



**Universal Periodic Review: United Kingdom
(May 2012)**

JUSTICE Stakeholder Submission

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Introduction

1. JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.¹

a) Pre-charge detention: Treatment of Suspects and Access to Justice²

2. Several recommendations from the last UPR cycle focused on the pre-charge detention of criminal suspects in the UK. We welcome several positive developments, but we are concerned that this progress may be hampered by new potential threats to the right to liberty and the right to a fair hearing.
3. In the Protection of Freedoms Bill 2010, the Government proposes to reduce the period of pre-charge detention from 28 days to 14 days.³ JUSTICE welcomes this proposal, having criticised the previous time-frame as disproportionate and incompatible with the right to liberty. Unfortunately, the Government plans to introduce emergency legislation designed to extend the period of detention temporarily if circumstances demand it (an example which has been given poses several simultaneous and serious terrorist attacks on London).⁴ We consider that the prospect of a debate which examines the necessity for continuing to detain a suspect or group of suspects at a highly sensitive time, when individuals are likely to be in custody, poses a serious risk to the right to a fair trial. Detention for up to 28 days was rarely used in practice and we see no need for the Government to put down a marker that Parliament might be enabled to extend pre-charge detention at a time of national crisis. Emergency legislation of this kind generally makes bad law; its use in the circumstances proposed could entirely undermine the right to due process and restrict our ability to bring those accused of the most serious criminal offences to justice.
4. In *Cadder v HM Advocate*, the UK Supreme Court held that people in Scotland must have access to legal advice while detained at a police station. Until this decision, there had been no such right in domestic law. The Scottish authorities had argued that since a person could only be detained for a limited time (around 6 hours); together with other safeguards, this was adequate to protect the individual right to a fair hearing. The Supreme Court disagreed.⁵ This important decision has led to significant changes in Scots criminal procedure. Unfortunately, these provide far greater room for exception than in England and Wales, and could lead to an individual being denied access to legal advice at the discretion of individual officers and does not require representation at interview. Advice could be limited to advice over the telephone.⁶ Since this development, the UK Government has proposed that it should have the power to enable it to limit access to legal advice in police stations in England and Wales to telephone advice.⁷ We are concerned that these developments represent a significant shift away from the right of detained persons to effective legal advice and undermine the right to liberty and the right to a fair trial guaranteed by the ICCPR.⁸

b) Counter-terrorism measures, review and international human rights standards⁹

5. A significant proportion of JUSTICE's work over the past decade has been committed to scrutiny of counter-terrorism legislation and policy in the UK and its compatibility with international human rights standards. We welcomed the recommendations in the UPR on the need for the UK to review existing legislation and remedy any incompatibilities.
6. While we welcomed the Government's recent decision to conduct a wholesale review of its counter-terrorism law and policy; its outcome has been disappointing.¹⁰ The Government proposes to remove its restrictive powers to impose control orders on terrorist suspects, but proposes "Terrorism Prevention and Investigation Measures" in their place.¹¹ "TPIMs" are control orders by another name. The Protection of Freedoms Bill proposes to remove the exceptional power to stop and search individuals without reasonable suspicion, but an alternative power is proposed in its place without adequate safeguards for legal certainty and the right to respect for privacy.¹²
7. We are concerned that criminal offences created as part of the previous Government's counter-terrorism strategy and criticised for their broad breadth and chilling effects on the right to freedom of expression, remain in force with no plans for review.¹³
8. No progress has been made to improve the likelihood of effective prosecution in terrorism cases. The fruits of intercepted communications remain inadmissible in court proceedings. In 2009, during the trial of three terrorist suspects accused of plotting to attack transatlantic aircraft, e-mails between

the UK and Pakistan, intercepted by US authorities in California, formed part of the evidence. This highlights the absurdity that similar evidence intercepted by UK intelligence services would be excluded from evidence.¹⁴

9. The definition of terrorism in the UK remains extraordinarily broad and out of step with the language of international law.¹⁵
10. There is work yet to be done in the UK to ensure that our counter-terrorism law and policy operates to keep us safe while respecting fundamental human rights standards.

c) Jurisdiction and extent of human rights obligations¹⁶

11. A number of recommendations focus on the alleged involvement or complicity of UK troops and intelligence services in torture and ill-treatment of detainees overseas. In its mid-term review of compliance with the UPR recommendations, the Government expressed its view that all UK Armed Forces receive training which “reflects applicable human rights obligations”, including in relation to the treatment of detainees. The Government has continued to resist the extraterritorial application of international and regional standards to the activities of troops overseas. We are concerned that this resistance has led, demonstrably, to failures in the ability of the UK to meet the standards required by international human rights law and the laws of war, when operating overseas. Several developments support the need for a wholesale review of UK Armed Forces training materials and the operation of legal advice on human rights standards in theatre:
 - In 2011, the European Court of Human Rights confirmed that the standards in the European Convention on Human Rights apply to people in the custody of UK Armed Forces overseas.¹⁷
 - A major public inquiry into the death of Baha Mousa, an Iraqi man who died after detention by UK Armed Forces in 2003, made significant criticisms of his treatment at the hands of individual troops; the training, guidance and advice given to individual troops and groups within the UK Armed Forces.¹⁸
 - After a successful judicial review of revised guidance on the treatment of detainees, this new guidance required further revision in order to meet the obligations of the UK to protect against unlawful torture and ill-treatment under Article 3 ECHR.¹⁹
12. These developments followed a heightened number of allegations of complicity of UK Armed Forces and Intelligence Services in torture and ill-treatment, including allegations in relation to the operation of UK troops in Iraq, involvement in relation to detention of individuals in Pakistan and Egypt and allegations in connection with the treatment of Binyam Mohammed, who was detained in Pakistan and then at Guantanamo Bay.²⁰ In July 2010, the Prime Minister announced the Government’s intention to hold a public inquiry to investigate these allegations after the conclusion of the necessary criminal investigations had been completed.²¹
13. In November 2011, speaking to accusations of complicity in torture, ill-treatment and rendition, the UK Foreign Secretary said that he intended to “draw a line” under these allegations. He said “the very making of these allegations undermined Britain’s standing in the world as a country that upholds international law and abhors torture”. He explained that the Government considers that it has taken steps – in the announced public inquiry on the treatment of detainees (the *Gibson* inquiry)²² and the introduction of proposals to enable litigation on allegations of ill-treatment to proceed under special Closed Material Procedures²³ – in order to ensure a full inquiry into existing allegations and proper investigation into similar claims in the future.²⁴
14. Unfortunately, the terms of reference and procedure adopted by the *Gibson* inquiry undermine its capability to undertake an effective and independent review. The Government (in the form of the Cabinet Secretary) will have ultimate control of disclosure of material and a significant part of the inquiry will be conducted behind closed doors and with no avenue for full public scrutiny of the allegations concerned. In light of its failings, both the detainees and a number of significant civil society organisations have decided to boycott this inquiry.²⁵ In these circumstances, it is inconceivable that the Government can continue to rely on this mechanism to discharge its international obligations to conduct an effective inquiry into the alleged torture and mistreatment of individual detainees.²⁶
15. In its Justice and Security Green Paper, the Government proposes to allow the executive to certify when certain information relevant to civil litigation must be considered by the court under Closed

Material Procedures (when the material is not revealed to the claimant or the public). The Government proposes to introduce mechanisms which would ensure that litigation brought by the Guantanamo detainees would have taken place behind closed doors, with the claimants unable to see information on which the Government sought to rely. The breadth of the proposals is extremely wide and proposes to grant a broad discretion to the executive to determine when these measures will be appropriate.

16. The Government proposes to change the law to ensure that when the UK holds certain information (including information which may provide evidence of torture or treatment in violation of the UN Convention against Torture) existing procedural measures in domestic law cannot be used to force the Government to reveal that information, if the Government deems national security is at risk.²⁷
17. We do not consider that the sweeping measures proposed by the Government are justified. They represent a fundamental in-road into the principle of open justice enshrined in domestic common law and in the UK's international obligations. The Government argues that these measures will increase transparency by ensuring that the Courts' can consider more cases against the security and intelligence services rather than striking them out. Unfortunately, this ignores the implications of any hearing based on evidence seen only by one side and unchallenged by the other. As Lord Kerr said in the Supreme Court decision in *Al-Rawi*: "To be truly valuable, evidence must be capable of withstanding challenge...Evidence which has been insulated from challenge may positively mislead".²⁸
18. The consultation on these proposals closed in January 2012 and legislation is expected later in 2012. We consider that the proposals to extend the use of Closed Material Procedures in the UK pose a significant risk to openness and transparency and could undermine significantly the UK's capacity to meet its international obligations in a manner which is transparent, accountable and fair.

d) Freedom of expression, policing and protest²⁹

19. The last UPR review took place in 2008, before the death of Ian Tomlinson during the policing of the G20 protests in the City of London in 2009.³⁰ In the aftermath of this case, and wider criticism of policing techniques during mass public protests, including the use of "kettling" techniques, significant public attention was placed on the importance of police management of public demonstrations in order to facilitate the right to protest, while protecting individuals from violence and disorder. Parliamentary Committees and Her Majesty's Inspectorate of Constabulary made significant recommendations to improve the "on the ground" guidance and training given to individual officers.³¹
20. The proportionality of public order policing in the UK continues to cause concern as public demonstrations rise in the face of increasing austerity measures. Litigation continues on the propriety of measures to contain protesters and the proportionality of arrests and sentences associated with offences in connection with different demonstrations. The European Court of Human Rights is due to give its judgment on the proportionality of the use of "kettling" in the UK during 2012.³²
21. During recent weeks, the Metropolitan Police Service (MPS) in London appears to have adopted a pre-emptive approach to policing of mass demonstrations which far from facilitating the individual right to protest, seems designed to chill individuals' interest in expressing their dissent. The techniques in question have included writing to individuals who had previously been arrested for disorder before a planned demonstration to warn them against coming to the protest and participating in disorder, and issuing a press statement to announce that baton rounds (or rubber bullets) would be available during the day, for "exceptional circumstances".³³ By intimating that the event is likely to become violent, and require a violent response, both of these techniques represent a departure from previous practice in the UK and appear designed to have a chilling effect on people who intend to exercise the right to protest. While the police have a clear responsibility to protect individuals from violence and disorder and to police associated offences, marking protest activity as inherently violent does little to facilitate peaceful protest.
22. The MPS was openly criticised in the press in connection with alleged failures associated with mass rioting in London in summer 2011. We are concerned to ensure that, in developing their approach to the policing of protest, proportionality is the key starting point for any force in the UK. Conflating the extremely violent scenes seen during the mass disorder which took place during the London riots with other subsequent planned or unplanned demonstrations is unhelpful.

23. In their response to the last UPR, the then Government made clear its intention to relax the existing law limiting the right to protest within 1km of the Houses of Parliament. The Police and Social Responsibility Act 2011 removes this restriction, but introduces new limitations and associated offences connected with protest in the area immediately opposite Parliament. These include restrictions on the use of sleeping materials (including blankets, sleeping bags and tents), loudhailers and other noise amplification equipment.³⁴ We have expressed our concern that these restrictions appear overly broad and should not be used disproportionately to discourage the exercise of free expression in this area of outstanding importance for democracy in the United Kingdom.³⁵

e) The bigger picture: A Bill of Rights for the UK?³⁶

24. The UK is currently engaged in a highly controversial debate about the proper approach to the protection of human rights domestically. This debate has involved high-level criticism of the Human Rights Act 1998 (the existing means by which domestic rights are executed and justiciable in the UK). As part of the current coalition agreement for Government, a Commission on a Bill of Rights for the UK has been established to “investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties”.³⁷ Concurrently, the UK holds the Chairmanship of the Committee of Ministers at the Council of Europe. One of the objectives of the UK is to look at the “subsidiary” nature of the European Court of Human Rights, with a view to reinstating the primary responsibility of the states to determine the scope of domestic rights protection.
25. We are not persuaded that there is any evidence base for change, or that the current debate about a Bill of Rights for the UK is necessary. We are concerned that the politicised nature of this debate may undermine the UK’s ability to meet its obligations in international human rights law in practice. In the long-term, we are concerned that any change to our existing constitutional arrangements which reduces the level of substantive or procedural protection offered by the Human Rights Act 1998 will damage the ability of the UK to meet its obligations both under the European Convention on Human Rights and the equivalent guarantees in the ICCPR and other instruments.³⁸

f) The bigger picture: Legal Aid, Sentencing and Punishment of Offenders Bill

26. The Government proposes to reduce the circumstances when individuals will be able to secure legal aid to fund legal advice, assistance and representation.³⁹ We are concerned that these proposals will have a significant impact on access to justice. In the long-term, reducing the ability of individuals without independent resources to challenge their treatment will damage the protection of fundamental rights in practice, without effective scrutiny. For example, if individuals are unable to seek professional advice on their housing disputes, we are concerned that this may have an unseen impact on the quality of housing and the associated right to adequate housing in the UK.⁴⁰ We consider that the UK Government has not yet provided an appropriate analysis of the decision to restrict access to legal aid significantly, or shown how the UK will continue to monitor the effective implementation of fundamental rights in the absence of publicly funded legal challenges to public decision-making.

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¹ In accordance with Decision 17/119 and the guidance of the OHCHR, we limit our comments to a few key areas, principally focusing on the recommendations in A/HRC/8/25/Add.1. The numbers allocated to the recommendations in this submission correspond to that document. This response should not be treated as a comprehensive analysis of JUSTICE's concerns about the UK's compliance with its international human rights obligations.

² **Recommendation 3:** Enshrine the right of access of detainees to a lawyer immediately after detention, and not after 48 hours; **Recommendation 15:** Strengthen guarantees for detained persons, and not extend, but shorten the length of time of pre-trial detentions.

³ Clauses 57 - 58

⁴ The Government has published draft legislation for consultation. These two draft Bills, the Detention of Terrorism Suspects (Temporary Extensions) Bills are, in effect, draft legislation to be introduced in Parliament in an emergency authorising the temporary extension of the period to 28 days. These draft Bills have been criticised by the parliamentary Joint Committee on Human Rights: *"We also doubt whether it has been demonstrated, by evidence, that it is necessary to make provision now for a contingency power to extend the period of pre-charge detention beyond 14 days in the event of some future emergency. We note that the Joint Committee on the draft bills considered that such a power would only be required in "truly exceptional circumstances". It is always possible to imagine such extreme scenarios but an evidence-based approach to law-making requires rigour in assessing the likelihood of such exceptional circumstances arising. It is a paradox of democratic accountability that elected Governments are unlikely to risk saying overtly that the threat from terrorism has diminished. Responsible Parliaments, however, must take a view, on the information available, as to whether emergency powers are really necessary. In our view, on the evidence we have seen, the case for legislating now to provide an emergency power to increase the period of pre-charge detention beyond 14 days has not been made out."* See Eighteenth Report of Session 2010-12, *The Protection of Freedoms Bill*, HC 195/HC 1490, para 130.

⁵ [2010] UKSC 43

⁶ Criminal Procedure (Legal Assistance, Detention and Appeals)(Scotland) Act 2010.

⁷ Legal Aid, Sentencing and Punishment of Offenders Bill, Clause 12. Although the Government has indicated that it does not intend to use this power, it has resisted all attempts by Parliamentarians to limit its scope or remove it from the Bill. See for example, [Law Society Gazette, Government will not remove police station advice, 4 July 2011](#).

⁸ Articles 9, 10, 14.

⁹ **Recommendation 4:** Introduce strict time limits on pre-charge detention of those suspected of terrorism, and provide information about so-called "secret flights". **Recommendation 8:** Continue to review all counter-terrorism legislation and ensure that it complies with the highest human rights standards.

¹⁰ The Government announced the outcome of its [review of counter-terrorism and security powers](#) in January 2011. Together with the outcome of the review, the Government published an independent [report by Lord MacDonald of River Glaven QC](#), who had been asked to comment on the review and its outcome.

¹¹ [JUSTICE's briefing on the Terrorism Prevention and Investigation Measures Bill is available online.](#)

¹² Protection of Freedoms Bill, Clauses 59 – 63. [JUSTICE's full briefing on the Bill is available online.](#)

¹³ These include the offence of glorification of terrorism (Sections 1, 2, 21, Terrorism Act 2006). When the Parliamentary Joint Committee on Human Rights asked the Government whether it intended to repeal this offence as part of its counter-terrorism review or in the Protection of Freedoms Bill, no positive response was forthcoming. See Eighteenth Report of Session 2010-12, *The Protection of Freedoms Bill*, HC 195/HC 1490, pages 86 – 89.

¹⁴ In a recent report on the need for reform of the UK's laws on surveillance, JUSTICE reviews the inadequacies of the Regulation of Investigatory Powers Act 2000 and calls for numerous reforms, including the lifting of the ban on intercept as evidence. See [JUSTICE, *Freedom from suspicion: Surveillance Reform for a Digital Age*, November 2011.](#)

¹⁵ The UK parliamentary Joint Committee on Human Rights has concluded that the breadth of the definition of terrorism in Section 1 of the Terrorism Act 2000 gives rise to a high risk that the relevant speech offences connected with terrorism are in breach of the right to freedom of expression as guaranteed by Article 10 ECHR (and Article 19 ECHR). See See Eighteenth Report of Session 2010-12, *The Protection of Freedoms Bill*, HC 195/HC 1490, pages 86 – 89.

¹⁶ **Recommendation 16:** Consider that any person detained by its armed forces is under its jurisdiction and respect its obligations concerning the human rights of such individuals. **Recommendation 17:** Accept the full and unrestricted implementation of UNCAT and the ICCPR in territories under its control. **Recommendation 22:** Elaborate specific policies and programmes aimed at ensuring that its applicable human rights obligations are not violated in situations of armed conflict.

¹⁷ See *Al Skeini v United Kingdom*, App No 55721/07 and *Al Jedda v United Kingdom*, App No 27021/08, judgment dated 7 July 2011. The first case decided by the Court, *Al Skeini v United Kingdom*, concerned the killing of six Iraqi civilians by British soldiers in southern Iraq, including the brutal death of Baha Mousa during his detention at a UK army base. In 2007, the House of Lords ruled that the Human Rights Act did not apply to the soldiers' actions save those on the army base. However, the European Court today ruled that the UK government had a duty to conduct an effective investigation into the deaths of all the civilians killed by British soldiers, whether or not they were within the confines of a UK military base. It based its decision on the fact that the UK had assumed responsibility for the maintenance of security in Southern Iraq and were exercising 'authority and control' over Iraqi civilians. The second case, , involved the indefinite detention of a dual British/Iraqi citizen in a Basra facility run by British forces. In 2007, the House of Lords ruled unanimously that the detention was lawful because the UK government had been authorised by UN Security Council resolution 1546. However, the Grand Chamber today held that the Security Council resolution did not displace the UK government's obligations to protect the right to liberty under article 5 of the European Convention on Human Rights.

¹⁸ The Gage Inquiry into the death of Baha Mousa reported on 8 September 2011. Copies of the Inquiry report and its recommendations are available, here: <http://www.bahamousainquiry.org/index.htm>. See also, [JUSTICE, Press Release, *Baha Mousa's death is a stain on our values*, 8 September 2011.](#)

¹⁹ [Equality and Human Rights Commission v Prime Minister \(and Others\) \[2011\] EWHC 2401](#). See also Guardian, *High Court rules it unlawful to put hood over detainees' heads*, 4 Oct 2011.

²⁰ Some of these allegations are set out in an inquiry by the Parliamentary Joint Committee on Human Rights. See [Twenty-third Report of Session 2008-09, *Allegations of UK complicity in torture*, HL 152/HC 230.](#)

²¹ The detainee inquiry and its full terms of reference can be found online, here: <http://www.detaineeinquiry.org.uk/>.

²² [Justice and Security Green Paper, October 2011, Cm 8194](#).

²³ The full text of the Home Secretary's speech is available online: <http://www.fco.gov.uk/en/news/latest-news/?view=Speech&id=692973282>

²⁴ See also [Guardian, William Hague lifts the lid on spying operations, 16 November 2011](#).

²⁵ [Letter to the Detainee Inquiry, 3 August 2011](#). See also [JUSTICE Press Release, 6 July 2011](#).

²⁶ In fact, the Government continues to resist any implication that an independent and impartial inquiry is required under international law. See letter from Inquiry to JUSTICE (and other NGOs) dated 6 July 2011. See also [JUSTICE Press Release, 6 July 2011](#).

²⁷ [Justice and Security Green Paper, October 2011, Cm 8194](#).

²⁸ *Al-Rawi v Security Service*, [2011] UKSC 34, para 93. The Government's proposals are in part designed to respond to a decision of the court that it had no inherent jurisdiction to create a closed material procedure which excluded the claimant.

²⁹ **Recommendation 19:** Harmonise its legislation with its human rights obligations towards individual protesters exercising their freedom of expression and opinion [...]

³⁰ Ian Tomlinson died after being struck to the ground during the G20 protests in London in summer 2009. A police officer is currently awaiting trial for his manslaughter. Further information about the Tomlinson case and the policing of the G20 in London can be found online. The policing of these protests was examined by both the [Joint Committee on Human Rights](#) and [Her Majesty's Inspectorate of Constabulary](#).

³¹ Copies of both Reports are available online: [Joint Committee on Human Rights](#) and [Her Majesty's Inspectorate of Constabulary](#).

³² *Austin v UK*, App No 39692/09.

³³ See for example, [Guardian, Police send warning letters to activists ahead of student protests, 8 November 2011](#).

³⁴ [Part 3, Police and Social Responsibility Act 2011; Sections 141 – 149](#).

³⁵ Further information is available in JUSTICE's briefing on the Police and Social Responsibility Bill: <http://www.justice.org.uk/resources.php/21/police-reform-and-social-responsibility-bill>

³⁶ **Recommendation 5** (*Not accepted*): Consider holding a referendum on the desirability or otherwise of a written constitution, preferably republican, which includes a bill of rights.

³⁷ The full terms of reference for the Commission can be accessed online: <http://www.justice.gov.uk/about/cbr/index.htm>

³⁸ Further information is available in JUSTICE's submission to the Bill of Rights Commission, which can be downloaded from our website: www.justice.org.uk

³⁹ Legal Aid, Sentencing and Punishment of Offenders Bill 2011

⁴⁰ JUSTICE's Briefing on the Legal Aid, Sentencing and Punishment of Offenders Bill is available on our website: <http://www.justice.org.uk/resources.php/284/legal-aid-sentencing-and-punishment-of-offenders-bill>