

# Country Report for South Africa

## I ADMINISTRATIVE DETENTION

### a) Preliminary remarks

1. Although there is a long history of counter-terrorism detention in respect of apartheid, the Protection of Constitutional Democracy against Terrorist and Related Activities Act (No 33 of 2004) does not contain any provision for detention without trial of terrorist suspects. Several prior draft Bills contained such a provision, but this clause was ultimately rejected.<sup>1</sup> This has led to South Africa's counter-terrorism law being classified as 'among the least restrictive'.<sup>2</sup>
2. As a result, detention only occurs in conformity with the principles and procedures of the criminal law. There is a general provision in the South African Constitution prohibiting detention without trial in s 12(1)(b). In addition, the Constitutional Court in *De Lange v Smuts*<sup>3</sup> set its face clearly against detention without trial:

When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in s 12(1)(b) is the notorious administrative detention without trial for purposes of political control.<sup>4</sup>

3. However, there is some provision for limited detention without trial following the declaration of a 'state of emergency' in s 37 of the South African Constitution. A state of emergency can be declared by an Act of Parliament<sup>5</sup> only when two conditions are satisfied: 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and...the declaration is necessary to restore peace and order.'<sup>6</sup> Since the Constitution was enacted in 1997, a state of emergency has not been declared in South Africa.<sup>7</sup> Should such a state of emergency be declared, s 12(1)(b) is *not* listed as one of the 'non-derogable rights', so detention without trial could theoretically be instituted in a state of emergency.

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<sup>1</sup> For an historical review see M Cowling, 'The Return of Detention without Trial? Some Thoughts and Comments on the Draft Anti-Terrorism Bill and the Law Commission Report' (2000) 13 South African Journal of Criminal Justice 344. See also K Roach, 'A Comparison of South African and Canadian Anti-Terrorism Legislation' (2005) 127 South African Journal of Criminal Justice 127.

<sup>2</sup> A Hubschle, 'South Africa's Anti-Terror Law: Among the Least Restrictive?' (2005) 14(4) African Security Review 105.

<sup>3</sup> *De Lange v Smuts* NO 1988(3) SA 785 (CC).

<sup>4</sup> *ibid*, Ackerman J.

<sup>5</sup> State of Emergency Act (No 64 of 1997).

<sup>6</sup> Constitution of South Africa, s 37(1)(a)-(b).

<sup>7</sup> KL Scheppele, 'Exceptions that Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life' in JK Tullis (ed), *The Limits of Constitutional Democracy* (Princeton University Press, New Jersey 2010), 132.

4. The rights of those detained without trial under such circumstances are laid down in s 37(6)-(7). There are two constitutionally mandated opportunities for judicial review of the detention. Section 37(6)(e) requires judicial review no later than ten days after the commencement of detention. Thereafter, the detainee may commence proceedings for a further judicial review pursuant to s 37(6)(f). The right to review includes the right of the detained person to appear before the court in person and to make representations against continued detention.<sup>8</sup> The detainee must be furnished with written reasons for detention two days prior to any hearing.<sup>9</sup> Once a person has been detained without trial in a state of emergency, and their release is ordered by a court, they cannot be re-detained.<sup>10</sup>
5. States of emergency are temporally finite, lasting for 21 days in the first instance, and can only be extended by the National Assembly for a maximum period of three months at a time.<sup>11</sup>
6. The remainder of this section deals with the general provisions on arrest and detention under South African criminal law.

#### **b) Threshold questions**

7. The law and procedure of arrest is governed by ss 39-53 of the Criminal Procedure Act (No. 51 of 1977). Arrest can occur with or without a warrant. Arrest (in physical terms) occurs when either the arrestee submits to arrest or, alternatively, when their body is 'forcibly confined'.<sup>12</sup> The effect of an arrest is that the arrestee is 'in lawful custody and... shall be detained in custody until he is lawfully discharged or released from custody.'<sup>13</sup> An arrested person must be immediately informed verbally of the reason for arrest (where arrest is without warrant) or furnished with a copy of the warrant on demand (where arrest occurs with a warrant).<sup>14</sup>
8. Section 35 of the South African Constitution sets out further specific rights for 'arrested, detained, and accused persons'. Section 35(1) sets out the rights of arrested persons, and s 35(2) sets out the rights of detained persons. In procedural terms, arrested persons have the right to remain silent and to be brought before a court within 48 hours, whereas detained persons have the right to legal counsel of their own choosing, to prompt information regarding the reason for detention, to challenge the lawfulness of the detention before a court, and to be released where their detention is unlawful.

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<sup>8</sup> Constitution of South Africa, s 37(6)(g).

<sup>9</sup> Constitution of South Africa, s 37(6)(h).

<sup>10</sup> Constitution of South Africa, s 37(7).

<sup>11</sup> Constitution of South Africa, s 37(2)(b).

<sup>12</sup> Criminal Procedure Act (No 51 of 1977), s 39(1).

<sup>13</sup> Criminal Procedure Act (No 51 of 1977), s 39(3).

<sup>14</sup> Criminal Procedure Act (No 51 of 1977), s 39(2).

### **c) Compensation for unlawful detention**

9. Damages for the tort of ‘wrongful’ or ‘unlawful’ detention are generally available, and the High Court has jurisdiction over quantum of damages. In the case of *Freeman*<sup>15</sup> Jones J followed the approach in *Seria v Minister of Safety and Security*<sup>16</sup> and held that:

the awards of the courts should reflect the value which our society places on rights to liberty and dignity and the seriousness of exposing a person to humiliation, degradation and diminution of his or her sense of personal worth, insofar as it is possible to do so in monetary terms.

10. The South African Constitution also provides mandatory safeguards and remedies (such as release).
11. Finally, the common law of South Africa recognises a general right not to be unlawfully detained: ‘*interdictum de libero homine exhibendo*, the common-law remedy used to release a person being unlawfully detained’. This is broadly equivalent to *habeas corpus*.<sup>17</sup>

## **II IMMIGRATION DETENTION**

### **a) Preliminary remarks**

#### *i) Immigration Act and Refugees Act*

12. The Immigration Act (No. 13 of 2002) and the Refugees Act (No. 130 of 1998) now make up the legal framework governing immigration detention in South Africa. Both have been subject to amendment in recent years, but the provisions governing immigration detention remain the same.

#### *ii) Bill of Rights*

13. The majority of the provisions of the South African Bill of Rights apply to all persons in the country, regardless of nationality. Section 12(1)(a) protects the ‘right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause’. Section 35(2) targets arbitrary detention and sets out basic protections that apply to all detained individuals; in addition, administrative detention (including immigration detention) is subject to the requirements in s 33 regarding lawful, reasonable and procedurally fair administrative action. The courts consider that any interference with personal liberty is therefore *prima facie* unlawful,<sup>18</sup> with the burden resting on the State to justify detention.

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<sup>15</sup> *Freeman v Minister of Safety and Security and Minister of Justice and Constitutional Affairs* [2006] ZAECHC 9 (3 March 2006).

<sup>16</sup> *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 (C).

<sup>17</sup> *Coetzee v National Commissioner of Police and Another* 2013 (11) BCLR 1227 (CC) (29 August 2013), [14].

<sup>18</sup> *Arse v Minister of Home Affairs (25/10)* [2010] ZASCA 9.

## **b) Decision to detain**

### *i) Immigration Act*

14. The South African Supreme Court of Appeal has held that the Department of Home Affairs has a discretionary power to detain under the Immigration Act;<sup>19</sup> however, as a result of the protections contained in the Bill of Rights, this discretion ought to be construed in favour of liberty where possible.<sup>20</sup>
15. Foreigners must fulfil the prescribed conditions for entry to South Africa, or they will have entered illegally (the term used is ‘illegal foreigner’) and will be automatically subject to detention and removal – to this end, they must obtain either a temporary or a permanent residence permit. An asylum permit falls under the former category.
16. Section 34(1) of the Immigration Act provides that, without need for a warrant, an immigration officer may arrest an illegal foreigner and cause them to be deported; they may also detain the foreigner pending deportation. Similarly, s 41(1) of the Immigration Act provides that if an immigration or police officer is not satisfied on reasonable grounds that a person is entitled to be in the Republic as a citizen, permanent resident or allowed foreigner, they may be interviewed and subsequently detained under s 34.
17. The Immigration Act and accompanying Immigration Regulations provide for a number of further rules and procedural safeguards regarding the decision to detain suspected illegal foreigners. In particular:
  - detention pursuant to s 34(1) must be pursuant to a warrant issued by an immigration officer;<sup>21</sup>
  - police and immigration officers may detain an individual for up to 48 hours to verify their immigration status;<sup>22</sup>
  - however, no one may be detained for longer than 48 hours for purposes other than deportation;<sup>23</sup>
  - a detainee may at any time request that their detention be confirmed as lawful by a court warrant – if a warrant is not issued within 48 hours of the request, they must be released;<sup>24</sup>

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<sup>19</sup> *Jeebhai v Minister of Home Affairs* (139/08) [2009] ZASCA 35.

<sup>20</sup> *Ulde v Minister of Home Affairs* (320/08) [2009] ZASCA 35.

<sup>21</sup> Immigration Regulations (2005), r. 28(1).

<sup>22</sup> Immigration Act (No 13 of 2002), ss 34, 41.

<sup>23</sup> Immigration Act (No 13 of 2002), s 34.

<sup>24</sup> Immigration Act (No 13 of 2002), s 34. Note that this requirement seems to go simply to the lawfulness of the detention decision itself under the Immigration Act – it does not appear necessary to consider alternatives to detention, etc.

- a detainee must be informed of these rights in language understood by the individual where possible, practicable and reasonable;<sup>25</sup>
- detention must not exceed 30 days without a warrant of the court – the court may extend the period for a maximum of 90 days ‘on good and reasonable grounds’; and
- a detainee must be notified of the intention to extend their detention and given an opportunity to make representations as to why it should not be extended.<sup>26</sup>

## *ii) Refugees Act*

18. The Refugees Act establishes a legal framework detailing separate procedures for the detention of asylum-seekers and refugees, who do not fall within the scope of the Immigration Act. Despite this, a report on immigration detention practice in South Africa has raised concerns that in practice the Immigration Act is often applied to asylum-seekers and refugees, resulting in some detainees being deported to countries where they may face persecution contrary to the prohibition on refoulement.<sup>27</sup>
19. Asylum-seekers are not subject to the same discretionary powers of detention under South African law as suspected illegal foreigners, and may (in theory, and subject to the qualification above) only be detained in the circumstances set out in the Refugees Act. In terms of detention regulation, the relevant provisions are as follows.
20. When the Minister withdraws an asylum permit, they may cause the relevant individual to be arrested and detained pending final adjudication of the asylum claim.<sup>28</sup> Again, a person in possession of a valid asylum permit cannot be arrested and detained under Immigration Act powers as they are not an ‘illegal foreigner’. The withdrawal of an asylum permit is therefore crucial to enlivening the power to detain. Importantly, this means asylum-seekers cannot be lawfully detained pending determination of their application. Thus, in *Arse v Minister of Home Affairs*,<sup>29</sup> the Supreme Court of Appeal held that asylum-seekers have the right to remain free from detention pending the outcome of their asylum applications, and ordered the immediate release of the applicant along with an asylum-seeker permit. Furthermore, the Court in *Bula v Minister of Home Affairs*<sup>30</sup> held that persons otherwise liable to detention as illegal foreigners who make (or evince an intention to make) an application for asylum engage the protective provisions of the Refugees Act and must accordingly be released.

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<sup>25</sup> Immigration Act (No 13 of 2002), s 34.

<sup>26</sup> Immigration Regulations (2005), r. 28(4).

<sup>27</sup> Gina Snyman, *Monitoring Immigration detention in South Africa* (Johannesburg: Lawyers for Human Rights, 2010).

<sup>28</sup> Refugees Act (No 130 of 1998), s 23.

<sup>29</sup> *Arse v Minister of Home Affairs* [2010] ZASCA 9.

<sup>30</sup> 2012 (4) SA 560 (SCA).

21. An asylum-seeker may not be detained for longer than is ‘reasonable and justifiable’, and any detention of longer than 30 days must be reviewed by a judge of the High Court.<sup>31</sup>

**c) Review of and challenges to detention**

*i) Specific statutory provisions*

22. Under the Refugees Act, following the initial review by a High Court Judge, an asylum-seeker’s detention must be further reviewed every 30 days.<sup>32</sup> No other provision appears to exist for challenging the decision to detain.
23. Under the Immigration Act, there is a procedure for requesting a review by the relevant Minister of a finding that a person is an illegal foreigner.<sup>33</sup> This does not in terms cover the subsequent decision to detain; however, the section goes on to provide that a person aggrieved by any other decision under the Immigration Act that ‘materially and adversely affects [their] rights’ may make an application to the Director-General for review or appeal of that decision.<sup>34</sup> The Director-General will then confirm, reverse or modify the decision; an applicant aggrieved by this further decision may apply to the Minister for review or appeal.<sup>35</sup> While s 34 (the section detailing detention powers) refers to the need to inform an illegal foreigner of their right to appeal the decision to deport them, it does not refer to the right to appeal the decision to detain. It is therefore possible, though by no means clear, that a statutory right of appeal to the Director-General and hence to the Minister exists in relation to this decision.

*ii) Bill of Rights*

24. As noted above, detainees also enjoy the protections in the Bill of Rights of the South African Constitution, including just administrative action,<sup>36</sup> access to the courts,<sup>37</sup> and a list of due process rights under s 35. Section 35(2)(d) in particular contains a codified version of the writ of *habeas corpus* – everyone detained has the right to ‘challenge the lawfulness of the detention before a court and, if the detention is unlawful, to be released’. Detainees may therefore challenge their detention on this basis, alleging that the circumstances under the relevant statute providing for use of the detention power have not been made out.

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<sup>31</sup> Refugees Act (No 130 of 1998), s 29.

<sup>32</sup> Refugees Act (No 130 of 1998), s 29.

<sup>33</sup> See Refugees Act (No 130 of 1998) as amended in 2004, s 8(1).

<sup>34</sup> Refugees Act (No 130 of 1998) as amended in 2004, s 8(3)-(4).

<sup>35</sup> Refugees Act (No 130 of 1998) as amended in 2004, s 8(4)-(7).

<sup>36</sup> Constitution of South Africa, s 33.

<sup>37</sup> Constitution of South Africa, s 34.

25. Where a detainee alleges that one of the requirements under the Immigration Act or Refugees Act has been breached, it is for the Department of Home Affairs to either justify the detention or release the individual.<sup>38</sup>
26. It has been reported that in practice many detainees are unaware of the procedural safeguards under the Immigration Act or of the availability of judicial review.<sup>39</sup> The same report raises concerns regarding widespread disregard for the procedural protections under the Immigration Act. It is therefore possible that the availability of remedial procedures in principle does not match their availability in practice.
27. Where a constitutional challenge to detention is successful, it appears that the usual remedy is an order for immediate release. For example, in the cases of *Aruforse v Minister of Home Affairs*<sup>40</sup> and *Hassani v Minister of Home Affairs*,<sup>41</sup> the court ordered the immediate release of individuals who had been detained for more than 120 days in breach of Immigration Act safeguards. Similarly, in *A v Minister of Home Affairs*<sup>42</sup> the High Court found that the applicant's detention had been rendered unlawful by the failure of the immigration officer to obtain a warrant to extend detention beyond 30 days; a warrant obtained later than this was inadequate, and immediate release was ordered.

#### **d) Compensation for unlawful detention**

28. Section 38 of the Bill of Rights provides that detainees have the right to allege before a court that one of their rights has been infringed or threatened, and that the court may consequently grant 'appropriate relief'. Appropriate relief in detention cases appears generally to consist of an order for immediate release; however, it is possible that compensation is also available under this provision.
29. There is also a private law action for delict – the *actio iniuriarum* – which may be used to vindicate rights to liberty by giving the aggrieved party monetary compensation. Such an action may be brought against public authorities.<sup>43</sup>

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<sup>38</sup> *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC).

<sup>39</sup> Gina Snyman, *Monitoring Immigration detention in South Africa* (Johannesburg: Lawyers for Human Rights, 2010).

<sup>40</sup> 2010 (6) SA 579 (GSJ).

<sup>41</sup> (01187/10) SGHC (5 February 2010).

<sup>42</sup> (101/10) SGHC (17 March 2010).

<sup>43</sup> *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC).

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

#### a) Decision to detain

30. The ability to detain a person with mental illness is governed by the Mental Health Care Act (No. 17 of 2002). Pursuant to s 32, a person may be ‘provided with care, treatment and rehabilitation services without [their] consent... on an outpatient or inpatient basis’ only if there is a reasonable belief that they have a mental illness of such a nature that:
- they are likely to inflict seriously harm on themselves or others, or their care, treatment and rehabilitation is necessary for the protection of their financial interests or reputation; and
  - the person is incapable of making an informed decision on the need for care, treatment and rehabilitation and is unwilling to receive the treatment required.
31. For persons to be taken into involuntary care, an application must be made to the head of the health establishment. An application may be made by the spouse, next of kin, partner, associate, parent or guardian of the person concerned (unless these parties are unwilling, incapable or unavailable, in which case the health care provider may make the application).<sup>44</sup>
32. The person will then be examined by two medical practitioners to decide whether the criteria identified above are met.<sup>45</sup> If the practitioners confirm that the person meets these requirements and the head of the health establishment grants the application for involuntary care, the person may be detained for care, treatment or rehabilitation – along with further assessment by medical practitioners – for a 72-hour period.<sup>46</sup>
33. After the 72-hour period, the head of the health establishment must decide within 24 hours whether further involuntary care is needed.<sup>47</sup> If not, the patient must be discharged immediately unless they consent to further care.<sup>48</sup> Conversely, if it is decided that the patient warrants further involuntary care, a request must be submitted to the Review Board within seven days.<sup>49</sup> The Review Board will then have 30 days to decide whether or not to grant the request based on the same criteria set out above.<sup>50</sup>
34. If the person is to be cared for, treated and rehabilitated on an inpatient basis (i.e. detained), they must be either kept in or transferred to a psychiatric hospital until the Review Board makes its

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<sup>44</sup> Mental Health Care Act (No 17 of 2002), s 33(1)(a). Note that if the patient is under the age of 18 then the application must be made by the parent or guardian of the user: s 33(2)(a)(i).

<sup>45</sup> Mental Health Care Act (No 17 of 2002), s 33(4).

<sup>46</sup> Mental Health Care Act (No 17 of 2002), s 34(1).

<sup>47</sup> Mental Health Care Act (No 17 of 2002), s 34(2).

<sup>48</sup> Mental Health Care Act (No 17 of 2002), s 34(3)(a).

<sup>49</sup> Mental Health Care Act (No 17 of 2002), s 34(3)(c).

<sup>50</sup> Mental Health Care Act (No 17 of 2002), s 34(7).

decision.<sup>51</sup> However, inpatient care is effectively a measure of last resort: if at any time the head of the health establishment comes to the view that the person is fit to be an outpatient, they must discharge them and inform the Review Board in writing.<sup>52</sup>

35. The person subject of the application has the right to be heard before the Review Board.<sup>53</sup> If the Review Board grants the request, it must submit a written notice for consideration by a High Court.<sup>54</sup>

## **b) Review of and challenges to detention**

### *i) Appeal to Review Board and High Court*

36. The patient or their representative may lodge an appeal to the Review Board within 30 days of the decision of the head of the health establishment.<sup>55</sup> The patient has the right to make written and oral representations on the merits of the appeal.<sup>56</sup>
37. The Review Board must give written notice of the reasons for its decision to the patient.<sup>57</sup> If the Review Board upholds the appeal then all treatment will be stopped and the patient discharged.<sup>58</sup> If the Review Board does not uphold the appeal then it must submit its decision and the relevant documents to the Registrar of a High Court for review, which must take place within 30 days.<sup>59</sup> The High Court may order further hospitalisation of the patient, or their immediate discharge.<sup>60</sup>

### *ii) Periodic review*

38. There is also compulsory periodic review of patients in involuntary care.<sup>61</sup> Six months after they were taken into care and every 12 months thereafter the head of the health establishment must review the patient's case and submit a summary to the Review Board, which must make a decision within 30 days as to whether to allow the continued hospitalisation of the patient or order their immediate discharge.<sup>62</sup> The head of the health establishment must, in their summary, state whether other care, treatment or rehabilitation that is less restrictive on the right of the

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<sup>51</sup> Mental Health Care Act (No 17 of 2002), s 34(4).

<sup>52</sup> Mental Health Care Act (No 17 of 2002), s 34(5).

<sup>53</sup> Mental Health Care Act (No 17 of 2002), s 34(7).

<sup>54</sup> Mental Health Care Act (No 17 of 2002), s 34(7).

<sup>55</sup> Mental Health Care Act (No 17 of 2002), s 35(1).

<sup>56</sup> Mental Health Care Act (No 17 of 2002), s 35(2)(b).

<sup>57</sup> Mental Health Care Act (No 17 of 2002), s 35(2)(d).

<sup>58</sup> Mental Health Care Act (No 17 of 2002), s 35(3).

<sup>59</sup> Mental Health Care Act (No 17 of 2002), ss 35-36.

<sup>60</sup> Mental Health Care Act (No 17 of 2002), s 36.

<sup>61</sup> Mental Health Care Act (No 17 of 2002), s 37.

<sup>62</sup> Mental Health Care Act (No 17 of 2002), s 36(c).

patient to movement, privacy and dignity is available. The Review Board must give written reasons for its decision to the patient.

## **IV MILITARY DETENTION**

### **a) Preliminary remarks**

39. South Africa's military law is found in the South African Defence Act (No. 44 of 1957) – primarily in its first schedule, the Military Discipline Code, which provides for the military criminal law (as amended by numerous subsequent Acts). The Military Discipline Supplementary Measures Act (No. 16 of 1999) enacts amendments to the military court system as well as providing for the pre-trial and post-trial procedural framework.

### **b) Threshold questions**

40. Sections 120-121 of the Military Discipline Code provide for the establishment of detention barracks both inside and outside South Africa and the formulation of regulations to manage such facilities.<sup>63</sup> Persons charged or to be charged with an offence under the Code may be detained there while awaiting trial or confirmation of sentence.<sup>64</sup> Detention barracks are not subject to independent oversight, but only to an internal complaints mechanism.<sup>65</sup> There is not a great deal of information available about the functioning of these barracks; however, it is possible that questions may arise as to whether and under what circumstances confinement there would amount to detention.

### **c) Decision to detain**

#### ***i) Pre-Trial procedures***

41. Any person arrested under the relevant sections of the Military Discipline Code must be brought before a military court within two days of their arrest.<sup>66</sup> The military court must ensure that the accused understands their rights to legal representation and a disciplinary hearing. Every person subject to the Military Code has the right to legal representation when appearing before a military court.<sup>67</sup>

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<sup>63</sup> See Defence Act (No 44 of 1957), s 120 and following.

<sup>64</sup> Defence Act (No 44 of 1957), s 121.

<sup>65</sup> Lucas Mutingh, *Guide to the UN Convention against Torture in South Africa* (2<sup>nd</sup> ed, Civil Society Prison Reform Initiative, Community Law Centre, 2011) <<http://cspri.org.za/publications/legal-guides/Guide%20to%20UN%20Convention%20Against%20Torture%20in%20South%20Africa.pdf>> accessed 21 February 2014.

<sup>66</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 29(1).

<sup>67</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 23.

42. In the alternative, a person subject to the Military Code – other than an officer or warrant officer – may elect to be heard by a commanding officer for any military disciplinary offence. The commanding officer then has the power to sentence the offender to a limited range of punishments.<sup>68</sup>
43. The court may remand the case, subject to the condition that it must release the detainee if the interests of justice so permit. Reasons must be given for deciding that a detainee is to remain in custody, and the remand limit may not exceed seven days unless a fresh order for remand is issued by the court.<sup>69</sup> Where a person is brought before a commanding officer rather than a court, the commanding officer has the same powers and duties in relation to remand.<sup>70</sup>
44. If an accused is not tried, heard or otherwise dealt with within fourteen days after the date of the first remand and remains in custody, this fact must be reported by a commanding officer or senior prosecution counsel to the local representative of the Adjutant General.<sup>71</sup> It is not clear what the Adjutant General may do on receiving such a report.
45. A military court may direct that a preliminary investigation be held in respect of allegations against the accused. Before any evidence is recorded in a preliminary investigation, the accused must be informed of the offence in respect of which the investigation is being held, of the investigatory and disclosure nature of the proceedings, of the fact that the proceedings will not constitute a trial, and of their right to cross-examine witnesses, call witnesses, and give evidence.<sup>72</sup> A preliminary investigation does not affect the rules governing the accused's detention in any way.

*ii) Trial procedures*

46. Trials conducted in a military court will generally be conducted in open court, subject to certain exceptions.<sup>73</sup>
47. Where the trial has commenced and is adjourned, if the interests of justice allow, the accused must be released; if they are to be kept in custody, reasons must be given and remand shall not exceed fourteen days. The senior prosecution counsel must report the fact of an accused's detention in custody to the local representative of the Adjutant General where this exceeds fourteen days.<sup>74</sup>

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<sup>68</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 11.

<sup>69</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 29(3).

<sup>70</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 29(4).

<sup>71</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 29(8).

<sup>72</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 30(4).

<sup>73</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 33(3).

<sup>74</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 33(4), (6).

#### **d) Review of and challenges to detention**

48. There does not appear to be any provision for review or appeal of the decision to remand a person subject to the Military Code in custody prior to trial.
49. A person who is convicted of an offence under the Military Code and sentenced has the right to ‘automatic, speedy and competent review of the proceedings’.<sup>75</sup> Section 26 sets out the duties of the reviewing authority, which include drawing attention to matters requiring comment and recommending to the appropriate authority the taking of any remedial action required.
50. Where a military court has convicted an accused, it must inform them of the review authority to whom the record of proceedings will be submitted for review; of their right to make written representations to that authority; and of their right to approach the Court of Military Appeals or the High Court.<sup>76</sup>
51. Every sentence of imprisonment must be reviewed by a Court of Military Appeals and shall not be executed until that review has been completed.<sup>77</sup>
52. In imprisonment cases, where an offender has been convicted by a military court, the presiding judge or commanding officer shall as soon as possible submit the record of the trial proceedings to the Director: Military Judicial Reviews.<sup>78</sup> A convicted person may as soon as possible, but not later than 14 days after the announcement of sentence, provide the Director: Military Judicial Reviews with representations in writing concerning the facts or law of the case.<sup>79</sup> Where the 14-day period is impractical, it may be extended, with reasons, by the local representative of the Adjutant General.<sup>80</sup>
53. Subject to exceptions, every person convicted and sentenced by a military court shall be detained in custody pending the review of their case.<sup>81</sup> However, the local representative of the Adjutant General may order release subject to conditions.<sup>82</sup>

#### **e) Compensation for unlawful detention**

54. The majority of the provisions of the Bill of Rights in the South African Constitution apply to all persons in the country, regardless of nationality. Section 12(1)(a) protects the ‘right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause’. Section 35(2) targets arbitrary detention and sets out basic protections that

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<sup>75</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 25.

<sup>76</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 33.

<sup>77</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(2).

<sup>78</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(6).

<sup>79</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(7).

<sup>80</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(8).

<sup>81</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(9).

<sup>82</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(11).

apply to all detained individuals, in addition to which administrative detention (including immigration detention) is subject to the s 33 requirements regarding lawful, reasonable and procedurally fair administrative action. Section 38 further provides that detainees have the right to allege before a court that one of their rights under the Bill of Rights has been infringed or threatened, and that the court may consequently grant ‘appropriate relief’, including a declaration of rights.

55. There is also a private law action for delict – the *actio iniuriarum* – which may be used to vindicate rights to liberty by giving the aggrieved party monetary compensation.

## **V POLICE DETENTION**

### **a) Preliminary remarks**

56. Some powers of detention by police are set out in the section on administrative detention above. The following section provides information about two other relevant regimes: police powers relating to crowd control, and police powers relating to detention after arrest (with a particular focus on detention without charge).

## **POLICE POWERS RELATING TO CROWD CONTROL**

### **a) Regulation of Gatherings Act**

57. The relevant legislation appears to be the Regulation of Gatherings Act (No. 205 of 1993). This provides for the notification of intended demonstrations to designated liaison officers, and for meetings prior to the occurrence of the demonstration to ensure that both police and participants are aware of the intended purposes, scale and scope of the gathering.
58. Section 9 of the Act details the powers of police. It empowers police to prevent people participating in a gathering from proceeding to a different place or deviating from the route specified,<sup>83</sup> and to ‘take such steps, including negotiations with the relevant persons, as are in the circumstances reasonable and appropriate to protect persons and property.’<sup>84</sup> If the police officer has reasonable grounds to believe that danger to persons or property resulting from the demonstration cannot be avoided by these steps, they may also order the participants to disperse within a specified (and reasonable) time<sup>85</sup> and then, if they fail to comply, order officers under their command to disperse the participants, including by the use of force but excluding the use of ‘weapons likely to cause serious bodily injury or death.’<sup>86</sup> The degree of force which may be

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<sup>83</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(1)(b).

<sup>84</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(1)(e).

<sup>85</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(2)(a).

<sup>86</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(2)(b).

used must not be greater than is necessary for dispersing the persons gathered, and must be ‘proportionate to the circumstances of the case and the object to be attained.’<sup>87</sup> It is interesting to consider whether the link made between the use of force and the dispersal of the demonstration suggests that force could *not* be used under the Act to contain protesters in a ‘kettle’.

#### **b) Standing Order No. 262**

59. One South African commentator has suggested that it was only in the year following the passage of the Act that the ‘transformation’ of the South African police force began in earnest.<sup>88</sup> A critical turning point with respect to crowd control was the introduction in 1997 of a South African Police Service (‘SAPS’) policy document which aimed to emphasise ‘crowd management’ rather than ‘crowd control’.<sup>89</sup> In 2002 the policy document became Standing Order (General) 262, ‘Crowd Management during Gatherings and Demonstrations’.<sup>90</sup> The stated purpose of the Order, which operates in tandem with the Regulation of Gatherings Act, is ‘to regulate crowd management during gatherings and demonstrations in accordance with the democratic principles of the Constitution and acceptable international standards.’<sup>91</sup>
60. The Order emphasises the avoidance of conflict by pro-active community engagement, and the importance of ensuring that crowd management is approached with a clear plan and clear structures for communication and command. In particular, the Order provides that ‘[t]he use of force must be avoided at all costs and members deployed for the operation must display the highest degree of tolerance’.<sup>92</sup> It further provides that, where ‘the use of force is unavoidable’ following multiple warnings, it must be aimed at de-escalating the conflict, minimal to achieve this goal, and reasonable and proportionate in the circumstances.<sup>93</sup> The Order also emphasises the importance of reporting and debriefing. Nothing specific is said in the Order in relation to arrest or detention.
61. Interestingly, at around the same time the Order was put in place, the units in the SAPS responsible for crowd management – Public Order Police Units – were restructured into Area

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<sup>87</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(2)(c).

<sup>88</sup> Bilkis, Omar (Institute for Security Studies), ‘Crowd Control: Can our police service still deliver?’ (2006) 15 South African Crime Quarterly 7, <<http://www.issafrika.org/uploads/CQ15OMAR.PDF>> accessed 19 February 2014.

<sup>89</sup> *ibid.* A copy of the document can be found at <[https://web.up.ac.za/sitefiles/file/47/15338/SKMBT\\_28311061513201.pdf](https://web.up.ac.za/sitefiles/file/47/15338/SKMBT_28311061513201.pdf)> accessed 19 February 2014.

<sup>90</sup> A copy of the document can be found at <[http://web.up.ac.za/sitefiles/file/47/15338/SKMBT\\_28311061513210.pdf](http://web.up.ac.za/sitefiles/file/47/15338/SKMBT_28311061513210.pdf)> accessed 19 February 2014.

<sup>91</sup> Standing Order (General) 262, para 1(1) (‘Background’).

<sup>92</sup> Standing Order (General) 262, para 11(1) (‘Execution’).

<sup>93</sup> Standing Order (General) 262, para 11(3) (‘Execution’).

Crime Combating Units, with a core focus on crime prevention and combating. This raised concerns about the loss of specialist crowd management skills.<sup>94</sup>

## **POLICE POWERS RELATING TO DETENTION AFTER ARREST**

### **a) Threshold questions**

62. See above in the section on administrative detention.

### **b) Decision to detain**

63. A police officer may make an arrest without a warrant only under the circumstances set out in s 40 of the Criminal Procedure Act (No. 51 of 1977). These include (but are not limited to):

- where the person commits or attempts to commit an offence in the officer's presence;
- where the person is reasonably suspected of having committed one of a list of specified offences, including murder, rape, robbery, kidnapping, theft, fraud, or other offences the punishment for which may be imprisonment exceeding six months without the option of a fine;
- where the person is in possession of something reasonably suspected to be stolen property, and is reasonably suspected of having committed an offence in relation to it; and
- where the person is found in any place by night 'in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence'.

### **c) Review of and challenges to detention**

64. A person who has been arrested must be informed of their right to apply for bail.<sup>95</sup> If a person is not released because no charge is brought against them or bail is denied, they must be brought before a court no later than 48 hours after the arrest.<sup>96</sup> This conforms with the provisions of s 35(1) of the South African Constitution, which provide that a person who has been arrested has the right to be brought before a court no later than 48 hours after their arrest.<sup>97</sup> In addition, s 35(2) guarantees to 'everyone who is detained' the right to be informed promptly of the reasons

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<sup>94</sup> Bilkis, Omar (Institute for Security Studies), 'Impact of SAPS Restructuring on Public Order Policing' (2006) South African Crime Quarterly 31. In 2006, the ACCUs were geographically restructured into 'Crime Combating Units' or CCUs.

<sup>95</sup> Criminal Procedure Act (No 51 of 1977), s 50(1)(b).

<sup>96</sup> Criminal Procedure Act (No 51 of 1977), s 50(1)(c).

<sup>97</sup> Constitution of South Africa, s 35(1)(d).

for detention,<sup>98</sup> to access legal representation<sup>99</sup> and to challenge the lawfulness of detention in person before a court.<sup>100</sup>

65. At their first court appearance, the person has the right to be charged or to be informed of the reasons for their continued detention.<sup>101</sup> If they are not so charged or informed, they must be released.<sup>102</sup> A person who has been arrested otherwise than in connection with a committed offence also has the right to have the court adjudicate on the cause for their arrest.<sup>103</sup>
66. If the person is charged, they have the right to apply to be released on bail.<sup>104</sup> The court may postpone the ability to apply for bail for a period not exceeding seven days at a time if it is of the opinion that it is necessary to provide the State with a reasonably opportunity to procure material evidence which may be lost if bail were granted, or if it is necessary in the interests of justice to do so.<sup>105</sup>
67. Once charged, an accused must be released on bail if the interests of justice so permit.<sup>106</sup> This condition will *not* be satisfied in circumstances where it is likely that that the accused would endanger the safety of the public or a particular person; commit an offence; attempt to evade trial; interfere with witnesses or evidence; or undermine the functioning of the criminal justice system.<sup>107</sup> The court must make its decision by ‘weighing the interests of justice against the right of the accused to his or her personal freedom’.<sup>108</sup>
68. An appeal against a decision to deny bail may be brought to a superior court, which may set aside the decision only if satisfied that it was wrong.<sup>109</sup>

#### **d) Compensation for unlawful detention**

69. An action for damages for unlawful arrest and detention can be brought either at common law or under s 12(1)(a) of the Constitution. A common-law case is based on interference with the liberty of the individual;<sup>110</sup> a constitutional case is based on ‘the unreasonable and unjustifiable

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<sup>98</sup> Constitution of South Africa, s 35(2)(a).

<sup>99</sup> Constitution of South Africa, s 35(2)(b)-(c).

<sup>100</sup> Constitution of South Africa, s 35(d).

<sup>101</sup> Constitution of South Africa, s 35(1)(e); Criminal Procedure Act (No 51 of 1977), s 50(6).

<sup>102</sup> Criminal Procedure Act (No 51 of 1977), s 50(6).

<sup>103</sup> Criminal Procedure Act (No 51 of 1977), s 50(6).

<sup>104</sup> These provisions accord with s 35(1)(f) of the Constitution, which provides that a person brought before the court after arrest must be released ‘if the interests of justice so permit’; see also Criminal Procedure Act (No 51 of 1977), s 60(1).

<sup>105</sup> Criminal Procedure Act (No 51 of 1977), s 50(6).

<sup>106</sup> Criminal Procedure Act (No 51 of 1977), s 60(1).

<sup>107</sup> Criminal Procedure Act (No 51 of 1977), s 60(4).

<sup>108</sup> Criminal Procedure Act (No 51 of 1977), s 60(9).

<sup>109</sup> Criminal Procedure Act (No 51 of 1977), s 65.

<sup>110</sup> *Duarte v Minister of Police* [2013] ZAGPJHC 51, [3], referring to *Minister van Wet en Orde v Mtshoba* 1990 (1) SA 280.

infringement of an individual's right not to be arbitrarily deprived of freedom or to be so deprived without just cause'.<sup>111</sup> In either case, the defendant bears the burden of establishing the lawfulness of both the arrest and the detention.<sup>112</sup> In constitutional cases it is more broadly established that the defendant bears the burden of justifying the deprivation of liberty, whatever form it might have taken.<sup>113</sup> The police officer is then liable for the damage caused by their unlawful act, subject to any specific provisions which might exempt them from liability in particular circumstances.<sup>114</sup>

## VI PREVENTIVE DETENTION

### a) Preliminary remarks

70. There are schemes of preventive detention for convicted and non-convicted persons available under South African law. The regime relating to non-convicted persons is described in the section on administrative detention above; as a result, the remainder of this section is concerned with the preventive detention of persons already convicted of an offence.
71. There are two forms of indeterminate preventive sentences for convicted persons which have been available pursuant to the Criminal Procedure Act 1977: the first relates to 'habitual criminals' and the second to 'dangerous criminals'.

### b) Habitual criminals

72. Pursuant to s 286 of the Criminal Procedure Act, a superior court may declare a person to be a 'habitual criminal'. The declaration may be made if the court is satisfied that the person 'habitually commits offences and that the community should be protected against [them].'
73. Under s 73(6)(c) of the Correctional Services Act (No. 111 of 1998), a person declared a 'habitual offender' may be detained for a period of fifteen years and is ineligible for parole for the first seven. Importantly, the previous version of the Correctional Services Act (being No. 8 of 1959) provided that a 'habitual criminal' could be *indefinitely* detained (with the same seven-year non-

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<sup>111</sup> *Zeeland v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC).

<sup>112</sup> See eg *Duarte v Minister of Police* [2013] ZAGPJHC 51, [3].

<sup>113</sup> See *Zeeland v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC), [24], holding that once the applicant has pleaded unlawful detention under the Constitution the respondent bears the burden of 'justify[ing] the deprivation of liberty, whatever form it may have taken.'

<sup>114</sup> See eg *Minister of Safety and Security v Kruger* [2011] ZASCA 7, dealing with a provision exempting police officers from liability where they unknowingly made an arrest pursuant to a defective warrant. The court held that the effect of the provision was not to preclude an award of damages: the arrest remained unlawful and, 'in accordance with ordinary principles', the officer's employer remained vicariously liable for its consequences.

parole period).<sup>115</sup> The length of imprisonment was therefore a question for the Parole Board, not a judicial authority. Unlike the status of ‘dangerous criminal’ (see directly below) there was no provision for review of the detainee’s status.<sup>116</sup> According to Anderson:

The crime of which the person is convicted is not important, but the list of previous convictions. The cumulative effect of all his crimes, and the threat it holds for the community are the factors which will sway the court. The actual length of time spent in prison then becomes a matter of his conduct whilst being incarcerated and a favourable finding of the Parole Board.<sup>117</sup>

74. In the case of *S v Niemand*, decided in 2001, the Court noted that s 73(6)(c) of the 1998 Act had yet to come into force, meaning that the relevant provisions of the 1959 Act remained operational. The Court found that these provisions were unconstitutional, as they constituted a disproportionate interference with his constitutional right to freedom and security of the person and not to be subjected to cruel, inhumane or degrading punishment.<sup>118</sup> The Court therefore ordered that the words ‘provided that no such prisoner shall be detained for a period exceeding 15 years’ be read into the 1959 Act.<sup>119</sup>
75. It appears that s 73(6)(c) was enacted in its present form by the Correctional Services Amendment Act (No. 25 of 2008).

### **c) Dangerous criminals**

76. Section 286A of the Criminal Procedure Act allows a superior court to declare a person a ‘dangerous criminal’ following conviction if the court is ‘satisfied that the person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him.’<sup>120</sup> The aim of this provision is to protect the public from individuals who suffer from psychopathy or related conditions. Notably, there is no specified list of ‘trigger offences’: as the Supreme Court of Appeal has itself noted, ‘[i]n theory any conviction can do’.<sup>121</sup>
77. Before such a status is imposed on a convicted person the sentencing court must direct an inquiry as to the suitability of imposing the status.<sup>122</sup> The inquiry is conducted by a medical superintendent of a psychiatric hospital, or a psychiatrist of the convicted person’s own choosing, who must compile a report, including as to whether the accused represents a danger to

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<sup>115</sup> *S v Niemand* 2002 (1) SA 21 (CC), [10].

<sup>116</sup> *ibid*, [19].

<sup>117</sup> A Anderson, ‘Preventative Detention in Pre-and Post-Apartheid South Africa: From a Dark Past to a Brighter Future’ (2008), <<http://www.isrcl.org/Papers/2008/Anderson.pdf>> accessed 13 January 2014.

<sup>118</sup> *S v Niemand* 2002 (1) SA 21 (CC).

<sup>119</sup> *ibid*, [32].

<sup>120</sup> A Anderson, ‘Preventative Detention in Pre-and Post-Apartheid South Africa: From a Dark Past to a Brighter Future’ (2008), <<http://www.isrcl.org/Papers/2008/Anderson.pdf>> accessed 13 January 2014.

<sup>121</sup> *S v Bull* [2001] ZASCA 105 (26 September 2001), [7].

<sup>122</sup> Criminal Procedure Act (No 51 of 1977), s 286A(2).

the wellbeing of others.<sup>123</sup> The convicted person is entitled to dispute the findings of the report made in judicial proceedings, and may call and cross-examine relevant witnesses.<sup>124</sup> In the case of *S v Bull* (*'Bull'*),<sup>125</sup> Supreme Court of Appeal ruled that 'in making a predictive judgment of dangerousness the court must consider... the personal characteristics of the accused, as revealed by psychiatric assessment, the facts and circumstances of the case and the accused's history of violent behaviour, particularly the accused's previous convictions.'<sup>126</sup>

78. The result of such a declaration is that the individual is subject to an indeterminate sentence.<sup>127</sup> However, there are procedural safeguards. The court must order that the person be brought before it again on the expiry of a period determined by it to re-assess the prisoner.<sup>128</sup> The court will adopt the same procedure and apply the same criteria as on the initial imposition of the sentence.<sup>129</sup> It may confirm the sentence of imprisonment for an indefinite period, or order the person's release unconditionally or under supervision.<sup>130</sup> If the sentence of indefinite detention is confirmed, the court must fix a further period at the end of which the person must again be brought before it for review. In *Bull*, the Court held that in fixing this period regard should be had to the sentence which would have been imposed as a determinate sentence for the relevant offence. The Court suggested that a period in excess of half this term, or in excess of 20 years if a sentence of life imprisonment would have been imposed, might be unlawful as it 'would deprive the accused of the right to be considered for parole when he might no longer be dangerous.'<sup>131</sup>
79. The constitutionality of the 'dangerous offender' provisions was upheld in *Bull*.

#### **d) Detention for treatment**

80. Section 296 of the Criminal Procedure Act permits a court to detain an individual upon conviction for the purposes of medical treatment. Such a measure would usually be taken 'in addition to or in lieu of any sentence in respect of an offence committed by a person', and would involve detention at a treatment centre established under the Prevention and Treatment of Drug

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<sup>123</sup> Criminal Procedure Act (No 51 of 1977), s 286A(3)(a)(i)-(ii).

<sup>124</sup> Criminal Procedure Act (No 51 of 1977), s 286A(4)(a)-(c).

<sup>125</sup> *S v Bull* [2001] ZASCA 105 (26 September 2001).

<sup>126</sup> *ibid*, [18].

<sup>127</sup> Criminal Procedure Act (No 51 of 1977), s 286B(1)(a).

<sup>128</sup> Criminal Procedure Act (No 51 of 1977), ss 286B(1)(b)-(2).

<sup>129</sup> Criminal Procedure Act (No 51 of 1977), s 286B(4).

<sup>130</sup> Criminal Procedure Act (No 51 of 1977), s 286B(4).

<sup>131</sup> *S v Bull* [2001] ZASCA 105 (26 September 2001), [28].

Dependency Act. It will usually occur where the offender's criminal behaviour is considered to have resulted from their substance addiction.<sup>132</sup>

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<sup>132</sup> A Anderson, 'Preventative Detention in Pre-and Post-Apartheid South Africa: From a Dark Past to a Brighter Future' (2008), <<http://www.isrcl.org/Papers/2008/Anderson.pdf>> accessed 13 January 2014.

# Country Report for Sri Lanka

## I ADMINISTRATIVE DETENTION

### a) Counter-terrorism

1. Terrorism is regulated by the Prevention of Terrorism (Temporary Provisions) Act 1979 ('PTA'), which was made permanent in 1982.
2. Also notable is the Public Security Ordinance 1947 ('PSO') under which, a proclamation of emergency can be made.<sup>1</sup> This is particularly important since the fundamental rights that can be restricted on grounds of public security under the Sri Lankan Constitution, can *only* be restricted under this Ordinance, or the regulations made thereunder.<sup>2</sup> The Governor General may make such emergency regulations as they think necessary, to authorise and provide for the detention of persons.<sup>3</sup> Under the PSO, the Prime Minister may order that public areas be blocked for use,<sup>4</sup> and if anyone violates, or is reasonably suspected of violating such an order, they may be arrested by the police without a warrant.<sup>5</sup> Armed forces may be granted the same powers of arrest as the police during an emergency,<sup>6</sup> in which case they must deliver the person arrested to a police officer within twenty-four hours.<sup>7</sup> No criminal proceedings can be initiated by anyone (including the detainee) without the permission of the Attorney General and no civil proceedings can be initiated at all for anything done in good faith under the emergency regulations,<sup>8</sup> or under the PSO itself.<sup>9</sup> However, this does not take away the right to question regulations or orders made under the PSO, before the Supreme Court.<sup>10</sup>
3. Emergency regulations were finally lifted from Sri Lanka in August 2011 and it is the PTA that is currently used to counter terrorism in the State.

### i) Threshold questions

4. There is no threshold question regarding whether a person has been detained or arrested.

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<sup>1</sup> Public Security Ordinance 1947, s 2.

<sup>2</sup> *Thavaneethan v Dayananda Dissanayake Commissioner of Elections and Ors* (2003) 1 Sri LR 74.

<sup>3</sup> Public Security Ordinance 1947, s 5(2)(a).

<sup>4</sup> Public Security Ordinance 1947, s 16.

<sup>5</sup> Public Security Ordinance 1947, s 18.

<sup>6</sup> Public Security Ordinance 1947, s 12.

<sup>7</sup> Public Security Ordinance 1947, s 20.

<sup>8</sup> Public Security Ordinance 1947, s 9.

<sup>9</sup> Public Security Ordinance 1947, s 23.

<sup>10</sup> *Wicremabandu v Herath and Ors* (1990) 2 Sri LR 348.

*ii) Decision to detain*

5. There is no safeguard under the PTA to inform the detained person of the grounds of their arrest, or to provide them with a lawyer. However, art 13 of the Sri Lankan Constitution, which requires that everyone charged with a crime will have a right to be heard, to be informed of the reasons for their arrest and to be provided with an attorney, continues to apply.
6. The powers under the PTA have been granted in relation to the series of offences specified thereunder,<sup>11</sup> ranging from causing the death of a specified person<sup>12</sup> to criminal intimidation of a witness.<sup>13</sup> Section 6(1) dealing with the investigation into any of these offences provides:

Any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorised in writing by the Superintendent in that behalf may, without a warrant and with or without assistance and notwithstanding anything in any other law to the contrary, arrest a person.<sup>14</sup>

7. The officer may do so based on a reasonable suspicion. However, this is an objective standard, and the subjective opinion of the police officer is not enough.<sup>15</sup> Obstructing a policeman trying to make such an arrest is a punishable offence.<sup>16</sup> While there is no statutory obligation to provide the detainee with the grounds of their arrest, this is required under article 13(1) of the Sri Lankan Constitution and failure to do so will render the arrest arbitrary.<sup>17</sup>
8. The detainee must be produced before the magistrate within 72 hours, who, upon application by the police will order their remand under trial unless the Attorney General consents to the release of such a person.<sup>18</sup> The Attorney General must therefore be informed as soon as possible of every detention, so that they can make the determination of whether or not to order release.<sup>19</sup>
9. Even otherwise, s 7(2) provides that:

Where any person connected with or concerned in or reasonably suspected to be connected with or concerned in the commission of any offence under the PTA appears or is produced before any court, such court shall order the remand of such person until the conclusion of the trial.

10. However, if the police applies, the Magistrate shall authorise the detention of such a person for a period not exceeding 72 hours.<sup>20</sup> It is important to note that there is no concept of bail here and

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<sup>11</sup> For a complete list, refer to Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, ss 2-3 ('Prevention of Terrorism Act 1979').

<sup>12</sup> Prevention of Terrorism Act 1979, s 2(1)(a).

<sup>13</sup> Prevention of Terrorism Act 1979, s 2(1)(c).

<sup>14</sup> Prevention of Terrorism Act 1979, s 6(1).

<sup>15</sup> *Channa Perris and Ors v Attorney General and Ors* (1994) 1 Sri LR 1.

<sup>16</sup> Prevention of Terrorism Act 1979, s 6(2).

<sup>17</sup> *Padmanathan v Sub Inspector Paranagama* (1999) 2 Sri LR 225.

<sup>18</sup> Prevention of Terrorism Act 1979, s 7(1).

<sup>19</sup> *Sukummar v Officer-in-Charge, Joseph Army Camp, Vavuniya and Ors.* (2003) 1 Sri LR 399.

<sup>20</sup> Prevention of Terrorism Act 1979, s 7(2).

only the Attorney General can authorise the release of a person before the conclusion of the trial. Section 3(1) of the Bail Act 1997 excludes the application of provisions of the Bail Act in relation to all PTA offences. Notably, a police officer conducting an investigation in respect of any person so arrested or remanded:

- shall have the right of access to such person and the right to take such person during reasonable hours to any place for the purpose of interrogation and from place to place for the purposes of investigation; and
- may obtain a specimen of the handwriting of such person and do all such acts as may reasonably be necessary for fingerprinting or otherwise identifying such person.<sup>21</sup>

11. Additionally, where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity,<sup>22</sup> the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister. Any such order may be extended from time to time for a period not exceeding three months at a time, up to 18 months.<sup>23</sup> If such an order is obtained within 72 hours of the arrest, then this dispenses with the need of producing the detainee before a judicial officer.<sup>24</sup> Furthermore, the order will lapse automatically after three months, unless specifically extended. This order may be suspended at any time by the Minister,<sup>25</sup> who can then revoke the suspension if a condition of the order has been violated, or there is a threat to public safety.<sup>26</sup> Similarly, the Minister may also order measures short of detention such as placing restrictions of travel and movement,<sup>27</sup> for a period of three months, extendable three months at a time up to 18 months.<sup>28</sup> This order can be varied or cancelled at the Minister's pleasure.<sup>29</sup> Violation of the Minister's order is a punishable offence under the PTA.<sup>30</sup>

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<sup>21</sup> Prevention of Terrorism Act 1979, s 7(3).

<sup>22</sup> 'Unlawful activity' is defined as 'any action taken or act committed by any means whatsoever, whether within or outside Sri Lanka, and whether such action was taken or act was committed before or after the date of coming into operation of all or any of the provisions of this Act in the commission or in connection with the commission of any offence under this Act or any act committed prior to the date of passing of this Act, which act would, if committed after such date, constitute an offence under this Act.' Prevention of Terrorism Act 1979, s 31. This definition was inserted by Amending Act 10 of 1982, w.e.f. 24 July 1979.

<sup>23</sup> Prevention of Terrorism Act 1979, s 9(1).

<sup>24</sup> *Weerawansa v the Attorney General and Ors* (2000) 1 Sri LR 387.

<sup>25</sup> Prevention of Terrorism Act 1979, s 9(2)(a).

<sup>26</sup> Prevention of Terrorism Act 1979, s 9(2)(b).

<sup>27</sup> Prevention of Terrorism Act 1979, s 11(1).

<sup>28</sup> Prevention of Terrorism Act 1979, s 11(3).

<sup>29</sup> Prevention of Terrorism Act 1979, s 11(4).

<sup>30</sup> Prevention of Terrorism Act 1979, s 12.

12. If a person commits an offence under the PTA, they will be tried before the High Court which will necessarily remand them till the end of the trial.<sup>31</sup> In the interests of national security or public order, the Secretary to the Ministry of the Minister in charge of Defence may order that the accused be kept in the custody of any authority, in such place and subject to such conditions as may be determined by the Secretary having regard to such interests. This is subject to directions given by the High Court to ensure fair trial.<sup>32</sup>

*iii) Review of and challenges to detention*

13. An order of suspension or revocation in respect of a detention ordered by the Minister is final and cannot be challenged before any Court by way of writ or otherwise.<sup>33</sup> Similarly, an order by the Minister restricting the movement of a person is also final.<sup>34</sup> These orders can however be challenged before an Advisory Board set up under the PTA, consisting of not less than three persons appointed by the President.<sup>35</sup> Similarly, writs in respect of detention ordered by the Minister are barred.<sup>36</sup>
14. In case an appeal is made on conviction, the convicted person must be kept in remand till the determination of the appeal.<sup>37</sup> The Court of Appeal may in ‘exceptional circumstances’ grant bail to the convicted person subject to such conditions as it deems fit.<sup>38</sup>

*iv) Compensation for unlawful detention*

15. There is no mention of any compensatory remedies under the PTA.

**b) Intelligence gathering**

16. The main intelligence agencies in Sri Lanka are the State Intelligence Service and the Directorate of Military Intelligence and Naval Intelligence.<sup>39</sup> The legal framework for intelligence gathering seems inaccessible. Sri Lanka has been under heavy criticism in the recent past for using ‘rehabilitation’ as a pretext to detain and interrogate people for the purpose of intelligence gathering.<sup>40</sup>

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<sup>31</sup> Prevention of Terrorism Act 1979, s 15.

<sup>32</sup> Prevention of Terrorism Act 1979, s 15A.

<sup>33</sup> Prevention of Terrorism Act 1979, s 10.

<sup>34</sup> Prevention of Terrorism Act 1979, s 11(5).

<sup>35</sup> Prevention of Terrorism Act 1979, s 13.

<sup>36</sup> Prevention of Terrorism Act 1979, s 10.

<sup>37</sup> Prevention of Terrorism Act 1979, s 19.

<sup>38</sup> Prevention of Terrorism Act 1979, s 19.

<sup>39</sup> ‘Role of Intelligence Services’ (*Ministry of Defence and Urban Development of Sri Lanka*, 30 December 2010) < [http://www.defence.lk/new.asp?fname=20100517\\_02](http://www.defence.lk/new.asp?fname=20100517_02) > accessed 21 January 2014.

<sup>40</sup> ‘Beyond Lawful Constraints: Sri Lanka’s Mass Detention of LTTE Suspects’ (*International Commission of Jurists*, September 2010) 32 - 37 <

## II IMMIGRATION DETENTION

### a) Threshold questions

17. There is no threshold question regarding whether a person has been detained or arrested.

### b) Decision to detain

18. The Immigrants and Emigrants Act 1948 prohibits entry without valid travel documents. To this extent, authorised officers may arrest persons on suspicion of travelling without valid documents.<sup>41</sup> A deportation order may also be issued against a person illegally entering or overstaying, and detention on failure to comply with this.<sup>42</sup>

19. The Immigration and Emigration Act provides for the following in s 21(1):

(1)The master of any ship arriving at any place in Sri Lanka shall, at the request of an authorized officer, detain on board the ship any person who has been refused an endorsement by that officer, or any person who enters Sri Lanka from that ship in contravention of the provisions of section 10.

20. There is no provision for a separate set of courts or challenge procedures in case of immigration detention. However, s 41 of the Immigrants and Emigrants Act provides that any person detained under the Act is deemed to be in legal custody.

### c) Review of and challenges to detention

21. There are no procedures specific to immigration detention set out. However, the right against arbitrary detention extend to foreigners as well as to citizens – the words read ‘*all persons*’ in article 13 as opposed to ‘citizens’.<sup>43</sup> They would therefore be susceptible to writ remedies. There may be a writ of *habeas corpus* in case there is prolonged detention of prisoners.<sup>44</sup>

### d) Compensation for unlawful detention

22. There are no specific provisions for monetary compensation.

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[http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6-Full\\_Report.pdf?bcsi\\_scan\\_76859af71b923077=0&bcsi\\_scan\\_filename=28738E40D73D48AB492577AF000B5BD6-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf?bcsi_scan_76859af71b923077=0&bcsi_scan_filename=28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf) > accessed 21 January 2014.

<sup>41</sup> *Veeradas v Controller of Immigration and Emigration and Others* [1989] LKSC 21; *Avaummab* [1962] LKSC 16

<sup>42</sup> Immigration and Emigration Act 1948, Part V r/w s 45.

<sup>43</sup> Constitution of Sri Lanka 1978 (Revised edition 2011), art 13.

<sup>44</sup> *Sumanadasa And 205 Others v Attorney General* [2006] LKSC 7.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

23. The main provision of law governing detention of persons of unsound mind seems to be the Mental Diseases Ordinance 1873,<sup>45</sup> which is discussed in detail below.
24. The Protection of the Rights of Persons with Disabilities Act 1996 is also pertinent for people with mental disabilities.<sup>46</sup> It provides that no person with a disability shall, on the ground of such disability, be subject to any restriction or condition with regard to access to, or use of, any building or place which any other member of the public has access to or is entitled to use.<sup>47</sup> While this could have been read as being in conflict with the rather harsh detention scheme provided under the Mental Diseases Ordinance, in the absence of an overriding clause, the Ordinance continues to be valid law.
25. The Mental Health Policy of Sri Lanka (2005 to 2015) proposes the idea of a new Act that recognises the need to respect the autonomy of persons with mental disabilities, but this has not culminated in the passing of any law.<sup>48</sup> There are some scholastic references to a pending Bill on the issue of disability rights, but no law has so far been enacted.<sup>49</sup>

#### a) Threshold questions

26. There is no threshold question as to whether a person has been detained or arrested. The deprivation of liberty of mentally unsound persons has been recognised as detention by the Supreme Court.<sup>50</sup>

#### b) Decision to detain

27. The Mental Diseases Ordinance allows for an application by a police officer, a *gram seva niladbari* (central government employee) or any private person to inquire into the state of a person suspected to be of unsound mind.<sup>51</sup> If an application is made by a private person, it must be accompanied by a certificate from a medical practitioner stating that they suspect the person in

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<sup>45</sup> This was later passed as a statute in 1956 as the Mental Diseases Act 1956 (Act No. 27 of 1956) but the researcher has been unable to locate the text of this statute.

<sup>46</sup> Protection of the Rights of Persons with Disabilities Act 1996, s 37.

<sup>47</sup> Protection of the Rights of Persons with Disabilities Act 1996, s 23(2).

<sup>48</sup> See para 7 of the Mental Health Directorate, *The Mental Health Policy of Sri Lanka 2005 – 2015* (2005) <[http://209.61.208.233/LinkFiles/On-going\\_projects\\_mhp-slr.pdf](http://209.61.208.233/LinkFiles/On-going_projects_mhp-slr.pdf)> accessed 17 January 2014.

<sup>49</sup> Fiona Kumari Campbell, 'The Terrain of Disability Law in Sri Lanka; Obstacles and Possibilities for Change', in S Rao and M Kalyanpur (eds), *South Asia and Disability Studies: Redefining Boundaries and Extending Horizons* (Peter Lang Publishers, forthcoming).

<sup>50</sup> *Channa Perris and Ors v Attorney General and Ors* (1994) 1 Sri LR 1; *Wicremabandu v Herath and Ors* (1990) 2 Sri LR 348.

<sup>51</sup> Mental Diseases Ordinance 1873, s 2.

respect of whom the application has been made is of unsound mind.<sup>52</sup> The District Court shall accordingly adjudicate whether or not such person is of unsound mind.<sup>53</sup> The District Court is obliged to adjudicate the matter with as little delay as possible.<sup>54</sup> The adjudication must be carried out in the presence of the suspected person,<sup>55</sup> except if, following an inquiry it determines their presence to be undesirable.<sup>56</sup> During this process, it is lawful to remand the person to custody for observation once or more often, for such time as shall be specified in the order.<sup>57</sup> It is also the duty of the Court to remand such a person if two medical practitioners certify that the person is of unsound mind (notwithstanding the Court's contrary opinion).<sup>58</sup> During such remand, they may be expected to submit to inspection by persons nominated by the Minister.<sup>59</sup> If, following this, the Court rules that the suspected person is of unsound mind, and a fit relative or friend of the person is willing, proper custody, care and maintenance of the person may be entrusted with such person.<sup>60</sup> In the absence of such a friend or relative, the person of unsound mind will continue to remain in custody at the Minister's pleasure, who may later make orders for their removal to a mental hospital using their discretion.<sup>61</sup> It is significant to note that the Court is entitled to 'hear evidence' under s 3 but there is not mandatory procedure to draw upon expert testimony in making the determination of soundness of mind.

28. An immediate emergency order for the removal of a person to a house of observation<sup>62</sup> can also be made by any Justice of Peace for the person's own sake, or for the sake of the public.<sup>63</sup> (Justices of Peace are appointed under s 37 of the Administration of Justice Law 1973 and can function as 'unofficial magistrates' which means they can exercise all powers of a magistrate except the power to try civil or criminal cases). In case of an emergency order being passed, the suspected person cannot be detained for over a period of 2 weeks, and notification of the detention must be given to the relevant District Court when such a suspected person is admitted

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<sup>52</sup> Mental Diseases Ordinance 1873, s 2.

<sup>53</sup> Mental Diseases Ordinance 1873, s 3(2).

<sup>54</sup> Mental Diseases Ordinance 1873, s 3(1).

<sup>55</sup> Mental Diseases Ordinance 1873, ss 3(1), 4(3).

<sup>56</sup> Mental Diseases Ordinance 1873, s 4(3).

<sup>57</sup> Mental Diseases Ordinance 1873, s 3(2).

<sup>58</sup> Mental Diseases Ordinance 1873, s 3(2).

<sup>59</sup> Mental Diseases Ordinance 1873, s 3(4).

<sup>60</sup> Mental Diseases Ordinance 1873, s 5(1). Note that a relative or friend can be, but does not have to be, a guardian. However, in case of children below 16, the phrase used is 'parent or guardian'. Hence the powers of the guardian of a mentally ill child to commit such a child to a facility are quite broad.

<sup>61</sup> Mental Diseases Ordinance 1873, s 5(1).

<sup>62</sup> Section 33(b) defines a house of observation as a building or a part of a building appointed by the Minister as a place for the observation of the behaviour of persons suspected to be of unsound mind.

<sup>63</sup> Mental Diseases Ordinance 1873, s 7(1).

to a house of observation.<sup>64</sup> The District Court shall then proceed to determine whether or not such person is of unsound mind, as it would in the case of any other application (given the application of s 3).<sup>65</sup> Discharge of a person is upon recovery as certified by the medical officer in charge of the mental hospital.<sup>66</sup>

29. A person voluntarily seeking to admit themselves to a mental hospital for treatment can apply to the Superintendent of the hospital.<sup>67</sup> Such a person is entitled to leave the hospital after giving the Superintendent a 72-hour notice of their intention to do so.<sup>68</sup> If a voluntary patient becomes incapable of expressing willingness or unwillingness to continue receiving treatment, they must be discharged within 28 days.<sup>69</sup> Discharge is also mandated upon a determination by the Superintendent that treatment is no longer required.<sup>70</sup> Additionally, the Superintendent may also decide to treat the voluntary patient as a temporary patient<sup>71</sup> (procedures governing temporary patients are discussed below).
30. Persons under sixteen years of age can be admitted to a mental hospital by their parents or guardians without any need for their consent upon furnishing a medical recommendation.<sup>72</sup> Similarly, persons incapable of expressing themselves as willing or unwilling to receive medical treatment can be admitted to a mental hospital as temporary patients on an application made to this effect by their relative or spouse to the Superintendent of the hospital, when it is accompanied by the recommendations of two medical practitioners.<sup>73</sup> Such an application may also be made by some other person, but in such a case it must be accompanied by an explanation of the applicant's connection with the patient.<sup>74</sup> A temporary patient cannot be detained for longer than a year.<sup>75</sup> If they become capable of expressing willingness or unwillingness to continue to receive treatment, detention for longer than 28 days after that is impermissible.<sup>76</sup>

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<sup>64</sup> Mental Diseases Ordinance 1873, s 7(5).

<sup>65</sup> Mental Diseases Ordinance 1873, s 7(7).

<sup>66</sup> Mental Diseases Ordinance 1873, s 8(2).

<sup>67</sup> Mental Diseases Ordinance 1873, s 23(1).

<sup>68</sup> Mental Diseases Ordinance 1873, s 24.

<sup>69</sup> Mental Diseases Ordinance 1873, s 27(1).

<sup>70</sup> Mental Diseases Ordinance 1873, s 27(2).

<sup>71</sup> Mental Diseases Ordinance 1873, s 27(3).

<sup>72</sup> Mental Diseases Ordinance 1873, s 23(2).

<sup>73</sup> Mental Diseases Ordinance 1873, s 28.

<sup>74</sup> Mental Diseases Ordinance 1873, ss 28 and 28(2)(c).

<sup>75</sup> Mental Diseases Ordinance 1873, s 30(1).

<sup>76</sup> Mental Diseases Ordinance 1873, s 30(2).

### **c) Review of and challenges to detention**

31. In case of the Mental Disease Ordinance, all decisions of the District Court are appealable before the Court of Appeal.<sup>77</sup> Such an appeal can be made by the suspected person, a relative or a friend, the Attorney General or any state counsel, the Inspector General of Police, the Director of Health Services, Commissioner of Prisons, or any testifying medical practitioner.<sup>78</sup>
32. It also seems possible to directly invoke the *habeas corpus* jurisdiction of the Court of Appeal to deal with cases of illegal or improper detention.<sup>79</sup>
33. As regards the rights under the Protection of the Rights of Persons with Disabilities Act, a person who is the victim of a discriminatory detention order may apply to the High Court for the Province in which the person affected by such contravention resides, for relief or redress.<sup>80</sup>

### **d) Compensation for unlawful detention**

34. No compensatory remedies seem to be provided for under the Mental Disease Ordinance. Under the Protection of the Rights of Persons with Disabilities Act, the High Court has the power to grant such relief or make such directions as it may deem just and equitable in the circumstances.<sup>81</sup>

## **IV MILITARY DETENTION**

### **a) Threshold questions**

35. There is no threshold question here.

### **b) Decision to detain**

36. Article 13 of the Sri Lankan Constitution 1978 reads as follows:

13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.  
(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the Judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such Judge made in accordance with procedure established by law...

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<sup>77</sup> Mental Diseases Ordinance 1873, s 19.

<sup>78</sup> Mental Diseases Ordinance 1873, s 20.

<sup>79</sup> Constitution of Sri Lanka 1978, art 141.

<sup>80</sup> Protection of the Rights of Persons with Disabilities Act 1996, s 24(1).

<sup>81</sup> Protection of the Rights of Persons with Disabilities Act 1996, s 24(3).

37. The Sri Lankan Code of Criminal Procedure 1979 provides that any person arrested must be produced before a Magistrate within twenty-four hours.<sup>82</sup> There is no information available on the right to representation by a lawyer in court.
38. The Sri Lankan Army Act provides for a number of persons to be subject to military law. These include persons serving in the Army and in the reserve forces.<sup>83</sup> Any person subject to military law who commits a civil or a military offence may be taken into military custody<sup>84</sup> and must be produced before the officer ordering such custody within twenty-four hours.<sup>85</sup> Detention in the barracks of the Army may be ordered as a punishment for offences by a competent military authority.<sup>86</sup> The Sri Lankan Army Act does not provide for the detention of civilians.
39. In practice, under a large number of emergency regulations, there have been records of arrest by the army. *Vinayagamoorthy* cites a 1994 Amnesty International report<sup>87</sup> which refers to numerous instances of Tamils detained by the army in various locations. These are predominantly under the preventive detention provisions, or under the Prevention of Terrorism Act, 1982.<sup>88</sup>
40. Furthermore, it is noted that fundamental rights may only be enforced against the State,<sup>89</sup> and only in cases where the act in question is attributable to the State.<sup>90</sup> This would mean that in the event that an act is done by a soldier in their personal capacity, no remedy will lie against the State.<sup>91</sup> It is uncertain whether criminal proceedings can be invoked against the individual soldier under the Army Act.

### c) Review of and challenges to detention

41. Sri Lanka appears to make no distinction in the absolute standards required for military detention and those of civilian forces.<sup>92</sup>
42. In both cases, art 13(1) must be satisfied, and may be enforced by way of writ of *habeas corpus*. Reasons must be provided to any person arrested or detained for an offence, and the prisoner

<sup>82</sup> Code of Criminal Procedure 1979, s 37.

<sup>83</sup> Army Act 1949 s 34.

<sup>84</sup> Army Act 1949, s 35.

<sup>85</sup> Army Act 1949, s 38.

<sup>86</sup> Army Act 1949, Part XVII.

<sup>87</sup> Amnesty International, 'Sri Lanka: Balancing human rights and security: abuse of arrest and detention powers in Colombo' (*Amnesty International*, 1 February 2004), <<http://www.amnesty.org/fr/library/info/ASA37/010/1994/en>> accessed 10 January 2014.

<sup>88</sup> Amnesty International, 'Locked Away: Sri Lanka's Security Detainees' (*Amnesty*, March 2012), <<http://files.amnesty.org/archives/asa370032012eng.pdf>> accessed 2 February 2014.

<sup>89</sup> Constitution of Sri Lanka 1978, art 17.

<sup>90</sup> *Velmurugu v The Attorney General* [1981] LKSC 32.

<sup>91</sup> *ibid.*

<sup>92</sup> See *Wimal Vidyamani v Jayatileke, Lt. Col and Others* [1992] LKSC 24); *Machchavallavan v Oic, Army Camp, Plantain Point, Trincomalee and Others* [2005] LKSC 6.

must be released if this reason for custody ceases to exist.<sup>93</sup> In order to satisfy art 13(1), it is necessary that a reason for arrest be recorded prior to arrest – subsequent investigations do not meet the test of art 13(1).<sup>94</sup>

43. The Sri Lankan Supreme Court<sup>95</sup> and Court of Appeal are empowered to exercise writ jurisdiction for the enforcement of fundamental rights,<sup>96</sup> and may grant writs of *habeas corpus* in case of imprisonment. However, in exercising writ jurisdiction, the Court will not substitute its

<sup>93</sup> *Channa Peris and Others v Attorney General and Others* [1994] LKSC 38.

<sup>94</sup> *Vinayagamoorthy, Attorney-At-Law (On Behalf of Wimalenthiran) v The Army Commander and Others* [1994] LKSC 11.

<sup>95</sup> Section 126 states: Fundamental rights jurisdiction and its exercise.

- (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.
- (2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.
- (3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of *habeas corpus*, *certiorari*, prohibition, *procedendo*, *mandamus* or *quo warranto*, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.
- (4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.
- (5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.

<sup>96</sup> Section 141 deals with Power to issue writs of *habeas corpus* and states that:

141. The Court of Appeal may grant and issue orders in the nature of writs of *habeas corpus* to bring up before such Court -

- a. the body of any person to be dealt with according to law ; or
  - b. the body of any person illegally or improperly detained in public or private custody, and to discharge or remand any person so brought up or otherwise deal with such person according to law :
- (a) Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the Judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such court shall seem right; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law, and the Court of First Instance shall conform to, and carry into immediate effect, the order so pronounced or made by the Court of Appeal:
  - (b) Provided further that if provision be made by law for the exercise by any court, of jurisdiction in respect of the custody and control of minor children, then the Court of Appeal, if satisfied that any dispute regarding the custody of any such minor child may more properly be dealt with by such court, direct the parties to make application in that court in respect of the custody of such minor child.

discretion for that of the officer's,<sup>97</sup> and will only determine if the decision to make an arrest was exercised reasonably.<sup>98</sup> The Sri Lankan Supreme Court has also held that wider discretion to detain persons under the Emergency Regulations may be exercised in times of Emergency.<sup>99</sup>

#### **d) Compensation for unlawful detention**

44. Monetary compensation may be awarded to the victim.<sup>100</sup>

### **V POLICE DETENTION**

45. Article 14 of the Constitution of Sri Lanka 1978 guarantees to its citizens the freedom of peaceful assembly, the freedom of movement and the freedom of speech and expression. Article 15 provides that the freedom of assembly is subject to restrictions in the interest of religious and racial harmony. Similarly, the freedom of movement can also be curbed in the interests of the national economy. However, the dispersal of an unlawful assembly can only be ordered by a magistrate or a police officer not below the rank of an Inspector.<sup>101</sup> The use of civil force,<sup>102</sup> as well as military force<sup>103</sup> is permissible for dispersing an unlawful assembly. Proceedings cannot be instituted concerning such action, except with the permission of the Attorney General.<sup>104</sup> Notably, to organise a procession, notice must be given to the police,<sup>105</sup> who can then regulate the conduct of the procession as they so deem fit.<sup>106</sup> Permission to conduct the procession can be denied in only if there is a threat public order.<sup>107</sup> Denial of license to conduct the procession can be challenged before the Magistrate of the division within a period of five days.<sup>108</sup> The Magistrate's order can be challenged within ten days before the Court of Appeal.<sup>109</sup>

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<sup>97</sup> *Elasinghe v Wijewickrema and Others* [1993] LKSC 12

<sup>98</sup> *ibid.*

<sup>99</sup> *Joseph Perera v Attorney-General* (1992) 1 Sri L. R. 199.

<sup>100</sup> *Abdul Latif v DIG of Police* (2005)1 Sri LR 22.

<sup>101</sup> Code of Criminal Procedure 1979, s 95(1).

<sup>102</sup> Code of Criminal Procedure 1979, s 95(2).

<sup>103</sup> A Magistrate, or the Government Agent of the District, or a police officer not below the rank of a Superintendent may order this step to be taken if the assembly cannot otherwise be dispersed, if it is necessary for public security: Section 95(3), Code of Criminal Procedure 1979. If the Magistrate, Government Agent or police officer not below the rank of a Superintendent cannot be reached, a commissioned officer can use military force without their authorisation, if it is necessary for public security: Section 96, Code of Criminal Procedure 1979.

<sup>104</sup> Code of Criminal Procedure 1979, s 97.

<sup>105</sup> Police Ordinance 1866, s 77.

<sup>106</sup> Police Ordinance 1866, s 78.

<sup>107</sup> Police Departmental Order E5, cited in JC Weliamuna, 'Judicial Intervention to Control Lawful Rallies: Subverting Democratic Rights' (*Groundviews*, 2 December 2012) < <http://groundviews.org/2012/02/12/judicial-intervention-to-control-lawful-rallies-subverting-democratic-rights/> > accessed 15 January 2014.

<sup>108</sup> Police Ordinance 1866, s 97(1).

<sup>109</sup> Police Ordinance 1866, s 97(4).

46. While concerns regarding Sri Lanka's poor human rights record have been raised when it comes to the freedom of assembly,<sup>110</sup> it seems that this is normally done through the use of force as specified in the Code of Criminal Procedure 1978 rather than through practices such as kettling.
47. Arguably, an unruly crowd could fall within the ambit of a 'disaster' as defined under the Sri Lanka Disaster Management Act 2005, which includes the occurrence of a man made event which endangers the health and safety of people or property.<sup>111</sup> In such a case, measures of disaster management could include kettling although the Act itself is silent on the issue. Such a measure would then need to be established as being in furtherance of religious or racial harmony, as well as the protection of the national economy. Scope for redress in this scenario is limited, since the Act provides immunity from legal proceedings for any action taken under it in good faith.<sup>112</sup> However, such invocation itself is unlikely, since in the past the Act seems to have been understood as being primarily directed towards ecological disasters.<sup>113</sup>

## VI PREVENTIVE DETENTION

### a) Threshold questions

48. There is no threshold question here.

### b) Decision to detain

49. Sri Lankan statutes may provide for preventive detention. This has been held to be within the scheme of the Constitution, during Emergency and under normal circumstances.<sup>114</sup>
50. A range of authorities have the discretion to order preventive detention under various statutes and regulations. The Prevention of Terrorism (Temporary Provisions) 1979 (made permanent in 1982) allows for preventive detention of up to 3 months if the Minister 'has reason to believe or suspect that any person is connected with or concerned in any unlawful activity.'<sup>115</sup> An 'unlawful activity' is defined as:

...any action taken or act committed by any means whatsoever, whether within or outside Sri Lanka, and whether such action was taken or act was committed before or after the date of coming into operation of all or any of the provisions of this Act in the commission or in connection with the commission of any offence under this Act or any act committed prior to

<sup>110</sup> For instance, Austria's comments before the Human Rights Council: Human Rights Council, *Report of the Working Group on the Universal Periodic Review A/HRC/22/16* (18 December 2012) [38].

<sup>111</sup> Sri Lanka Disaster Management Act 2005, s 25.

<sup>112</sup> Sri Lanka Disaster Management Act 2005, s 23.

<sup>113</sup> For instance, refer to: Ministry of Disaster Management, *Draft National Policy on Disaster Management* (February 2013) <<http://www.disastermin.gov.lk/web/images/pdf/draft%20dm%20policy.pdf>> accessed 16 January 2014.

<sup>114</sup> *Wicremabandu v Herath and Others* [1990] LKSC 19.

<sup>115</sup> The Prevention of Terrorism (Temporary Provisions) 1979, s 9.

the date of passing of this Act, which act would, if committed after such date, constitute an offence under this Act.<sup>116</sup>

51. These offences are listed in ss 2 to 5 of the same Act.<sup>117</sup> It would appear here that the Sri Lankan statute permits retrospective criminal legislation under these circumstances. This is a matter for some concern.

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<sup>116</sup> The Prevention of Terrorism (Temporary Provisions) 1979, s 31(1).

<sup>117</sup> Section 2 provides that (1) Any person who -

- (a) causes the death of any specified person, or kidnaps or abducts a specified person, or commits any other attack upon any such person, which act would, under the provisions of the Penal Code, be punishable with death or a term of imprisonment of not less than seven years; or
  - (b) causes the death of any person who is a witness to any offence under this Act, or kidnaps or abducts or commits any other attack upon any such person, which act would, under the provisions of the Penal Code, be punishable with death or a term of imprisonment of not less than seven years; or
  - (c) commits criminal intimidation of any special person or a witness referred to in paragraph (b); or
  - (d) commits the offence of robbery of the property of the Government, any department, statutory board, public corporation, bank, co-operative union or co-operative society; or
  - (e) commits the offence of mischief to the property of the Government, any department, statutory board, public corporation, bank, cooperative union or co-operative society or to any other public property; or
  - (f) without lawful authority imports, manufactures or collects any firearms, offensive weapons, ammunition or explosives or any article or thing used, or intended to be used, in the manufacture of explosives; or
  - (g) possesses without lawful authority, within any security area, any firearms or any offensive weapon, ammunition or explosives or any article or thing used, or intended to be used, in the manufacture of explosives; or
  - (h) by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups; or
  - (i) without lawful authority erases, mutilates, defaces or otherwise interferes with any words, inscriptions, or lettering appearing on any board or other fixture on, upon or adjacent to, any highway, street, road or any other public place; or
  - (j) harbours, conceals or in any other manner prevents, hinders or interferes with the apprehension of, a proclaimed person or any other person, knowing or having reason to believe that such person has committed an offence under this Act, shall be guilty of an offence under this Act.
- (2) Any person guilty of an offence specified in -
- (i) paragraph (a) or (b) of subsection (1) shall on conviction be liable to imprisonment for life, and
  - (ii) paragraphs (c), (d), (e), (f), (g), (h), (i) or (j) of subsection (1) shall on conviction be liable to imprisonment of either description for a period not less than five years but not exceeding twenty years.
- (3) In this section -
- (i) 'proclaimed person' means any person proclaimed by the Inspector-General of Police by Proclamation published in the Gazette to be a person wanted in connection with the commission of any offence under this Act; and
  - (ii) 'security area' means any area declared by the Minister by Order published in the Gazette to be a security area if he is satisfied that by reason of any unlawful activity there is in such area a reasonable apprehension of organised violence.
- 3.** Any person who -
- (a) does any act preparatory to the commission of an offence; or
  - (b) abets, conspires, attempts, exhorts or incites the commission of an offence; or

52. The Emergency Regulations 2005 have also been enacted under the Public Security Ordinance 1947 which, during the period of Emergency, allowed for preventive detention during the period of emergency. These provisions were widely worded, and allowed for detention on several grounds including national security, the maintenance of public order and maintenance of essential services.<sup>118</sup> These allow for detention if the Secretary to the Ministry of Defence is satisfied that they may act in a manner prejudicial to ‘national security.’<sup>119</sup> The regulations provide for the detainee to approach an Advisory Committee – as opposed to a magistrate - however, this is to be appointed by the President.<sup>120</sup> There is no provision in the Statute for extension of detention beyond 3 months. However, the Sri Lankan courts are willing to award compensation for prolonged arrest. This is set out below. Powers are also conferred on the police to arrest any person suspected of an offence under the Emergency Regulations without warrant.<sup>121</sup>
53. The Emergency Regulations also provide that ss 36, 37 and 38 of the Code of Criminal Procedure, 1979 do not apply to persons detained under orders of preventive detention.<sup>122</sup> These provide that a person must be produced before a Magistrate within 24 hours, and that any arrest

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(c) causes the death of any person, or commits any attack upon any person whomsoever in the course of committing any offence under this Act, which act would, under the provisions of the Penal Code, be punishable with death or with a term of imprisonment of not less than seven years, shall be guilty of an offence and shall on conviction be liable to imprisonment of either description for a period of not less than five years but not exceeding twenty years where the offence is one specified in paragraph (a) or (b), or to imprisonment for life where the offence is one specified in paragraph (c).

4. Where any person is convicted by any court of any offence under section 2 or section 3, then, in addition to any other penalty that the court shall impose for such offence -

(a) all property movable and immovable, of that person shall, by virtue of such conviction, be deemed to be forfeited to the Republic; and

(b) any alienation or other disposal of such property effected by such person after the date of coming into operation of this Part shall be deemed to have been, and to be, null and void.

5. Any person who -

(a) knowing or having reasonable cause to believe that any person -

(i) has committed an offence under this Act, or

(ii) is making preparation or is attempting to commit an offence under this Act, fails to report the same to a police officer; or

(b) having in his possession any information relating to the movements or whereabouts of any person who has committed or is making preparations or is attempting to commit an offence under this Act fails to report the same to a police officer, shall be guilty of an offence and shall, on conviction be liable to imprisonment of either description for period not exceeding seven years.

<sup>118</sup> Emergency Regulations 2005, reg 18.

<sup>119</sup> Emergency Regulations 2005, reg 18.

<sup>120</sup> Emergency Regulations 2005, reg 19.

<sup>121</sup> Emergency Regulations 2005, reg 20.

<sup>122</sup> Emergency Regulations 2005, reg 21.

by the police is to be reported to the Magistrate.<sup>123</sup> The regulations provide no procedure for challenge.

54. It is noted that there has been widespread criticism of the manner and the scale of preventive detention in Sri Lanka. The International Commission of Jurists has observed that this is on an unprecedented scale, and contravenes art 9(3) of the ICCPR.<sup>124</sup> Further, concerns are expressed that ‘surrendees’ and ‘rehabilitees’ under the Regulations may be clubbed with those under preventive detention.<sup>125</sup> These Emergency Regulations are no longer in force after the lifting of the Emergency in 2011.<sup>126</sup> Nevertheless, the Prevention of Terrorism Act continues to remain in force.

### c) Review of and challenges to detention

55. Case law on preventive detention requires an examination of the grounds of detention, and the release of the prisoner where these grounds cease to exist.<sup>127</sup> The Court of Appeal or the Supreme Court may further determine whether the order for preventive detention satisfies the test of *Wednesbury* unreasonableness<sup>128</sup> - in other words, an order may be struck down if it such that no reasonable person would have made it.<sup>129</sup> Courts are willing to strike down orders of

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<sup>123</sup> The provisions read as follows:

How person arrested is to be dealt with

36. A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case.

Person arrested not to be detained more than twenty-four hours

37. Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

Police to report arrests

38. Officers in charge of police stations shall report to the Magistrates' Courts of their respective districts the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise.

<sup>124</sup> ICJ Briefing Note ‘Beyond Lawful Constraints: Sri Lanka’s Mass Detention of LTTE Suspects’ (*International Committee of Jurists*, September 2010) <[http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6Full\\_Report.pdf?bcsi\\_scan\\_76859af71b923077=0&bcsi\\_scan\\_filename=28738E40D73D48AB492577AF000B5BD6-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6Full_Report.pdf?bcsi_scan_76859af71b923077=0&bcsi_scan_filename=28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf)> accessed 10 January 2014.

<sup>125</sup> *ibid* 28-30.

<sup>126</sup> Shihar Aneez, ‘Sri Lanka President Lifts Wartime Laws’ *Reuters* (Colombo, 25 August 2011) <<http://in.reuters.com/article/2011/08/25/idINIndia-58967520110825>> accessed 17 January 2014.

<sup>127</sup> *Wicremabandu v Herath and Others* 1990] LKSC 19.

<sup>128</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

<sup>129</sup> *Sunil Rodrigo (On Behalf of B. Sirisena Cooray) v Chandananda De Silva and Others* [1997] LKSC 36; *Chandra Kalyanie Perera and Another v Captain Sirwardena and Others* [1990] LKSC 22.

detention where the material submitted is found inadequate or tenuous' - for instance, a single letter is insufficient for an order of detention.<sup>130</sup> Thus, Sri Lankan courts exercise writ jurisdiction over the violation of fundamental rights, and grant a declaration that there has been a violation of fundamental rights.

**d) Compensation for unlawful detention**

56. Sri Lankan Courts also grant compensation for the violation of these rights. These are often small sums of money (from Sri Lankan Rs. 35,000<sup>131</sup> to Rs 50,000).<sup>132</sup>

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<sup>130</sup> *Jayarathne and Others v Chandrananda De Silva, Secretary, Ministry of Defence and Others* [1998] LKSC 36.

<sup>131</sup> *Wimal Vidyamani v Jayatilleke, Lt. Col and Others* [1992] LKSC 24.

<sup>132</sup> *Jayarathne and Others v Chandrananda De Silva, Secretary, Ministry of Defence and Others* [1998] LKSC 36.

# Country Report for Switzerland

## I ADMINISTRATIVE DETENTION

1. Remand and preventive detention for security reasons that do not follow a criminal conviction are governed under different regimes, including immigration law, (cantonal) police law, and criminal procedure law. There is no separate regime of administrative detention relating to counter-terrorism operations in Swiss law. As a result, the following section refers only to criminal procedure law and police law (immigration detention is covered in a separate section below).

### a) Detention pursuant to Criminal Procedure Law

#### *i) Preliminary remarks*

2. Traditionally, criminal procedure law is applicable a person is suspected of having committed a criminal offence. However, Swiss criminal procedure law is not clear on this point. On the one hand, art 197 of the Criminal Procedure Code ('CrimPC')<sup>1</sup> provides that preventive detention under this law may only be imposed if 'there is reasonable suspicion that an offence has been committed'. On the other hand, art 221 para 2 CrimPC permits preventive detention if 'there is serious concern that a person will carry out a threat to commit a serious felony.'<sup>2</sup> This latter provision allows preventive detention in order to prevent a person from committing a serious offence, rather than to secure a criminal procedure or conviction. The Swiss Federal Court has confirmed this possibility. The Swiss government maintains that art 221 para 2 is consistent with 5(1)(c) ECHR.<sup>3</sup> In this case, arts 222-228 CrimPC apply *mutatis mutandis*.<sup>4</sup>
3. In Swiss law, preventive detention under criminal procedure law operates in three stages. The first follows the initial arrest (arts 217-220 CrimPC); secondly, there is the possibility of preventive detention ('remand') being ordered by a specialised court (a 'compulsory measures court') (arts 222-228 CrimPC); and third, preventive detention may be ordered by a criminal court after a criminal conviction (arts 229-233 CrimPC). This last stage takes place before an offender is transferred to a prison or during an appellate proceeding. The discussion below relates only to the first and second stages.

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<sup>1</sup> Schweizerische Strafprozessordnung vom 5. Oktober 2007 (SR. 311.0).

<sup>2</sup> Note that the crimes related to terrorism are either felonies or misdemeanours. See especially Title Twelve of the Swiss Criminal Code: Felonies and Misdemeanours against Public Order.

<sup>3</sup> Botschaft des Bundesrates zur Vereinheitlichung des Strafprozessrechtes vom 21. Dezember 2005, 1229.

<sup>4</sup> *ibid*.

*ii) Threshold questions*

4. Arrest by the police under art 217 CrimPC is regarded as detention.<sup>5</sup> Generally, in Swiss law, criteria regarding the nature, the duration, the impact and the modalities are decisive.<sup>6</sup>

*iii) Decision to detain*

aa) Initial arrest by police

5. The police may arrest a person under the following circumstances:
- where there is a strong suspicion that the person has committed a serious crime (a felony or misdemeanour);
  - where there is a warrant for the person's arrest; or
  - where there is a suspicion that the person will commit a serious crime (a felony or misdemeanour).
6. If a person is caught in the act of committing a *contravention*, or the police encounter them immediately after committing such an offence, arrest is also possible in the event that:
- the person refuses to provide his or her personal details;
  - the person does not live in Switzerland and fails to provide security for payment of the anticipated fine immediately; or
  - the arrest is necessary in order to prevent the person from committing further contraventions.
7. The maximum duration of detention following arrest is in every case 24 hours; note that 'if the person was stopped before the arrest, then the period while stopped shall be taken into account when calculating the time limit'.<sup>7</sup> After 24 hours, the person must be released or the case must be handed over to the public prosecutor, who must be informed about the arrest 'immediately' after it takes place.<sup>8</sup> A further period of preventive detention (called 'remand') is only possible in the event of a serious crime (felony or misdemeanour: see art 221 para 1 CrimPC), not if only a contravention is at stake.

bb) Application for remand

8. If the grounds for detention are confirmed after an interrogation by the public prosecutor, they may apply to the compulsory measures court (which is a specialised cantonal court concerned

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<sup>5</sup> Botschaft des Bundesrates zur Vereinheitlichung des Strafprozessrechtes vom 21. Dezember 2005, 1226.

<sup>6</sup> BGE 136 I 87 E. 6.5.3.; 134 I 140 E. 3.2. p. 143 f., see also BGE 123 II 193 E. 3c p.197 ff.

<sup>7</sup> CrimPC, art 219 para 4.

<sup>8</sup> CrimPC, art 219 para 1.

exclusively with decisions about compulsory measures) within 48 hours of the arrest.<sup>9</sup> The written application for remand must contain a brief statement about the reasons for detention and the most relevant files. Otherwise, the prosecutor must order the detainee's immediate release.<sup>10</sup>

9. The compulsory measures court makes its decision on the application for remand after a private hearing with the prosecutor, the accused and their defence agents.<sup>11</sup>
10. As noted above, under Swiss criminal procedure law there are two main reasons to order remand. The first is where there is a strong suspicion that the accused has committed a criminal offence (felony or misdemeanour) and the detention is necessary due to the danger of absconding, compromising efforts to secure a criminal conviction, or posing a 'considerable risk' of reoffending. The second is where there is a 'serious concern that a person will carry out a threat to commit a serious felony'.<sup>12</sup> In the latter case, it is enough that the commission of a serious felony is 'highly probable' considering all circumstances; in contrast to the rules regarding attempt, the person does not have to make any concrete steps or make any arrangements.<sup>13</sup>
11. The compulsory measures court must make its decision within 48 hours of receipt of the application.<sup>14</sup> If it decides in favour of the detainee, they must be released immediately.<sup>15</sup>

cc) Right to be heard in relation to application for remand

12. The detainee and their lawyer have a right to inspect the files before the hearing.<sup>16</sup> However, this right covers only the documents that are submitted by the prosecutor to substantiate the application for remand.<sup>17</sup>
13. The detainee and their lawyer also have a right to attend the hearing before the compulsory measures court.<sup>18</sup> However, the detainee can waive the right to a hearing. In this case, the compulsory measures court must decide in written proceedings according to the application made by the public prosecutor and the submissions made by the detainee.<sup>19</sup>

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<sup>9</sup> CrimPC, art 224 para 2.

<sup>10</sup> CrimPC, art 224 para 3.

<sup>11</sup> CrimPC, art 225 para 1.

<sup>12</sup> See also BGE 125 I 361, 366 E.4c.

<sup>13</sup> Marc Foster, Kommentar zu Artikel 221 StPO' Marcel A. Niggli, Marianne Heer and Hans Wiprächtler (Basel 2010), art 221 n 17.

<sup>14</sup> CrimPC, art 226 para 1.

<sup>15</sup> CrimPC, art 226 para 5.

<sup>16</sup> CrimPC, art 225 para 2.

<sup>17</sup> Botschaft des Bundesrates zur Vereinheitlichung des Strafprozessrechtes vom 21. Dezember 2005, 1231.

<sup>18</sup> CrimPC, art 225 para 1.

<sup>19</sup> CrimPC, art 225 para 4.

*ii) Review of and challenge to detention*

aa) Contesting decisions of the compulsory measures court

14. A detainee may contest decisions of the compulsory measures court about the ordering, extension, or ending of their detention.<sup>20</sup> The decision-making body is a cantonal court designated by the cantonal legislator.

bb) Periodic review of detention

15. In making its decision, the compulsory measures court can limit the period of preventive detention. If it does not do so, an automatic review takes place after three months.<sup>21</sup> An extension of the period of detention may (on the application of the prosecutor) be granted for a maximum of three months or, in exceptional cases, for a maximum of six months.<sup>22</sup> The law does not prescribe an explicit absolute maximum duration; however, the detention must be lawful within the limits of the principle of proportionality.<sup>23</sup> Note that the absence of a maximum duration could be especially problematic if the preventive detention is ordered under art 221 para 2 CrimPC (which, as noted above, provides for detention on the basis of a serious concern that a person will carry out a threat to commit a serious felony).

cc) Application to public prosecutor and reconsideration by compulsory measures court

16. According to art 228 CrimPC, a detainee can also apply to the public prosecutor at any time for release from remand unless the compulsory measures court has set a time period (of a maximum of one month) within which the accused is not allowed to apply for release.<sup>24</sup> The public prosecutor can order the detainee's immediate release. If they do not, the compulsory measures court must receive the files within three days, during which time the detainee and their lawyer must have the possibility to respond. The compulsory measures court must decide within five days of receiving this response.<sup>25</sup> The application will be granted if the criteria for detention set out above (i.e. a strong suspicion that the person has committed a criminal offence and that detention is necessary due to the danger of absconding etc., or a serious concern that the person will carry out a serious felony) are not found to be met.

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<sup>20</sup> CrimPC, art 222.

<sup>21</sup> CrimPC, art 227 para 1.

<sup>22</sup> CrimPC, art 227 para 7.

<sup>23</sup> Marc Foster, *Kommentar zu Artikel 226 StPO* Marcel A. Niggli, Marianne Heer and Hans Wiprächtler (Basel 2010), art 221 n 17, art 226 n 10.

<sup>24</sup> CrimPC, art 228 para 5.

<sup>25</sup> CrimPC, art 228 para 4.

### *iii) Compensation for unlawful detention*

17. The Swiss Federal Constitution of the Swiss Confederation ('SFC') stipulates no right to remedies for people who are unlawfully detained. However, Art 5(5) ECHR as well as art 9(5) of the International Covenant on Civil and Political Rights are applicable. Furthermore, art 431 para 1 CrimPC provides that if a compulsory measure (i.e. preventive detention) has been applied unlawfully, the criminal justice authority will award 'appropriate damages and satisfaction'. The unlawfulness of preventive detention is established if 'the permitted period of detention is exceeded' and 'the excessive deprivation of liberty cannot be not accounted for in sanctions imposed in respect of other offences.' Note that there are exceptions from that right.<sup>26</sup>

### **b) Detention pursuant to police law**

#### *i) Decision to detain*

18. Preventive detention for counter-terrorism reasons could also be carried out under the general provisions of police law. However, there are 26 different cantonal laws governing police detention.
19. According to the police law of the Canton Berne as well as Canton Zurich, a person can be detained for a maximum duration of 24 hours (see art 34 para 1 lit c PolG BE; § 27 PolG ZH)<sup>27</sup>. But in the Canton Bern, for example, police detention can be prolonged for a maximum of 7 days if a person poses a serious danger to others.<sup>28</sup> However, police detention must always be restricted to a minimum.<sup>29</sup> Furthermore, police detention that lasts longer than three hours is only lawful if a special police officer authorised to do so by the Confederation or the canton gives the order.<sup>30</sup>

#### *ii) Review of and challenge to detention*

20. Since police detention is effected by a body other than a court, the detainee has a constitutional right to 'have recourse to a court at any time' (art 31 para 4 of the SFC). The decision-making body is designated by the cantonal law.
21. Regarding the period of the court's decision, the SFC provides in art 31 para 4 that the court 'shall decide as quickly as possible on the legality of their detention.' In any case, the court has to

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<sup>26</sup> CrimPC, art 431 para 3.

<sup>27</sup> Polizeigesetz Kanton Bern vom 8. Juni 1997 (551.1); Polizeigesetz Kanton Zürich vom 23. April 2007 (550.1.)

<sup>28</sup> PolG BE, art 34 para 2.

<sup>29</sup> PolG BE, art 34 para 2.

<sup>30</sup> See CrimPC, art 219 para 5.

decide within the maximum duration of the permitted police detention (eg 24 hours in Berne and Zurich); practice indicates a maximum of four hours.<sup>31</sup>

22. An appeal may be brought on the basis that detention is unlawful because the grounds for detention under the relevant cantonal law (eg that the person poses a serious danger to themselves or others) are not present, or that the conditions for the initial arrest by police under art 217 CrimPC were not met.

*iii) Compensation for unlawful detention*

23. See above in relation to detention under criminal procedure law.

## II DETENTION OF PERSONS WITH MENTAL ILLNESS

### a) Preliminary remarks

24. The regulation on the detention of persons with a mental illness has been subject to a broad reform which became law on 1 January 2013. The principles and safeguards are legally consolidated on a federal level whereas the details about the procedure before the cantonal authorities are left to the cantonal law. This research will consider federal law and will only make some remarks on cantonal law where appropriate.

### b) Threshold questions

25. The Swiss Federal Court decided that the compulsory psychiatric assessment of a person with an alleged mental illness in a psychiatric clinic must be qualified as detention (*Freiheitsentziehung*) and not just a restriction on liberty.<sup>32</sup> The same ruling was made in the case of a forced hospitalisation for a period of a few days.<sup>33</sup>

### c) Decision to detain

*i) Identity of decision-maker*

26. An order for the hospitalisation of a mentally ill person is made by the adult protection authority (art 428 Swiss Civil Code),<sup>34</sup> which is an administrative cantonal authority. Cantonal law (26 different regimes) governs the legal organisation of these authorities. According to art 429 para 1 Swiss Civil Code, ‘the cantons may designate doctors who in addition to the adult protection authority are authorised to order hospitalisation for a period specified by cantonal law.’ However, the period may not be longer than six weeks.

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<sup>31</sup> Markus Mohler, Grundzüge des Polizeirechts in der Schweiz, Basel 2012, n 1371.

<sup>32</sup> BGE 124 I 40 E. 3c.

<sup>33</sup> BGE 90 I 29 E. 5.

<sup>34</sup> Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907 (SR. 210).

27. Pursuant to art 429 para 2 of the Swiss Civil Code, ‘hospitalisation may not continue beyond the specified period at the latest unless an enforceable hospitalisation order from the adult protection authority applies.’
28. The adult protection authority can make a hospitalisation order if the person is suffering from a mental disorder or mental disability or serious neglect and the required treatment or care cannot be provided otherwise. The burden that the patient places on family members and third parties, and their protection, must be taken into account.<sup>35</sup>
29. There is no absolute time limit on detention. Instead, art 426 para 3 of the Swiss Civil Code holds that ‘[t]he patient shall be discharged as soon as the requirements for hospitalisation no longer are fulfilled.’

*ii) Circumstances in which detention may be ordered*

30. Article 430 of the Swiss Civil Code (paras 1-4) set out the procedure for a hospitalisation order. The patient must be interviewed and examined by a doctor. The patient is also entitled to receive a copy of the hospitalisation order, which must contain at least the place and date of the examination; the name of the doctor; the diagnosis, reasons therefor and the purpose of hospitalisation; and instructions on rights of appeal.

*iii) Right to be heard*

31. Article 447 of the Swiss Civil Code stipulates that the detainee ‘shall be heard in person unless to do so appears inappropriate.’ Apart from the hearing, the detainee is entitled to inspect the case files ‘unless legitimate interests require otherwise’.<sup>36</sup> However, the detainee and other persons participation in the proceedings are ‘obliged to cooperate in the enquiries into the circumstances’.<sup>37</sup>

*iv) Right to representation*

32. Regarding the proceedings before the administrative authority, according to art 432 of the Swiss Civil Code ‘[a]ny person committed to an institution may appoint a person that he or she trusts as a representative to support him or her during their stay and until the conclusion of all related procedure.’

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<sup>35</sup> See Swiss Civil Code, art 426 paras 1-2.

<sup>36</sup> Swiss Civil Code, art 449b para 1.

<sup>37</sup> Swiss Civil Code, art 449b para 2.

## **d) Review of and challenges to detention**

### *i) Periodic review*

33. According to art 431 para 1 of the Swiss Civil Code, the detainee has a ‘right to review at the sixth month after hospitalization at latest’ by the protection authority itself. Article 431 para 2 holds that a second review has to take place within the following six months, and thereafter the protection authority ‘shall conduct a review as often as necessary, but at least once every year.’ The decision to detain can be altered or reversed if the requirements for hospitalisation are not met or the institution does not seem to be suitable anymore.<sup>38</sup>

### *ii) Right of appeal*

#### aa) Instruction on right to appeal

34. According to art 430 para 2.4 of the Swiss Civil Code, the hospitalisation order must instruct the detainee of their rights of appeal.

#### bb) Constitutional right to a legally constituted, competent, independent and impartial court

35. Since the hospitalisation order is made by a body other than a court, the detainee has a constitutional right to ‘have recourse to a court at any time’ (art 31 para 4 of the SFC).<sup>39</sup> The authority must be a body in the sense of art 30 para 1 SFC, meaning a ‘legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited.’
36. Regarding the time of the recourse, the Swiss Federal Court has ruled that the right of appeal must be given at ‘appropriate’ (*angemessen*) and ‘reasonable’ (*vernünftigen*) intervals; what this exactly means must be decided in each individual case. With respect to the review of hospitalisation orders, it ruled that the intervals could be longer than in the case of prisoners awaiting trial.<sup>40</sup>
37. Furthermore, the Swiss Federal Court has ruled that blocking periods for fresh requests for release (in the form of either a review by the adult protection authority or an appeal to a court) are only lawful if they do not extend to more than one month or, exceptionally, between one and three months.<sup>41</sup>
38. Regarding the period of the court’s decision, the SFC provides in art 31 para 4 that the court ‘shall decide as quickly as possible on the legality of their detention.’ According to art 450e para 5

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<sup>38</sup> Swiss Civil Code, art 431 para 1.

<sup>39</sup> Schweizerische Bundesverfassung vom 18. April 1999 (SR. 101). Note that art 31 para 4 SFC is equivalent to Art 5(4) ECHR

<sup>40</sup> BGE 130 III 729 E. 2.1.2.

<sup>41</sup> BGE 126 I 26.

of the Swiss Civil Code, in the case of the challenge of a hospitalisation order the court ‘normally’ decides within five working days of the appeal being filed.

39. According to art 430 para 4 of the Swiss Civil Code, ‘an appeal does not have suspensive effect unless the doctor or the competent court orders otherwise.’<sup>42</sup>

cc) Grounds of appeal

40. Pursuant to art 450a para 1 of the Swiss Civil Code, the grounds on which the decision to detain can be altered or reserved are:

- ‘an infringement of the law’;
- ‘an incorrect or incomplete finding of legally relevant fact’; or
- ‘an inappropriate decision’.

41. According to art 450a para 2 of the Swiss Civil Code, ‘an appeal is also competent on the grounds of denial of justice or unjustified delay.’

*iii) Rights to an oral hearing and to representation*

42. In proceedings before the appellate authority, art 450 para 4 of the Swiss Civil Code stipulates that the ‘judicial appellate authority shall normally hear the client as a panel of judges.’ Furthermore, art 449a and 450e of the Swiss Civil Code both prescribe that ‘if necessary’ the adult protection authority as well as the court shall ‘order that the client is represented’ and ‘appoint a person experienced in care-related and legal matters as deputy.’

**e) Compensation for unlawful detention**

43. Article 454 para 1 of the Swiss Civil Code sets out the ‘right to damages’ of ‘any person who is injured by an unlawful act or omission related to official adult protection measures.’ If the injury is serious, the person is entitled to satisfaction.
44. The canton is liable for the damage, whereas the ‘injured party has no right to damages against the person who caused the injury’.<sup>43</sup> The canton’s right of recourse against the person that caused the injury is then governed by cantonal law.<sup>44</sup>

### **III POLICE DETENTION**

45. Two types of detention by police – under criminal procedure law and under cantonal police law – are discussed in the section on administrative detention above. We were not able to locate any additional specific provisions regarding practices such as ‘kettling’ in crowd-control situations (if

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<sup>42</sup> See also Swiss Civil Code, art 450e para 2.

<sup>43</sup> Swiss Civil Code, art 454 para 3.

<sup>44</sup> Swiss Civil Code, art 454 para 4.

they exist, it would be in the context of cantonal police law). However, cantonal police statutes do contain general rules about the compulsory measures which may be exercised by police.

46. In terms of relevant case-law, the Swiss Federal Court decided on the 22 January 2014<sup>45</sup> that the ‘kettling’ of three participants in an unauthorised demonstration for two hours did not amount to a deprivation of liberty. However, after the ‘kettling’ the participants were brought to the police station (hand-cuffed) and held in custody for another 3-5 hours. The Swiss Federal Court concluded that the handcuffing, the transportation, and the fact that the applicants were held in a cell, amounted not to a mere restriction on liberty but to a deprivation of liberty for the purpose of art 31 para 4 of the SFC (which provides that any person who has been deprived of their liberty by a body other than a court has the right to have recourse to a court at any time). The result is that the participants have had a constitutional right to have the lawfulness of the police arrest reviewed by the Cantonal Measure Court as soon as possible.
47. Another relevant question under Swiss law could be whether the interference with personal liberty (guaranteed by art 10 SFC) constituted by practices such as ‘kettling’ could be justified under the provisions of art 36 SFC (which deals with restrictions on fundamental rights). According to the framework of analysis provided for by art 36, ‘kettling’ would need to have a legal basis (most likely in police law); to be justified in the public interest; and to be proportionate. Within the balancing test required by art 36, significant factors might include whether the demonstration was authorised in advance and whether it proceeded peacefully. Furthermore, questions about the duration of ‘kettling’ might be scrutinised with respect to the principle of proportionality (especially ‘necessity’) in the context of the individual case.

## IV PREVENTIVE DETENTION

### a) Preliminary remarks

48. This section considers the most severe preventive detention of a person after serving a sentence, namely indefinite incarceration (*Verwahrung*). There are two different types of indefinite incarceration in Swiss law: ‘normal indefinite incarceration’ (art 64 para 1 of the Swiss Criminal Code)<sup>46</sup> and ‘lifelong indefinite incarceration’ (art 64 para 1bis of the Swiss Criminal Code).
49. Lifelong indefinite incarceration became law in 2004 after the people’s initiative on ‘life sentences for highly dangerous and ‘untreatable’ sexual or violent offenders.’ A new art 123a SFC was added:

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<sup>45</sup> BGE vom 22. Januar 2014, 1C\_350/2013, 1C\_352.

<sup>46</sup> Schweizerisches Strafgesetzbuch vom 21 December 1937 (SR. 311.0.).

1 If a sex offender or violent offender is regarded in the reports required for sentencing as being extremely dangerous and his or her condition assessed as untreatable, he or she must be incarcerated until the end of his or her life due to the high risk of reoffending. Early release and release on temporary license are not permitted.

2 Only if new scientific findings prove that the offender can be cured and thus no longer represents a danger to the public can new reports be drawn up. If the offender is released on the basis of these new reports, the authorities granting his or her release must accept liability if he reoffends.

3 All reports assessing sex offenders or violent offenders must be drawn up by at least two experienced specialists who are independent of each other. The reports must take account of all the principles that are important for the assessment.

50. The main difference between the two preventive measures is the provision for review. Where periodic reviews are available in respect of normal indefinite incarceration, in the case of lifelong indefinite incarceration a review can only be carried out if there are ‘new scientific findings that lead to the expectation that the offender can be treated so that he will no longer pose a risk to the public.’<sup>47</sup>

#### **b) Normal indefinite incarceration**

##### *i) Decision to detain*

aa) Identity of decision-maker

51. An order for either normal or lifelong indefinite incarceration is made by the court which imposes the original sentence.<sup>48</sup>
52. Normally, the order is made at the time of the conviction. However, since 2007, Swiss criminal law allows also order to be made retrospectively, after the offender has served their sentence (*nachträgliche Verwahrung*). Article 65 of the Swiss Criminal Code provides that ‘[i]f during the execution of the custodial sentence, *new* information or evidence comes to light to the effect that the requirements for indefinite incarceration are fulfilled and already applied at the time of conviction although the court could not have had knowledge of this, the court may order indefinite incarceration retrospectively.’

bb) Circumstances in which detention may be ordered

53. Normal indefinite incarceration can be considered on conviction for one of the following trigger offences: murder, intentional homicide, serious assault, rape, robbery, hostage taking, arson, or endangering life. It may also be imposed in relation to any other offences with a minimum

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<sup>47</sup> Swiss Criminal Code, art 64c para 1.

<sup>48</sup> Swiss Criminal Code, art 64.

sentence of five years' imprisonment<sup>49</sup> if the offender 'has caused or intended to cause serious detriment to the physical, psychological or sexual integrity of another person.'<sup>50</sup>

54. Importantly, an order for indefinite incarceration can only be imposed if the offender is at substantive risk of reoffending. According to art 64 para 1 lit b of the Swiss Criminal Code, a danger of recidivism is established if:
- (a) 'due to the personality traits of the offender, the circumstances of the offence and his general personal circumstances', 'it is seriously expected that he will commit further offences of the same type'; or
  - (b) 'due to a permanent or long-term mental disorder of considerable gravity that was a factor in the offence, it is seriously expected that the offender will commit further offences of the same type.'
55. In the latter case, indefinite incarceration according to art 64 para 1 of the Swiss Penal Code is only inflicted if measures taken in a closed psychiatric institution or therapeutic institution do not promise any success.
56. According to art 56 para 4 of the Swiss Criminal Code, the court must base its decision on the report of an expert who has neither treated the offender before nor been responsible in any other way for their care.
57. It is important to note that the psychiatric reports play a key role. An order for indefinite incarceration can therefore be inflicted even though there is scientific evidence that the error rate is considerably high.<sup>51</sup> In the literature, it is therefore stressed that only a high probability of reoffending can justify an order for indefinite incarceration.<sup>52</sup> However, in the opinion of many experts, indefinite incarceration raises serious human rights concerns since it is not limited and can factually mean whole-life confinement.<sup>53</sup>

## *ii) Review of and challenges to detention*

### aa) Annulment of order during custodial sentence

58. Generally, the execution of the custodial sentence takes priority over indefinite incarceration. The execution of the order for indefinite incarceration can be annulled by the court that made it if, during the execution of the custodial sentence, it is 'highly probable'<sup>54</sup> that the offender will

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<sup>49</sup> See Swiss Criminal Code, art 64 paras 1-2.

<sup>50</sup> Swiss Criminal Code, art 64 para 1.

<sup>51</sup> Günter Stratenwerth, *Schweizerisches Strafrecht Allgemeiner Teil II: Strafen und Massnahmen* (2nd ed, Bern 2006), para 12 n 8.

<sup>52</sup> *ibid*, para 12 n 9.

<sup>53</sup> *ibid*, para 12 n 10.

<sup>54</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuche (Allgemeine Bestimmungen,

not reoffend when at liberty (art 64 para 3 Swiss Criminal Code).<sup>55</sup> The earliest possible time of release is the ‘time when the offender has served two thirds of a specific custodial sentence or 15 years of a life sentence.’

bb) Periodic review by administrative authority

59. The lawfulness of indefinite incarceration is subject to different mechanisms of automatic and periodic review. The competent body concerned with the review is a cantonal administrative authority; the formation of the authority is in the competence of each canton.
60. After serving the sentence and before the indefinite incarceration takes effect, the cantonal authority considers whether the offender should be transferred into an in-patient therapeutic treatment.<sup>56</sup> This review takes place every second year.
61. Furthermore, the detainee is entitled to an automatic and periodic review of their eligibility for parole: art 64b of the Swiss Criminal Code prescribes that the competent authority shall consider either ‘on request or ex officio’ ‘at least once annually, and for the first time after two years’ (...) ‘whether and when the offender may be released on parole from indefinite incarceration.’
62. The cantonal authority must base its decision on a report from the institution board; an independent specialist assessment (by an expert who has neither treated the offender nor been responsible in any other way for their care);<sup>57</sup> a hearing of a committee comprising representatives of the prosecution services, the execution authorities and one or more psychiatrists;<sup>58</sup> and a hearing of the offender.<sup>59</sup> The specialists and psychiatrists concerned must not be those responsible for the treatment or care of the offender.

cc) Appeal to a court

63. Since the order for indefinite incarceration is made by a body other than a court, the offender has constitutional right to ‘have recourse to a court at any time’.<sup>60</sup> As noted before, the authority must be a body in the sense of art 30 para 1 SFC, that means a ‘legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited.’ Multiple appeals are permitted,

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Einführung und Anwendung des Gesetzes) und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht vom 21. September 1998, 2098.

<sup>55</sup> Swiss Criminal Code, art 64 para 3.

<sup>56</sup> Swiss Criminal Code, art 64b para 1 lit b.

<sup>57</sup> Swiss Criminal Code, art 56 para 4; see also Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 901.

<sup>58</sup> Swiss Penal Code, art 62d para 2; see eg the detailed rules about the representatives in the Canton Berne, <[http://www.prison.ch/images/stories/pdf/konkordat\\_nw\\_ch/052\\_Konkordatlische\\_Fachkommission.pdf](http://www.prison.ch/images/stories/pdf/konkordat_nw_ch/052_Konkordatlische_Fachkommission.pdf)> accessed January 2014.

<sup>59</sup> Swiss Criminal Code, art 64b para 2.

<sup>60</sup> SFC, art 31 para 4.

and an appeal must be allowed if the conditions specified in art 64 para 1 lit b of the Swiss Criminal Code are no longer met.

### **c) Lifelong indefinite detention**

#### *i) Decision to detain*

aa) Identity of decision-maker

64. As noted above order for either normal or lifelong indefinite incarceration is made by the court which imposes the original sentence.<sup>61</sup>

bb) Circumstances in which detention may be ordered

65. Similar to the normal indefinite incarceration, lifelong indefinite incarceration can only be considered on conviction for one of the following trigger offences: murder, intentional homicide, serious assault, robbery, rape, indecent assault, false imprisonment or abduction, hostage taking, trafficking in human beings, genocide, or a felony under the heading of crimes against humanity or war crimes (Title Twelve).<sup>62</sup> The threshold is higher than for normal indefinite incarceration, as there is no additional provision relating to offences with a specified minimum sentence of imprisonment.

66. Furthermore, an order for lifelong indefinite incarceration may be made only where:

- ‘the offender, by committing the offence, caused or intended to cause serious detriment to the physical, psychological or sexual integrity of another person’;
- ‘there is a high probability that the offender will commit one of these felonies again’; and
- ‘the offender is assessed as being permanently untreatable, as the treatment offers no long-term prospect of success.’<sup>63</sup>

67. Article 56 para 4bis of the Swiss Criminal Code provides that the court must ‘base its decision on reports from at least two experienced specialists who are independent of each other and who have neither treated the offender nor been responsible in any other way for his care.’ However, it is not necessary that both experts conclude in favour of detention; in these cases the court is free to commission a third report.<sup>64</sup>

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<sup>61</sup> Swiss Criminal Code, art 64.

<sup>62</sup> Swiss Criminal Code, art 64 para 1bis.

<sup>63</sup> Swiss Criminal Code, art 64 para 1bis, a-c.

<sup>64</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 900.

68. The third criterion – that the offender must be regarded as permanently untreatable – has given rise to human rights concerns since such a verdict at the time of the conviction was criticised as erroneous, unscientific and suspicious.<sup>65</sup>
69. In November 2013, the Swiss Federal Court annulled a decision of the Appeal Court which ruled that the lifelong indefinite incarceration can be imposed if the psychiatrists come to the conclusion that the offender is untreatable *for the next twenty years*. The Swiss Federal Court rejected this ruling on the basis that lifelong indefinite incarceration can only be imposed if the court regards the offender as permanently untreatable at the time of the conviction. Since the two psychiatric reports in the case at hand both concluded that it could not be assessed whether the offender was permanently untreatable in the sense of lifelong untreatable (*lebenslänglich untherapierbar*), the measure could not be inflicted.<sup>66</sup>
70. It is an open question whether psychiatrists can ever assess someone as permanently untreatable in the sense of lifelong untreatable.

***ii) Review of and challenge to detention***

aa) Parole

71. According to art 64c para 4 of the Swiss Criminal Code, the court that ordered lifelong indefinite incarceration may grant the offender parole from indefinite incarceration if they no longer pose a risk to the public due to old age, serious illness or on other grounds. Parole is governed by art 64a of the Swiss Criminal Code. The court bases its decision on reports from at least two experienced specialists who are independent of each other and who have neither treated the offender nor been responsible in any other way for his care.<sup>67</sup>

bb) Review by administrative authority

72. Most concerns about the new provisions regarding lifelong indefinite incarceration related to the insufficient mechanisms for considering a detainee's release. According to art 64 para 1bis, the competent authority must consider (ex officio or on application) whether there is new scientific knowledge establishing that the offender is treatable so that they will no longer pose a risk to society. The authority must decide on the basis of a report from the Federal Commission for the

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<sup>65</sup> See [http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2469/files2473/VernehmlassungU ni\\_ger.pdf](http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2469/files2473/VernehmlassungU ni_ger.pdf); see also Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 903.

<sup>66</sup> BGE vom 23. November 2013, 6B\_93/2013.

<sup>67</sup> Swiss Criminal Code, art 64c para 5.

Assessment of the Treatability of Offenders.<sup>68</sup> The Commission is constituted of ten forensic-psychiatric experts.<sup>69</sup>

73. Apparently, the review is not concerned with the lawfulness of the person's detention in general, but more narrowly with the verdict of being untreatable. In this regard, it is important to note that the ground of review is not that the offender could have changed over time,<sup>70</sup> but that new scientific knowledge (such as new forms of therapy or new medication) indicates that the offender could now be treatable. Various experts have expressed the view that the content of the review in case of the lifelong indefinite incarceration is a violation of Art 5(4) ECHR because it is not about the lawfulness of the detention but the treatability of the offender.<sup>71</sup> Following the decision in *Vinter v UK*<sup>72</sup> it is more than questionable whether this rule violates the right to periodic review (Art 5(4) ECHR) or is even a breach of Art 3 ECHR.
74. If the administrative authority concludes that an offender is treatable, a therapy can be ordered.<sup>73</sup> The offender cannot be forced to undertake the therapy;<sup>74</sup> however, this is the only avenue to possible release. If the therapy proves to be successful, a court can transform this special detention into a stationary treatment in a psychiatric facility.<sup>75</sup>

cc) Appeal to a court

75. See above in relation to normal indefinite incarceration. Note that the court can assess the dangerousness of the offender and can order a release.<sup>76</sup> However, the reports on recidivism and dangerousness made by psychiatrists and the Federal Commission for the Assessment of the

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<sup>68</sup> See Verordnung über die Eidgenössische Fachkommission zur Beurteilung der Behandelbarkeit lebenslänglich verwahrter Straftäter vom 26. Juni 2013 (This law came into force on 1 January 2014.); see also Verordnung über die Eidgenössische Fachkommission zur Beurteilung der Behandelbarkeit lebenslänglich verwahrter Straftäter. Erläuterungen zum Entwurf.

<sup>69</sup> Verordnung über die Eidgenössische Fachkommission zur Beurteilung der Behandelbarkeit lebenslänglich verwahrter Straftäter vom 26. Juni 2013, art 3.

<sup>70</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 906.

<sup>71</sup> See [http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2469/files2473/VernehmlassungU\\_ni\\_ger.pdf](http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2469/files2473/VernehmlassungU_ni_ger.pdf) accessed 20 February 2014.

<sup>72</sup> *Vinter v United Kingdom* (2012) 55 EHRR 34.

<sup>73</sup> Swiss Criminal Code, art 64c para 2.

<sup>74</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 905.

<sup>75</sup> Swiss Criminal Code, art 64c para 3.

<sup>76</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 905.

Treatability of Offenders are not disputable.<sup>77</sup> The court is obliged to decide within a short period of time (Art 5(4) ECHR); in this respect, Swiss law refers to the case law of the ECHR.<sup>78</sup>

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<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

# Country Report for the United Kingdom

## I ADMINISTRATIVE DETENTION

### a) Preliminary remarks

1. Although there is a general criminal justice procedure for arrest (governed by the Police and Criminal Evidence Act 1984, discussed below), counter-terrorism cases have been generally dealt with in the realm of either detention without trial (which was abolished in the *Belmarsh* case, discussed below), or by various preventative regimes which, in some cases, may have the cumulative effect of amounting to detention without trial. This section discusses all such regimes.

### b) General criminal law

#### i) *Decision to detain*

2. The law of arrest is detailed in the Police and Criminal Evidence Act 1984 ('PACE'), Part III. A police constable may make an arrest with a warrant, or without a warrant in certain specified circumstances. Warrants are issued by a court.<sup>1</sup> Circumstances where arrest without a warrant is permissible include where the constable reasonably suspects a person to be committing an offence<sup>2</sup> or about to commit an offence;<sup>3</sup> or where a person is committing an offence<sup>4</sup> or is about to commit an offence.<sup>5</sup> A person must be provided with specific information upon arrest to render the arrest lawful.<sup>6</sup>
3. Where a person is arrested without a warrant, the custody officer at the police station must determine whether there is sufficient evidence to charge them and may detain them for as long as is necessary to enable them to do so.<sup>7</sup> If this evidence is not available, the person must be released (on or without bail) unless there are reasonable grounds for believing that detention without charge is necessary to secure or preserve evidence relating to the offence, or to obtain such evidence by questioning;<sup>8</sup> in this case detention may be authorised.<sup>9</sup> The detainee must be informed of the grounds for detention, and a written record must be made in their presence.<sup>10</sup>

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<sup>1</sup> Criminal Procedure Rules, Part 18.

<sup>2</sup> Police and Criminal Evidence Act 1984, s 24(1)(c).

<sup>3</sup> Police and Criminal Evidence Act 1984, s 24(1)(a).

<sup>4</sup> Police and Criminal Evidence Act 1984, s 24(1)(b).

<sup>5</sup> Police and Criminal Evidence Act 1984, s 24(1)(d).

<sup>6</sup> Police and Criminal Evidence Act 1984, s 28.

<sup>7</sup> Police and Criminal Evidence Act 1984, s 37(1).

<sup>8</sup> Police and Criminal Evidence Act 1984, s 37(2).

<sup>9</sup> Police and Criminal Evidence Act 1984, s 37(3).

<sup>10</sup> Police and Criminal Evidence Act 1984, s 37(4), (5).

Once a determination regarding the available evidence has been made, the person must generally be charged or released.

4. A person can only be detained without charge for a period of 24 hours.<sup>11</sup> However, a senior police officer may authorise the extension of detention for up to 36 hours (renewable once) if they have reasonable grounds for believing that detention without charge is necessary to secure or preserve evidence relating to the offence for which the person is under arrest, or to obtain such evidence by questioning them.<sup>12</sup> The authorising officer is required to inform the person of the grounds for their continued detention, and to give the person or any solicitor representing them an opportunity to make representations about the detention.<sup>13</sup> They are also required to inform the person of the right to have someone informed of their detention and to access legal representation.<sup>14</sup>
5. On expiration of the 36-hour period, the person must be released from detention (on or without bail) unless either they have been charged, or a warrant for continued detention has been obtained from a magistrate.<sup>15</sup> A warrant will be issued only where the magistrate is satisfied that there are reasonable grounds for believing that the further detention is justified by the need to secure, preserve or obtain evidence; the offence for which they are under arrest is an indictable offence; and the investigation is being conducted diligently and expeditiously.<sup>16</sup> The detainee must be provided with a copy of the information before the court and must be brought before the court for the hearing, at which they are entitled to legal representation.<sup>17</sup> The further detention may be for a maximum of 36 hours, but may be extended by a further 36 hours (to a maximum of 96 hours) if an application for an extension is made and granted.<sup>18</sup>
6. A person who has been charged with an offence but not granted bail (due to ineligibility)<sup>19</sup> may be held in prison to await trial. This is known as being remanded in custody.

### *ii) Review of and challenges to detention*

7. Reviews of detention without charge must be carried out by an officer of at least the rank of inspector who has not been directly involved in the investigation.<sup>20</sup> Reviews of detention where the person has been charged must be carried out by the custody officer.<sup>21</sup>

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<sup>11</sup> Police and Criminal Evidence Act 1984, s 41(1).

<sup>12</sup> Police and Criminal Evidence Act 1984, s 42.

<sup>13</sup> Police and Criminal Evidence Act 1984, s 42.

<sup>14</sup> Police and Criminal Evidence Act 1984, s 42.

<sup>15</sup> Police and Criminal Evidence Act 1984, s 42.

<sup>16</sup> Police and Criminal Evidence Act 1984, s 43.

<sup>17</sup> Police and Criminal Evidence Act 1984, s 43.

<sup>18</sup> Police and Criminal Evidence Act 1984, ss 43, 44.

<sup>19</sup> Bail Act 1976, Sch 1.

8. In each case, the review must be carried out no later than six hours after detention was first authorised, and the second must be no later than nine hours after the first. Subsequent reviews must be at intervals of not more than nine hours.<sup>22</sup>
9. For persons who have been detained without charge, the task of the reviewing officer is substantively the same as that of the custody officer at the beginning of the detention period.<sup>23</sup> Thus, if the conditions which initially justified detention without charge are no longer met, the person must be released (on or without bail) or charged. Before determining whether to authorise a person's continued detention, the review officer must give the person or their legal representative an opportunity to make submissions about the detention.<sup>24</sup>
10. In addition, a decision to remand a prisoner in custody is a judicial one, and is subject to judicial review.<sup>25</sup>

*iii) Compensation for unlawful detention*

11. Wrongful arrest is an actionable tort at common law. It is also actionable as a breach of Art 5(5) ECHR (which provides 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') pursuant to Schedule I of the Human Rights Act. A court seized of the matter may make an award of damages on the basis of 'just satisfaction' for breach of the rights in the Human Rights Act if it is a court with the power to award damages.<sup>26</sup> Awards of damages are generally in line with awards made by the ECtHR, and are typically less than awards made in common law tort cases.

**c) Specific counter-terrorism provisions**

*i) Context: rejection of 'indefinite detention without trial'*

12. The decision of the House of Lords in *A v Home Secretary (No. 1) Belmarsh*<sup>27</sup> ('*Belmarsh* decision') is authority for the proposition that although the government can lawfully derogate from Art 5 ECHR in a time of 'war or public emergency threatening the life of the nation',<sup>28</sup> it cannot use such a lawful derogation to institute a regime of 'indefinite detention without trial' of foreign

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<sup>20</sup> Police and Criminal Evidence Act 1984, s 40(1).

<sup>21</sup> Police and Criminal Evidence Act 1984, s 40(1).

<sup>22</sup> Police and Criminal Evidence Act 1984, s 40(3).

<sup>23</sup> Police and Criminal Evidence Act 1984, s 40(8) and (9) with s 37(1)-(6).

<sup>24</sup> Police and Criminal Evidence Act 1984, s 40(12).

<sup>25</sup> *SR v Nottingham Magistrates Court* [2001] EWHC (Admin) 802.

<sup>26</sup> Human Rights Act 1998, s 8(4).

<sup>27</sup> *A v Home Secretary (No. 1) Belmarsh* [2004] UKHL 56.

<sup>28</sup> *Lawless v Ireland (No 3)* (1961) 1 EHRR 15.

nationals suspected of terrorism. In the *Belmarsh* decision, the British government claimed that it was unable either to institute criminal proceedings against the claimants (who were detained without trial at HMP Belmarsh) or to lawfully deport them. The regime under s 21 of Part IV of the Anti-Terrorism Crime and Security Act 2001 was held to be in violation of Art 5 ECHR read together with Art 14 ECHR. The regime allowed the Home Secretary to certify and detain a foreign national on the ‘reasonable suspicion’ that he or she was an international terrorist. This power did not apply to British citizens. Following the *Belmarsh* decision, Parliament enacted a new regime of preventive anti-terrorism measures revolving around ‘control orders’; these and their successor provisions are discussed below.

*ii) Special Immigration Appeals Commission: detention and bail*

13. Foreign nationals certified as terrorist suspects by the Home Secretary under various statutory procedures can be detained pending deportation. The Home Secretary has an obligation of ‘due diligence’ to expedite removal, but there is no statutory time limit on immigration detention in these circumstances. However, compensation (of £1) was paid to two persons detained for a period of two years under an undisclosed Home Office policy which sought to detain all foreign nationals awaiting deportation.<sup>29</sup> Relevant limits on immigration detention are discussed in the section on ‘Immigration Detention’ below.
14. The Special Immigration Appeals Commission Act 1997 gives the Special Immigration Appeals Commission (‘SIAC’) jurisdiction over bail hearings where the Home Secretary certifies that detention is ‘necessary in the interests of national security’.<sup>30</sup> The SIAC comprises two High Court judges, and one ‘lay member’ who is generally a former diplomat or intelligence official. The lay member ‘is there to advise his judicial colleagues on how much weight should be given to the various kinds of secret information submitted in evidence’.<sup>31</sup> Bail hearings before the SIAC can involve closed material (secret evidence) which neither the appellant nor their own counsel can access. In *Cart v Upper Tribunal R (U) and (XC) v Special Immigration Appeals Commission (Cart)*,<sup>32</sup> the Divisional Court held that this entitled detainees at bail hearings to the level of procedural protection laid down in *A v UK*<sup>33</sup> In *Cart*, the SIAC’s decision to revoke XC’s bail had been based *wholly* on closed evidence. Although the court acknowledged that immigration detention was essentially temporary in nature, Laws LJ considered the executive to be bound by

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<sup>29</sup> *WL (Lumba) v Home Secretary* [2011] UKSC 23.

<sup>30</sup> Special Immigration Appeals Commission Act 1997, s 3(2).

<sup>31</sup> B Barber, ‘On SIAC’ (2004) 26(6) London Review of Books 40-41, <<http://www.lrb.co.uk/v26/n06/brian-barber/on-siac>> accessed 5 December 2013.

<sup>32</sup> *Cart v Upper Tribunal R (U) and (XC) v Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin).

<sup>33</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29.

the decision in *A v UK* to disclose a ‘core irreducible minimum’ of the reasons for detention, because detention engaged Art 5(4) ECHR.<sup>34</sup>

### *iii) Terrorism Prevention and Investigation Measures*

15. As noted above, following the *Belmarsh* decision, Parliament enacted a regime of preventive anti-terrorism measures known as ‘control orders’,<sup>35</sup> which were subsequently replaced with ‘terrorism prevention and investigation measures’ (‘TPIMs’).<sup>36</sup> These measures apply to nationals and non-nationals alike.
16. Ordinary TPIMs allow for various restrictions to be placed upon terrorism suspects; these include electronic tagging, surveillance, obligations to report to a police station, restrictions on work and education, restrictions on association, and curfews. None of the preventative measures available under the ordinary TPIMs regime can be said to amount to ‘detention’ contrary to Art 5 ECHR; as a result, it is not discussed further. However, it may be worth noting that the TPIMs regime is in this respect notably more liberal than the regime of control orders it replaced: in particular, unlike the control orders regime, it does not provide for forcible location; strictly limits powers in connection with TPIMs to those specified in Sch 1 to the Act; and ensures that TPIMs are time-limited.<sup>37</sup>
17. Importantly, there also exists a draft Bill making ‘enhanced’ terrorism prevention and investigation measures (‘ETPIMs’) available should the perceived need for their institution arise.<sup>38</sup> It is envisaged that this Bill will be introduced as ‘emergency legislation’ if necessary in the future.<sup>39</sup> Importantly, the measures provided for under the ETPIMs regime would include restrictions on movement (including the imposition of a curfew for up to 16 hours on an individual), residence (including possible forced relocation), communication and association. In this respect, the ETPIMs regime (if enacted) would constitute a move back toward the type of measures provided for under the old regime of control orders.
18. The TPIM Act foreshadows the possible future introduction of the ETPIM Bill, and in particular addresses the situation where the Secretary of State would wish to introduce the

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<sup>34</sup> *Cart v Upper Tribunal R (U) and (XC) v Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin), [109]-[112]; *Home Secretary v AF* (No. 3) [2009] UKHL 28, [81].

<sup>35</sup> Prevention of Terrorism Act 2005, now repealed.

<sup>36</sup> Terrorism Prevention and Investigations Measures Act 2011.

<sup>37</sup> See Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, ‘Draft Enhanced Terrorism Prevention and Investigation Measures Bill, First Report’ (21 November 2012) HL Paper 70/HC 495.

<sup>38</sup> Draft Enhanced Terrorism Prevention and Investigation Measures Bill. See also Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, ‘Draft Enhanced Terrorism Prevention and Investigation Measures Bill, First Report’ (21 November 2012) HL Paper 70/HC 495.

<sup>39</sup> Explanatory Note to the Terrorism Prevention and Investigations Measures Act 2011.

ETPIM Bill into law, but could not do so because it is during the period between the dissolution of one Parliament and the first Queen's Speech of the new Parliament. If, during this period, the Secretary of State considers that it is necessary to do so by reason of urgency, the Secretary may make a temporary enhanced TPIM.<sup>40</sup> The temporary enhanced TPIM is the same in substance to the ETPIMs envisaged under the ETPIM Bill, although it is limited to a maximum of 90 days.<sup>41</sup>

19. Unlike ordinary TPIMs, temporary enhanced TPIMs (if made under s 26) or ETPIMs (if legislated for via the present Bill) might raise questions regarding the threshold of detention. The House of Lords has previously held that a curfew confining a suspect to their home for 18 hours a day as part of the (now discontinued) control order regime did in fact amount to detention in violation of Art 5 ECHR.<sup>42</sup> Furthermore, the ECtHR has authority on *inter alia* the length of curfews (in conjunction with other restrictions) amounting to a deprivation of liberty can be as low as 12 hours.<sup>43</sup> Such precedents apply equally to the TPIMs and (should it be enacted) the ETPIMs regime. The Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill noted the concerns raised by a witness before the Committee, Professor Helen Fenwick, of the risk of the ETPIMs regime to violate Art 5 ECHR where there was a 'particularly stringent' ETPIM.<sup>44</sup> Similarly, the Joint Committee noted the Government's acknowledgement that the compliance of the proposed ETPIMs regime with Art 5 ECHR represents a 'grey area' which could be open to challenge, although the Government ultimately expressed confidence that the ETPIMs were ECHR compliant.<sup>45</sup>
20. In light of this 'grey area' surrounding the threshold question, it is worth briefly considering the procedural safeguards and review process governing the ETPIMs regime. Before imposing an ETPIM, five conditions must be met:

(1) Condition A is that the Secretary of State is satisfied on the balance of probabilities that the individual is, or has been, involved in terrorism-related activity (the "relevant activity").

(2) Condition B is that some or all of the relevant activity is new terrorism-related activity.

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<sup>40</sup> Terrorism Prevention and Investigations Measures Act 2011, s 26

<sup>41</sup> Explanatory Note to the Terrorism Prevention and Investigations Measures Act 2011, [136].

<sup>42</sup> *Home Secretary v JJ* [2007] UKHL 45.

<sup>43</sup> H. Fenwick, 'Designing ETPIMs around ECHR Review or Normalisation of 'Preventive' Non-Trial-Based Executive Measures?' (2013) 76(5) *Modern Law Review* 876–908, 892; see also *Trijonis v Lithuania* App no 2333/02 17 March 2005, *Ciancimino v Italy* (1991) 70 DR 103 and *Raimondo v Italy* (1994) 18 EHRR 237, [39].

<sup>44</sup> Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, 'Draft Enhanced Terrorism Prevention and Investigation Measures Bill', First Report (21 November 2012) HL Paper 70/HC 495, [89].

<sup>45</sup> Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, 'Draft Enhanced Terrorism Prevention and Investigation Measures Bill, First Report' (21 November 2012) HL Paper 70/HC 495 [87]-[89].

(3) Condition C is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual.

(4) Condition D is that:

(a) the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified terrorism prevention and investigation measures to be imposed on the individual, and

(b) some or all of the specified terrorism prevention and investigation measures are measures that may not be imposed by a standard TPIM notice.

(5) Condition E is that:—

(a) the court gives the Secretary of State permission under section 6 of TPIMA 2011 (as it applies to this Act by virtue of section 3), or

(b) the Secretary of State reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining such permission.

21. The ETPIMs (if the bill comes into law) are subject to the same approval and review process as the existing TPIM legislation.<sup>46</sup> Thus, as with ordinary TPIMs, any decision by the Secretary of State to impose an ETPIM (if the bill comes into law) must first be permitted by the High Court.<sup>47</sup> The function of the Court on hearing the application is to determine whether the Secretary of State's decision is 'obviously flawed', and to determine whether to give permission to impose measures on the individual or, if certain conditions are not satisfied, to give directions in relation to the measures to be imposed.<sup>48</sup> However, if the Secretary of State reasonably considers that the urgency of the case requires TPIMs to be imposed without obtaining such permission, the Secretary of State is not required to seek the Court's permission but must immediately refer the notice to the Court.<sup>49</sup> In such circumstances, the function of the Court is to consider whether the decision of the Secretary of State was 'obviously flawed' (applying principles applicable to judicial review), and has the power to quash the TPIM notice if it concludes the decision was obviously flawed.<sup>50</sup>
22. Once the decision has been either permitted or confirmed, it is subject to an automatic hearing to review the decisions of the Secretary of State that the relevant conditions were met and

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<sup>46</sup> Draft Enhanced Terrorism Prevention and Investigation Measures Bill 2011, s 3.

<sup>47</sup> See TPIM Act 2011 s 6 and Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, 'Draft Enhanced Terrorism Prevention and Investigation Measures Bill, First Report' (21 November 2012) HL Paper 70/HC 495 [40] and [51].

<sup>48</sup> TPIM Act 2011, ss 6(3) and (9).

<sup>49</sup> TPIM Act 2011, Sch 2.

<sup>50</sup> TPIM Act 2011, Sch 2.

continue to be met.<sup>51</sup> As part of this review process, the Court has the power to quash the notice, quash particular measures within the notice, and give power to the Secretary of State to revoke the notice or vary measures specified within the notice.<sup>52</sup>

*iv) Detention without charge on suspicion of terrorism*

aa) Decision to detain

23. The Terrorism Act 2000, as amended by the Terrorism Act 2006 and the Protection of Freedoms Act 2012, provides for the detention of a terrorist suspect without criminal charge for a maximum of 14 days. This form of detention without charge is regulated by Sch 8 of the Terrorism Act 2000, and is authorised when a person is arrested without a warrant on suspicion of being a terrorist pursuant to s 41 of that Act.<sup>53</sup>
24. A person detained under the Sch 8 has the right to have someone informed of their detention and to access legal representation.<sup>54</sup> A delay in allowing these rights to be exercised may be authorised by an officer of at least the rank of Superintendent where they have reasonable grounds for believing there is a risk of (inter alia) interference with evidence, injury to a person, the altering of persons suspected of having committed a serious offence, the hindering of the recovery of property obtained as a result of a serious offence, interference with the gathering of information about acts of terrorism, or the altering of a person making it more difficult to prevent or apprehend people in connection with acts of terrorism.<sup>55</sup> Provision is also made for an officer to be present at consultations between the detainee and their legal representative under certain circumstances.<sup>56</sup>

bb) Review of and challenge to detention

25. Detention must be 'be periodically reviewed by a review officer.'<sup>57</sup> A review must be carried out as soon as practicable after a person's arrest, then at 12-hourly intervals thereafter.<sup>58</sup> A review officer in this context may be a police officer, but the officer cannot be directly concerned in the criminal investigation.<sup>59</sup> During a review of detention, the review officer must give the detainee (or their solicitor) the opportunity to make written or oral representations regarding the

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<sup>51</sup> TPIM Act 2011, ss 8 and 9.

<sup>52</sup> TPIM Act 2011, s 9(5).

<sup>53</sup> See Terrorism Act 2000, s 41(2).

<sup>54</sup> Terrorism Act 2000, Sch 8, paras 6-7.

<sup>55</sup> Terrorism Act 2000, Sch 8, para 8.

<sup>56</sup> See eg Terrorism Act 2000, Sch 8, para 17.

<sup>57</sup> Terrorism Act 2000, Sch 8, para 21(1).

<sup>58</sup> Terrorism Act 2000, Sch 8, para 21(2)-(3).

<sup>59</sup> Terrorism Act 2000, Sch 8, para 24.

detention.<sup>60</sup> If the review officer holds a rank lower than Superintendent, the detention must be checked (at least once) by an officer holding the rank of Superintendent or higher.<sup>61</sup>

26. A review officer may authorise a person's continued detention only if satisfied that it is necessary to obtain or preserve relevant evidence; pending the result of an examination or analysis of relevant evidence; pending a decision whether to apply to the Secretary of State for a deportation notice, or pending the outcome of such an application; or pending a decision whether the detained person should be charged with an offence.<sup>62</sup> A written record of the decision must be made, and if detention is reauthorized the detainee must be informed of the grounds.<sup>63</sup>
27. A person detained under s 41 with Sch 8 must be released no more than 48 hours from the time of their arrest unless a warrant for further detention is obtained.<sup>64</sup>
28. Schedule 8 Part III covers extension of detention without charge beyond 48 hours. An application must be made to a judicial authority for a warrant to extend detention.<sup>65</sup> The application must be made by either a Crown Prosecutor or a police officer having at least the rank of Superintendent.<sup>66</sup> The initial extension is for a period of seven days from the time of the person's arrest under s 41.<sup>67</sup> The judicial authority must satisfy itself that there are reasonable grounds for believing continued detention without charge is necessary (again) to preserve or obtain relevant evidence, or pending the result of an examination or analysis of relevant evidence.<sup>68</sup> A further extension may be made on application to a total period of 14 days.<sup>69</sup>
29. The Joint Committee on Human Rights ('JCHR'), reporting in parliamentary session 2005-2006, expressed concerns that judicial control of this type was investigative, and not in line with the adversarial judicial control demanded by Art 5 ECHR.<sup>70</sup> The JCHR made a further recommendation of an 'enforceable right to compensation' for those detained and released without charge under the Terrorism Act, but the law has not been amended to reflect this.<sup>71</sup> There have been no actions in the common law of tort, or damages claims under the Human Rights Act 1998, to date.

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<sup>60</sup> Terrorism Act 2000, Sch 8, para 26.

<sup>61</sup> Terrorism Act 2000, Sch 8, para 25(2).

<sup>62</sup> Terrorism Act 2000, Sch 8, para 23.

<sup>63</sup> Terrorism Act 2000, Sch 8, para 28.

<sup>64</sup> Terrorism Act 2000, s 41(3), (5) and (7).

<sup>65</sup> Terrorism Act 2000, Sch 8, para 29(1).

<sup>66</sup> Terrorism Act 2000, Sch 8, para 29.

<sup>67</sup> Terrorism Act 2000, Sch 8, para 29.

<sup>68</sup> Terrorism Act 2000, Sch 8, para 32.

<sup>69</sup> Terrorism Act 2000, Sch 8, para 36 (as amended by the Protection of Freedoms Act 2012, s 57).

<sup>70</sup> Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention', 24<sup>th</sup> Report (2005/2006) HL Paper 240/HC 1576, [138].

<sup>71</sup> *ibid* [143].

*v) Detention at ports or border controls on suspicion of terrorism*

30. Schedule 7 of the Terrorism Act 2000 relates to the powers of police and immigration officials to detain persons at ports and border controls. Under the Schedule, an official may question a person at UK ports and border controls in order to determine whether they are a terrorist within the meaning of s 40(1)(b).<sup>72</sup> For the purposes of this questioning an official has the power to detain a person for a maximum of nine hours.<sup>73</sup> The power may be exercised whether or not the officer has grounds for suspecting that the person falls under s 40(1)(b).<sup>74</sup>
31. There is limited jurisprudence on the legality provision to date. In *Beghal v DPP*<sup>75</sup> the Court rejected claims by way of judicial review that Sch 7 violated Arts 5, 6, and 8 ECHR. The Court dealt with the Art 5 issue as follows:

In our judgment, the argument under Art 5 can be dealt with summarily. On the facts of this case, the Respondent accepts that there was interference with the Appellant's Art 5 rights... [But] the Appellant accepts that she cannot contend that the interference was other than 'in order to secure the fulfilment of any obligation prescribed by law'. Thus, provided that the interference was 'lawful' the interference was justified. Our conclusion under Art 8 that the Schedule 7 powers of examination are lawful, accordingly determines the Art 5 debate as well.<sup>76</sup>

*vi) Action for habeas corpus*

32. The remedy of *habeas corpus* is available at common law for any form of detention. When relief is granted using a writ of *habeas corpus*, the decision cannot be reversed on appeal to a higher court (although appeal may be made on a point of legal principle). According to s 15(4) of the Administration of Justice Act 1960, which deals with *habeas corpus* appeal proceedings, an appeal brought by virtue of this section does not 'affect the right of the person restrained to be discharged in pursuance of the order under appeal'.

## II IMMIGRATION DETENTION

### a) Decision to detain

*i) Identity of decision-maker*

33. The power of immigration officers to detain was introduced in para 16(2) Sch 2 of the Immigration Act 1971 and has been maintained in subsequent Acts. Section 62 of the Nationality, Immigration and Asylum Act 2002 extended this power to the Secretary of State,

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<sup>72</sup> Terrorism Act 2000, Sch 7, para 2(1).

<sup>73</sup> Terrorism Act 2000, Sch 7, para 6.

<sup>74</sup> Terrorism Act 2000, Sch 7, para 2(4).

<sup>75</sup> *Beghal v DPP* [2013] EWHC 2573 (Admin).

<sup>76</sup> *ibid*, [113].

who may authorise detention in cases where they have the power to set removal directions. The Secretary of State's powers of detention were further extended by s 36(1) of the UK Border Act 2007 to cases where they are considering whether the provisions on automatic deportation apply.

*ii) Circumstances under which detention may be ordered*

34. Immigrations officers have a power to detain in the following key cases:
- persons arriving in the UK may be detained pending examination by an immigration officer to determine whether they should be granted leave to enter;<sup>77</sup>
  - persons seeking to leave the UK may be detained for 12 hours in order to see if they are British citizens and whether they entered lawfully;<sup>78</sup>
  - persons refused leave to enter and those reasonably suspected of having been refused leave to enter may be detained pending the giving of directions for their removal from the UK;<sup>79</sup>
  - illegal entrants and those suspected of being illegal entrants may be detained, pending a decision on whether to issue removal directions and pending removal in pursuance of such directions;<sup>80</sup> and
  - persons who do not abide by a condition of their leave to enter or remain, or who have obtained such leave by deception, or whose leave has been revoked, may be detained pending a decision to remove them or pending removal.<sup>81</sup>
35. The Secretary of State has a power to detain in the following key cases:
- pending a decision whether to direct removal pursuant to the Secretary of State's powers under Schedule 2 to the Immigration Act, and pending removal;
  - in the case of people seeking to leave the UK who have made an asylum or human rights claim or who have sought departure from the immigration rules, pending the Secretary of State's examination and decision whether to grant leave to enter or to remove;<sup>82</sup>
  - where the Secretary of State has reasonable grounds to suspect that the person may make one of the specified decisions above;<sup>83</sup>

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<sup>77</sup> Immigration Act 1971, Sch 2, para 16(1).

<sup>78</sup> Immigration Act 1971, Schedule 2, para 16(1A), inserted by the Immigration and Asylum Act 1999, Schedule 14, para. 60

<sup>79</sup> Immigration Act 1971, Schedule 2 paras 8, 16(2), as amended by the Immigration and Asylum Act 1999, section 140(1); and the Nationality, Immigration and Asylum Act 2002, section 73(5)

<sup>80</sup> Immigration Act 1971, Schedule 2, paras 9, 16(2) as amended

<sup>81</sup> Immigration and Asylum Act 1999, s 10(1)(a), (b), (ba) and (7).

<sup>82</sup> Nationality, Immigration and Asylum Act 2002, s 62(2) and (3)(a).

<sup>83</sup> Nationality, Immigration and Asylum Act 2002, s 62(7).

- where a person who makes a claim for asylum has leave to enter or remain and fails to comply with the conditions attached thereto;<sup>84</sup>
- where a recommendation for deportation made by a court is in force a person must be detained pending the making of a deportation order unless a court otherwise directs or the Secretary of State directs that he or she be released pending further consideration of their case;<sup>85</sup>
- when a notice has been given to a person of the decision to deport them, the Secretary of State may detain them pending the making of the order;<sup>86</sup> and
- persons against whom a deportation order has been made may be detained by the Secretary of State pending their removal or departure from the UK.<sup>87</sup>

### *iii) General presumptions and limitations*

36. In *Minteh (Lamin) v Secretary of State for the Home Department*,<sup>88</sup> it was held that there is a presumption in favour of temporary release. This presumption was then confirmed in the 1998 White Paper: *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum*.<sup>89</sup> The presumption reflects the courts' broader duty to guard the liberty of the person in the absence of express legislative direction.<sup>90</sup>
37. Article 5(1)(f) ECHR provides a relevant exception to the prohibition on deprivations of liberty – the immigration detention regime is justified by the UK as falling within this exception.
38. If the Secretary of State fails to follow their own policy in making a detention decision, it is established that this would constitute an error of law rendering the decision liable to challenge.<sup>91</sup>

### *iv) Provision of reasons and monthly review*

39. In the 1998 White Paper, the UK Government stated that the reasons for detention should be provided at the time of detention and that this process should be repeated once a month. An Immigration Officer will therefore usually complete Form IS 91, under which he or she must specify the power under which the person has been detained, the reasons for detention and the basis on which the decision was made. The detainee must also be informed of their bail rights

<sup>84</sup> Nationality, Immigration and Asylum Act 2002, s 71(1)-(3).

<sup>85</sup> Immigration Act 1971, Sch 3, para 2(1), as amended by the Immigration and Asylum Act 1999, s 54(3).

<sup>86</sup> Immigration Act 1971, Sch 3, para 2(2), as amended by the Asylum and Immigration (Treatment of Claimants) Act 2004, s 34(2).

<sup>87</sup> Immigration Act 1971, Sch 3, para 2(3), as amended by the Asylum and Immigration (Treatment of Claimants) Act 2004, s 54(3).

<sup>88</sup> [1996] EWCA Civ 1339.

<sup>89</sup> Secretary of State for the Home Department (White Paper, Cm 4018, 1998) ch 12.

<sup>90</sup> See eg *Tam Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] A.C. 97.

<sup>91</sup> *R v Secretary of State for the Home Department, ex parte Khan (Asif Mahmood)* [1984] 1 WLR 1337.

upon completion of the form. The requirement that reasons for detention be provided at the time detention and thereafter monthly is also set out in Rule 9 of the Detention Centre Rules 2001.

40. The monthly provision of reasons also acts as a form of periodic review of detention. In *R (Kambadzi) v Secretary of State for the Home Department*,<sup>92</sup> the Supreme Court held that the failure to conduct regular reviews as provided for rendered the detention of the applicant unlawful.

#### *v) Time limits on detention*

41. There is no express time limit placed on immigration detention in the UK. However, there have been a number of cases in which UK courts have considered the relevance of time to the scope of the power to detain. For example, Dyson LJ in *R (on the application of I) v Secretary of State for the Home Department*<sup>93</sup> stated that the length of the period of detention was relevant to the question of how long it was reasonable for the Secretary of State to detain a person pending deportation pursuant to para 2 Sch 3 of the Immigration Act 1971. Similar, in the case of *R v Governor of Durham Prison; Ex parte Singh* [1984] All E.R. 983, Woolf J considered that:
- this power could only be used pending the individual's removal and not for any other purpose;
  - while there is no statutory time limit on administrative detention, the power is impliedly limited to a duration and circumstances which are reasonable and consistent with the statutory purpose of the powers; and
  - a failure by the immigration authority responsible to take the action it should take, or to take it sufficiently promptly, would render the detention unlawful.
42. The passage of time may therefore be considered relevant in challenging the lawfulness of detention (see below).

### **b) Review of and challenge to detention**

#### *i) Habeas corpus and judicial review*

43. In addition to the monthly reviews described above, a detainee may challenge their detention in the High Court either through an application for *habeas corpus* or judicial review. *Habeas corpus* concerns the power to detain and judicial review the broader exercise of discretion to detain. In the former case, the Secretary of State has the burden of proving that the power to detain exists and that the detention is for a purpose authorised by the statute.<sup>94</sup> In the latter, the applicant

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<sup>92</sup> [2011] UKSC 23.

<sup>93</sup> [2002] EWCA Civ 888, [48].

<sup>94</sup> *Hicks v Faulkner* (1881) 8 QBD 167.

must show that the decision to detain was illegal, irrational, or subject to some procedural impropriety. Possible remedies on judicial review include an order quashing the decision to detain, an order preventing an authority from acting beyond the scope of its powers, a mandatory order compelling an authority to fulfil its duties, or a declaration setting out the rights and obligations of the parties.

44. In addition, an action may be brought under s 7 of the Human Rights Act, alleging a breach of Art 5 ECHR.
45. There does not appear to be any provision for a merits-based review of the decision to detain – but an equivalent avenue may be provided by the Temporary Admission/Bail proceedings discussed below.

### *ii) Temporary admission/Release with restrictions/Bail*

46. A person liable to detention under the Immigration Acts may be granted temporary admission or release on restrictions or, if they have already been detained, bail. The power to grant this is set out in paras 21(1) and (2) of Sch 2 of the Immigration Act 1971. In theory an immigration officer is able to exercise this power in relation to an illegal entry or administrative removal case liable to detention under para 16, apart from where the person is detained on embarkation.<sup>95</sup>
47. A detainee may apply to the First-Tier Tribunal (Immigration and Asylum Chamber) for bail. An Immigration Judge will then hear their submissions before ruling on whether bail should be granted. Bail may be applied for on multiple occasions, though policy guidance suggests that a fresh application be made only where there is a change in the detainee's circumstances, which may include the lapse of time. If bail is refused, written reasons will be given.

### **c) Compensation for unlawful detention**

48. A person who has been unlawfully detained may sue Home Office officials for damages for false imprisonment.<sup>96</sup>
49. In addition, if the Court finds a breach of a Convention right as set out above, it may grant such relief or remedy as it considers 'just and appropriate'.<sup>97</sup> This may include an award of damages.<sup>98</sup>
50. Finally, in *BA & Ors v Secretary of State for the Home Department*<sup>99</sup> the Court of Appeal held that it was not an abuse of process for the claimant failed asylum-seekers – who had been refused

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<sup>95</sup> O Richards, *British Immigration Practice Handbook*, vol 1, (2<sup>nd</sup> ed, Oakley Press 2012) 469.

<sup>96</sup> *ID v Home Office* [2005] EWCA Civ 38.

<sup>97</sup> Human Rights Act 1998, s 8(1).

<sup>98</sup> Human Rights Act 1998, s 8(3).

<sup>99</sup> [2012] EWCA Civ 944 (11 July 2012).

permission to bring judicial review proceedings of removal directions – to subsequently bring a private law claim for damages for unlawful detention.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

#### a) Threshold questions

51. Whether a mentally ill person is held to be ‘detained’ will depend on the circumstances of the case, in particular the degree of control and supervision they are under and whether, in practice, they would be free to leave.
52. In *HL v United Kingdom*<sup>100</sup> the applicant, a severely autistic adult, was informally admitted to hospital. He did not resist admission and so the doctors did not consider detaining him compulsorily under the Mental Health Act 1983.
53. The applicant complained his time in the hospital as an ‘informal patient’ amounted to a ‘deprivation of liberty’ within the meaning of Art 5(1). The ECtHR agreed and noted that:

in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question.<sup>101</sup>

54. Here the court found that situation amounted to ‘detention’ as the applicant was under ‘continuous supervision and control’ and, in reality, was not free to leave.<sup>102</sup> This led to the introduction of the deprivation of liberty safeguards in the Mental Capacity Act 2005. The UK Supreme Court March 2014 held that any deprivation of liberty on account of living arrangements, requires authorisation by the court or through these safeguards. Notably, it held that the key question was whether there was ‘continuous supervision and control’ and in determining this, the person’s compliance or lack of objection, or the relative normality of the placement (whatever the comparison made) was not relevant.<sup>103</sup>

#### b) Decision to detain

##### *i) Circumstances in which detention may be ordered*

55. Under the Mental Health Act 1983 (as amended by the Mental Health Act 2007) a person may be detained if they are suffering from a mental disorder, defined in s 1(2) as ‘any disorder or disability of the mind’.

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<sup>100</sup> *HL v United Kingdom* [2004] ECHR 471.

<sup>101</sup> *ibid*, [89].

<sup>102</sup> *ibid*, [91].

<sup>103</sup> *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council; P and Q (by their litigation friend the Official Solicitor) v Surrey County Council* [2014] UKSC 19 [50] (Lady Hale).

56. Sections 2-4 of the Mental Health Act provide for compulsory admission to hospital for assessment or treatment. Section 2 provides for compulsory admission to hospital for 28 days if a person is ‘suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment)’<sup>104</sup> and the detention is ‘in the interests of [their] own health or safety or with a view to the protection of other persons.’<sup>105</sup>
57. Section 3 provides for compulsory admission for an initial six month period for treatment if the patient is ‘suffering from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in hospital’;<sup>106</sup> it is necessary for health and safety of the patient or for the protection of others; treatment cannot be provided unless the patient is detained;<sup>107</sup> and there is appropriate medical treatment available.<sup>108</sup>
58. Section 4 allows for detention for assessment in urgent cases pending the completion of an application under s 2.<sup>109</sup>
59. All applications need to be made to the managers of the hospital by an approved mental health professional or by the patient’s nearest relative<sup>110</sup> and must be supported by the written recommendations of two registered medical practitioners<sup>111</sup> (save an emergency application under s 4 which requires only one medical recommendation).<sup>112</sup> Of these recommendations, one must be given by a practitioner with special experience in mental disorders, and one must if practicable be given by a practitioner who knows the patient.<sup>113</sup>
60. The application constitutes sufficient authority for the managers of the hospital to detain the patient in accordance with the provisions of the Mental Health Act.<sup>114</sup>

*ii) Orders for discharge*

61. The clinician responsible for the patient may subsequently order their discharge under a ‘community treatment order’ if the treatment the patient needs can be provided without their being detained in a hospital.<sup>115</sup> Patients on community treatment orders are subject to recall to

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<sup>104</sup> Mental Health Act 1983, s 2(2)(a).

<sup>105</sup> Mental Health Act 1983, s 2(2)(b).

<sup>106</sup> Mental Health Act 1983, s 3(2)(a).

<sup>107</sup> Mental Health Act 1983, s 3(2)(c).

<sup>108</sup> Mental Health Act 1983, s 3(2)(d).

<sup>109</sup> Mental Health Act 1983, s 4.

<sup>110</sup> Mental Health Act 1983, s 11.

<sup>111</sup> Mental Health Act 1983, ss 2(3) and 3(3).

<sup>112</sup> Mental Health Act 1983, s 4(3).

<sup>113</sup> Mental Health Act 1983, s 12(2).

<sup>114</sup> Mental Health Act 1983, s 6.

<sup>115</sup> Mental Health Act 1983, s 17A.

the hospital if, in the opinion of the responsible clinician, they require treatment in hospital and there would be a risk of harm to their health or safety (or the health or safety of others) if they were not recalled to hospital for that purpose.<sup>116</sup> Once the person has been recalled, they must be released within 72 hours unless the community treatment order is revoked.<sup>117</sup>

62. A general order discharging a patient who is liable to be detained may also be made in writing by the clinician responsible for the patient, the managers of the hospital, or – significantly – by the nearest relative of the patient.<sup>118</sup> However, the order cannot be made by the nearest relative except after giving at least 72 hours' notice to the managers of the hospital. If, within this time, the responsible clinician gives the managers a report certifying that the patient if discharged 'would be likely to act in a manner dangerous to other persons or to himself', the order for discharge is of no effect.<sup>119</sup>

### **c) Review of and challenge to detention**

#### *i) Periodic review by responsible clinician*

63. As noted above, the authority to detain for treatment under s 3 of the Mental Health Act only lasts for an initial period of six months. A person may only be detained for longer if the authority is renewed.<sup>120</sup> This may occur for an initial further period of six months, and for further periods of one year thereafter.<sup>121</sup> The clinician responsible for the patient has the power to authorise renewal and can only do so if, after examining the patient, reports to the managers of the hospital that they are satisfied that the conditions in s 3 continue to be met.<sup>122</sup> The report cannot be made unless a person who has been 'professionally concerned' with the patient's treatment, but belongs to a different profession than the responsible clinician, agrees in writing that the conditions are satisfied.<sup>123</sup>
64. The patient must be informed of the renewal and the reasons for it.<sup>124</sup>

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<sup>116</sup> Mental Health Act 1983, s 17E.

<sup>117</sup> Mental Health Act 1983, s 17F.

<sup>118</sup> Mental Health Act 1983, s 23(1)-(2).

<sup>119</sup> Mental Health Act 1983, s 25.

<sup>120</sup> Mental Health Act 1983, s 20(1).

<sup>121</sup> Mental Health Act 1983, s 20(2).

<sup>122</sup> Mental Health Act 1983, s 20(3)-(4).

<sup>123</sup> Mental Health Act 1983, s 20(5A).

<sup>124</sup> Mental Health Act 1983, s 20(3).

### *ii) Review by Mental Health Tribunal*

65. Detention may be challenged by making an application to the Mental Health Tribunal,<sup>125</sup> which may discharge the patient if it is not satisfied that the patient meets the statutory criteria for compulsory admission.
66. If no application has been made, the managers of a hospital where a person must also refer their case to the Mental Health Tribunal after the first six months of detention.<sup>126</sup> They must also refer the case to the Mental Health Tribunal if a period of more than three years has passed since the case was last considered by the Tribunal.<sup>127</sup>

### *iii) Appeal from decision of Mental Health Tribunal*

67. Decisions of the Mental Health Tribunal may (with leave) be appealed to the Upper Tribunal's Administrative Appeal Chamber on a point of law.<sup>128</sup>

### *iv) Judicial review*

68. The patient may also challenge a detention decision via judicial review proceedings. However, they must be granted leave to bring such proceedings and it should be noted that the ECtHR in *HL v United Kingdom* criticised the Government's reliance on judicial review and did not consider it to be an adequate safeguarding procedure.<sup>129</sup>

### *v) Claim under Human Rights Act*

69. The detained person may also bring a case under s 6 the Human Rights Act 1998, claiming a breach of Art 5(1) by a public authority.

### **d) Compensation for unlawful detention**

70. If there is found to be a breach of Art 5 ECHR, Art 5(5) provides 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.
71. This is a direct and enforceable right to compensation before the national courts.<sup>130</sup>

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<sup>125</sup> See Mental Health Act 1983, ss 66 and 72-75.

<sup>126</sup> Mental Health Act 1983, s 68.

<sup>127</sup> Mental Health Act 1983, s 68(6).

<sup>128</sup> Tribunals Courts and Enforcement Act 2007, s 11.

<sup>129</sup> *HL v United Kingdom* [2004] ECHR 471, [138].

<sup>130</sup> See *A v United Kingdom* (2009) 49 EHRR 29, [229] and *Storck v Germany* (2005) 43 EHRR 96, [122].

## IV MILITARY DETENTION

### a) Preliminary remarks

72. The law relating to servicemen and women is found primarily in the Armed Forces Act 2006, as amended by the Armed Forces Act 2011. The Acts detail offences, court jurisdiction, police and court powers, and provisions on various types of custody.

### b) Decision to detain

#### *i) Stop and search powers*

73. Part 3 Chapter 2 of the Armed Forces Act 2006 empowers service policemen (and persons authorised by a commanding officer) to stop and search any person who is, or whom the service policeman has reasonable grounds for believing to be, subject to service law. The provisions explicitly allow a person searched to be ‘detained’ for the duration of a search.<sup>131</sup> A ‘service policeman’ means a member of one of the Royal Navy Police, the Royal Military Police, or the Royal Air Force Police.<sup>132</sup>
74. In order to exercise the power to detain under the stop and search provisions, the service policeman must have reasonable grounds for suspecting that the search will reveal:
- stolen or prohibited articles;
  - unlawfully obtained service stores; or
  - drugs.<sup>133</sup>
75. In addition, the power may only be used in:
- any place to which the public has access;
  - any other readily accessible place but which is not a dwelling or service accommodation;
- or
- any premises which are permanently or temporarily occupied or controlled for service purposes, but are not service accommodation.<sup>134</sup>
76. Finally, the time for which a person may be detained for the purposes of a search is limited to ‘such time as is reasonably required to permit a search to be carried out’.<sup>135</sup>
77. Various additional limitations apply under the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009. Under s 3, an officer exercising the powers under s

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<sup>131</sup> See eg Armed Forces Act 2006, s 75(3).

<sup>132</sup> Armed Forces Act 2006, s 375.

<sup>133</sup> Armed Forces Act 2006, s 75(2).

<sup>134</sup> Armed Forces Act 2006, s 78.

<sup>135</sup> Armed Forces Act 2006, s 80.

75 of the Armed Forces Act 2006 must comply with certain notification requirements, including giving documentary evidence of their status as a police officer. If they conduct a search, they must also leave a notice setting out specified personal information and stating that claims for compensation for damage done to vehicles searched may be made to the officer's unit. Section 4 requires a full written record of the search to be made unless it is not practicable to do so. Persons who have been stopped and searched may request copies of these records.

*ii) Custody without charge*

78. A service policeman may arrest a person they reasonably suspect of being about to commit a service offence. Where this occurs, the arrest must be as soon as practicable to the arrested person's commanding officer, and the person may be kept in service custody until such time as a service policeman is satisfied that the risk of their committing the relevance offence has passed.<sup>136</sup>
79. In addition, a person who is reasonably suspected of being engaged in committing, or of having committed, a service offence may be arrested by (depending on the circumstances) an officer of superior rank, a service policeman, or a person lawfully exercising authority on behalf of a provost officer.<sup>137</sup>
80. In these cases, there are limits on the circumstances in which the arrested person may be detained without charge.<sup>138</sup> A commanding officer may authorise that the person be held for up to 48 hours,<sup>139</sup> but only where they have reasonable grounds for believing detention is necessary:
- to secure or preserve evidence relating to a service offence for which the suspect is under arrest; or
  - to obtain evidence through questioning.<sup>140</sup>
81. During the 48-hour period, the commanding officer must review and re-authorise the detention without charge every 12 hours.<sup>141</sup>
82. After the 48-hour limit, the person must either be released or further custody up to a maximum of 96 hours must be authorised by a Judge advocate.<sup>142</sup> The person must receive written grounds for the application and be brought to a hearing before the Judge advocate, where they are entitled to legal representation.<sup>143</sup> Again, the order for detention without charge may be made

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<sup>136</sup> Armed Forces Act 2006, s 69.

<sup>137</sup> Armed Forces Act 2006, s 67.

<sup>138</sup> See Armed Forces Act 2006, s 98.

<sup>139</sup> Armed Forces Act 2006, s 99(6).

<sup>140</sup> Armed Forces Act 2006, s 99(2).

<sup>141</sup> Armed Forces Act 2006, ss 99(5), 100.

<sup>142</sup> Armed Forces Act 2006, ss 99(6), 101.

<sup>143</sup> Armed Forces Act 2006, s 101.

only where it is necessary to secure, preserve, or obtain evidence.<sup>144</sup> At the end of the extended period, the person must be charged or released.

*iii) Custody after charge*

83. When a person ('the accused') has been charged, the commanding officer may decide to release them if they were already in custody (this can be subject to administrative conditions on the accused). If the accused is to be kept in custody, the commanding officer must bring the accused before a Judge advocate as soon as is practicable.<sup>145</sup>
84. The accused is entitled to legal representation at the custody hearing. These are usually conducted by video-link.
85. The Judge advocate may order that the accused be detained for up to eight days; they must give reasons for the decision and sign a written certificate setting these out. Permissible reasons include:<sup>146</sup>
  - the Judge advocate is satisfied that there are substantial grounds for believing that the accused, if released, would fail to attend a hearing, commit an offence, or interfere with witnesses or otherwise obstruct the course of justice;
  - the Judge advocate is satisfied that the accused should be kept in custody for his own protection or, if he is under 17, for his own welfare or interests; or
  - the Judge advocate is satisfied that, because of the lack of time since the accused was charged, it has not been practicable to obtain sufficient information for the purpose of deciding whether either of the first two conditions has been met.
86. Alternatively, the Judge advocate may order the accused's release from custody. This may be subject to similar conditions as in a grant of civilian bail, such as reporting or residence requirements.<sup>147</sup> The accused may be arrested and brought back before the Judge advocate if they fail to comply with these conditions.

*iv) Detention after summary hearing*

87. In certain circumstances a commanding officer may hear a charge against a service person summarily.<sup>148</sup> The punishments available include detention for up to 28 days.<sup>149</sup>

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<sup>144</sup> Armed Forces Act 2006, s 101(6).

<sup>145</sup> Armed Forces Act 2006, s 105(1).

<sup>146</sup> Armed Forces Act 2006, s 106.

<sup>147</sup> Armed Forces Act 2006, s 107.

<sup>148</sup> Armed Forces Act 2006, s 131.

<sup>149</sup> Armed Forces Act 2006, s 132-133.

### **c) Review of and challenges to detention**

#### *i) Custody without charge*

88. As noted above, during any period (up to 48 hours) for which a person is detained without charge prior to being brought before a Judge advocate, the person's commanding officer must review and re-authorise the detention without charge every 12 hours.<sup>150</sup>
89. There does not appear to be any mechanism for review of the decision of a Judge advocate to extend custody without charge for up to 96 hours.

#### *ii) Custody after charge*

90. When custody after is authorised by a Judge advocate, the person's commanding officer has an ongoing duty to consider whether the continuation of custody is necessary and must either release the accused or request a review before the Judge advocate if the grounds no longer exist.<sup>151</sup>
91. The Judge advocate at the custody hearing must also set a date for review no more than eight days after the hearing, and custody must then be reviewed every eight days thereafter (unless the accused, with legal advice, consents to a longer period of up to 28 days).<sup>152</sup> Review must be at a hearing before a Judge advocate unless the accused consents, with legal advice, to a paper review.
92. At the first review, the accused may support an application for release with any arguments of fact or law, whether or not they were advanced previously; at subsequent reviews, the Judge advocate need not hear arguments which have already been made.<sup>153</sup>

#### *iii) The Summary Appeal Court*

93. A service person who has been dealt with summarily by their commanding officer has a right of appeal to the Summary Appeal Court ('SAC').<sup>154</sup> At the hearing, they have the right to legal representation.<sup>155</sup>
94. An appeal to the SAC against an initial finding is by way of (a) a rehearing of the charge, and (b) a rehearing as respects punishment (unless a finding is quashed, in which case the sentence is automatically quashed also). An appeal may also be made in respect of sentence alone.<sup>156</sup> As the

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<sup>150</sup> Armed Forces Act 2006, ss 99(5), 100.

<sup>151</sup> Armed Forces Act 2006, s 108.

<sup>152</sup> Armed Forces Act 2006, s 108(7).

<sup>153</sup> Armed Forces Act 2006, s 108(5)-(6).

<sup>154</sup> Armed Forces Act 2006, s 141.

<sup>155</sup> Armed Forces (Summary Appeal Court) Rules 2009 r. 41.

<sup>156</sup> Armed Forces Act 2006, s 146.

appeal is by way of rehearing, there is no need to prove that the original finding was unsafe or that the punishment was manifestly wrong.

95. The SAC may quash a finding that a charge has been proved, in which case it may also quash any related punishment.<sup>157</sup> It may also vary any punishment provided that the punishment given is no more severe than that originally awarded.<sup>158</sup>
96. The service person may also apply for a decision of the SAC to be subject to an opinion of the High Court if it is considered wrong in law or *ultra vires*.<sup>159</sup>

#### *iv) Court Martial Appeal Court*

97. Where a service person has been sentenced by a Court Martial, they may appeal to the Court Martial Appeal Court against their conviction or sentence.<sup>160</sup>
98. The Court Martial Appeal Court may quash a conviction or sentence and pass another sentence, no more severe than the one quashed.
99. The High Court has no jurisdiction to consider judicial review applications in order to make orders relating to the jurisdiction of the Court Martial.<sup>161</sup>

#### *v) Human Rights Act 1998*

100. The military law system is still subject to the Human Rights Act 1998. An action may therefore be brought under s 7 of the Human Rights Act, alleging a breach of Art 5 ECHR.

#### **d) Compensation for unlawful detention**

101. Under the Human Rights Act, if the Court finds a breach of a Convention right, it may grant such relief or remedy as it considers 'just and appropriate'.<sup>162</sup> This may include damages.<sup>163</sup>

#### **e) Detention of foreign nationals**

102. It is not entirely clear what law governs the detention of foreign nationals by the military abroad.<sup>164</sup> Capture and detention of foreign nationals by the British forces has become commonplace since 2004 in the course of the conflicts in Iraq and Afghanistan. No statutory power to arrest and detain civilians has been given to British forces conducting military operations in these areas. However, in Iraq, UN Security Council Resolution 1546 (2004) did

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<sup>157</sup> Armed Forces Act 2006, s 147.

<sup>158</sup> Armed Forces Act 2006, s 147(3).

<sup>159</sup> Armed Forces Act 2006, s 149.

<sup>160</sup> Court Martial Appeals Act 1968, s 1.

<sup>161</sup> Supreme Court Act 1981, s 29.

<sup>162</sup> Human Rights Act 1998, s 8.

<sup>163</sup> Human Rights Act 1998, s 8 (3).

<sup>164</sup> Peter Rowe, 'Is there a right to detain civilians by foreign armed forces during a non-international armed conflict?' (2012) 61 *International and Comparative Law Quarterly* 697.

authorise the Multi-National Force to intern civilians for imperative reasons of security. Security Council Resolutions relating to Afghanistan also allow participating forces to ‘take all necessary measures’, presumably including detention.

103. Guidance to Intelligence Officers and Service Personnel on detention and interviewing practice has been issued by the UK government. Emphasis is placed on ensuring that there is no suspicion that detainees are or will be subject to torture and ensuring compliance with domestic and international law standards for due process and detention.<sup>165</sup>
104. What is clear is that the ECHR, along with the safeguards provided for thereunder, still applies to the military’s overseas detention practices.<sup>166</sup> In addition, the remedy of *habeas corpus* is available at common law for any form of detention, including detention overseas by British forces in conjunction with the ‘war on terror’.<sup>167</sup>

## V POLICE DETENTION

### a) Preliminary remarks

105. English common law permits preventive police detention. Such detention occurs for the purposes of preventing ‘by arrest or other action short of arrest, any breach of the peace occurring in [police] presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur.’<sup>168</sup> According to the Court of Appeal, this common law power is ‘unapologetically, a preventative power.’<sup>169</sup>

### b) Threshold questions

106. Whether being held by the police as part of crowd control measures will count as ‘detention’ will depend on the circumstances, including the area of confinement, the level of supervision, and the prospect of punishment for non-compliance.<sup>170</sup>
107. The current authority in this area in England and Wales is the ECtHR’s Grand Chamber decision in *Austin v United Kingdom*.<sup>171</sup> The case involved 3,000 people held within a cordon (or ‘kettled’) in Central London in 2001. Police held the crowd for up to seven hours in cold, wet weather without providing food and drink, toilet facilities or shelter. The majority of the court

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<sup>165</sup> Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (July 2010) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62632/Consolidated\\_Guidance\\_November\\_2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf)> accessed January 2014.

<sup>166</sup> See *Al-Jedda v UK* (2011) 53 EHRR 23; *Al-Skeini and Others v UK* (2011) 53 EHRR 18.

<sup>167</sup> *Foreign Secretary and Another (Appellants) v Rabmatullah (Respondent)* [2012] UKSC 48.

<sup>168</sup> *R (Laporte) v Chief Constable of Gloucester* [2007] 2 AC 105, [29] (Lord Bingham).

<sup>169</sup> *R (On Application of Hicks and Others) v Metropolitan Police Commissioner* [2014] EWCA Civ 3 [27].

<sup>170</sup> See *Guzzardi v Italy* (1981) 3 EHRR 333 and *Storck v Germany* (2005) 43 EHRR 96.

<sup>171</sup> *Austin v United Kingdom* (2012) 55 EHRR 14.

held that this police cordon did not amount to detention within the meaning of Art 5 ECHR. The court held that ‘Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public’<sup>172</sup> and that, in determining whether someone has been detained or ‘deprived of his liberty’ within the meaning of Art 5, ‘the starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.’<sup>173</sup>

108. Here the court appears to have added additional criteria to the definition of ‘detention’, extraneous to the restriction of the liberty of the person involved, by asking whether the ‘type’ and ‘manner of implementation’ of the police action was ‘necessary’ or ‘unavoidable’.<sup>174</sup>
109. It should be noted that the court emphasised that the finding of no deprivation of liberty was ‘based on the specific and exceptional facts of this case’<sup>175</sup> and that the decision is difficult to reconcile with previous authorities such as *Gillan and Quinton v UK*<sup>176</sup> and *A v UK*<sup>177</sup> which found breaches of Art 5(1) in comparable circumstances. There was also a strong dissenting judgement which argued that:

the majority’s position can be interpreted as implying that, if it is necessary to impose a coercive and restrictive measure for a legitimate public-interest purpose, the measure does not amount to a deprivation of liberty. This is a new proposition which is eminently questionable and objectionable.<sup>178</sup>

### c) Decision to detain

110. In *R (Moos and McClure) v Commissioner of Police for the Metropolis*<sup>179</sup> the High Court laid down guidelines for when ‘kettling’ may be used. The court held that the police may curtail citizens’ lawful exercise of their rights ‘only when the police reasonably believe that there is no other means whatsoever to prevent an imminent breach of the peace’.<sup>180</sup>
111. A case relating to detention outside the context of ‘kettling’ is that of *Hicks*.<sup>181</sup> In this case, several groups of protestors (Republican campaign groups, members of LGBTQ groups and groups opposed to public-spending cuts, and some persons dressed as zombies) were detained

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<sup>172</sup> *ibid*, [56].

<sup>173</sup> *ibid*, [57].

<sup>174</sup> *ibid*, [59].

<sup>175</sup> *ibid*, [68].

<sup>176</sup> *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105.

<sup>177</sup> *A v United Kingdom* (2009) 49 EHRR 29.

<sup>178</sup> *Austin v United Kingdom* (2012) 55 EHRR 14, [3].

<sup>179</sup> *R (Moos and McClure) v Commissioner of Police for the Metropolis* [2012] EWCA Civ 12.

<sup>180</sup> *ibid*, [56].

<sup>181</sup> *R (On Application of Hicks and Others) v Metropolitan Police Commissioner* [2014] EWCA Civ 3.

on the day of the Royal Wedding by police. The purpose of the detention was recorded as to prevent the group members from participating in activities designed to disrupt the celebrations. This detention was found to be lawful at common law.<sup>182</sup>

112. A further appeal to the Court of Appeal was made regarding the applicability of Art 5(1)(c) ECHR to the detention. Article 5(1) reads: 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.' The appellants argued that their detention was contrary to Art 5(1)(c) because it was not for the purpose of bringing them 'before a competent legal authority' (i.e. a magistrate).
113. Strasbourg case law was conflicted as to whether the two limbs of Art 5(1)(c) ('necessary to prevent an offence' and 'for the purposes of bringing and individual before a judicial authority') should be read together or separately. The most recent case, *Ostendorf v Germany*,<sup>183</sup> favours a conjoined reading, whereas previous case law<sup>184</sup> permits detention for either purpose. Using their power under s 2(1) of the Human Rights Act 1998, the Court of Appeal disregarded the ruling in *Ostendorf v Germany* and dismissed Hicks' appeal, choosing instead to interpret Strasbourg case law in a manner that compatible with the existing English common law. It therefore upheld the decision that the detention of the protesters had been lawful.<sup>185</sup>

#### **d) Compensation for unlawful detention**

114. Those detained in police cordons may challenge the lawfulness of their detention under s 6 of the Human Rights Act 1998 arguing that the police acted in breach of Art 5 ECHR. It is also possible that the decision to use a cordon could (with leave) be challenged via judicial review proceedings.
115. If a court were to find that a Convention right had been breached, it could 'grant such relief or remedy, or make such order within its powers as it considers just and appropriate' under s 8(1) of the Human Rights Act. This includes a power to award damages where the court is satisfied that to do so is necessary in order to afford just satisfaction to the claimant.<sup>186</sup>

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<sup>182</sup> *ibid*, [2].

<sup>183</sup> *Ostendorf v Germany* [2013] ECHR 197.

<sup>184</sup> *Lawless v Ireland (No 3)* (1961) 1 EHRR 15.

<sup>185</sup> *R (On Application of Hicks and Others) v Metropolitan Police Commissioner* [2014] EWCA Civ 3, [96].

<sup>186</sup> Human Rights Act 1998, s 8(3).

116. In *A v United Kingdom*<sup>187</sup> the Grand Chamber found a breach of Art 5(1) and ordered the state to pay damages of between EUR 1,700 and EUR 3,900 to each applicant. The court held that it had a ‘wide discretion to determine when an award of damages should be made, and frequently holds that the finding of a violation is sufficient satisfaction without any further monetary award.’<sup>188</sup>

## VI PREVENTIVE DETENTION

### a) Imprisonment for Public Protection

117. This type of detention was imposed after the ‘tariff’ (punishment) period of a sentence imposed upon conviction of a criminal offence. The sentence of Imprisonment for Public Protection (‘IPP’) was abolished in 2012.<sup>189</sup> IPP was imposed when a court considered that an offender posed a ‘significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences’.<sup>190</sup> The scheduled offences included violent offences and sexual offences, and an IPP sentence required that a minimum custodial sentence of 2 years be imposed.<sup>191</sup>
118. The ECtHR held in *James, Wells and Lee v The United Kingdom*<sup>192</sup> that although the IPP framework was not unlawful in and of itself, the regime of IPP failed to provide for rehabilitation of offenders and this in turn rendered the detention arbitrary in nature. According to the Court:

Where a Government seeks to rely solely on the risk posed by offenders to the public in order to justify their continued detention, regard must be had to the need to encourage the rehabilitation of those offenders. In the applicant’s case, this meant that they were required to be provided with reasonable opportunities to undertake courses aimed at helping them to address their offending behaviour and the risks they posed.

119. According to Bettinson and Dingwall, ‘[t]he IPP sentence, therefore, failed to ensure that the execution of the ‘applicants’ post-tariff detention conformed to the objective of rehabilitation... Consequently, the Court found that the post-tariff detention was arbitrary and unlawful for the purposes of Art 5(1) ‘until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses’.’<sup>193</sup>
120. The IPP scheme was replaced by provisions for a regime of Extended Determinate Sentences (‘EDS’) and ‘mandatory’ life sentences for second serious offences under the Criminal Justice

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<sup>187</sup> *A v United Kingdom* (2009) 49 EHRR 29.

<sup>188</sup> *ibid*, [250].

<sup>189</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 123.

<sup>190</sup> Criminal Justice Act 2003, s 225(1).

<sup>191</sup> Criminal Justice Act 2003, s 225(3B) (repealed).

<sup>192</sup> *James, Wells and Lee v The United Kingdom* [2012] ECHR 1706.

<sup>193</sup> *ibid*, [232] discussed in V Bettinson and G Dingwall, ‘Challenging the Ongoing Injustice of Imprisonment for Public Protection: *James, Wells and Lee v The United Kingdom*’ (2013) 76(6) *Modern Law Review* 1094-1105, 1102.

Act 2003 (as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012). Both have a preventive element and are discussed immediately below.

### **b) Extended Determinate Sentences**

121. Under s 226A of the Criminal Justice Act, a court may impose an extended sentence of imprisonment: one comprised of both the sentence the person would usually receive, and an ‘extension period’ for which the person is to be subject to a licence.
122. The power to order an EDS is enlivened where:<sup>194</sup>
  - a person has been convicted of a specified violent or sexual offence;
  - the court considers that ‘there is a significant risk to the members of the public of serious harm occasioned by the commission by the offender of further specified offences’;
  - the court is not otherwise required to impose a sentence of imprisonment for life (see below); and
  - either the person has previously been convicted of an specified offence, or a custodial period of at least 4 years is considered appropriate for the present offence.
123. The extension period must be ‘of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences’.<sup>195</sup> It must not exceed five years for a specified violent offence, or eight years for a specified sexual offence.<sup>196</sup> The total EDS must not exceed the maximum term permitted for the relevant offence.<sup>197</sup>
124. The Secretary of State is required to release a person serving an EDS on licence as soon as the custodial period has expired, unless either the custodial term is ten years or more, or the sentence was imposed in respect of particular specified offences (mainly serious violent, sexual, or terrorism-related offences).<sup>198</sup> In either of these cases, the person’s case must instead be referred to the Parole Board; if the Parole Board is satisfied that ‘it is no longer necessary for the protection of the public’ that the person be detained, they must then be released on licence.<sup>199</sup> Parole Board proceedings are discussed in more detail below.
125. When a person serving an EDS is released on licence, they – like other persons released on licence – may be recalled to prison at any time by the Secretary of State.<sup>200</sup> However, unlike other

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<sup>194</sup> Criminal Justice Act 2003, s 224A(1)-(3).

<sup>195</sup> Criminal Justice Act 2003, s 224A(7).

<sup>196</sup> Criminal Justice Act 2003, s 224A(8).

<sup>197</sup> Criminal Justice Act 2003, s 224A(9).

<sup>198</sup> Criminal Justice Act 2003, s 246A(1)-(2).

<sup>199</sup> Criminal Justice Act 2003, s 246A(3)-(7).

<sup>200</sup> Criminal Justice Act 2003, s 254.

offenders, a person serving an EDS who is recalled is not eligible for ‘automatic release’; in fact, the Secretary of State *must* not release them after recalling them to prison unless satisfied that ‘it is not necessary for the protection of the public’ that they remain in prison.<sup>201</sup> The person’s case need only be referred to the Parole Board on the expiry of 28 days, or if the person makes written representations regarding the recall before that time.<sup>202</sup> If the Parole Board does not order the person’s re-release on licence, it is not required to set a fixed release date;<sup>203</sup> however, the person’s case must be referred again to the Parole Board after a maximum of one year.<sup>204</sup> Before that date, the Parole Board may recommend a review on its own motion.<sup>205</sup>

126. A defendant may appeal against an EDS, including the court’s assessment of dangerousness, as for any other sentencing decision. A decision of the Secretary of State to recall a person released on licence may be challenged only via judicial review.<sup>206</sup> Mechanisms for review of Parole Board decisions are discussed below.

### **c) Parole Board proceedings**

127. The Parole Board comprises members from a variety of backgrounds, including: judicial, psychiatrist, psychologist, probation and independent members.<sup>207</sup> Most Parole Board reviews engage Art 5(4) ECHR. Where Art 5(4) is engaged, the Parole Board sits in a judicial capacity as a court for this purpose.<sup>208</sup> According to its Guidance on the interpretation of the above provisions:

In order to direct release, [the Board must be satisfied that] it is no longer necessary for the prisoner to be detained in order to protect the public from serious harm (to life and limb). It is not a requirement to balance the risk against the benefits to the public or the prisoner of release.<sup>209</sup>

128. In the case of *Osborn v Parole Board*,<sup>210</sup> the Supreme Court held that an oral hearing is required to satisfy common law standards of procedural fairness (which, according to the Supreme Court, meet the standard of Art 5(4) EHCR) whenever fairness to the prisoner requires a hearing in the

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<sup>201</sup> Criminal Justice Act 2003, s 255C(1)-(3).

<sup>202</sup> Criminal Justice Act 2003, s 255C(4).

<sup>203</sup> Criminal Justice Act 2003, s 256.

<sup>204</sup> Criminal Justice Act 2003, s 256A.

<sup>205</sup> Criminal Justice Act 2003, s 256A(2)-(3).

<sup>206</sup> *Osborn v Parole Board* [2013] UKSC 61, [4].

<sup>207</sup> UK Government, ‘Who are the members of the Parole Board?’ <<http://www.justice.gov.uk/about/parole-board/parole-board-members>> accessed 19 February 2014.

<sup>208</sup> Parole Board, Litigation Strategy (April 2013), <[www.justice.gov.uk/downloads/.../parole-board/litigation-strategy.doc](http://www.justice.gov.uk/downloads/.../parole-board/litigation-strategy.doc)> accessed January 2014.

<sup>209</sup> Parole Board for England and Wales, ‘Guidance to members on LASPO Act 2012 – test for release’ (Revised Guidance, December 2013) p 4, <<http://www.justice.gov.uk/downloads/offenders/parole-board/guidance-on-laspo.pdf>> accessed 2 February 2014.

<sup>210</sup> *Osborn v Parole Board* [2013] UKSC 61.

light of the facts of the case and the importance of what is at stake.<sup>211</sup> By doing so, it will act compatibly with Art 5(4) ECHR.<sup>212</sup> As the decision related specifically to persons recalled from release on licence by the Secretary of State (as well as to prisoners serving an IPP sentence), it is now significantly more likely that these persons will be granted an oral hearing.<sup>213</sup>

#### **d) Appeals and remedies**

129. There is no legal route of appeal against Parole Board decisions, but as a public body its decisions are open to challenge by judicial review; private law actions for damages can also be brought in respect of administrative decisions. Judicial review could proceed on either common law grounds, or pursuant to human rights grounds.
130. In the 2013 case of *Sturnham and Faulkner*<sup>214</sup> the Supreme Court dismissed an appeal for damages sought for administrative delay in reviewing the need for further detention of a person who has served the ‘tariff’ relating to an IPP or life sentence. The Supreme Court rejected the argument that the detention of a life prisoner constitutes false imprisonment if it continues beyond the point at which the prisoner would have been released, had a hearing been held. Regarding remedies, the Court concluded that damages should usually be awarded where when it can be shown on the balance of probabilities that a violation of Art 5(4) has resulted in prolonged detention. If this cannot be established, but the prisoner has suffered frustration and anxiety, a more modest award is appropriate. The Court also noted that when awarding damages in such cases courts should be guided primarily by ECtHR principles, as opposed to common law tort principles.<sup>215</sup>

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<sup>211</sup> *ibid*, [81].

<sup>212</sup> *ibid*, [103].

<sup>213</sup> See Ministry of Justice, ‘Parole Board: Practice Guidance for Oral Hearings’ <<http://www.justice.gov.uk/offenders/parole-board/oral-hearings>> accessed 14 January 2014.

<sup>214</sup> *R (Faulkner) v SSJ; R (Sturnham) v Parole Board* [2013] UKSC 23.

<sup>215</sup> Matrix Legal Information Team, ‘*R (Faulkner) v SSJ; R (Sturnham) v Parole Board* [2013] UKSC 23’, United Kingdom Supreme Court Blog, <<http://uksblog.com/new-judgment-r-faulkner-v-secretary-of-state-for-justice-anor-r-faulkner-v-secretary-of-state-for-justice-the-parole-board-and-r-sturnham-v-the-parole-board-2013-uksc-23/>> accessed 14 January 2014.

# Country Report for the United States of America

## I ADMINISTRATIVE DETENTION

1. Following 9/11, there was a massive increase in detention for the purposes of counter-terrorism, intelligence gathering and reasons of national security. As there is no general preventive detention law in America, the US government has used various different mechanisms and areas of law to achieve this, including temporary stops, immigration detention, detention as a material witness, and criminal law detention, and these have been outlined below.

### **a) Threshold questions**

2. In *Terry v Ohio*, it was held that ‘whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person’<sup>1</sup> and they are considered to be detained. This is important as stopping people for questioning before detaining them on the basis of this has been an important tactic used by police and immigration officials in investigating terrorism since 9/11.

### **b) Decision to detain**

#### *i) Temporary stops*

3. Where a person is stopped for questioning, police or immigration officials must have grounds for ‘seizing’ the person. For police officers, they must have ‘an articulable suspicion that the person has been, is, or is about to be engaged in criminal activity’.<sup>2</sup> In the case of immigration officials, they must have a ‘reasonable suspicion’ that the person is an illegal alien.<sup>3</sup>

#### *ii) Immigration detention*

4. Under 8 United States Code (‘USC.’) § 1182 (a)(3)(b), aliens can be removed from the US or refused entry based on involvement in terrorist activities, the definition of which is described in detail in the statute.<sup>4</sup> However, it also should be noted that media reports have criticised this regime, asserting that where the government has suspected a person’s involvement in terrorist activities but had insufficient evidence, it has often filed pretextual or minor immigration charges against suspects as a way of effecting their detention and subsequent removal from the US.<sup>5</sup>

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<sup>1</sup> *Terry v Ohio*, 392 US 1 (1968).

<sup>2</sup> *United States v Place*, 462 US 696 (1983).

<sup>3</sup> *United States v Brignoni-Ponce*, 422 US 873 (1975).

<sup>4</sup> 8 USC. § 1182 (a)(3)(b).

<sup>5</sup> MB Sheridan, ‘Immigration Law as an Anti-Terrorism Tool’, *Washington Post* (Washington DC, 13 June 2005).

### *iii) Material witnesses*

5. The practice of detaining material witnesses has been used extensively in combating terrorism, and material witnesses are defined as those whose testimony is ‘material in a criminal proceeding’.<sup>6</sup> Under 18 USC. § 3144 it is possible to detain material witnesses where it is ‘impracticable’ to secure their testimony by other means.<sup>7</sup> It does appear however, that this process is being used to detain those who the government suspect of terrorist involvement but do not yet have enough evidence on to find the ‘probable cause’ necessary for a criminal charge, nor the immigration violations to detain or remove on immigration grounds (for example if the person concerned is a US citizen). The reason behind this is that the standard of ‘impracticability’ is a lower standard than ‘probable cause’, and so it is easier for the government to detain on that basis. An investigation by Human Rights Watch found that many material witnesses were essentially held as suspects as opposed to witnesses.<sup>8</sup>

### *iv) Criminal law*

6. A related strategy to the use of ‘pretextual’ immigration detention is the charging of relatively minor criminal offences in order to detain terror suspects. A Washington Post study found that government investigations into terrorism had led to criminal charges for large numbers of suspects that were unconnected to terrorist offences.<sup>9</sup> This strategy relies on prosecutors use of their discretion to oppose bail, and also of judges to support the security efforts and refrain from granting bail.

## **c) Review of and challenges to detention**

### *i) Temporary stops*

7. Even if they are only stopped temporarily, persons stopped and questioned may still challenge their detention as an infringement of their Fourth Amendment Rights, under Title 42 US Code §1983.<sup>10</sup>

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<sup>6</sup> 18 USC. § 3144 (2000).

<sup>7</sup> 18 USC. § 3144 (2000).

<sup>8</sup> Human Rights Watch, ‘Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11’ (27 June 2005) available < <http://www.hrw.org/reports/2005/06/26/witness-abuse> > accessed 5 March 2014.

<sup>9</sup> A Goldstein, ‘A Deliberate Strategy of Disruption; Massive Secretive Effort Aimed Mainly at Preventing More Terror’, *Washington Post* (Washington DC, 4 November 2001).

<sup>10</sup> 42 USC. § 1983.

*ii) Immigration detention*

8. For those suspected of terrorist activities and detained under 8 USC. § 1182 (a)(3)(b) subject to removal from the US,<sup>11</sup> they are able to challenge their detention under 8 USC. § 1227(d) through filing an application for non-immigrant status. However, they do not have a general appeal right against the decision.<sup>12</sup>
9. In terms of those detained on the pretext of a minor immigration charge, it was held in *Turkmen v Ashcroft* that the fact that the US government had an ulterior motive would not affect the legality of the detention if it was made under valid immigration law. They would however be entitled to the normal rights and protections afforded to immigrant detainees, which have been outlined in the section above entitled ‘immigration detention’.

*iii) Material witness*

10. Those detained as material witnesses are entitled to a detention hearing and subsequent appeal.<sup>13</sup>

*iv) Criminal law*

11. In this instance those charged with pretextual criminal offences in order to facilitate their detention would be entitled to a full criminal trial and would have appeal rights, just like any normal criminal defendant. The fact the charge was a pretext would not affect whether or not they were convicted.

**d) Remedies for unlawful detention**

*i) Temporary stops*

12. If the stop was found to be an unlawful infringement on their right to be free from ‘unreasonable’ seizures, the person detained would be entitled to damages under 42 USC. § 1983 on the ground that they had been deprived of their constitutional rights under the Fourth Amendment.<sup>14</sup>

*ii) Immigration detention*

13. The remedies would be the same as was stated in the section on ‘Immigration Detention’, discussed below.

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<sup>11</sup> 8 USC. § 1182 (a)(3)(b).

<sup>12</sup> 8 USC. § 1227(d).

<sup>13</sup> 18 USC. § 3142.

<sup>14</sup> 42 USC. § 1983.

### *iii) Material witnesses*

14. It may be possible to recover damages as compensation, although in practice it would be difficult as US government bodies have immunity under many circumstances. The primary case in this area is *Ashcroft v Al-Kidd*, where Al-Kidd attempted to sue the Attorney General personally for his role in Al-Kidd's detention as a material witness in connection with the trial of an Islamic terror suspect. The Supreme Court held that the Attorney General, whom at the time was Ashcroft, had qualified immunity, and could only be personally sued if it was possible to demonstrate that he was personally involved or had direct knowledge of the events, a very high standard of proof.

### *iv) Criminal law*

15. If the person could prove that their detention was unlawful they could seek damages on the basis of the infringement of their constitution rights, under Title 42 USC. § 1983.<sup>15</sup>

## **II IMMIGRATION DETENTION**

16. The Immigration and Customs Enforcement (ICE) enforce immigration procedures in the United States, which is a bureau within the Department of Homeland Security. Previously, it was known as the Immigration and Naturalization Service (INS).

### **a) Threshold questions**

17. Under Title 8 USC. § 1226, an 'alien' (to use the US terminology) is considered to be detained where they have been taken into custody on the basis of a warrant issued by the Attorney General<sup>16</sup>.

### **b) Decision to detain**

18. For aliens who have previously committed a crime listed under the 8 USC. § 1226 (c), the ICE is *required* to detain them once they have been identified<sup>17</sup>. Thus, there is a regime of mandatory detention in such cases. In practical terms, the Attorney General is required to issue a warrant to detain under these circumstances.
19. Additionally, for those aliens identified at a US border either because they lack proper immigration documentation or have committed fraud or wilful representation to attempt to gain admission to the US, they are subject to 'expedited removal'. Again, the ICE must detain them

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<sup>15</sup> 42 USC. § 1983.

<sup>16</sup> 8 USC. § 1226.

<sup>17</sup> 8 USC. § 1226 (c).

until they are removed from the country.<sup>18</sup> In these circumstances, Immigration Judges do not have the authority to review these detentions unless the alien indicates an intention to apply for asylum.<sup>19</sup>

20. There is also provision for mandatory detention of asylum seekers pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.<sup>20</sup> If the fear of persecution is deemed to be not credible, this cannot be subject to administrative review.<sup>21</sup>
21. There is similarly a regime for mandatory detention of suspected terrorists (as certified by the Attorney General), who must within seven days of commencement of the detention be charged with a criminal offence for be subject to removal proceedings.<sup>22</sup> The certification must be reviewed every six months.<sup>23</sup> Where a person in such circumstances has not been removed, and whose removal is unlikely in the reasonably foreseeable future, there is a limitation on indefinite detention such that the person may be detained for additional periods of up to six months only 'if the release of the alien will threaten the national security of the United States or the safety of the community or any person'.<sup>24</sup>
22. For those aliens who have not committed a crime and who are identified within the US, the ICE can either detain, detain and release on a cash bond (minimum \$1500) or detain and release on parole.<sup>25</sup> This decision is made at the discretion of the Attorney General, who issues the warrant to arrest and detain.<sup>26</sup> The detainee would not be entitled to make representations at this point and the decision to detain cannot be judicially review or challenged in any court.<sup>27</sup> Only the government's basis for removal can be challenged, and this will be outlined below.

### **c) Review of and challenges to detention**

23. Under the immigration practice of 'expedited removal', certain categories of non-citizens, including those found inadmissible at the border and those who have committed fraud to gain admission to the US, can be removed from the US without any judicial hearing or reviews, unless they wish to claim asylum.<sup>28</sup>

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<sup>18</sup> 8 USC. § 1225 (b)(1)(A)(i).

<sup>19</sup> 8 USC. §1225(b)(1)(A).

<sup>20</sup> 8 USC. § 1226(b)(1)(B)(IV).

<sup>21</sup> 8 USC. § 1226(b)(1)(C).

<sup>22</sup> 8 USC. § 1226a(a)(5).

<sup>23</sup> 8 USC. § 1226a(7).

<sup>24</sup> 8 USC. § 1226a(a)(6).

<sup>25</sup> 8 USC. § 1226.

<sup>26</sup> 8 USC. § 1226.

<sup>27</sup> 8 USC. § 1226 (e).

<sup>28</sup> 8 USC. §1225(b)(1)(A).

24. For other types of immigration detention, there is a review process. Upon detention the ICE must provide the alien with a Notice to Appear.<sup>29</sup> Following this, a hearing will take place before an Immigration Judge, where the government must prove that the person detained is not a citizen of the United States, and also that the alien has breached immigration law in a manner which permits removal. If the government fails to prove its case, the Immigration Judge will order the detainee's release, although the ICE can file an appeal within 30 days of the decision, and under these circumstances will often continue to detain pending its outcome.<sup>30</sup> Normal practice under these circumstances is that the Department for Homeland Security will continue to detain while deciding whether or not to appeal.
25. For asylum seekers, if the fear of persecution is deemed to be not credible, this cannot be subject to administrative review.<sup>31</sup> As the detention for asylum seekers is mandatory in nature, there does not appear to be any avenue to challenge the lawfulness of that detention.
26. For suspected terrorists, judicial review of any decisions in relation to removal (including review of the merits of any determinations made) is available exclusively in habeas corpus proceedings. The merits of the Attorney General's certification that the alien is a security threat cannot be otherwise reviewed.<sup>32</sup> The law sets out in detail the limited nature of the habeas corpus procedure, including limitation on rights of appeal.<sup>33</sup>
27. Where the Immigration Court finds in favour of the US government and issues a removal order, there is access to an appeals process. After the case has been decided by the Immigration Court, an appeal can be made to the Board of Immigration Appeals (BIA) by filing a Notice to Appeal within 30 days of the initial decision.<sup>34</sup> In *Casas-Castrillon* it was held that detention is not authorised indefinitely during this period, and the detainees are entitled to a bond hearing while their appeal is being decided.<sup>35</sup> However, if the hearing is unsuccessful then they may be detained for as long as the case is under review, which in some occasions has been as long as 7 years.<sup>36</sup> Following the BIA review, it is possible to appeal to the Federal Circuit Court with jurisdiction over the Immigration Court in which the case was decided for judicial review.<sup>37</sup> This must be done within 30 days of the BIA's decision. Additionally, this appeal is restricted to certain

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<sup>29</sup> 8 USC. §1229.

<sup>30</sup> 8 USC. §1229.

<sup>31</sup> 8 USC. § 1226(b)(1)(C).

<sup>32</sup> 8 USC. §1226a(b)

<sup>33</sup> 8 USC. §1226a(b).

<sup>34</sup> 8 USC. §1229; 8 C.F.R. §1003.3.

<sup>35</sup> *Casa-Catrillon v Dep't of Homeland Security*, 535 F.3d 942 (9<sup>th</sup> Cir 2008).

<sup>36</sup> *Prieto-Romero v Clark*, 534 3Fd 1053 (9<sup>th</sup> Cir. 2008).

<sup>37</sup> 8 USC. § 1225; US Department of Justice, 'Board of Immigration Appeals' available <<http://www.justice.gov/eoir/biainfo.htm>> accessed 5 March 2014.

questions of law, including whether the decision was ‘manifestly contrary to law’, however the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude the contrary.<sup>38</sup>

28. Once a removal order has been granted and the appeals process has either been exhausted or the alien has chosen not to appeal, the ICE has a duty to instigate removal within a ‘reasonable time’, which in *Zadvydas v Davis*<sup>39</sup> was held to be six months. After six months, ICE are required to release the alien on parole if there is not a ‘significant likelihood of removal in the reasonably foreseeable future’, and can recall them once removal has been arranged. If the ICE fails to do this, the alien may file a habeas corpus writ in the federal district court with jurisdiction, in order to challenge their continued detention.<sup>40</sup>
29. In these proceedings, other than in the case of expedited removal, those detained receive the rights contained in the Due Process Clause. This is due to the fact that, in the United States, non-citizens, regardless of the legality of their immigration status, are generally given due process rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments.<sup>41</sup> However, many of these can be difficult to access. For example, the Due Process Clause guarantees the opportunity to be represented by counsel, but as immigration proceedings in the US are civil as opposed to criminal, the 6<sup>th</sup> Amendment does not guarantee a right to counsel in immigration proceedings. While representation is allowed, the US government will not fund or subsidise this.
30. Despite this however, a related problem which can still occur is that, while in the initial immigration hearing translators can be provided, in the paper based appeals system, appeals must be made to the BIA in English. This means that a detainee who does not have access to an attorney and does not speak English, or is illiterate, may not actually be able to exercise their right to an appeal.

#### **d) Remedies for unlawful detention**

31. Generally the primary remedy where detention is found to have been unlawful is release from custody. However, it is also possible file an action for false imprisonment and claim damages. A current example of this is *Roy v County of Los Angeles*, where six petitioners have brought a class action lawsuit against the Los Angeles County Sheriff’s Department on the basis that they were illegally detained by the Department on the instructions of the ICE.<sup>42</sup>

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<sup>38</sup> 8 USC. § 1252(b)(4); B Lonegan, ‘Immigration Detention and Removal’ available <[www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center](http://www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center)> accessed 19 January 2014, 26.

<sup>39</sup> 533 US 678 (2001).

<sup>40</sup> *Ly v Hansen*, 351 F.3d 263 (6<sup>th</sup> Cir. 2003).

<sup>41</sup> *Phyller v Doe*, 457 US 202, 210 (1982).

<sup>42</sup> *Roy v County of Los Angeles*, 2:12-cv-09012 (C.D. Cal.) a copy of the claim can be found at Civil Rights Litigation

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

32. In the United States, procedures for the detention of persons with a mental illness are provided through legislation enacted at the state level. For reference, a link is enclosed below to the procedures for each individual state and the federal district of Washington, D.C.<sup>43</sup> However, instead of outlining 51 separate statutes, the answer below will focus on the US Supreme Court decisions in this area which create the framework which states are required to adhere to when drafting legislation.

#### a) Threshold questions

33. A person would be considered to be detained for the purposes of US mental health law if they are held involuntarily in a designated mental facility.

#### b) Decision to detain

34. In *O'Connor v Donaldson*, the Supreme Court held that States may not 'commit' a person (to use the US terminology) solely because they are mentally ill.<sup>44</sup> Four years later in *Addington v Texas*, it held that, although involuntary commitment is a civil procedure, the standard of proof which the government must adhere to is 'clear and convincing evidence', as opposed to on 'preponderance of the evidence'.<sup>45</sup> In order to detain, the government must offer clear and convincing evidence that:

- i) The person suffers from a mental illness
- ii) They are a danger to themselves or others.

35. The hearing to determine this (civil commitment hearing) will be held in the Probate Division of the civil court with original jurisdiction for the area in which the person concerned is resident. Other than the higher standard of proof, the hearing follows the normal rules of civil procedure and is adversarial. The person detained will have the opportunity to instruct counsel, present evidence and cross-examine witnesses.

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Clearing House, 'Case Profile: Roy v Los Angeles County' < <http://www.clearinghouse.net/chDocs/public/IM-CA-0064-0001.pdf> > accessed 5 March 2014.

<sup>43</sup> 'Summary of State Laws Governing Emergency Detention of Mentally Ill Adults' available < [www.aapa.org/uploadedFiles/content/The\\_PA\\_Profession/Federal\\_and\\_State\\_Affairs/Resource\\_Items/Emergency%20Detention%209-12.pdf](http://www.aapa.org/uploadedFiles/content/The_PA_Profession/Federal_and_State_Affairs/Resource_Items/Emergency%20Detention%209-12.pdf) > accessed 19 January 2014.

<sup>44</sup> 422 US 563 (1975).

<sup>45</sup> 441 US 418 (1979).

### **c) What procedures are available for detainees to challenge their detention?**

36. In *Jones v the United States* it was held that confinement was only authorised for as long as the required mental illness and dangerousness to the person's self or others persisted.<sup>46</sup> In practical terms this created a necessity for periodic review of the person's condition in order to fully comply with the court's ruling. The period of review varies between states, although common practice is that a detainee's condition will be reviewed for these purposes at a minimum of every 30 days.
37. The person committed does also have the right to file an appeal against the initial decision to commit, but the grounds for appeal vary between different states.

### **d) Remedies for unlawful detention**

38. If the person is successful during the civil commitment hearing or appeal then they will be released from the detention facility.
39. In terms of compensation, in *O'Connor v Donaldson*, the petitioner successfully sued the state hospital he had been confined in for damages, on the ground that the staff had deprived him of his constitutional right to liberty under the 5<sup>th</sup> Amendment.<sup>47</sup> This type of action is available to those subject to unlawful civil commitment under 42 USC. § 1983.<sup>48</sup> The person detained can seek compensation based on the initial detention, or any period of the confinement as a whole, for example if their health improved but they were still not released. Additionally, the state civil commitment statutes also each have a provision for compensation on this basis.

## **IV MILITARY DETENTION**

### **a) Decision to detain**

40. Prior to the Obama Administration's retirement of the expression in 2009,<sup>49</sup> the United States Government detained 'enemy combatants', who it defined as individuals who are 'part of or supporting forces hostile to the United States or coalition partners' and who 'engaged in an armed conflict against the United States'.<sup>50</sup> This original power to detain enemy combatants was contained in the Authorization for Use of Military Force (AUMF) resolution, which was passed

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<sup>46</sup> 463 US 354, 368 (1983).

<sup>47</sup> 422 US 563 (1975).

<sup>48</sup> 42 USC. § 1983.

<sup>49</sup> Department of Justice, 'Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees' (13 March 2009) available < <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>> accessed 5 March 2014.

<sup>50</sup> *Hamdi v Rumsfeld* 542 US 507 (2004).

by Congress in the wake of 9/11.<sup>51</sup> In 2009, the Obama Administration submitted a new standard for the government's authority to hold detainees at Guantanamo Bay, providing that 'individuals who supported al Qaeda or the Taliban are detainable only if the support was substantial'.<sup>52</sup> The authority to hold detainees under this new regime at Guantanamo Bay was based on the AUMF, which itself was informed by principles of the laws of war.<sup>53</sup>

#### **b) Review of and challenges to detention**

41. The background to the process has differed depending on whether the detainee is a US citizen or non-US citizen, and these backgrounds and current procedures are outlined below.

##### *i) US citizens*

42. US citizens detained under the AUMF are required to be detained within the United States. Under the US Constitution, every individual detained within the United States is entitled to a *habeas corpus* petition to challenge their detention.<sup>54</sup> This *habeas corpus* petition would be filed under 28 USC. § 2241 and would be heard in the federal court with jurisdiction for the district where the person is in custody<sup>55</sup>. In the federal habeas review, the 'person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts'.<sup>56</sup> This evidence can be presented orally in court.<sup>57</sup>

##### *ii) Non-US citizens*

43. Until recently the majority of non-US citizens detained under the former 'enemy combatants' regime were transferred to the US Naval Base at Guantanamo Bay, Cuba. In the case of *Rasul v Bush*, it was held that these prisoners had a right to file a habeas corpus petition in order to challenge their detention.<sup>58</sup> Following this however, the US Government passed the Detainee Treatment Act of 2005<sup>59</sup> and Military Commissions Act of 2006<sup>60</sup>, which restricted any future habeas rights of those non-citizens held outside the United States. However, in the case of *Boumediene v Bush*, it was held by the US Supreme Court that not only did Guantanamo detainees

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<sup>51</sup> Pub L 107-40, 115 Stat 224.

<sup>52</sup> Department of Justice, 'Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees' (13 March 2009) available < <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>> accessed 5 March 2014

<sup>53</sup> *ibid.*

<sup>54</sup> United States Constitution, art 1, s 9, cl.2.

<sup>55</sup> 28 USC. § 2241(d).

<sup>56</sup> 28 USC. § 2243.

<sup>57</sup> 28 USC. § 2246.

<sup>58</sup> 542 US 466 (2004).

<sup>59</sup> Pub L No. 109-148, 119 Stat 2739.

<sup>60</sup> Pub L No. 109-366, 120 Stat 2600.

have the right to file a habeas corpus petition in US federal court, but they were also extended the fundamental rights afforded by the US Constitution.<sup>61</sup> Therefore, it seems that non-US citizens detained under this power have the same habeas petition process outlined above with regards to US citizens.

### **c) Remedies for unlawful detention**

44. Where the habeas petition is successful, the court will order the release of the detainee.
45. In terms of compensation for Guantanamo detainees, the recent decision of the Ninth Circuit of Appeals in *Hamad v Gates* concluded that it did not have jurisdiction to hear the petitioner's claim for damages.<sup>62</sup> The petitioner had been detained in Guantanamo for five years before eventually being transferred back to his home country of Sudan. The court's decision was based on s 2241(e)(2) of the Detainee Treatment Act of 2005 (which it held had not been invalidated by the decision in *Boumediene*).<sup>63</sup> That section provides that 'no court, justice or Judge' could hear 'any other action' relating to detention (including a claim for damages).<sup>64</sup> This suggests that former Guantanamo detainees may not have a mechanism to seek damages for their detention.
46. Furthermore, it should also be noted that s 2241(e)(2) does not apply to US citizens but only to aliens, meaning that US citizens could seek damages for infringement of their constitutional rights, were they able to demonstrate that their detention was unlawful.

## **V POLICE DETENTION**

47. This summary will particularly focus on the practice of 'kettling' in the United States, where police corral large crowds during demonstrations or protests, leaving them only one choice of exit or in many occasions, no exit at all.

### **a) Threshold questions**

48. Under the 4<sup>th</sup> Amendment to the US Constitution, a person has the right to be free from 'unreasonable searches and seizures'. In the landmark case of *Terry v Ohio*, it was held that 'whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person'.<sup>65</sup> Therefore, this is what constitutes police detention in US law, and if an individual is seized (detained) through kettling or any other police procedure, the restraint on their freedom must be in accordance with the law.

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<sup>61</sup> *Boumediene v Bush*, 553 US 723 (2008) .

<sup>62</sup> *Hamad v Gates*, DC No. 2:10-cv-00591-MJP (2013) .

<sup>63</sup> This provision was codified in 28 USC. § 2241(e)(2).

<sup>64</sup> 28 USC. § 2241(e)(2).

<sup>65</sup> 392 US 1 (1968).

## **b) Decision to detain**

49. Under the 10<sup>th</sup> Amendment to the US Constitution, ‘police power’ is conferred upon the individual states, allowing them to enact measures to preserve and protect the safety, health, welfare and morals of the community within those states. The key case in this area was *Jacobson v Massachusetts*, where the Supreme Court officially recognised state’s police powers for the first time, upholding a state law providing for compulsory vaccinations against smallpox in Boston, despite the fact that this was an infraction against the right to liberty guaranteed under the 1<sup>st</sup> Amendment.<sup>66</sup>
50. Essentially, based on the *Jacobson* holding, the states’ police powers allow them to restrict constitutional freedoms where the restrictions are in pursuance of the goals noted above.
51. Under the 1<sup>st</sup> Amendment, the public has the right to freedom of assembly, but each state can restrict this freedom by declaring the assembly unlawful and detaining those involved, if it does so in pursuance of public safety, health, welfare and morals of the community, although in this context it is most likely to be on the ground of public safety. It appears that this decision would normally be made by the police commander in charge of the state or county police force that is policing the event where the crowd has gathered.<sup>67</sup>

## **c) Review of and challenges to detention**

52. Where the state utilises its police power, for example to use the tactic of kettling to restrict a group’s 1<sup>st</sup> Amendment Rights, those detained will not have a direct mechanism to challenge their detention during the time they are detained at the scene of the protest. If they are then taken into custody in the form of a holding facility or jail, they will have to be charged with a crime within a time period which varies between states (the longest being 72 hours) before being automatically brought before a judge to determine the legality of the detention.
53. If they are released after the detention without charge or without being brought into custody however, detainees may still challenge their detention as an infringement of their 1<sup>st</sup> and 4<sup>th</sup> Amendment Rights, under 42 USC. § 1983.<sup>68</sup> In these circumstances the court will conduct a ‘balance of interests test’ to determine whether the goals served by the state’s use of its police powers was proportionate to the restriction to the detainees civil rights. In the case of kettling, the court would assess whether the nature of the police confinement and length of confinement were proportionate to the perceived threat to public safety.

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<sup>66</sup> 197 US 11 (1905).

<sup>67</sup> Eric Daigle, ‘Crowd Management and Civil Rights Protection’ (September 2012) available <[http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2744&issue\\_id=92012](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2744&issue_id=92012)> accessed 5 March 2014.

<sup>68</sup> 42 USC. § 1983.

#### **d) Remedies for unlawful detention**

54. If the state's actions were found to be disproportionate to the threat, those detained would be entitled to damages under 42 USC. §1983 on the ground that they had been deprived of their constitutional rights under the 1<sup>st</sup> and 4<sup>th</sup> Amendments.<sup>69</sup>

### **VI PREVENTIVE DETENTION**

55. This section will focus on the practice where those charged with a crime and convicted criminals are detained in custody, both before their original trial and following the end of their sentence, based on perceptions of their future dangerousness to the public. Academic commentary in this area seems to suggest that preventive detention is less commonly written about than other areas of US criminal law.

#### **a) Threshold questions**

56. As preventive detention takes place when an individual is in custody, either after the initial arrest and prior to trial, or after serving a prison sentence, then this is not generally an issue.

#### **b) Decision to detain**

##### *i) Pre-trial detention*

57. US law authorises a federal judicial officer (federal judge) to order detention until trial, at a detention hearing.<sup>70</sup> Detention pending trial is permitted where there is 'a serious risk the person will flee', 'a serious risk that such person will obstruct ... justice' or attempt to intimidate witnesses or jurors,<sup>71</sup> and it is the judge's decision as to whether one or more of these factors exist. There is also a rebuttable presumption in favour of detention where the defendant has been charged with certain serious crimes, or has been charged with any felony and has previously been convicted of other serious crimes, which are defined in the statute.<sup>72</sup> Additionally, the judicial officer has the power to order pre-trial detention where they find that no condition or combination of conditions will assure both the appearance of the person at trial and the safety of the public.<sup>73</sup> In making this decision the judge will assess the nature of the charged offence, weight of evidence against the defendant, and the defendant's personal circumstances.<sup>74</sup>

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<sup>69</sup> 42 USC. § 1983.

<sup>70</sup> 18 USC. § 3142(e).

<sup>71</sup> 18 USC. § 3142(e)-(f).

<sup>72</sup> 18 USC. § 3142(f)(1).

<sup>73</sup> 18 USC. § 3142(g).

<sup>74</sup> *ibid.*

58. At the detention hearing the defendant has a right to instruct counsel, to testify, to present witnesses, cross-examine witnesses who appear at the hearing, and present information. In relation to this final aspect, admissibility of evidence rules do not apply to pre-trial detention hearings.<sup>75</sup> Where the judge orders detention, they must issue written findings of fact. Where they release the defendant on bail, they must not impose ‘a financial condition that results in the pre-trial detention of that person’, in other words set bail so high that it acts as a de facto preventive regime.<sup>76</sup>
59. It should be noted that the above describes federal detention procedures for those charged with federal crimes, and that for those charged by states, the state detention procedures may vary.

*ii) Preventive detention post sentence*

60. In *Kansas v Hendricks*, the US Supreme Court upheld the preventive detention of individuals who had completed their sentences, but had been shown to be dangerous as the result of a ‘mental abnormality’.<sup>77</sup> In the case the Supreme Court specifically stated that the mental abnormality did not need to be one which would normally be considered extreme, provided it made the person ‘dangerous beyond (their) control’.<sup>78</sup> In a later decision in *Kansas v Crane*, the Court stressed that ‘lack of control’ is not intended to have a ‘particularly narrow or technical meaning’, but simply requires ‘proof of serious difficulty in controlling behaviour’.<sup>79</sup> While this case was decided in relation to a state statute (from Kansas), the court’s rationale provided a framework for wider state practice and has been codified into federal law.<sup>80</sup> Importantly, this is considered to be a civil procedure, and so due to this does not violate the double jeopardy rule, and other aspects of criminal due process.
61. In terms of procedure, as it is a civil procedure then it is subject to civil due process as opposed to criminal due process, which offers less protection for the person subject to proceedings. Whether the person who has completed their sentence is dangerous or not is certified by the Attorney General, or any person authorized by him,<sup>81</sup> and where this is the case the individual will be referred to the court with jurisdiction for the district where they are confined.<sup>82</sup> They will then receive a psychiatric assessment and participate in a hearing where the decision regarding their detention will be made. At the hearing the individual concerned has the opportunity to

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<sup>75</sup> 18 USC. § 3142(f)(2).

<sup>76</sup> 18 USC. § 3142(c)(2).

<sup>77</sup> 521 US 346 (1997).

<sup>78</sup> 521 US 346, 358.

<sup>79</sup> 534 US 407 (2002).

<sup>80</sup> 18 USC. § 4248.

<sup>81</sup> 18 USC. § 4246.

<sup>82</sup> 18 USC. § 4246.

instruct counsel, present evidence, and confront and cross-examine witnesses who appear at the hearing.<sup>83</sup>

62. Once again, the above is based on federal procedure and individual states may differ, but as was noted, in this instance the federal statute was based on a Supreme Court decision focusing on state practice.

### **c) Review of and challenges to detention**

#### *i) Pre-trial detention*

63. Where the judge has ordered detention pending trial at the detention hearing, the defendant is entitled to appeal the decision under 18 USC. § 3145.<sup>84</sup>

#### *ii) Preventive detention post sentence*

64. Once the decision has been made to detain, the person will be held until the person's condition is such that their release would not create 'a substantial risk of bodily injury to another person', or 'serious damage to property of another'.<sup>85</sup> This decision will be determined by the Director of the facility in which the individual is resident in.<sup>86</sup>

### **d) Remedies for unlawful detention**

#### *i) Pre-trial detention*

65. If the detention is found to be unlawful on appeal then the defendant is entitled to be released from custody until trial.<sup>87</sup> Provided that the detention was in accordance with the procedures described above, it is not normally possible to claim compensation. If detention was not in accordance with this process, the defendant may be able to bring an action for damages for wrongful arrest, false imprisonment, or malicious prosecution under 42 USC. § 1983.<sup>88</sup>

#### *ii) Preventive detention post sentence*

66. If it is found that the person's release would not create 'a substantial risk of bodily injury to another person' or 'serious damage to the property of another' by the facility Director as stated above, they will be either discharged unconditionally<sup>89</sup> or discharged on condition of ongoing

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<sup>83</sup> 18 USC. § 4247.

<sup>84</sup> 18 USC. § 3145.

<sup>85</sup> 18 USC. § 4246(d)(2).

<sup>86</sup> 18 USC. § 4246(e).

<sup>87</sup> 18 USC. § 3145.

<sup>88</sup> 42 USC. § 1983.

<sup>89</sup> 18 USC. § 4246(e)(1).

treatment.<sup>90</sup> As they are assessed on an ongoing basis, it does not appear that after discharge they could then bring an action for compensation under 42 USC. § 1983, unless they could show that in the initial detention decision following their sentence, procedure as stated above was not correctly followed, or that they had unlawfully been designated a risk during the periods of assessment.<sup>91</sup>

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<sup>90</sup> 18 USC. § 4246(e)(2).

<sup>91</sup> 42 USC. § 1983.

# Country Report for Uruguay

## I ADMINISTRATIVE DETENTION

1. There is no specific provision under Uruguayan Law with regards to the possibility to detain a person on grounds of counter-terrorism, intelligence gathering or security reasons. As a general rule, arrests in Uruguay only proceed in cases of flagrante delicto or with a written judicial order. And in either case, the order of detention needs to be issued by a competent judge who should see the detainee, and take their statement within 24 hours, and begin the criminal proceeding within 48 hours.<sup>1</sup> These guarantees can only be limited in very exceptional circumstances especially established in the Constitution. It is the case of what is call ‘medidas prontas de seguridad’<sup>2</sup> that functions as a ‘state of exception’ and allows the Executive Branch to limit certain rights upon informing the General Assembly. These measures are provisional and only proceed in case of serious unexpected events of external attack or internal unrest.<sup>3</sup> Under this ‘state of exception’ the Executive Branch can deprive the liberty of a person and allocate her/him in a facility that is not originally designated as a reclusion facility—such as military facility—and to move a person within the limits of the country, only when the person has not opted to abandon the country.<sup>4</sup>

## II IMMIGRATION DETENTION

2. Uruguayan immigration law doesn’t regulate explicitly this matter.<sup>5</sup> There is no provision on the law with regards to detain individuals suspected of visa violations, illegal entry or unauthorised arrival. As a developing country with very slow rate of population growth, Uruguay has historically adopted an immigration-friendly policy and immigrants have normally found little requirements or bureaucratic obstacles to enter and settle in the country.
3. The sanctions provided in the immigration law are only pecuniary<sup>6</sup> and the immigrant can challenge all definitive decisions regarding their status before the immigration authority according to s 317 of the Uruguayan Constitution and this shall have suspensive effect.<sup>7</sup>

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<sup>1</sup> Uruguayan Constitution, ss 15 and 16.

<sup>2</sup> A possible translation would be ‘immediate measures of security’.

<sup>3</sup> Uruguayan Constitution, s 168.

<sup>4</sup> Uruguayan Constitution, s168,

<sup>5</sup> Law 18.250.

<sup>6</sup> Law 18250, Chapter XIII.

<sup>7</sup> Law 18.250 s 49.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

4. The legal framework for the detention of persons with mental illness is established in ss 92 to 101 of the Criminal Code. When the crime is committed by a person with mental illness (including alcoholics or a drug addicts) ‘curative measures’ should be adopted and the person shall be detained in a mental institution. These measures are taken after the judge has assessed the mental situation of the subject — with the advisory opinion of a mental health professional — and decided that the subject is unable to comprehend and/or control their behaviour and therefore cannot be held criminally responsible. The analysis of the subject unimputability is ought to be made by the Court and shall have its scientific basis on a report issued by the ‘Instituto Técnico Forense’ (or Forensic Investigation Office) that will interview the subject. This Office shall re-evaluate the situation of the patient every six months<sup>8</sup> and this evaluation can result in a review of the measures.
5. The law establishes that these patients shall be detained in a Criminal Sanatorium. However, this type of institution was never established and, in fact, they are detained in ordinary asylums under the care of the State.
6. The subject ought to be assisted and represented by an attorney and by their tutor/curator/legal representative and should be heard in every stage of the proceedings.
7. These regulations had been widely criticized due to the fact that, according to s 94 of the Criminal Code, these measures have no minimum or maximum duration. Therefore, the judge has absolute discretion in deciding the extension in time of these measures. There is a bill under consideration of the Parliament of a new Criminal Code that will modify this indetermination of the curative measures.<sup>9</sup>

### IV MILITARY DETENTION

#### a) Threshold questions

8. There does not appear to be any threshold question as to whether ‘military detention’ in Uruguay constitutions ‘detention’.

#### b) Decision to detain

9. As a general rule, arrests in Uruguay only proceed in cases of *flagrante delicto* or with a written judicial order. And in either case, the order of detention needs to be issued by a competent judge

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<sup>8</sup> Decision 245/2013, Criminal Court of Appeal, Second Circuit, 2013, Available at <[www.bjn.poderjudicial.gub.uy](http://www.bjn.poderjudicial.gub.uy)> accessed 15 January 2014.

<sup>9</sup> Cairoli, ‘M Por qué y cómo debe reformarse el Código Penal - online code UY/DOC/217/2011’ available <<http://www.laleyonline.com.uy/>> accessed 15 January 2014.

who should see the detainee, and take their statement within 24 hours, and begin the criminal proceeding within 48 hours.<sup>10</sup> Furthermore, under Uruguayan law, no measure resulting in deprivation of liberty can be ordered without legal text allowing it and written judicial order.

10. Under Uruguayan law no detention can be ordered by military personnel or under military custody or at any other military facility. These guarantees can only be limited in very exceptional circumstances especially established in the Constitution. It is the case of what is called ‘medidas prontas de seguridad’<sup>11</sup> that functions as a ‘state of exception’ and allows the Executive Branch to limit certain rights upon informing the General Assembly. These measures are provisional and only proceed in case of serious unexpected events of external attack or internal unrest.<sup>12</sup> Under this ‘state of exception’ the Executive Branch can deprive the liberty of a person and allocate her/him in a facility that is not originally designated as a reclusion facility — such as military facility — and to move a persons within the limits of the country, only when the person has not opted to abandon the country.<sup>13</sup>
11. According to the Military Criminal Code and Military Procedure Code — that applies exclusively to the armed forces of Uruguay — military personnel found guilty of a crime shall be judged by specialised military Courts and shall be detained in military facilities as long as they provide satisfactory reclusion conditions.<sup>14</sup>

## **V POLICE DETENTION**

12. Information regarding any issues concerning police detention, particularly with respect to ‘kettling’ in crowd control situations, could not be located. Some aspects may be considered ‘police detention’ concerning pre-trial preventive decision, which are dealt with in Section VI below.

## **VI PREVENTIVE DETENTION**

13. The relevant legal instruments on this matter are International Covenant on Civil and Political Rights, American Convention on Human Rights, ss 26 and 27 of the Uruguayan Constitution, Law 17.726, Law 16.058, Law 15.859 and ss 71 and 72 of the Criminal Procedure Code.

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<sup>10</sup> Uruguayan Constitution, ss 15 and 16.

<sup>11</sup> A possible translation would be ‘immediate measures of security’.

<sup>12</sup> Uruguayan Constitution, s 168.

<sup>13</sup> Uruguayan Constitution, s 168.

<sup>14</sup> Military Procedure Code, ss 10 and 11.

### a) Pre-trial detention

14. The Uruguayan pre-trial detention framework is established in the Criminal Procedure Code, especially ss 71 and 72. According to this domestic regulation, during any stage of the criminal proceeding the judge can order preventive detention. This law authorises the judge who is analysing the case to order this kind of detentions; the judge must be competent according to the law.
15. Some material limits are established in s 72: preventive detention only proceeds when there are reasonable grounds to suspect (a) that the subject will attempt to evade the proceeding; (b) that the subject's freedom will endanger the investigation and/or the recollection of evidence; or (c) is consider to be necessary for 'public security' reasons or (d) if the subject have been indicted or convicted previously.<sup>15</sup> Also, preventive detention can be ordered in those cases where the crime committed caused or has the potentiality to cause 'social alarm'.<sup>16</sup>
16. However, the majority of the case law in Uruguay considered that preventive detention should be mandatory according to a narrow interpretation of s 27 of the Constitution.<sup>17</sup> This section was construed strictly as establishing that preventive detention of the indictee is the general rule, and that freedom during the proceedings can only be granted in exceptional cases when (i) the subject has no previous indictment and (ii) the proceedings will not result in an imprisonment for 24 months or more.<sup>18</sup> This interpretation results in Uruguay being one of the countries with the highest proportion of pre-trial detainees among the total prison population; 64.6 per cent of the detainees have no conviction whatsoever.<sup>19</sup>

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<sup>15</sup> Section 72 of the Uruguayan Criminal Procure Code provides:

'...el Juez podrá decretar la prisión preventiva: A) Si hubiere motivo fundado para presumir que el imputado tratará de sustraerse a la acción de la justicia; B) Si fuere igualmente presumible que la libertad del prevenido obstaculizará la eficacia de la instrucción; C) Si fuere necesario, por razones de seguridad pública; D) Si se tratase de procesado reincidente o que tuviera causa anterior en trámite. En la consideración de este extremo el Juez estará, provisoriamente, a los dichos del imputado y, en definitiva, a las resultancias de la planilla de antecedentes judiciales que el Instituto Técnico Forense deberá expedir dentro de la veinticuatro horas de serle solicitada'.

<sup>16</sup> Law 15.859, s 3.

<sup>17</sup> Section 27 f the Uruguayan Constitution provides:

'En cualquier estado de una causa criminal de que no haya de resultar pena de penitenciaría, los Jueces podrán poner al acusado en libertad, dando fianza según la ley'.

<sup>18</sup> Law 17.726. See also Camano, D. 'Límites normativos a la duración de la prisión preventiva' available <[http://new.pensamientopenal.com.ar/sites/default/files/2011/10/41viera\\_0.pdf](http://new.pensamientopenal.com.ar/sites/default/files/2011/10/41viera_0.pdf)> accessed 9 December 2013.

<sup>19</sup> Aborn, R. and Canon, 'H. Prisons: in jail but not sentenced' available <<http://www.americasquarterly.org/aborn-prisons>> accessed 9 January 2014.

17. For this detention to be legitimate it should be requested by the Public Prosecutor and ordered by a competent judge. The detainee can challenge the order of preventive detention in accordance to s 132 of the Criminal Procedure Code and needs to be represented and assisted by an attorney in all opportunities before the Court.<sup>20</sup>
18. This law and its interpretation have been widely criticized because it confuses the procedural non-punitive measure of preventive detention with the imprisonment as a criminal punishment.<sup>21</sup> It is a widely spread practice, enabled by domestic law—in evident contradiction with international human rights obligations assumed by Uruguay—to consider factors as ‘the nature of the crime’, ‘the previous conviction or indictment of the subject’ and ‘the potential punishment established for the offence’ to determine the order of preventive imprisonment. Therefore, preventive detention in Uruguay functions as an ‘anticipated punishment’.<sup>22</sup>
19. In the cases where the detainee was detained preventively but (1) there was no conviction whatsoever or (2) the conviction resulted in a sanction of imprisonment for a period shorter than the one already been served by the detainee, the detainee is entitled under Law 15.859 to compensation by the State for the material and moral damages that preventive detention have caused.<sup>23</sup>

#### **b) Preventive detention post sentence**

20. Under Uruguayan Law, the judge can impose ‘eliminative measures’<sup>24</sup> after the convict has served the time. These kinds of measures can only be applied to recidivist offenders and homicides and where because of the exceptional gravity of the fact, derived from the nature of the motives, the way of execution and other related circumstances, the subject is demonstrated to be ‘dangerous’. These ‘measures’ can result in a new reclusion period that can last for fifteen years.<sup>25</sup>

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<sup>20</sup> Law 15.032, s132.

<sup>21</sup> Gelsi Bidart, A. ‘Pre sumario y garantías procesales’ available <<http://www.laleyonline.com.uy>> accessed 10 January 2014.

<sup>22</sup> Camano, D. ‘Límites normativos a la duración de la prisión preventiva’ available <[http://new.pensamientopenal.com.ar/sites/default/files/2011/10/41viera\\_0.pdf](http://new.pensamientopenal.com.ar/sites/default/files/2011/10/41viera_0.pdf)> accessed 9 December 2013.

<sup>23</sup> Law 15.859, s 4.

<sup>24</sup> Uruguayan Criminal Code.

<sup>25</sup> Uruguayan Criminal Code, ss 92 and 95.