HOUSE OF LORDS

Select Committee on the Constitution

8th Report of Session 2014–15

Counter-Terrorism and Security Bill

Ordered to be printed 12 January 2015 and published 12 January 2015

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 92

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution."

Membership

The Members of the Constitution Committee are:

Lord Brennan
Lord Crickhowell
Lord Cullen of Whitekirk
Baroness Dean of Thornton-le-Fylde
Baroness Falkner of Margravine
Lord Goldsmith
Lord Lang of Monkton (Chairman)
Lord Lester of Herne Hill
Lord Lexden
Lord Powell of Bayswater
Baroness Taylor of Bolton

Declarations 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

Publications

All publications of the committee are available 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

Further information

Further information about the House of Lords and its committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is available at:
http://www.parliament.uk/business/lords

Committee staff

The current staff of the committee are Antony Willott (Clerk), Dr Stuart Hallifax (Policy Analyst) and Hadia Garwell and Philippa Mole (Committee Assistants). Professor Adam Tomkins is the Legal Adviser to the committee.

Contact details

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email constitution@parliament.uk

Counter-Terrorism and Security Bill

1. The Counter-Terrorism and Security Bill was brought from the Commons on 7 January. It is being semi-fast-tracked, in that the House will be asked to waive the recommended minimum intervals between the stages of the bill. Its second reading in the House of Lords is scheduled to take place on 13 January and its committee stage is to commence the following week.

Fast-tracking

2. The main impetus behind the bill seems to be that, on 29 August 2014, the Joint Terrorism Analysis Centre raised the UK national terrorist threat level from substantial to severe (meaning that a terrorist attack is "highly likely"). Among the major concerns is the number of individuals who have returned to the UK from fighting in Syria and Iraq. The explanatory notes accompanying the bill state that there are about 550 individuals "of interest to the police and security services" who have travelled from the UK to Syria, of whom about half have returned to the UK. The Prime Minister announced on 1 September 2014 that legislation would be brought forward to stop people travelling overseas to fight for terrorist organisations and subsequently returning to the UK.

3. In the event the bill was introduced into the House of Commons on 26 November 2014, nearly three months after the Prime Minister's announcement. The last bill to be fast-tracked was the Data Retention and Investigatory Powers Act 2014. In part, that Act was needed in order to address a defect in the law identified in a court judgment. The judgment in question was dated 8 April 2014; the bill was introduced into the House of Commons on 14 July 2014; thereafter the bill was taken through all its legislative stages in both Houses in three sitting days. In its report on the bill the Constitution Committee stated that "the contrast between the time taken by the Government to consider their response [to the court judgment] and the time given to Parliament to scrutinise the bill is a matter of concern".[1] **We repeat this concern now. Even though the Counter-Terrorism and Security Bill is being only semi-fast-tracked, there remains a contrast between the time taken within Government to prepare the bill and the time given to Parliament to scrutinise it**.

4. The Joint Committee on Human Rights (JCHR) took oral evidence on the bill from James Brokenshire MP, the Minister for Security and Immigration, on 3 December, the day after the bill's second reading in the Commons. During that evidence session the Chair of the JCHR, Dr Hywel Francis, noted that the bill had been described as "being fast-tracked but not urgent".[2] The question may be asked: if a bill is not urgent, why is it being

---

1 Constitution Committee, *Data Retention and Investigatory Powers Bill*, (3rd Report, Session 2014–15, HL Paper 31), para 6

2 Oral evidence taken before the Joint Committee on Human Rights, 3 December 2014 (Session 2014–15), Q 2 (James Brokenshire MP)

fast-tracked? The Minister's answer was that, because of the raising of the threat level, "there is a degree of urgency".[3]

5. In 2009 the Constitution Committee published a report on fast-track legislation in which it recommended that a Government introducing fast-track legislation should explain and justify why, in their opinion, fast-tracking was necessary.[4] As has now become customary, this was done for the present bill in the explanatory notes. **We welcome this.** In this instance a number of the explanations given are particularly full: the Government have supplied detailed answers on the efforts that have been made to maximise parliamentary scrutiny and on the extent to which various provisions are subject to sunset clauses. **Nonetheless, the House may wish to consider carefully whether the reasons put forward by the Government for the fast-tracking of each element of the bill offer sufficient justification.**

6. While the Anti-terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005 were fast-tracked, more recent terrorism legislation has tended not to be. Neither the Terrorism Act 2006, the Counter-Terrorism Act 2008, the Terrorist Asset-Freezing etc Act 2010, nor the Terrorism Prevention and Investigation Measures Act 2011 were fast-tracked. **We hope that the present bill does not herald a return to the automatic or frequent fast-tracking of terrorism legislation.**

Temporary Exclusion Orders

7. Part 1 of the bill concerns "temporary restrictions on travel" and comprises two elements. The first (clause 1 and schedule 1) is a new power to seize passports from persons suspected of involvement in terrorism, designed to prevent such persons from leaving the UK. The second raises a constitutional matter which we bring to the attention of the House. Clause 2 empowers the Secretary of State to impose a "temporary exclusion order" on an individual, meaning that the individual cannot return to the UK unless they have a permit to do so (such permits being issued by the Secretary of State) or unless he or she is deported to the UK. A temporary exclusion order ("TEO") may remain in force for up to two years. TEOs apply to those with the right of abode in the UK. The provisions of Part 1 are not another means of using immigration law for the purposes of counter-terrorism: the provisions of Part 1 apply to all British citizens (as well as others with a right of abode in the UK).

8. A permit to return may be made conditional upon any requirement imposed by the Secretary of State (clause 4(2)). The bill provides for no limitation as to the extent or content of such requirements. Failure to comply with such a requirement invalidates the permit to return, meaning that the individual remains excluded from the UK (clause 4(3)).

9. David Anderson QC, the independent reviewer of terrorism legislation, in evidence to the Joint Committee on Human Rights (on 26 November 2014) and to the House of Commons Home Affairs Committee (on 3 December 2014) described TEOs as being "about controlled and managed return" to the UK, rather than exclusion from the UK. None the less, he was insistent

---

3 *Ibid.*

4 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, Session 2008–09, HL Paper 116)

in his evidence to the latter Committee that, as he put it, "you absolutely have to inject some form of judicial control into it because it is quite an onerous thing to do to somebody".[5] He suggested that, as with Terrorism Prevention and Investigation Measures ("TPIMs"), a court should authorise the making of a TEO and there should be a right of appeal to a court.[6] The bill as it stands provides for neither.

10. This is a point of constitutional importance, raising as it does issues relating to both the rule of law and the liberty of the individual. As Mr Anderson said to the Home Affairs Committee, "in peacetime we have never accepted the power of the Home Secretary simply to place someone under Executive constraint for two years without providing for some relatively speedy process of appeal".[7]

11. An Opposition amendment was moved at report stage in the House of Commons to bring the Secretary of State's power to issue a TEO under judicial supervision but the amendment was defeated on a division.[8] The Minister for Security and Immigration, James Brokenshire MP, stated that "with responsibility for all other national security and counter-terrorism matters, it is the Secretary of State who is best placed to make an informed judgment about whether a temporary exclusion order is appropriate in each case".[9] With respect to the Minister, this is not in doubt. Of course it is the Secretary of State who must decide whether a TEO is necessary but, given the gravity of the impact of a TEO on an individual, it is constitutionally inappropriate for that decision not to be subject to direct judicial oversight. The analogy with TPIMs is apt: a TPIM (like a TEO) is made by the Secretary of State but under the Terrorism Prevention and Investigation Measures Act 2011, section 6, the court must thereafter determine whether or not the Secretary of State's decision to impose a TPIM is "obviously flawed". **We recommend that the bill should be amended to provide for appropriate judicial oversight of temporary exclusion orders.**

12. We welcome the fact that the Secretary of State said at third reading in the House of Commons that "the Government have committed to look very carefully at judicial oversight of the temporary exclusion order power. We will return to this issue in the House of Lords".[10]

Data Retention

13. Part 3 of the bill concerns data retention. It amends the Data Retention and Investigatory Powers Act 2014, enabling the Secretary of State to require internet service providers to retain data that would allow relevant authorities to identify the individual or the device that was using a particular internet protocol ("IP") address at any given time.

14. Whether existing data retention powers should be enhanced or not is a contested matter. **The constitutional issue arising is that a semi-fast-**

---

5 Oral evidence taken before the House of Commons Home Affairs Committee, 3 December 2014 (Session 2014–15), Q 138 (David Anderson)

6 *Ibid.*, Q 138

7 *Ibid.*, Q 140

8 HC Deb, 6 January 2015, col 211

9 HC Deb, 6 January 2015, col 207

10 HC Deb, 7 January 2015, col 340

track bill is being used to amend sensitive and controversial provisions contained in earlier legislation that was also fast-tracked. Moreover, the fast-tracking of the Data Retention and Investigatory Powers Act 2014 was undertaken expressly on the basis that it did "not enhance data retention powers"[11] but merely placed on a firm legal footing powers that the UK had already provided for but the basis for which had been found unlawful by the Court of Justice of the European Union.

15. **The bill seeks to enhance the data retention powers provided for in the fast-tracked Data Retention and Investigatory Powers Act 2014. The House may wish to consider whether the semi-fast-tracking of this bill allows Parliament sufficient time to scrutinise whether the enhanced powers are proportionate.**

[11] Explanatory Notes to the Data Retention and Investigatory Powers Bill, [HL Bill 37 (2014–15)-EN] paragraph 36