



HOUSE OF LORDS

Select Committee on the Constitution

16th Report of Session 2010–12

Police (Detention and Bail) Bill

Report

Ordered to be printed 6 July 2011 and published 7 July 2011

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 178

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current Membership

Lord Crickhowell
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Baroness Jay of Paddington (Chairman)
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Rennard
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Declaration of Interests

A full list of Members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

Professor Adam Tomkins, Legal Adviser, is a Member of and unpaid Ad Hoc Legal Adviser to Republic.

Publications

All publications of the Committee are available on the internet at:

<http://www.parliament.uk/hlconstitution>

Parliament Live

Live coverage of debates and public sessions of the Committee's meetings are available at

<http://www.parliamentlive.tv>

General Information

General Information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at:

<http://www.parliament.uk/business/lords>

Committee Staff

The current staff of the Committee are Emily Baldock (Clerk), Stuart Stoner (Policy Analyst) and Nicola Barker (Committee Assistant).

Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 1228/5960

The Committee's email address is: constitution@parliament.uk

The Police (Detention and Bail) Bill

1. The Police (Detention and Bail) Bill is being fast-tracked through both Houses of Parliament in order to “reverse” the effect of a High Court judgment dated 19 May 2011 but published only on 17 June: namely, *R (Chief Constable of Greater Manchester Police) v Salford Magistrates’ Court and Hookway*.¹
2. The ruling of the High Court in the *Hookway* case has been appealed to the United Kingdom Supreme Court. A hearing has been set down for 25 July 2011. On 5 July the Supreme Court dismissed an application filed by Greater Manchester Police to stay the effect of the High Court’s judgment. In a short statement, the Court gave the following reasons: that the Government had announced that they proposed to introduce emergency legislation on the matter, that the application was unusual, and that it was questionable whether it was open to the Court to grant a stay.²
3. The subject matter of the case—and of the Bill—is whether the “detention clock” provided for by the Police and Criminal Evidence Act 1984, section 41, continues to run once a suspect has been released on police bail. For 25 years the understanding has been that it does not. This means that the police may re-arrest a suspect released on bail, and detain and question him or her further, as long as the maximum period of pre-charge detention (that is, 96 hours) is not exceeded. The ruling in *Hookway* appears to reverse this understanding. In a compelling analysis the acknowledged academic expert on the Police and Criminal Evidence Act, Professor Michael Zander, has argued that Parliament’s intention in passing the Act was that the detention clock would not run while a suspect was on police bail (as had been the accepted practice until the *Hookway* decision).³
4. The Bill seeks to “reverse” the effect of the High Court judgment retrospectively. While understandable in the context of this Bill, retrospectivity is in principle always to be guarded against. As JUSTICE have observed, retrospectivity in statute “offends against the principle of legal certainty and weakens the rule of law”.⁴ Having Parliament legislate retrospectively and having the Supreme Court adjudicate on what may well then be moot is an unusual prospect.
5. In 2009 we published a report on fast-track legislation in which we recommended, among other matters, that a Government introducing fast-track legislation into Parliament should be expected to comply with certain requirements.⁵ In particular, we recommended that the Government should fully explain and justify why, in their opinion, it was necessary for legislation to be fast-tracked.⁶ The then Government accepted our recommendations,

¹ [2011] EWHC 1578 (Admin).

² *R (Chief Constable of Greater Manchester Police) v Salford Magistrates’ Court and Hookway* <http://www.supremecourt.gov.uk/news/373.html>.

³ Professor Michael Zander QC, *The Detention Clock: An Unhelpful Decision which is Surely Wrong* 175 *Criminal Law and Justice Weekly* 365 (18 June 2011).

⁴ JUSTICE, Briefing on the Police (Detention and Bail) Bill, July 2011, para 7.

⁵ Constitution Committee, 15th Report (2008–2009): *Fast-track Legislation: Constitutional Implications and Safeguards* (HL Paper 116).

⁶ *Ibid*, para 186.

and they have since been complied with.⁷ **We are pleased to note that in this instance, too, the explanatory notes accompanying the Bill explain why fast-tracking is, in the Government's opinion, necessary.**

6. We note that there appears to be cross-party support for the Bill. We note also that the police have made plain, including in evidence to Parliament, that there is a strong public interest in swift action.⁸ We further note that human rights and civil liberties campaigners, such as Liberty and JUSTICE, have not raised objections to the substance of the Bill.
7. Notwithstanding all of the above, however, there is one feature of the Bill which touches upon an issue of constitutional principle which we draw to the attention of the House. As noted above, the High Court judgment which this Bill seeks effectively to “reverse” is itself under appeal to the UK Supreme Court in litigation which remains ongoing. **We are concerned that asking Parliament to legislate in these highly unusual circumstances raises difficult issues of constitutional principle as regards both the separation of powers and the rule of law. We have noted the constitutionally important distinction between legislative and adjudicative functions before.⁹ We are concerned that, in the understandable rush to rectify a problem which the police have identified as being serious and urgent, insufficient time has been allowed for Parliament fully to consider the constitutional implications of what it is being asked to do.**
8. It is not for us to say what the effect of Parliament legislating in advance of the Supreme Court hearing may be on the Court when it hears the case on 25 July. It may be that we will need to return to this matter later in the year.
9. In this respect, the circumstances of the Police (Detention and Bail) Bill are markedly different from those of the Terrorist Asset-Freezing (Temporary Provisions) Bill in 2010. That legislation was introduced in response to a judgment of the Supreme Court. Parliament had the advantage, when considering the legislation, of a considered Supreme Court judgment to assist it in its deliberations.¹⁰
10. We note also that several campaigners and commentators have argued that practices of police bail need more broadly to be revised.¹¹ Owing to its being fast-tracked, this Bill is not the ideal occasion for these matters to be addressed, but it may be that we will wish to return to them when, for example, the Protection of Freedoms Bill is brought to this House later in the year.

⁷ The bills which have been fast-tracked since that report are: the Video Recordings Bill (Constitution Committee, 5th Report (2009–2010) (HL Paper 36)); the Terrorist Asset-Freezing (Temporary Provisions) Bill (2009–2010); and the Loans to Ireland Bill (2010–2012).

⁸ The House of Commons Home Affairs Committee took evidence from Jim Barker-McCardle, Chief Constable of Essex and Commander Steve Bloomfield, Metropolitan Police on 5 July 2011. The transcript will be available on the Committee's website <http://www.parliament.uk/homeaffairscom>.

⁹ Most recently in our written submission to the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills: Report (2010–2012) (HL Paper 161, HC Paper 893) DTS 3, www.parliament.uk/detentionofterroristsuspectsbills.

¹⁰ See JUSTICE, Briefing on the Police (Detention and Bail) Bill, July 2011, para 6.

¹¹ See, for example, *The Guardian*, 3 July 2011 (letters to the editor); Liberty, *Briefing on the Police (Detention and Bail) Bill*, July 2011, paras 9–12; and JUSTICE, *Briefing on the Police (Detention and Bail) Bill*, July 2011, paras 9–10.