the general public interest. In reaching this conclusion, the Department has had regard to the following considerations:

> (a) There is plainly a public interest in not disrupting the operation of a fundamental part of the criminal justice system that has operated in an understood fashion by all

[3] *Maurice v France* (application no. 18810/03), see in particular paragraphs 63 to 70.

[4] *Lumba v Secretary of State for the Home Department* [2011] All ER (d) 262 (Mar), see in particular paragraphs 64 to 88.

concerned for over 25 years without challenge and creating legal certainty by restoring the position retrospectively;

(b) The operational impact of policing and therefore public protection is real and significant. The consequences of failing to overturn the judgment in *Hookway* could include the following:

> (i) Although the Department believes that *Hookway* does not prevent a person being bailed to return after a period more than 96 hours after his or her arrest, he or she could not be further detained on his or her return from bail unless there was new evidence. Moreover, if such a person broke his or her bail conditions in a way which did not constitute a criminal offence, for example by going to an address from which he or she was prohibited in a case of suspected domestic violence, or if he or she failed to answer to bail, he or she could not be further detained (although he or she could be arrested and taken to the police station under section 46A of PACE);
>
> (ii) if a person who was initially arrested as part of a mass arrest (for example, following widespread public disorder) when there was not time for all arrestees to be questioned was then bailed, the police would be unable to detain and question him or her more than 96 hours after his or her arrest if there was no evidence other than the original arresting officer's testimony;
>
> (iii) The police could also be unable to question a previously-bailed suspect for the purposes of checking whether his or her account remained consistent with his or her initial account, and also for allowing a court to draw appropriate inferences from a "no comment" interview at that stage;

(c) Unless the Bill is given retrospective effect, it is possible that a very large number of people could bring claims for damages for detention occurring before the judgment, even though that detention was in accordance with what was honestly thought to be a long-understood legal position. Such claims are likely to be small, probably nominal, and would cover nominal periods of detention. But taken together, this could be very disruptive to deal with and could impose a high overall cost on the legal system. As well as damages for false imprisonment within the limitation period, people could also seek to unpick convictions and challenge evidence in forthcoming trials which followed periods spent in custody beyond 96 hours. While the Department is not in a position to quantify the potential financial exposure, and while it does not have a clear view on the likelihood of convictions being overturned, it does consider the potential for disruption and distraction to the police and the courts is very significant indeed;

(d) The nature of any detention occurring since the judgment now rendered unlawful is unlikely to have given rise to significant damage and any compensation awarded is likely to be nominal.

37. The second potential ECHR issue is whether the retrospective provision fits with Article 5(5), which states that "*everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation*".

38. The analysis here is no different from the analysis above in respect of the common law claim. Thus as a matter of English law Article 5(5) gives rise to a claim for damages under the Human Rights Act. The effect of the retrospective legislation is to:

- render the past detention lawful; and
- in consequence remove the cause of action under the Human Rights Act that would otherwise have existed.

39. On this analysis, what is in issue is only an interference with A1P1 rights. There is no free-standing Article 5 interference. Rather, the claim that is specified in Article 5 is treated as no more and no less than any other civil cause of action. On this analysis the Department considers that the interference is justified, as above.

ECHR Article 8 (right to respect for private and family life)

40. The Department has considered if it is possible that this Bill interferes with the Article 8 rights of a person who was released on bail more than 96 hours after his or her arrest and who is on police bail at the time the Bill is enacted. Such a person might, following *Hookway*, be said to have a claim under Article 8 that his or her bail should be brought to an end. This would be on the basis that being subject to police bail, particularly if onerous conditions are attached, could constitute an interference with the right to respect for private and family life, in a way analogous to (though much less severe than) the interference with the Article 8 rights of a person who is subject to notification requirements under the Sexual Offences Act 2003. The Bill arguably has the effect of extinguishing this claim.

41. The Department considers, however, that on a proper analysis if any right is interfered with by the extinguishing of such a claim it is an A1P1 right, which is considered above. In any event, an interference with Article 8 rights, like an interference with A1P1 rights, is capable of justification if it is in accordance with the law, if it seeks to achieve a legitimate public aim and if the interference is proportionate to the policy aim. This interference would have lawful authority in the form of the legislation, and for the reasons set out above in relation to retrospection, the Department is satisfied that this interference is justified.

ECHR Article 6 (right to a fair trial)

42. The Department has also considered if it is possible that this Bill interferes with the Article 6 rights of a person who has been convicted of an offence as a result of his or her questioning in police detention for a period that spanned more than 96 hours from his or her arrest and whether that person could argue that evidence obtained during such a period was inadmissible. The Department does not consider that separate issues arise under this head. If any right is interfered with by the extinguishing of such a claim it is an A1P1 right and any interference strikes a fair balance between the interests of the affected persons and the general public by reference to the same considerations as are set out above. Moreover, the Department would argue that if the admissibility of this evidence was not challenged at the time by the defendant then it is now too late to do so in relation to past completed criminal trials.

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