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The *Anti-Terrorism, Crime and Security Bill:* Parts IV & V: immigration, asylum, race and religion

Bill 49 of 2001-02

The *Anti-Terrorism, Crime and Security Bill* Bill 49 of 2001-02] seeks (amongst other things) to amend the *Terrorism Act 2000*. The Bill has attracted some controversy, not least in its provisions for the detention of suspected international terrorists in circumstances where there is no immediate prospect of removing them to any other country. Other provisions include the extension of the law on incitement to racial hatred so as to include incitement to religious hatred.

This paper covers those parts of the Bill which deal with immigration and asylum, race and religion, including derogation from the European Convention on Human Rights. Papers covering other aspects of the Bill will be produced in time for the Second Reading Debate on 19 November 2001.

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Summary of main points

This paper covers those parts of the Bill which deal with immigration and asylum, race and religion, including derogation from the European Convention on Human Rights.

Part 4 of the Bill deals with immigration and asylum. It sets out a range of measures, including arrangements for the Home Secretary to certify people as suspected international terrorists, not entitled to the protection of Article 33 (1) of the 1951 UN Convention relating to the Status of Refugees. Provision is also made for detention of suspected international terrorists in circumstances where there is no immediate prospect of removing them to any other country.

Like the announcements which preceded it, this part of the Bill has attracted some controversy and argument, for three main reasons. Firstly, it would allow for what could potentially be indefinite (in other words, not time-bounded) detention without trial. Secondly, it would do so through machinery from which the courts' customary powers of judicial review would be excluded. Thirdly, the Government considers that the Bill's powers to detain could not be exercised without derogating from the European Convention on Human Rights, about a year after the *Human Rights Act 1998* came into force and the United Kingdom's sole remaining derogation was withdrawn.

The second part of this paper therefore examines the background to the laying, in anticipation of the Bill, of *Human Rights Act 1998 (Designated Derogation) Order 2001* on 12 November 2001, with respect to Article 5 of the *European Convention on Human Rights*. This section looks at the Derogation provision in the European Convention, how it has been used in the past and how the European Court of Human Rights (and the Commission of Human Rights before 1998) have approached its use.

Part 5 of the Bill is intend to bring into effect the Government's plans to strengthen the law on incitement to racial hatred, to encompass incitement to religious hatred.

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I Immigration and asylum

Like the announcements which preceded it, this part of the Bill has attracted some controversy and argument, for three main reasons. Firstly, it would allow for what could potentially be indefinite (in other words, not time-bounded) detention without trial, of suspected international terrorists. Secondly, it would do so through machinery from which the courts' customary powers of judicial review would be excluded. Thirdly, the Government considers that the Bill's powers to detain could not be exercised without derogating from the European Convention on Human Rights, about a year after the *Human Rights Act 1998* came into force and the United Kingdom's sole remaining derogation was withdrawn, when the *Terrorism Act 2000* came into force.[1]

A. Current law: Deportation

Current law provides some opportunity for the Secretary of State to remove from the United Kingdom people whose presence here is deemed not conducive to the public good. However, the *Immigration Act 1971* excludes people with the right of abode – which would include British citizens - from deportation and so British citizens who have the right of abode here cannot be removed.

Under section 3(5) of the *Immigration Act 1971*, a person who is not patrial[2] shall be liable to deportation from the United Kingdom if

- he has a limited leave to enter or remain in the United Kingdom and does not observe any condition attached to that leave or remains beyond the time limit on that leave, or
- the Secretary of State deems his deportation to be conducive to the public good, or
- another person to whose family he belongs is being or has been ordered to be deported.

An official within the Immigration and Nationality Directorate has confirmed that a person with indefinite leave to remain could be liable to deportation as long as they had not been granted British citizenship.[3]

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1 The *Human Rights Act 1998* received Royal Assent in November 1998: all its provisions had been brought into force by October 2000

2 Since refined and redefined as the having the 'right of abode' (*British Nationality Act 1981*)

3 Personal communication 18 September 2001

B. Revocation and forfeiture of indefinite leave to remain

The Home Secretary has no current powers to revoke indefinite leave to remain once granted but, as has just been noted, such a person could still be liable to deportation.

People may forfeit their indefinite leave to remain, on the other hand, if they are out of the country for long periods. The Immigration Rules provide that anyone who had indefinite leave to enter or remain in the United Kingdom when they last left may be readmitted for settlement if they return within two years.[4] In other words, someone who is settled here but leaves the country for more than 2 years may well forfeit their settled status.

C. Grant of British citizenship

The British Nationality Act 1981 sets out the requirements to be met by those seeking naturalisation as British citizens. Section 6 of the Act provides that the Home Secretary may naturalise a person who fulfils those various requirements *if he sees fit*. Thus naturalisation is always at the Home Secretary's discretion. There is no provision under which British citizenship, once granted by naturalisation, could be revoked.

D. Revocation of refugee status in the United Kingdom

Refugees can lose their refugee status by voluntarily re-availing themselves of the protection of their country of origin, by obtaining residency in or the nationality of another country, if their presence in the United Kingdom is a threat to national security or if their presence is not conductive to the common good as stipulated in the 1951 UN Convention relating to the Status of Refugees.

Article 1f of the UN Convention of 1951 states that the provisions of the Convention shall not apply to anyone

> With respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

---

[4] Para 18 of HC 395 (May 1994)

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 32 of the 1951 UN Convention provides that:

1. The contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 of the same convention provides that:

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The import of Article 1f is that someone may have a well-founded fear of persecution, but by committing (for example) a war crime they may place themselves outside the protection of the UN Convention. Articles 32 and 33, meanwhile, permit states to remove the protection of refugee status once it has been granted. Former refugees who have been stripped of their refugee status would be liable to deportation.

However, Article 3 of the European Convention of Human Rights demands that not only must governments not subject people to inhuman and degrading treatment, they must also consider the extra-territorial implications - ie (in this context) whether deporting someone might put them at risk of inhuman and degrading treatment in the country to which they

were deported. There is no exception, as there is with the UN Convention, on national security grounds. Thus, someone who had lost or forfeited the protection of the UN Convention might still be able to claim the protection of the ECHR.

Decisions on whether to rescind refugee status would be taken by the Home Office on a case by case basis. Home Office officials have indicated that - if it was decided to strip someone of their refugee status and then deport them - the Home Office would then have to consider the destination to which they should be deported and whether it would be safe to deport them there.[5] It used to be the case that decisions to deport on the personal authority of the Home Secretary on national security grounds carried no right of appeal. Following challenge at law, the Special Immigration Appeals Commission was set up to hear appeals of this type. Thus human rights issues could be ventilated at appeal, as well as during consideration of the case within the Home Office.

E. Detention

The Immigration and Nationality Directorate and the immigration service have wide powers to detain people for immigration reasons. People may be held solely on the basis of their immigration status and the Immigration and Nationality Directorate's or immigration service's view that they might seek to evade immigration control if they were at liberty.

1. Powers under the Immigration Act 1971

Broadly speaking, therefore, these various powers to detain are tied to situations where a person who is subject to immigration control is an illegal entrant or has been (or may be) refused leave to enter and directions have been (or may be) made for his removal from the United Kingdom. Schedule 2 to the *Immigration Act 1971* (as amended) provides that:

> ***Detention of persons liable to examination or removal***
>
> **16** (1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.
>
> […]

There are associated powers of arrest:

---

[5] personal communications 18 September and 11 October 2001

> **17** (1) A person liable to be detained under paragraph 16 above may be arrested without warrant by a constable or by an immigration officer.
>
> (2) If—
>
> > (a) a justice of the peace is by written information on oath satisfied that there is reasonable ground for suspecting that a person liable to be arrested under this paragraph is to be found on any premises; or
> > (b) in Scotland, a sheriff, or a . . . justice of the peace, having jurisdiction in the place where the premises are situated is by evidence on oath so satisfied;
>
> he may grant a warrant [authorising any immigration officer or constable to enter, if need be] by force, the premises named in the warrant for the purposes of searching for and arresting that person.
>
> **18** (1) Persons may be detained under paragraph 16 above in such places as the Secretary of State may direct (when not detained in accordance with paragraph 16 on board a ship or aircraft).
>
> […]

Similarly, Schedule 3 to the *Immigration Act 1971* (as amended) provides that people who are subject to deportation orders may be detained at the Secretary of State's direction. Where a person has been recommended for deportation by a court but is not detained in connection with the sentence of the court and has not been bailed by the court, they will – unless the court or the Secretary of State directs otherwise – be detained pending the making of a deportation order.

2. The lawfulness of detention

On 7 September Collins J., sitting in the Administrative Court, gave judgement in favour of four Kurds who had come to the United Kingdom to seek asylum. They had been detained for a period not exceeding ten days in Oakington reception centre. [6] Collins J. held that this detention was unlawful as it violated the right to liberty enshrined in Article 5 of the European Convention on Human Rights.

That judgement was overturned on appeal in October 2001.[7] The Court of Appeal held that:[8]

---

6 Source: Lawtel 7 September 2001 (unreported elsewhere)

7 R v Secretary of State for the Home Department ex parte Shayan Baram Saadi, Zhenar Fazi Maged, Dilshad Hassan Osman and Rizgan Mohammed [2001] EWCA Civ 1512.

> 67. The Secretary of State has determined that, in the absence of special circumstances, it is not reasonable to detain an asylum seeker for longer than about a week, but that a short period of detention can be justified where this will enable speedy determination of his or her application for leave to enter. In restricting detention to such circumstances he may well have gone beyond what the European Court would require. We are content that he should have done so. The vast majority of those seeking asylum are aliens who are not in a position to make good their entitlement to be treated as refugees. We believe, nonetheless that most right thinking people would find it objectionable that such persons should be detained for a period of any significant length of time while their applications are considered, unless there is a risk of their absconding or committing other misbehaviour.
>
> 68. We started this judgement by remarking that it was artificial to consider English domestic law and the Human Rights Convention separately. The Human Rights Act has made the Convention part of the constitution of the United Kingdom, but the Convention sets out values which our laws have reflected over centuries. The need, so far as possible, to interpret and give effect to statutory provisions in a matter which is compatible with Convention rights is now a mandatory discipline, but it is not a novel approach.
>
> 69. The policies that have constrained, and still constrain, the exercise of the statutory power to detain aliens who arrive on our shores do not result from any conscious application of Article 5 of the Convention. They result from a recognition, that is part of our heritage, of the fundamental importance of liberty. The deprivation of liberty with which this appeal is concerned falls at the bottom end of the scale of interference with that right. It is right, nonetheless, that its legitimacy should have received strict scrutiny. Our conclusion is that it is lawful. This appeal is, accordingly, allowed.

Thus the short-term detention of asylum seekers was held to be reasonable and not unlawful. The case is now being taken to the House of Lords.

This case also touched on some contentious wider issues about the use of judicial review and pursuit of compensation. In a statement issued following the handing down of the Court of Appeal's judgement, the asylum seekers' solicitor said:[9]

> The decision of the Court of Appeal is very disappointing. We believe that the decision is contrary to the European Convention on Human Rights.
>
> […]

---

8 Ibid

9 *Statement For ILPA Members Following Decision Of Court Of Appeal On The Oakington Cases* 19 October 2001

> The effect of the Court of Appeal's judgement is to greatly extend the Home Office's powers of detention since it would not have to show that detention is necessary to prevent unlawful immigration. If the Court of Appeal is right, this leaves asylum seekers without any significant protection of the right to liberty which is enshrined in Article 5 of the European Convention on Human Rights. It gives the Home Office the ability to detain purely for administrative convenience. We will seek to establish that this is unlawful in our appeal to the House of Lords.
>
> […]
>
> I would also like to take this opportunity to put the record straight about various comments made by the Home Secretary, David Blunkett, following the earlier decision in the High Court in these cases. In his conference speech, Mr Blunkett stated:
>
> > " … the lawyers came out of that hearing and announced to the world that they were seeking tens of millions of pounds of compensation for those who had passed though the Oakington Centre over the years. I went back to my constituency, and then to the North East of England – the anger, the frustration, the verging on racism that I found in working class communities on those statements alone was enormous".
>
> That was an irresponsible misrepresentation of the statement I made and seems itself designed to encourage negative public reaction to these cases. The written statement which I both distributed and read to the press after ruling in the High Court made **no** mention of compensation.

The solicitor concluded by arguing that:

> […]
>
> " The Home Secretary's comments should not be allowed to divert attention from the real issues in this case ".

3. Immigration detention centres

Until recently, all the United Kingdom's dedicated immigration detention centres were in England.[10,11] In October 2001, a new purpose-built detention centre for immigration detainees and failed asylum seekers was opened at Harmondsworth near Heathrow Airport.[12]

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[10] Although some immigration detainees are held in prison establishments

[11] On 30 June 2001, immigration detainees were being held by the Immigration Service at 6 locations, plus Campsfield House asylum reception centre [HC Deb 16 October 2001 Col 1194W]

[12] See *Harmondsworth Immigration Detention Centre Opens* Home Office Press Notice 237/2001 4 October 2001

In February 2001, Barbara Roche – at that time Minister of State for immigration - confirmed that the Government intended to open a detention centre for asylum seekers on the site of the former Dungavel House prison in Lanarkshire.[13] The contract to run the Dungavel detention centre was awarded to Premier Custodial Group, which runs Scotland's only contracted prison.[14] A report in the Glasgow *Herald* in August 2001 suggested that the question of who would inspect the detention centre - the chief inspector of prisons for Scotland or that for England and Wales - was still to be resolved.[15] There have been rumours (so far unsubstantiated) that the eventual capacity of the Dungavel detention centre may be significantly more than 150.[16]

4. Prisons

Many immigration detainees are held in prisons rather than dedicated immigration detention centres. Barbara Roche described prison facilities and regimes for immigration detainees in January 2001:[17]

> We differentiate between those Prison Service establishments where immigration detainees have separate facilities from the rest of the establishment, where it is possible to provide a regime that reflects more closely that which operates inside an Immigration Detention Centre, and mainstream prisons where detainees are afforded the same conditions as remand prisoners. Separate facilities have been provided at Her Majesty's Prison Rochester, Her Majesty's Prison Haslar for some time and since July 2000 at Her Majesty's Prison Lindholme.
>
> Figures relating to the number of immigration detainees in prisons in January 1997 are not available in the same detail as those for 2000. At that time details were recorded of the number of persons detained in prisons who had sought asylum at some stage. I have included these in the table, marked with an asterix.

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13 HC Deb 15 February 2001 Col 250W

14 "Private Prison Company Wins Detention Centre Contract" *(Glasgow) Herald* 25 May 2001

15 "Doubts Over Immigrants' Centre Checks; Scotland's First Base At Dungavel May Be Monitored From South Of The Border" *(Glasgow) Herald* 20 August 2001

16 "Man To Face Court Over Killing Of Refugee" *The Scotsman* 20 August 2001

17 HC Deb 30 January 2001 Col 168-9W

	January 1997	*January 2000*	*December 2000*
Haslar	*92	156	120
Rochester	*139	193	177
Lindholme	*0	0	105
Mainstream prisons	*93	167	387
Total	*324	516	789

The higher use of prisons in December 2000 is a reflection of the temporary use of 500 Prison Service places, for about 12 months, to support the removals programme.

Within a local prison immigration detainees are entitled to the same rights and privileges, and are managed in the same manner, as unconvicted prisoners. Detainees have access to books, newspapers, writing materials and other means of occupation of their choice and at their own expense. They are permitted to wear their own clothing. They are entitled to an unlimited number of visits, within the capacity of the establishment, and there is no restriction on the number of letters they may receive or send. They have access to legal and consular representatives and are afforded full use of Prison Service medical services. The Immigration Service ensures that Immigration Officers regularly visit prisons to provide information to detainees about the progress of their case.

A more detailed picture was given in July 2001, in a number of written answers.[18]

At the Labour Party conference in October 2001, the Home Secretary David Blunkett announced that, within four months, the Government would end the practice of detaining asylum seekers in prison. This was reiterated by Angela Eagle (Home Office Parliamentary Under Secretary of State for Europe, Community and Race Equality) later that month:[19]

> I should also like to confirm that we fully expect to be able to end detention on remand in remand wings of prisons, at Cardiff by Christmas and elsewhere in the prison estate by the end of January, as my right hon. Friend the Home Secretary announced.

[18] HC Deb 20 July 2001 Col 654-6W
[19] HC Deb 24 October 2001 Col 109WH

5. Internment

The Government has argued that the Bill's proposals on detention are distinct from, and do not constitute, internment because detainees would be free to leave at any time for a safe third country.[20]

Internment was a feature of anti-terrorism measures used to combat terrorism in Northern Ireland. In retrospect, it was not considered to have been successful. One assessment was provided in 1986 by Paul Wilkinson:[21]

> Internment or detention without trial, was introduced in 1972 in response to desperate pleas of the Northern Ireland Stormont government. It was argued that the normal judicial processes had proved incapable of providing essential protection for society. Lawyers and magistrates and witnesses were being intimidated. The police were hamstrung in their efforts to bring known terrorists to trial, and to have them convicted. Such action is always bound to cause an outcry among the terrorists' supporters and families. However, in 1972 the initial rounding up of large numbers of suspects was handled so clumsily that it became a major propaganda weapon for the terrorists both in the Catholic community in Northern Ireland and in the United States. The measure was invariably condemned by civil libertarians as an infringement of civil liberties. But this opposition was given far more cutting edge as a result of the fact that many of those netted by the security forces had little or nothing to do with involvement in IRA terrorism.
>
> By the end of 1975 Mr Merlyn Rees, then Secretary of State for Northern Ireland, had carried out his intention of releasing all internees. But as fast as they were released they were returning to active service that had been so depleted by army and police success in 1974. The army estimates that up to 70% of the released internees became reinvolved
>
> In such situations detention without trial may be seen as the only way to bring about a substantial drop in the level of violence and to quickly demobilise the terrorist leadership structure. But it constitutes a denial of the fundamental right of habeas corpus.

Section 3 of the *Northern Ireland (Emergency Provisions) Act 1998*, which was enacted on 8 April 1998, provided for the repeal of Section 36 and Schedule 3 of the *Northern Ireland (Emergency Provisions) Act 1996*. These provisions of the 1996 Act were designed to give the Secretary of State power to issue "detention orders" and detain, or "intern" particular individuals without trial. The powers had been set out in previous

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[20] See for example **"**Blunkett Rejects 'Airy Fairy' Fears: Terrorists May Be Detained Without Trial" Gu*ardian* 12 November 2001

[21] Paul Wilkinson (1986) T*errorism and the Liberal State* 2nd ed

versions of the Northern Ireland emergency legislation, but had been dormant since the equivalent provisions of the *Northern Ireland (Emergency Provisions) Act 1978* were allowed to lapse in June 1980. This was effected through the specific exclusion of the detention order provisions from the statutory instrument which enabled the remainder of the 1978 Act to continue in force.

The then Northern Ireland minister, Lord Dubs, set out the Government's reasons for repealing the 1996 Act's internment provisions in his speech opening the second reading debate in the House of Lords on the Bill which became the *Northern Ireland (Emergency Provisions) Act 1998.* He said:[22]

> Clause 3 repeals the power of detention without trial, otherwise known as internment. Some regard this as the most controversial aspect of the Bill. The Government have long held the view that internment does not represent an effective counter-terrorism measure. I have already spoken of the need to strike a balance between effectiveness and overreaction. The power of internment has been shown to be counter-productive in terms of the tension and divisions which it creates. Quite apart from any judgment about its appropriateness in principle, the fact is that internment has not worked in practice. Indeed many would say it was a disaster when last used in the 1970s. There is nothing to suggest that it would be any more effective in the future. The Government's efforts at this time are focused on achieving stability and building trust within the community in Northern Ireland. We cannot envisage any circumstances in which we would seek to deprive an individual of his or her liberty without trial and without the normal safeguards that the law provides for the protection of suspects. Such action would surely run counter to the rule of law as it is understood internationally.

The Conservative Party's Northern Ireland spokesman, Andrew Mackay, set out his party's view of the repeal of internment during the debate on the second reading of the Bill in the House of Commons, in which he said:[23]

> Let me make our position clear. No party can approach this subject lightly. Throughout our period of office, we were urged, not least in the aftermath of terrible atrocities, to consider introducing internment. We were also advised by several sources, regularly including the hon. Member for Wigan (Mr. Stott), to repeal those powers. At all times, our approach was consistent. Governments should consider invoking the power only if there were a serious deterioration in the security situation. It would be self-defeating to spell out the precise circumstances in which that would happen, but the facts that the power has not been used since 1975 and that it has technically lapsed, are not compelling reasons to warrant its removal altogether from the statute book.

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22 HL Deb 12 January 1998 Col 889-90

23 HC Deb 18 November 1997 Col 181-82

> It is worth pointing out that the equivalent power in the Republic of Ireland has not been used, to my knowledge, since the 1950s, but the power contained in the Offences Against the State Acts of 1939 and 1940 remains in force. It ill behoves this House to remove internment from the statute book when our friends south of the border are not planning to do the same.
>
> At present, the Secretary of State can sign the order for internment, which then has to be approved by resolutions of both Houses of this Parliament within 40 days. Clause 3 will make such action impossible without the introduction of primary legislation, robbing the Government of the key element of surprise.
>
> The history of Irish republicanism is littered with historic and bitter divisions. Does the Minister imagine that, in the event of an overall settlement, there will not be people in Northern Ireland, on both sides, who, following many precedents, cry betrayal and return to violence? Recent days have shown the potential for that to happen if a comprehensive settlement falls short of what is expected by some in the republican movement. Does he not believe that, in such a scenario, the power to intern may prove necessary, or, as my right hon. Friend the Member for Cities of London and Westminster (Mr. Brooke) said, can he envisage no circumstances in which it would be necessary and right to use that power, particularly if he obtains a political settlement? It is naive beyond belief at this crucial time to take internment off the statute book when the Minister could easily keep it there without using it for the time being, as we did.

In the report of his *Inquiry into Legislation Against Terrorism*, published in 2 volumes in October 1996, Lord Lloyd of Berwick considered the need for possible future emergency legislation for the whole of the United Kingdom and said of detention orders that:[24]

> During the Gulf War, a number of aliens were held in detention under the Immigration Act, pending deportation on grounds of national security. In planning, there may be a case for considering a power, on the lines of EPA section 36, to detain terrorist suspects in time of emergency.

It is possible that any future re-introduction of internment might lead to court challenges alleging breaches of Articles 5 and 6 the European Convention on Human Rights. Article 5 provides a "right to liberty and security" expressed in the following terms:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;

---

[24] Cm 3420 Vol 1, para.18.14

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. 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.

Article 6 of the European Convention provides an entitlement to a fair and public hearing "within a reasonable time" by an independent and impartial tribunal established by law.

F. Taking and retention of fingerprints

1. Powers under the *Asylum and Immigration Appeals Act 1993*

The *Asylum and Immigration Appeals Act 1993* created a power to require asylum seekers and their dependants to provide fingerprints. Section 3 (2) of that Act provides that

fingerprints may not be taken from a dependant under the age of sixteen except in the presence of an adult who is (a) the child's parent or guardian; or (b) a person who for the time being takes responsibility for the child and is not an immigration officer, constable, prison officer or officer of the Secretary of State. Any fingerprints which are taken must be destroyed within a month of the person being given indefinite leave to remain in the United Kingdom or within 10 years.[25]

2. Powers under the *Immigration and Asylum Act 1999*

Section 141 of the *Immigration and Asylum Act 1999* provides that that fingerprints may be taken in certain circumstances, such as where the person's identity is in doubt or there is a suspicion that, if granted temporary admission, they may not comply with immigration conditions. There is a variety of restrictions on the circumstances in which fingerprints may be taken. For example, where on a person arriving in the UK fails to produce a valid passport with photograph or some other document satisfactorily establishing his identity and nationality or citizenship, no fingerprints may be taken from him if the immigration officer considers that he has a reasonable excuse for not producing those documents (section 143 (10)). Again, fingerprints may not be taken from a child except in the presence of an adult who is (a) the child's parent or guardian or (b) a person who for the time being takes responsibility for the child.

Section 143 of the same Act stipulates when any fingerprints must be destroyed. For the most part, this is as soon as reasonably practicable after the person's identity as a British citizen or Commonwealth citizen with right of abode has been established or he has (as the case may be) been given leave to enter or indefinite leave to remain in the United Kingdom or a deportation order against him has been revoked. Where the detention period is not otherwise specified, it is 10 years.

In November 2001, Angela Eagle (Parliamentary Under Secretary of State for Europe, Community and Race Equality) described plans for a computerised fingerprint storage system:[26]

> […] However, the introduction of a computerised fingerprint storage system in December 2000 has allowed for the quick and effective electronic checking of prints of all asylum seekers against the Immigration and Nationality Directorate's records. Remote checking of fingerprints has been made possible which was not the case under the paper system. The introduction of smart cards will build on this technology to tackle fraud.

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[25] *Asylum and Immigration Appeals Act 1993:* section 3

[26] HC Deb 6 November 2001 Col 179W

G. Judicial review

To be amenable to judicial review, a decision must be one of a 'public body'. Although most judicial review proceedings are brought against organisations whose role and activities are defined by statute, case law has established that bodies performing public functions may be subject to judicial review even if their powers are not statutory nor prerogative in origin.[27]

Judicial review can be used to challenge decisions on the grounds of illegality, irrationality or procedural impropriety.[28] However, there are a number of potential barriers to an applications for judicial review:[29]

- the proceedings being challenged may not be susceptible to review
- an *ouster clause* which excludes jurisdiction may prevent the applicant from taking judicial review
- the applicant's failure to exhaust alternative remedies or appeal procedures may bar him from seeking judicial review

In his speech to the Labour Party conference in October 2001, the Home Secretary, David Blunkett suggested that the constant use of judicial review in extradition and asylum cases had become a 'lawyer's charter'. He argued that removing the option of judicial review would prevent abuse of the system, whilst not undermining due process:[30]

> Legislating to confirm the agreements reached in the last three weeks with our European partners - on arrest, on joint investigation, on shared information. And of course on extradition. What a farcical situation we face when it can take five, seven, ten years to extradite someone who is known to have been engaged in, or perpetrating, terrorism.
>
> Speeding up our processes will not remove due process but it will remove the ability of those to abuse it. Preventing those who are arrested under suspect at airports from using the asylum laws to be able to claim sanctuary, will not threaten those legitimately entering the country. Removing the constant use of judicial review, which has frankly become a lawyer's charter, will not remove basic freedom to appeal or to due process of law.
>
> These do not threaten our freedoms, but they do threaten those who seek to take away our freedoms, and that is the lesson of the last three weeks.

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27 Richard Clayton and Hugh Tomlinson (1993) *Judicial Review: A Practical Guide* London: Longman: page 4

28 For a fuller description see (for example) ibid: pages 26 - 32

29 ibid: page 16

30 Speech By The Rt Hon David Blunkett MP, Home Secretary To Labour Party Conference: 3 October 2001

H. The terrorist attacks in the USA: United Kingdom anti-terrorism measures

1. Home Secretary's statement on 15 October

In the aftermath of the terrorist attacks on the USA on 11 September 2001, the Home Secretary David Blunkett announced plans to detain indefinitely those people who were no longer recognised as refugees but who could not be returned to their own country because they might be at risk. This would entail a derogation from Article 5 of the European Convention on Human Rights. Speaking in the Commons, the Home Secretary said:[31]

> I think that we all accept that there is a compelling need for more effective powers to exclude and remove suspected terrorists from our country. We rightly pride ourselves on the safe haven that we offer to those genuinely fleeing terror. But our moral obligation and love of freedom does not extend to offering hospitality to terrorists. That is why, both in the emergency terrorism Bill and in a separate extradition measure, I will ensure that we have robust and streamlined procedures.
>
> I believe that it will be possible to achieve these changes without substantial alteration to the Human Rights Act 1998. Nevertheless, it may well be necessary, using article 15, to derogate from article 5 of the European convention. That would allow the detention of foreign nationals whom we intend to remove from the country, and who are considered a threat to national security. This would occur in circumstances falling outside those permitted by article 5 of the European convention on human rights, but within the scope of article 1f of the 1951 refugee convention.

He confirmed that he did not envisage withdrawing from or deratifying the European Convention on Human Rights, as denying Article 3 would require:[32]

> Deportation, like preventing people who are feared to be terrorists and who are travelling through our country from claiming asylum, is another matter. It seems to us that when a third safe country cannot be found, holding such people--with proper rights of appeal and the opportunity for a return to their case--is preferable to sending them back to certain death when their guilt has not been ascertained. We are not, therefore, seeking to withdraw from or deratify the ECHR, which would be necessary in terms of denying article 3. As I said, we may derogate from article 5, while continuing to hold to article 1f of the refugee convention, in order to have the ability better to protect ourselves while protecting appeal rights.

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31 HC Deb 15 October 2001 Col 924

32 HC Deb 15 October 2001 Col 927 - 8

> […]
>
> I can assure the House that we have thought long and hard. We have not rushed into these measures. In the next few weeks, there will be time to contemplate as well as to scrutinise the legislation that we are introducing. We want to get it right because we have obligations to our own people and to our international requirements. If we can get it right, we will have managed to sweep away some of the nonsense that has been found in recent weeks to exist in our system. I appeal to our judiciary to work with us to ensure that democracy in all its guises can operate fairly and openly, rather than be held up to ridicule by those who should be upholding it.

An article in the *Guardian* quoted the views of John Wadham of Liberty:[33]

> […]
>
> The decision to suspend the operation of article 5 of the European human rights convention, which bans illegal detention, was taken under a separate part of the convention, article 15, which allows a state to opt out of a particular provision on grounds of a public emergency or a "threat to the life of the nation".
>
> Human rights experts said last night that the government was within its rights to issue a declaration that it was not going to apply part of the convention but it could face a legal challenge in the European court of human rights. Mr Blunkett stressed that the 1951 UN convention on refugees exempted terrorists from the right to claim asylum.
>
> John Wadham, director of Liberty, said: "We already have the most draconian anti-terrorism laws compared to most of Europe and America that were renewed only months ago which is why the government is in some difficulty about what they can do."

2. Home Secretary's announcement on 29 October 2001

The Home Secretary made a further announcement to the House on 29 October 2001 in which he set out his plans for future policy on asylum, migration and citizenship. On detention of asylum seekers, he said:[34]

> Where an appeal has failed, my intention is to streamline the process for removal. Those who have no right to stay must leave the country immediately. *[Interruption.]*

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33 "UK To Intern Terrorist Suspects" *Guardian* 16 October 2001

34 HC Deb 29 October 2001 Col 628-9

> We currently have 1,900 detention places, which we will have increased to 2,800 by the spring of next year. I intend that we should expand the capacity by a further 40 per cent. to 4,000 places. Those will become secure removal centres. *[Interruption.]* Asylum seekers will no longer be held in mainstream prison places; I can confirm that from January next year that practice will cease. *[Interruption.]*

When asked about Oakington, the Home Secretary had said that it would continue to be used for those asylum seekers for whom detention and fast-tracking was appropriate:[35]

> **Mr. Andrew Lansley (South Cambridgeshire):** The Home Secretary will know from the debate in Westminster Hall last week that I welcome the introduction of reception centres more generally for those applying for asylum. Does he intend that those accommodation centres, as he now terms them, will be established using the powers under the Immigration Act 1971 and the Immigration and Asylum Act 1999--which allow the Secretary of State to do so by order--for those granted temporary admission? Does he intend that the Oakington centre in my constituency should remain a place of detention legally or will it, too, be a reception centre using those powers instead of remaining a place of detention with all the difficulties of legal challenges that might ensue?
>
> **Mr. Blunkett:** On the latter point, leave was granted to appeal to the House of Lords--as the hon. Gentleman will know, being so close to the situation. It is not my intention to address that issue this afternoon, except that I did say that we intended to continue to use Oakington for those entering the country for whom detention and fast-tracking is appropriate. On the other point, both the 1971 and 1999 Acts facilitate the setting up of accommodation centres. Should any legal challenge arise on the obligation to take up such a place if offered or the denial of financial support to an individual or family, we will legislate in the Bill that I announced in my statement.

Later, the Home Secretary reiterated that the use of prisons to hold asylum seekers was to stop by the end of January 2001.[36]

In November 2001, Lord Rooker (Minister of State at the Home Office) confirmed that Oakington would not be converted into the new style of accommodation centre from which asylum seekers could come and go:[37]

> **Lord Greaves** asked Her Majesty's Government:

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35 HC Deb 29 October 2001 Col 635-6
36 HC Deb 29 October 2001 Col 642-3
37 HL Deb 8 November 2001 WA35-6

> Under the proposals for reform of the system for receiving asylum seekers, is it intended that Oakington Detention Centre will become one of the new-style "open gate" accommodation centres.[HL1083]
>
> **Lord Rooker:** No. Oakington will continue to operate on the basis of detention in order to maintain our capacity to make speedy decisions within seven to 10 days on straightforward asylum applications. It will remain a central plank of our asylum policy.

I. The *Anti-Terrorism, Crime and Security Bill* [Bill 49 of 2001-02]

Clauses 22 to 23 of the Bill seek to extend the powers to detain suspected international terrorists, to include those circumstances where there may be a temporary or permanent obstacle to removal or departure, attributable either to a point of law or to practical considerations.

The Explanatory Notes state that:[38]

> 74. Although there are powers to detain people where the intention is to remove them, case law in the UK is that if removal is not going to be possible within a reasonable period of time, detention will be unlawful. Similarly, the European Court of Human Rights has established that the relevant part of Article 5(1)(f) of the European Convention on Human Rights (ECHR) permits the detention of a person only in circumstances where action is being taken with a view to deportation.
>
> 75. The Government has concluded that, following the events of 11 September 2001 in the USA, there is a heightened threat from international terrorists, and that a public emergency exists in the UK. It has further concluded that in these circumstances action in the form set out in clauses 21 to 23 needs to be taken to safeguard national security against the threat posed by international terrorists whom the UK wishes to but cannot remove.
>
> 76. Clauses 21 to 23 enable suspected international terrorists to be detained in circumstances where either a legal impediment derived from an international obligation or a practical consideration prevents removal. In parallel with these provisions, the UK intends to make a derogation from Article 5 of the ECHR (right to liberty and security) to the extent necessary to ensure that the measures contained in clauses 21 to 23 are not in breach of our obligations under the ECHR. Article 15 of the ECHR permits a derogation from Article 5 in a time of public emergency to the extent strictly required by that emergency.

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[38] *Anti-Terrorism, Crime and Security Bill* Bill 49–EN Explanatory Notes - available at http://pubs1.tso.parliament.uk/pa/cm200102/cmbills/049/en/02049x--.htm

Clause 24 enables the Special Immigration Appeals Commission (SIAC) to decide bail applications.

Clauses 21 and 25 to 26 deal with the process by which the Secretary of State would certify someone to be a suspected international terrorist, with provision for appeals and reviews. People would be liable to being certificated if the Secretary of State believed that their presence in the United Kingdom was a risk to national security or suspected them to be an international terrorist. In this context, an international terrorist is one who is or has been concerned in committing, preparing or instigating acts of international terrorism, is a member (or belongs to) an international terrorist group or has links with anyone who is a member of or belongs to such a group **(clause 21 (2)).** What might constitute a 'link' with an international terrorist group is not defined in the Bill.

On appeals, the Explanatory Notes state that:[39]

> 86. […] A person against whom such a certificate is made may appeal within three months of the date of the certificate against that decision to SIAC, which will consider whether or not it agrees with the Secretary of State's certification. If SIAC agrees with the Secretary of State's certificate it will dismiss the appeal; if it does not agree, or if it finds any other reason why the certificate should not have been issued, it will cancel the certificate, in which case the certificate will be treated as having never been made. For either outcome, there will by virtue of clause 27(1) be the right to seek leave to appeal to the Court of Appeal (or its equivalents in Scotland and Northern Ireland).

Each certificate must be reviewed by SIAC. If an appeal has been lodged, the review must take place as soon as reasonably practicable once six months have elapsed from the final determination of the appeal. If no appeal has been brought, the review must take place as soon as reasonably practicable after six months have elapsed from the certificate's issue **(clause 26).**

Clause 29 restricts access to courts and tribunals on matters relating to the Secretary of State's decision on certification or SIAC's decision or actions to those provided for within this part of Bill. According to the Explanatory Notes:[40]

> 91. Clause 29 provides that proceedings to question the decisions or actions of the Secretary of State in making a certificate under clause 21 or any other actions or decisions taken by him under clauses 21 to 31 may not be entertained in any court or tribunal except as provided by a provision of this Part. In effect, this means that SIAC will be the first venue to hear such challenges. The clause also provides that decisions of SIAC in relation to any matter connected with clauses

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39 *Anti-Terrorism, Crime and Security Bill* Bill 49–EN Explanatory Notes

40 ibid

> 21 to 27 may not be entertained in any court or tribunal except as provided by a provision of this Part.
>
> 92. The intention of this clause is to ensure that legal challenges to the certification process are confined to SIAC and the statutory appeal routes that already exist for challenges to decisions by SIAC.

In other words, these decisions would not be amenable to judicial review.

Clause 33 would give the Secretary of State the power to present the Special Immigration Appeals Commissioner with a certificate, to the effect that an asylum appellant was not entitled to the protection of the 1951 UN Convention relating to the Status of Refugees because Article 1f or 33(2) applied to him. This would then compel SIAC, where it agreed with the statements within the Secretary of State's certificate, to dismiss the part of the appeal relating to asylum. Appeals against SIAC's decision could be taken to the Court of Appeal or its equivalents in Scotland and Northern Ireland.

The Explanatory Notes observe that:[41]

> 95. Clause 33 introduces new arrangements for the consideration and associated appeal to SIAC of asylum claims made by certain individuals. These are individuals whom the Secretary of State has certified as being excluded from refugee status or not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1(F) and/or Article 33(2) of that Convention apply, and whose removal from the UK would be conducive to the public good. Where such a certificate is made, SIAC will, in hearing the asylum appeal, be able to consider only the statements made in that certificate, and will not be able to consider whether a person has a well-founded fear of persecution.
>
> […]
>
> 97. So if either or both of Article 1(F) or 33(2) applies then a person can be removed without contravening the UK's obligations under the Refugee Convention. It is therefore not necessary to consider whether, had a person not been so excluded, he would have qualified for refugee status based on a well-founded fear of persecution. The purpose of this clause is to reflect this by enabling an asylum claim to be refused solely on the basis that the applicant is excluded from the protection of the Refugee Convention.
>
> 98. Accordingly, where SIAC upholds the Secretary of State's certificate it must dismiss such part of the appeal as amounts to a claim for asylum. If there are other elements to the appeal SIAC would proceed to consider those elements.

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41 *Anti-Terrorism, Crime and Security Bill* Bill 49–EN Explanatory Notes

> 99. Should SIAC allow the appeal, the case would return to the Secretary of State who would have to consider the substance of the asylum claim. If the claim was still refused any appeal would lie to the Immigration Appellate Authority in the normal way (under the Immigration and Asylum Act 1999), assuming that no public interest provision applied (in which case the appeal would go back to SIAC).
>
> 100. The clause provides for appeals against decisions of SIAC to be made to the Court of Appeal (or its equivalents in Scotland and Northern Ireland). It also provides that this is the only avenue for bringing proceedings against a decision of SIAC in connection with this clause; prevents legal proceedings to a decision or action of the Secretary of State in connection with a certification except through SIAC; and enables with appropriate modifications the clause to be extended by Order in Council to any of the Channel Islands or the Isle of Man.

Clause 35 removes the requirement within the *Immigration and Asylum Act 1999* to destroy fingerprints within a certain time, both for fingerprints already on record and those which might be taken in the future.

J. Home Secretary's evidence to the Joint Committee on Human Rights

Appearing before the Joint Committee on Human Rights on 14 November 2001, shortly after the publication of the Bill, the Home Secretary, David Blunkett argued that there might be people, using the United Kingdom as a base, who were suspected of involvement in terrorism but against whom there was insufficient evidence of their having committed a crime. Where existing terrorism and extradition law could not be used, the Bill's new powers would ensure that the United Kingdom did not offer such people a haven:[42]

> Where people are adjudged to have been involved or engaged directly with the terrorist acts against the World Trade Centre or the Pentagon, then of course we can use existing laws, including our terrorist laws, we can use our extradition laws and we can negotiate removal, and that is what we have been doing already in terms of those who have or are currently held on charges which would enable us to remove them, just as that would be the case in Germany or Italy. But where we have people who use the United Kingdom as a base but have not been adjudged or are not believed to have sufficient evidence to show they committed a crime here but our security and intelligence services believe they are a threat here or in the rest of the world, we have an obligation to ensure we do not act as a host, as a haven, for those people who are not British nationals, who are here as guests in our country but are abusing that hospitality.

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[42] Joint Committee on Human Rights 14 November 2001: Uncorrected evidence

He went on to explain why it might not be possible to remove suspected international terrorists from the United Kingdom:

> They have the opportunity of leaving the country but if we are not to send them to torture, death or degrading treatment, we cannot under Article 3 of the ECHR, as you are aware, actually send them abroad. If I just give you the scenario: someone is adjudged by our security and intelligence services to be a risk, we do not have an extradition arrangement with a particular country or we believe that individual would be in danger, as I have just described, I adjudge they are not conducive to the public good and I want to remove them. If they go for *habeas corpus*, and I cannot show I can remove them to a third safe country, then they have to be released, and that has been of course the case in the past. There are times when through the appeals process people have not used *habeas corpus* but there has been a direct appeal through the courts, and people have been held for a very long time. In the *Chahal* case which became notorious because of its relevance to Article 3 and the jurisprudence which was made of it, he was held for five years.

Lord Lester of Herne Hill asked the Home Secretary why the United Kingdom was alone in seeking to derogate from Article 5 of the European Convention on Human Rights:[43]

> **Lord Lester:** […] As I understand it, we are not concerned with internment in the sense of preventative detention, you are not seeking a detaining power to hold undesirable people indefinitely because you cannot prove a case against them but you are satisfied that they are undesirable. We are concerned with a rather narrow problem, as I understand the Derogation Order, which is that Article 5 of the European Convention on the Right to Liberty only allows detention against someone against whom action is being taken with a view to deportation or extradition, and the practical problem is, as I understand it, that if you cannot send such a person to a country where they face torture or the death penalty, if there is no extradition arrangement and if you cannot find a safe country, then you need a power to hold that person until you find a country or they do, am I right?
>
> (*Mr Blunkett*) You are right, yes.
>
> […]
>
> **Lord Lester:** If that is the only problem we are concerned with, what I do not understand is why we are the only European country that is taking these powers and going to the unusual lengths of derogation to tackle it?
>
> (*Mr Blunkett*) Other countries have considered, and are in the process of still considering, what changes they wish to make to their domestic law. If you take a

[43] Joint Committee on Human Rights 14 November 2001: Uncorrected evidence

> country like Denmark, which has been changing its domestic law, their adjudgment is that the particular threat that they are facing can be dealt with by supervision of people who are hosted in their community. We are not in that position. We are adjudged internationally to be more at risk than the Danes or other smaller European countries, we know that we are, and the steps we have taken since 11 September, in terms of civil contingencies and security protection, have reflected that heightened concern. Our position internationally and our support for the United States have increased that danger. Also, as the Germans and French are often pointing out, we have a larger host community of those who the Germans and French allege are organising for international terror.

The Home Secretary also confirmed that detainees would be free to leave if they were able to identify a safe third country to which to go:[44]

> **Lord Lester:** But in respect of that host community, if they are British nationals these proposals will not bite, but for the rest, as I understand it, if you have a Mr Khan, hypothetically, who you suspect to be a terrorist, if Mr Khan says, "Well, I can go to Iraq, or to Syria, or to Libya" or some other country, you will let him out straightaway to go there. That is under the scheme as I understand it, is that not right?
>
> (*Mr Blunkett*) If a country is prepared to take someone, then we would release them under these particular powers, because we are talking about immigration powers here, in circumstances where, to pick up madam Chairman's original question, we could also be dealing with people who then claim asylum once they are actually charged.

In response to questions from Sean Woodward about how 'links' to terrorism would be defined, the Home Secretary suggested that definitions should be kept as loose as possible, to ensure that the law did not become inflexible:[45]

> As we discovered, and I have the definitions of the Terrorism Act in front of me, the narrower you make the definition, the more difficult you make it to actually be able to deal with a changing situation where, through the changes in international communication, whether in fact that is communication between people or the transmission of finance, you actually restrain yourself from being able to take action in circumstances where those undertaking or threatening to undertake terror, or engaged in organising to do so, are able to use against you the tightness of the definition you have given. 'Links' in this case entail the kind of contact, support or organisation that enable or support those who are undertaking terror. To do otherwise would be to allow those who are actually engaged in providing support to actually be allowed to remain here simply because they are not themselves directly engaged in such terrorist activity.

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[44] Joint Committee on Human Rights 14 November 2001: Uncorrected evidence

[45] ibid

> […]
>
> I accept it is a broad definition based on the recognition that we are talking about links with those who are undertaking or believed to be undertaking such actions, but the definition itself would have to be tested through the process that I have described.

K. Reactions to Part 4 of the Bill

Liberty (the National Council for Civil Liberties) has argued that the proposals to detain suspected international terrorists amount to internment and that such measures are wrong in principle and disproportionate to the threat facing the United Kingdom:[46]

> "The Home Secretary is clearing the way for internment for foreigners - by opting out of part of the Convention on Human Rights at a time when none of the other 40-plus European countries who have signed it see the need to do so. The situation in the UK does not warrant such an extreme attack on a historic core principle of British justice.
>
> Arbitrary detention - locking someone up indefinitely, without trial or any hope of release - is wrong in principle. Liberty's Human Rights Litigation Unit will seek to challenge this in the European courts as soon as possible. "Anti-terrorism laws in this country have historically led to innocent people being locked up for many years; the danger is that these new proposals will lead to the same injustice".

In a later response to the Bill, Liberty considered the human rights and other issues raised by its various proposals and indicated that it would seek to challenge the unnecessary and unjust detention of suspected international terrorists. On the asylum and immigration issues dealt with in this paper, Liberty argued:[47]

> The internment proposal is by some way the worst proposal in a generally alarming and ill-conceived Bill. The Government is smuggling in other illiberal measures under the cover of proposals to deal with the events of 11th September.
>
> **Internment:**
> The Government intends to jail people not for anything they have done, but for what the Home Secretary thinks they might have done or might do in the future.

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[46] *Home Secretary To Derogate From European Convention On Human Rights - Order In Parliament On Monday Reaction From Human Rights Organisation Liberty* Liberty 10th November 2001 – available on Liberty website at http://www.liberty-human-rights.org.uk/

[47] *Home Secretary's Antiterrorism Bill – Internment Power The Worst Of An Alarming Bill* Liberty response 13 November 2001 – available on Liberty website at http://www.liberty-human-rights.org.uk/mpress74.html

This punches a hole in our constitutional protections - and the Government can only get away with it because they're using it against foreigners. Why is it that none of the other 40-plus European countries that have signed the Human Rights Convention feel they have to do this? As soon as people are detained, Liberty will seek to challenge these unnecessary and unjust proposals in the European Court of Human Rights.

Overall:
As a package of measures, this is not a considered response to the real issues of countering terrorism. The Government has ample powers to tackle terrorism already and should concentrate on using existing law before creating sweeping new powers and vague new offences that undermine basic principles of justice and freedom. Too many of these measures will not make us safer but will make us less free.

Fingerprints for identity:
The power to take fingerprints from more people at the point of arrest (rather than charge) to prove identity risks becoming a back-door route to a national fingerprint database. It will only help establish identity if someone is already on the database (ie has previously been charged with an offence), so its effectiveness is questionable. We would be very concerned if its ineffectiveness subsequently became a justification for requiring everyone in the country to have their fingerprints taken and logged on police computer.

[…]

Stopping the asylum claims of 'terrorist suspects':
The key question for asylum is whether someone has a well-founded fear of persecution. If their fear is well-founded - with all that may imply about the quality of justice in the country they have fled - then they should not be sent back. But if there is evidence they have committed serious offences, they can be prosecuted. It's vitally important that people who arrive in Britain are treated fairly and that those who are likely to be persecuted in other countries are protected, and not put on the first plane back. Asylum seekers' experience of the system shows how necessary it is that there are adequate safeguards - and judicial review is an essential part of that process.

[…]

Conclusion:
It's hard for politicians always to protect the minority from the majority when they need the majority's votes to be re-elected; that's why we have human rights and judges, to ensure that in times of panic and fear, impartiality and fairness survive for everyone. Too many of these new proposals risk falling short of the highest British standards of justice.

The Government, however, has argued that the proposals for detention of suspected international terrorists do not constitute internment, as detainees would have the option of leaving at any time for a safe third country:[48]

> Detention without trial of suspected terrorists will spearhead a series of controversial measures published by the Government tomorrow in response to the events of 11 September.
>
> Although ministers are determined to avoid the phrase "internment", there is no question that the Emergency (Anti-Terrorist) Bill will contain the most hardline proposals seen in the UK since the early days of the Troubles in Ulster.
>
> […]
>
> Most controversial of all, however, it will allow for the indefinite detention of asylum-seekers who are deemed to be plotting terrorist acts. Downing Street and the Home Office are frustrated that terror suspects cannot be removed from the country because they are part of the asylum appeals system.
>
> […]
>
> Detention without trial is specifically prohibited by Article 5 of the European Convention on Human Rights and is such an extreme measure that all Governments have to cite either war or a state of "public emergency" to opt out of it. David Blunkett will do exactly that when he lays an order in Parliament today, using the provision of Article 15 of the Convention which allows such a derogation.
>
> Under the Bill, which will receive its second reading in the Commons next week, terror suspects who claim asylum will appear before a High Court judge in a private hearing. They will be allowed legal representation and a right to appeal, but can be detained for up to six months if deemed a threat to national security.
>
> After six months, the suspect is either sent to a safe third country that will accept him or appears before a special Immigration Appeals Commission. A further detention could then be ordered.
>
> Internment without trial has been used before, for example against Northern Ireland terrorist suspects in the 1970s and German citizens during the Second World War.
>
> But Mr Blunkett was at pains to stress yesterday that his only other options to these plans were to do nothing or to pull out of the European Convention on Human Rights completely, to allow foreign nationals to be sent back to countries where their lives would be threatened.

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[48] "Campaign Against Terrorism: Security - Terror Suspects Can Be Detained Without Trial" *Independent* 12 November 2001

> Mr Blunkett said the House of Lords ruled last month that the standard of evidence required from the security services was sufficient for the Government to imprison people under the convention. "There are hearings that go through the process we would all expect and there will be a right of appeal and that will be reviewed," he told ITV's Jonathan Dimbleby programme.
>
> He pointed out the legislation would contain "sunset clauses" ensuring it had to be renewed annually once it had been in place for 15 months.
>
> […]

It has been suggested that the Bill will face opposition in the Lords, where Liberal Democrat peers may criticise the proposals to "intern" suspected terrorists:[49]

> Controversial legislation allowing the internment of suspected terrorists could face strong opposition in the House of Lords, the Liberal Democrats said yesterday.
>
> Charles Kennedy, Liberal Democrat leader, expressed misgivings about part of the government's response to the September 11 terror attacks. The Conservatives claimed aspects of the Home Office's new anti-terrorism bill could make Britain an even bigger target for attacks.
>
> David Blunkett, home secretary, yesterday presented a legislative order to parliament that would exempt the bill's provisions allowing the detention of suspected terrorists without trial from the European convention on human rights. The government does not want the legislation to fall foul of article five of the convention that bans detention without trial.
>
> […]
>
> The bill will be fast-tracked through parliament, but Mr Kennedy claimed it could run into opposition in the Lords, where the Liberal Democrats wield influence.

On the day before the Bill's publication, the Home Secretary, David Blunkett was quoted as having suggested that concerns about the detention of suspected international terrorists and the lack of access to judicial review were "airy fairy":[50]

> […]
>
> He [Mark Fisher MP] predicted that MPs from all parties would be "very concerned" by the proposals, which will be debated in the Commons next week. Dismissing the views of his critics, Mr Blunkett said: "We could live in a world

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49 "Terrorism Measures 'Will Face Opposition In Lords'" *Financial Times* 13 November 2001

50 **"**Blunkett Faces Anger On Human Rights" *Daily Telegraph* 12 November 2001

> which is airy fairy, libertarian, where everybody does precisely what they like and we believe the best of everybody, and then they destroy us."
>
> In an interview on ITV, he strongly defended his approach. "We will be talking about small numbers, but I don't give a damn whether it is one, a dozen or 20. The important thing is that they don't put our lives at risk, nor do they organise or enable others to put lives at risk elsewhere."
>
> […]
>
> In his interview, Mr Blunkett conceded that the standard of evidence would not be the same as that before a judge and jury. But he said there was "an agreed threshold of evidence" that had been accepted in a House of Lords ruling.
>
> […]
>
> If the commission decides to detain a suspect, he can be held for up to six months. At that point, if he has not found a third country that is prepared to take him, the case will go back to the commission. Asked if this meant that, in practice, some people would be detained indefinitely, Mr Blunkett replied: "Until, of course, Parliament decides that we should no longer apply this particular measure.
>
> "From getting it up and running, it will be ratified on an annual basis. Parliament will be able to remove that power and we'd want to withdraw it ourselves if the situation improved to a point where we no longer required it."
>
> Mr Blunkett claimed that his policy did not amount to internment because he was not identifying people by nationality, as happened in the Second World War.

In a letter to the *Times*, published two days after publication of the Bill, the former Master of the Rolls, Lord Donaldson of Lymington, took issue with the Home Secretary, David Blunkett for having described the use of judicial review as an "airy-fairy" civil liberty and called on Parliament to reject this aspect of the Bill:[51]

> It is trite constitutional law that it is for Parliament to authorise the actions of ministers and for the judiciary to rule on claims that ministers have exceeded that authority. Ministers usually, and perhaps always, believe that their actions are authorised and are understandably put out if the courts take a different view.
>
> David Blunkett apparently seeks power to intern suspected foreign terrorists indefinitely and has denounced "airy-fairy civil liberties" (report, November 12). The internee would be legally represented but would be barred from seeking judicial review and would be allowed to appeal only on a point of law, and that not to a court but to a Special Immigration Appeals Commission.

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[51] "Inherent Dangers In Plan To Intern Terrorist Suspects" *Times* 14 November 2001

> I cannot accept that the right of an individual to apply to the courts by judicial review for a writ of habeas corpus can properly be described as an "airy-fairy civil liberty". This writ requires those who are detaining the applicant to bring "the body" before the court without delay and to justify the detention, failing which the court will order his release.
>
> […]
>
> There have been previous attempts by Parliament and others to exclude the supervisory jurisdiction of the courts in various contexts, but all have been held to be ineffective. It is to be hoped that Parliament will reject this aspect of the new Bill, but if not we shall be faced with a major constitutional crisis in the form of a serious dispute between Parliament and the judiciary.

Liberty has also suggested that the proposals on fingerprinting might pave the way for a national fingerprint database:[52]

> […]
>
> The civil rights group Liberty warned that the Government proposals – drawn up in response to the 11 September terror attacks - could lead to a national fingerprint database being set up "by the back door" and the unjustified storage by police of private e-mails.
>
> The group's director, John Wadham, said proposals for internment would "punch a hole in our constitutional protections". He said: "The Government intends to jail people not for anything they have done, but for what the Home Secretary thinks they might do in the future. The Government can only get away with it because they're using it against foreigners."
>
> Lord Rooker, a Home Office minister, said the proposed reforms in the Anti - Terrorism, Crime and Security Bill were "cautious and moderate". And the Home Office minister Beverley Hughes said the proposals would "safeguard our way of life against those who would take our freedom away". The measures are likely to be in place by Christmas.
>
> […]
>
> But Liberty pledged to challenge the reforms under human rights laws. Mr Wadham asked: "Why is it that none of the other 40-plus European countries that have signed the human rights convention feel they have to do this?"
>
> […]

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[52] "New Law On Detention 'Faces Court Challenge'" *Independent* 14 November 2001

Fingerprints of asylum-seekers would be retained for up to 10 years, in a measure some believe could be a forerunner for a national fingerprint database.

II Derogations from the European Convention on Human Rights

A. Introduction

In anticipation of the introduction of the *Anti-terrorism, Crime and Security Bill* the Government laid the *Human Rights Act 1998 (Designated Derogation) Order 2001* on 12 November 2001, with respect to Article 5 of the *European Convention on Human Rights* (the European Convention). Article 5 provides that "everyone has the right to liberty and security of person" and that no-one shall be deprived of his liberty except in the cases set out in that Article and in accordance with a procedure prescribed by law.

This section looks at the Derogation provision in the European Convention, how it has been used in the past and how the European Court of Human Rights (and the Commission of Human Rights before 1998) have approached its use.

B. Article 15 of the European Convention

Article 15 of the Convention provides:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3,4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

C. The Use of the Derogation

There have been few occasions on which Council of Europe Member States have relied upon a derogation under Article 15 of the European Convention. The United Kingdom withdrew its last derogation on 19 February 2001. This derogation had been introduced in December 1988 and March 1989 following cases in the Court of Human Rights. It applied in respect of provisions of the *Prevention of Terrorism Act 1989* (PTA), which had been called into question by the Court in the *Brogan* case in 1988 concerning Northern Ireland. It allowed the UK to derogate from certain obligations under the European Convention and its validity was upheld by the Court in the *Brannigan and McBride* case (see below). The withdrawal was made possible by the coming into force on 19th February of the *Terrorism Act 2000*, which replaced the PTA, changing the law on arrest and detention in Northern Ireland.

Turkey is the only Council of Europe State with a derogation currently in force. This is linked to the terrorist activities in the southeast of the country by members of the PKK (Kurdistan Workers' Party, see *Aksoy v Turkey* and *Demir and Others v Turkey*, below). On 12 May 1992 Turkey's notified derogations from Articles 5, 6, 8, 10, 11 and 13 of the Convention were withdrawn and the Government limited the scope of its Notice of Derogation with respect to Article 5 of the Convention only.

The first use of derogations arose in two applications brought by the Greek Government against the UK concerning Cyprus when it was under British rule.[53] In these cases, known as the *Cyprus cases*, the then European Commission on Human Rights established its competence "to pronounce on the existence of a public danger which, under Article 15, would grant to the Contracting Party concerned the right to derogate from the obligations laid down in the Convention". The Commission also considered it was competent to assess the measures taken by the Party under Article 15 and supported "a certain measure of discretion" (or margin of appreciation, see below) in the Government's assessment of the "extent strictly required by the exigencies of the situation".[54] The competence of the Strasbourg bodies to determine the validity of derogations made under Article 15 was challenged in the *Lawless v Ireland* case. The Irish Government maintained that the measures it had taken under Article 15 did not contradict Article 18 (limitation on the use of restrictions on rights) and were therefore outside the scope of the Commission and Court. However, the judgment in 1961 confirmed that the Court controlled the application of Article 15:[55]

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53 *Greece v UK*, No.176/56, 2YB 174 & 182 (1958-59); *Greece v UK*, No. 299/57, 2YB 178 & 186 (1958-59).

54 *Greece v UK*, No. 176/57.

55 *Lawless v Ireland*, judgments of 14 November 1960, 7 April 1961 & 1 July 1961, Series A, Nos. 1-3; (1979-80) 1 EHRR 1,13 & 15.

> It is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled.[56]

D. How the Court Interprets Article 15

In the case of an alleged breach of a Convention Article from which a government has lodged a derogation, the Court first examines the substantive complaint and if it finds a violation, it then examines whether the violation is covered by the derogation. In determining the validity of a derogation the Court interprets each element of Article 15 in the answers to three questions raised by the Article:

- Does the situation constitute a public emergency?
- Are the measures to be taken "strictly required by the exigencies of the situation?
- Are they consistent with international obligations?

1. War or Public Emergency

To date there have been no derogations concerning a state of war.

In *Lawless* the Court defined a public emergency as: [57]

> … an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.

The scope of the margin of appreciation was evident in this case, in which the Court found the Irish Government's claim that a state of public emergency existed was "reasonably deduced" from a combination of factors, which it enumerated. The Court stated:[58]

> It falls in the first place to each contracting state, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency

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[56] Judgment, 1 July 1961, para. 2.
[57] *Lawless* judgment, 1 July 1961, para. 28.
[58] *Ibid*, para. 207.

> and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation.

In the *Greek Case* in 1969 the Commission considered the validity of a derogation invoked by the revolutionary government of the Colonels, who had seized power in a *coup* in April 1967.[59] The new Greek Government argued that the decline in public order over several months had resulted in a state of near anarchy, that constitutional government was collapsing and that Communists were preparing an armed take-over of Greece, which had forced it to take emergency action, including derogations from the Convention. The Commission considered on this occasion that the events of April 1967 did not constitute a public emergency threatening the life of the Greek nation.[60] The Commission referred to the Government's margin of appreciation in considering whether it had reason to believe that a public emergency existed. However, diverging from the Court's *Lawless* definition, the Commission also considered whether such an emergency existed in fact, and concluded that it did not.

2. The Exigencies of the Situation and Proportionality

In considering whether the measures to be applied under Article 15 are strictly required by the exigencies of the situation, the Strasbourg bodies have considered three strands:

- Is the derogation necessary to cope with the threat to the life of the nation?
- Are the measures proportional? That is to say, are they sufficient but no greater than what is needed to deal with the emergency?
- For how long have the measures been applied?

In the *Greek Case*, since the Commission was not satisfied that a state of public emergency existed which threatened the life of the nation, it was not strictly speaking necessary for it to consider whether the Greek Government's measures were required by the exigencies of the situation. The Commission did examine this question, however, and found that the measures went beyond what the 'hypothetical' situation required.[61]

In *Lawless*, the Court accepted that the usual judicial proceedings in Ireland were unable to counter the danger to public order posed by IRA terrorism. It was satisfied that detention without trial was justified under Article 15, in view of the dangers posed by the on-going IRA terrorist activity. The Court also took account of the safeguards the Irish Government had put in place to prevent abuse of the detention system.[62]

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59 *Greek Case*, (1969), 2YB, 32.
60 *Ibid*. 76.
61 *Greek Case*, 135-6 & 148-9.

In *Ireland v United Kingdom,* the Court emphasised the margin of appreciation to be granted to each Party and found that the extrajudicial deprivation of liberty was justified by the circumstances between August 1971 and March 1975, as they were perceived by the British Government.[63] The Court stipulated, however:

> There must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other. Moreover, the obligations under the Convention do not entirely disappear. They can only be suspended or modified 'to the extent that is strictly required' as provided in Article 15.[64]

The Court also required that "the interpretation of Article 15 must leave a place for progressive adaptation".[65]

In *Brannigan and McBride* the Court accepted the British Government's argument that under the common law system in the UK it would not be possible to introduce a judicial procedure into the detention process at an early stage.[66] It also accepted that extended detention was necessary to investigate suspected terrorists who might have been trained in resisting interrogation and where extensive forensic checks might be necessary. The Court found that in this case detention without judicial supervision was "strictly required by the exigencies of the situation".

The Court restated its approach to the scope of the margin of appreciation in interpreting Article 15 in *Brannigan and McBride v UK*. Recalling the *Lawless* judgment, the Court added:

> Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstance leading to, and the duration of the emergency situation.[67]

Two more recent instances of derogations from Article 5 have involved the Turkish Government and the detention of suspected Kurdish terrorists. At the time of consideration of *Aksoy v Turkey* by the Commission in 1994 confrontations between the security forces and members of the PKK (Workers' Party of Kurdistan) had cost several thousand civilian and security forces' lives.[68,69] Since 1987 ten of the eleven provinces of

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62 *Lawless* judgment, 1 July 1961, paras. 31-8.
63 *Ireland v UK*, judgment, 18 January 1978, Series A, No.25; (1979-80) 2 EHRR 25.
64 *Ireland v UK* (1978) 2 EHRR 25:
65 *Ireland v UK*, judgment 18 January 1978, para. 83.
66 *Brannigan and McBride v UK*, judgment 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539.
67 *Brannigan and McBride v UK*, judgment 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539, para. 43.
68 Application 00021987/93, judgment 18 December 1996.
69 Around 4,000 in each case, according to figures supplied by the Turkish Government in 1994.

south-eastern Turkey had been under emergency rule. Turkey gave notice of its derogation on 6 August 1990 after the promulgation of Government decrees to tackle the worsening terrorist situation. The Government derogated from the rights enshrined in Articles 5, 6, 8, 10, 11 and 13 of the Convention. The applicant (who had been killed in 1994 but whose case was pursued by his father) had been detained for 14 days under emergency legislation allowing for detention of up to 30 days. The Court acknowledged the problems in investigating terrorist crimes but found the period of detention in this case unacceptably long and leaving the applicant vulnerable to arbitrary interference with the right to liberty and to torture. In any case, Article 3 (prohibition of torture) makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. The Court found that the Government had not provided sufficient safeguards against abuse (compared to those available in *Brannigan and McBride*), and that the applicant had been denied access to medical, legal and family help, and found the Government in breach of Articles 3, 5(3) and 13.

In *Demir and Others v Turkey* the complaint concerned periods of detention of at least sixteen and twenty-three days. Turkey invoked a derogation from obligations under Article 5 on the grounds that the terrorist activity of the PKK in south-eastern Turkey which had created a "public emergency threatening the life of the nation" had forced the Government to introduce long periods of incommunicado detention, without any judicial intervention.[70] The Court stated that the mere fact that the detention concerned was in accordance with Turkey's domestic law or that an inquiry or investigation had not been completed could not justify under Article 15 measures derogating from Article 5(3). Recalling *Aksoy* the Court found that the Turkish Government had not introduced adequate safeguards against arbitrary treatment and that the harshness of the detention concerned had not been required by the crisis relied upon by the Government. The Court found that the Turkish Government's 'thorough' and 'careful' police investigations prior to the detention of the suspects did not answer the central question as to why judicial scrutiny of the applicants' detention would have prejudiced the progress of the investigation. The Court concluded: [71]

> In respect of such lengthy periods of detention in police custody it is not sufficient to refer in a general way to the difficulties caused by terrorism and the number of people involved in the inquiries.

The Court concluded unanimously that there had been a violation of the Convention.

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[70] Application numbers 00021380/93 ; 00021381/93 ; 00021383/93, Judgment 23 September 1998

[71] *Demir and Others v Turkey*, judgment 23 September 1998, from: http://hudoc.echr.coe.int/hudoc.

3. Compatibility with International Law and Obligations

The third element of Article 15 requires that measures must be consistent with the State's obligations under international treaties, human rights conventions or international customary law. Article 53 of the European Convention on Human Rights states:

> Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreements to which it is a Party.

This alone would preclude any derogation invoked by a State that would contradict its human rights obligations under international law. The only case where international obligations have been identified was *Brannigan and McBride*, where the UK's obligations under the United Nations *International Covenant on Civil and Political Rights* were raised in connection with validating a derogation by officially proclaiming it. The Court noted that the British Government had made a statement to the Commons setting out the reasons for the derogation, which it (the Court) considered to be sufficiently formal and public.

E. The *Human Rights Act 1998 (Designated Derogation) Order 2001*[72]

The Order laid on 12 November 2001 designated the proposed derogation for the purposes of Section 14(1) of the *Human Rights Act 1998*.

The Schedule to the Order sets out the British Government's notification of the proposed derogation to the Council of Europe under Article 15(3) of the Convention, defines the circumstances of public emergency that it considers to exist in the UK following the terrorist attacks in the US on 11 September, and states that the Government finds it necessary to derogate from Article 5(1) in respect of the extended detention powers to be included in the Anti-terrorism, Crime and Security Bill.

The Government justifies the proposed derogation on the grounds that a public emergency, within the meaning of Article 15(1) of the Convention, exists within the UK.

This is not the same as declaring a national state of emergency, for which there is a specific procedure under the *Emergency Powers Act 1920*.[73]

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[72] UP 638 2001/02.

The Schedule confirms that the derogation is necessary because the extended power of arrest and detention in the forthcoming Bill may not be consistent with Article 5(1)(f) of the European Convention, as interpreted by the Court in the case of *Chahal*.[74] The Explanatory Note on the Bill clarifies this:

> [The Bill] contains an extended power to arrest and detain a foreign national where it is intended to remove or deport the person from the United Kingdom because the Secretary of State believes that his presence is a risk to national security and suspects him of being an international terrorist, but where such removal or deportation is not for the time being possible. In such cases, detention may be incompatible with Article 5(1)(f) because it is not for the time being possible to take action with a view to deportation, for example, if deportation would result in treatment contrary to Article 3 [prohibition of torture] of the Convention.

The Government would not necessarily be in a position to say that action was being taken with a view to deportation within the meaning of Article 5(1)(f), had therefore availed itself of the right of derogation conferred by Article 15(1) and would "continue to do so until further notice".

F. Possibility of Challenge

The lawfulness of the derogation may become the subject of a challenge in the domestic courts or at the Court of Human Rights. John Wadham and Shami Chakrabarti[75] considered a UK derogation from the Convention in an article in the *New Law Journal* in October 2001:[76]

> Although the atrocities in the United States were shocking and substantial, and although some groups have identified the United Kingdom as a legitimate target of similar attacks, it is not clear whether the EctHR would accept that there is an "emergency threatening the life of the nation". The circumstances as they apply to the UK are not the same as the situation in the United States and the emergency is not of the same order as previously existed in Northern Ireland and as pleaded by the Government in *Brannigan*.

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73 The last proclamation under the Act was on 6 March 1974 and was revoked on 11 March 1974, when the miners' strike ended. A state of emergency had begun on 13 November 1973 and an election was called on 7 February for 28 February, with dissolution on 8 February. Parliament was due to open on March 12. The first proclamation issued at the time of the strike was on 13 November 1973 and successive proclamations were published in the London Gazette until 6 March (HC Deb 19 November 1984 c58w. This PQ gives dates for previous proclamations under the 1920 Act).

74 *Chahal v UK* (1996) 23 EHRR 413 para.112, which established that Article 5(1)(f) allowed the detention of a person with a view to deportation only in circumstances where "action is being taken with a view to deportation".

75 John Wadham director of the human rights organisation, Liberty, and Shami Chakrabarti, in-house counsel of Liberty,

76 "Indefinite Detention Without Trial" *New Law Journa*l 26 October 2001

The article questions the justification for a UK derogation, "given the nature of terrorist threats to European countries generally", and asks why the other 42 Council of Europe countries have not enacted similar measures. It could be argued that Britain's role in the military campaign in Afghanistan has made it more vulnerable to terrorist attacks by the al Qaeda network than other European states. Wadham and Chakrabati are not convinced:

> Overcoming this hurdle will be particularly difficult given that the assessment of the lawfulness of the measure will be by a majority of judges who come from those other countries who have not found it necessary to design provisions which involve indefinite detention without trial and which breach a fundamental right of the Convention.

The Council of Europe Secretary-General, Walter Schwimmer, told BBC Radio 4 on 12 November that he was not happy with the Government's decision to derogate from Article 5. The *Guardian* commented that the "anti-terrorist legislation will prove the sternest test since September 11 of the Westminster political consensus".[77] In the House of Commons, Points of Order were raised in which Members criticised the Home Secretary for not making a statement on the derogation and the public emergency situation.[78]

G. The French Reservation

Francis Jacobs and Robin White consider the French Government's hesitations in ratifying the European Convention in view of its concerns about Article 15.[79] Article 16 of the French Constitution confers wide-ranging powers on the President in the event of a state of emergency. Article 16 provides:

> When the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public powers is interrupted, the President of the Republic takes the measures required by these circumstances, after officially consulting the Prime Minister, the Presidents of the Assemblies as well as the Constitutional Council.

At the time of ratification of the European Convention in 1974 the French Government entered a reservation to Article 15:

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77 *Guardian* 13 November 2001.
78 HC Deb 12 November 2001 Col 572-3
79 Jacobs and White (1996) *The European Convention on Human Rights* 2nd edition

> The Government of the Republic … makes a reservation in respect of paragraph 1 of Article 15, to the effect, firstly, that the circumstances specified in Article 16 of the Constitution regarding the implementation of that Article, in Section 1 of the Act of 3 April 1878 and in the Act of 9 August 1849 regarding proclamation of a state of siege, and in Section 1 of Act No. 55-385 of 3 April 1955 regarding proclamation of a state of emergency, and in which it is permissible to apply the provisions of those texts, must be understood as complying with the purpose of Article 15 of the Convention and that, secondly, for the interpretation and application of Article 16 of the Constitution of the Republic, the terms to the extent strictly required by the exigencies of the situation shall not restrict the power of the President of the Republic to take the measures required by the circumstances.[80]

Jacobs and White comment:[81]

> The Court seems to be acutely aware of the political nature of its decision making in this area, and few States should experience concern over their actions if the position taken in the *Brannigan and McBride* case is maintained, which, as some of the dissenting opinions in that case make clear, accords to States too wide a margin of appreciation.

III Incitement to religious and racial hatred

Part 5 of the Bill is intend to bring into effect the Government's plans to strengthen the law on incitement to racial hatred, to encompass incitement to religious hatred.

A. Current law

1. Racial discrimination: the definition of a racial group

The *Race Relations Act 1976* makes it unlawful to discriminate directly or indirectly on racial grounds in employment, housing, education, the provision of goods and services etc. Section 3 defines "racial grounds" as "colour, race, nationality or ethnic or national origins". The Act does not make unlawful discrimination on religious grounds, though case law has determined that it protects Sikhs and Jews, because they belong to groups defined by ethnic origin as well as a common religion. Submissions from the Islamic Human Rights Commission have complained recently that Muslims, unlike Sikhs and

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[80] Source: Council of Europe website at: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm

Jews, are not protected by the Act. This has come about through the operation of case law and interpretation rather than a specific provision of the Act.

The indirect discrimination provisions of the Act have, however, been used in cases where people have been discriminated against by reason of their religious observance. In the case of *Mandla v Dowell Lee* in 1983[82] (the 'Sikh turban case') it was held that the term "ethnic" is to be construed widely in a broad cultural and historic sense and hence that Sikhs belong to a group defined by ethnic origins as well as a common religion. Lord Fraser defined certain essential characteristics that determine whether a group is *ethnic*:[83]

> The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are ... relevant: (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people … and their conquerors might both be ethnic groups.

Jews also meet these criteria. It has been held too that gypsies[84] constitute a racial group because the word *ethnic*, as Lord Fraser had determined, is not to be construed in a strictly biological or racial sense.

2. The *Race Relations (Amendment) Act 2000*

The *Race Relations (Amendment) Act 2000* implemented a principal recommendation of the Report of the Macpherson Inquiry into the death of Stephen Lawrence, that the *Race Relations Act 1976* should apply to the police. It also implemented the Government's decision that it should be extended to all those areas of public authority activity not expressly included by the Act and excluded by the *Amin* judgement. A Library research paper on the Race Relations (Amendment) Bill is available via the Parliamentary intranet.[85] The Act itself is available on the HMSO website.[86]

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81 Jacobs and White, p.324.

82 *Mandla v Dowell Lee* [1983] 2 AC 548

83 [1983] 1 All ER at 1066

84 *Commission for Racial Equality v Dutton* [1989] 1 All ER 306, [1989] 2 WLR 17, CA

85 The *Race Relations Amendment Bill [HL]* Bill 60 of 1999-2000: Library Research Paper 00/27: 8 March 2000 – available at http://hcl1.hclibrary.parliament.uk/rp2000/rp00-027.pdf

86 at http://www.hmso.gov.uk/acts/acts2000/20000034.htm

3. Article 14 of the European Convention on Human Rights

Article 14 of the European Convention on Human Rights forbids discrimination on any ground - including religion - preventing the enjoyment of those rights and freedoms set out in the Convention. Rights protected include the freedom of expression, freedom of thought, conscience and religion, freedom of assembly and association. Article 9 of the Convention specifically defines the right of everyone to "manifest his religion or belief, in worship, teaching, practice and observance." There has, therefore, been some protection within United Kingdom domestic law against discrimination on religious grounds since the *Human Rights Act 1998* came into force on 2 October 2000. A Library research paper on the *Human Rights Bill* is available via the Parliamentary intranet [87]

4. Blasphemy

Blasphemy was originally an ecclesiastical offence punishable in the ecclesiastical courts, but by the end of the 12th century the sanctions which could be imposed by those courts had lost their effectiveness. The first reported case heard before the Court of King's Bench was *Taylor's Case* in 1676 where it was held that the language of the defendant was not only contrary to religion, but was also regarded as constituting a danger to civil order. [88]

The last time the law of blasphemy was invoked successfully was in 1979 in the case of *Whitehouse v Lemon and Gay News Ltd* [1979] QB 10, (C.A.). This was a private prosecution brought by Mrs Mary Whitehouse against *Gay News* for publication of a poem which recounted the homosexual fantasies of a Roman centurion as he removed the body of Christ from the cross. The defendants were convicted on a majority verdict of 10 to 2. The Court of Appeal upheld the conviction. A suspended sentence of 9 months on the editor was set aside by the Court of Appeal, but fines of £500 and of £1,000 on the company were upheld.

There had previously been no prosecution since 1922 and in 1949 Lord Denning commented:[89]

> The reason for this law was because it was thought that a denial of Christianity was liable to shake the fabric of society, which was itself founded on the

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87 *The Human Rights Bill [HL]* Bill 119 of 1997-98 Library Research Paper 98/24: 13 February 1998 - available at http://hcl1.hclibrary.parliament.uk/rp98/rp98-024.pdf

88 R v Taylor (1676) 1 Vent 293

89 "Freedom Under The Law" Hamlyn Lectures 1st series 1949 page46

> Christian religion. There is no such danger to society now and the offence of blasphemy is a dead letter.

In *Whitehouse v Lemon*, the trial judge found that blasphemy, or its written form blasphemous libel, is committed if there is published any writing concerning God or Christ, the Christian religion, the Bible or some sacred subject, using words which are scurrilous, abusive or offensive and which tend to vilify the Christian religion and therefore have a tendency to lead to a breach of the peace. In the House of Lords in the same case, Lord Scarman approved this definition but added that "It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language".[90] Thus material which is to be penalised by the common law offence must have a strongly offensive character, and this distinguishes it from the very much wider dictionary definition of "impious or profane talk" or cursing or swearing.

In 1990 an unsuccessful attempt was made to extend the scope of the offence to cover attacks on the Islamic religion by prosecuting the publishers and author of *The Satanic Verses.*[91] This application for judicial review of the refusal of the Chief Metropolitan Stipendiary Magistrate to grant summonses against Salman Rushdie and Viking Penguin Publishing Ltd was rejected and it was confirmed that it is only the Christian religion and possibly only the tenets of the Church of England which are protected. In 1985 a majority of the Law Commission recommended that the common law offences of blasphemy and blasphemous libel should be abolished, while a minority proposed a new statutory offence which would protect all religions.[92] The question was looked at by the Commission for Racial Equality in their second review of the *Race Relations Act 1976* in 1991.

It is difficult to predict how the two areas of legislation – blasphemy and incitement to religious hatred - might interact, since the extent of that interaction will depend on how the law is interpreted by the courts. Moreover, recent press reports have suggested that the Home Secretary, David Blunkett favours the scrapping of the blasphemy laws:[93]

> […]
>
> On Wednesday, Mr Blunkett also suggested that the blasphemy laws, which only protect Christians, were no longer needed.
>
> "There will come a time when it will be appropriate for the blasphemy law to find its place in history", he told the Parliamentary Joint Committee on Human Rights.

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90 [1979] A.C.665-666

91 Discussed in the *Times* law report of *R v Bow Street Magistrates Court ex parte Choudhury*, 10 April 1990.

92 1984-85 HC 442

93 "Blunkett Casts Doubt Over Blasphemy Laws" *BBC News Online* 14 November 2001

In similar vein, the Home Secretary was also reported as having suggested that the proposed law on incitement to religious hatred would not have caught Salman Rushdie's *The Satanic Verses*:[94]

> The Home Secretary said that Satanic Verses had not been intended, nor was likely, to stir religious hatred which would then lead to public disorder. He agreed that many Muslims regarded the novelist's book as demeaning to their religion. But he said that would not be sufficient for it to be prosecuted under the new law.

B. Incitement to racial hatred

1. Public order offences

There is a distinction to be made between unlawful discrimination as defined by race relations legislation and offences created by the *Public Order Act 1986.* This is usefully discussed by Anthony Lester and Geoffrey Bindman in *Race and Law* (1972):

> **Relationship with the anti-discrimination law**
>
> Section 6 of the Race Relations Act 1965 created the offence of incitement to racial hatred. A person is guilty of the offence if, with the deliberate intention of stirring up racial hatred, he circulates written matter or uses words in public, which (a) are threatening, abusive or insulting and (b) are likely to stir up such hatred. Section 5 of the Theatres Act 1968 made it an offence for anyone to present or direct a public performance of a play, involving the use of threatening, abusive or insulting words, with the deliberate intention of stirring up racial hatred, if that performance, taken as a whole, is likely to have such an effect.
>
> These offences are entirely separate from the anti-discrimination sections of the Race Relations Acts. They deal with the stirring up of racial hatred rather than with the acts of racial discrimination; they are criminal rather than civil; and they are enforced by the Attorney-General in the criminal courts, rather than by the Race Relations Board in designated county courts. To a marginal extent the two types of legislation may occasionally cover similar subject-matter. A person who deliberately incites another to discriminate contrary to the Race Relations Act 1968 is treated as having himself discriminated. If he uses extreme language to incite another to discriminate, with the intention of stirring up racial hatred, he may also be guilty of violating section 6 of the 1965 Act.

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[94] "Blasphemy Law To Be Scrapped Soon" *Guardian* 15 November 2001

> The problems which both laws are intended to tackle are also related to each other in a wider sense. Where racial hatred is stirred up, it is obviously much harder to reduce racial discrimination against the victims of such hatred; conversely, where racial discrimination is prevented, the conditions in which racial hatred flourish are likely to be removed.
>
> However, the prohibition of racial incitement raises controversial issues both of principle and practical expediency which do not apply to the law against racial discrimination. It is important that the two subjects should not be confused […]

2. The *Public Order Act 1986*

Though the offence of incitement to racial hatred was created in race relations legislation, the fact that it was not the same as unlawful discrimination was recognised when the *Race Relations Act 1976* replaced it by enacting a new section 5A to the *Public Order Act 1936*. The offence is now in Part III of the *Public Order Act 1986*.

Section 17 of the *Public Order Act 1986* defines *racial hatred* as

> hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origin.

Sections 18 and 19 make it an offence to use threatening, abusive or insulting words or behaviour or display any threatening, abusive or insulting written material or publish or distribute such material with the intention of stirring up racial hatred or if racial hatred is likely to be stirred up thereby. Offences under section 19 were made arrestable for the purposes of the *Police and Criminal Evidence Act 1984*. Section 23 provides that it is an offence for a person to be in possession of racially inflammatory material, whether written or recorded, if he intends publication to stir up racial hatred, or if racial hatred is likely to result. This legislation also defines other offences which are not specific to race relations, but designed to deal with behaviour or speech likely to cause a person harassment alarm or distress as, for example, in section 5.

In 1991, in their second review of the *Race Relations Act 1976,* the Commission for Racial Equality was critical of the difficulties imposed by the requirement to obtain the consent of the Attorney General for prosecutions, pointed to the low number of consents given and called for an independent review.

3. Home Affairs Committee report on racial attacks and harassment

The question of incitement to racial hatred was considered by the Home Affairs Committee (HAC) in its report on *Racial Attacks and Harassment*.[95] The main amendments proposed by the HAC were

- ♣ replacement of the requirement under s.27(1) to obtain consent for a prosecution from the Attorney General with a requirement to obtain the consent of the Director of Public Prosecutions

- ♣ replacement of the test that the offender must intend to stir up racial hatred, or that this must be likely to result from the actions in question, with a "more objective" test that racial hatred was a reasonably foreseeable result

- ♣ further consideration to be given to a new law of group defamation

- ♣ consideration also to be given to the strengthening of the *Malicious Communications Act 1988*

The Government's response to the HAC was published in October 1994.[96]

Figures for the number of prosecutions for incitement to racial hatred were given in November 2001:[97]

> Section 70 of the Race Relations Act 1976 was repealed by the Public Order Act 1986, where the provisions on incitement to racial hatred can now be found.
>
> Information provided by the Attorney-General's office showing the majority of the data requested--for the period 1997 to 2001 (to date)--is in the table.

Offences of incitement to racial hatred under Part III of the Public Order Act 1986	***1997***	***1998***	***1999***	***2000***	***2001*** [(a)]
Number of consent applications	12	2	4	7	7
Withdrawn	--	1	--	--	--
Not granted	2	--	--	--	--
Prosecuted	10	1	4	7	7
Convicted	9	1	3	[(b)]4	[(c)]--

[(a)] To date
[(b)] Two results awaited
[(c)] Results awaited *Source:* Attorney-General's office

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95 1993-94 HC 71

96 *Racial Attacks and Harassment Government Reply to the Third Report from the Home Affairs Committee* Session 1993-94 HC 71 Cm 2684 October 1994

97 HC Deb 1 November 2001 Col 851W

C. Incitement to religious hatred

1. The *Crime and Disorder Act 1998*

The extension of the protection against racist discrimination and attacks to discrimination and hostility based on religious grounds - which would have included Muslims - was a subject much discussed during the passage of the *Crime and Disorder Act 1998.* The Act provided new racially aggravated offences and enhanced sentences where racial motivation could be shown. A Government amendment was made to the Bill on 23 June 1998 which was intended to make it clear that, for the purpose of deciding whether or not an offence is covered by the racially aggravated provisions, it is not important that the offender's hostility is also based to any extent on the victim's membership of a religious group. The then Home Secretary also said that the possibility of bringing forward legislation to cover religiously motivated offences was not ruled out.

The Prime Minister said in May 1999 that the Government was considering how to strengthen existing provisions:[98]

> **Ms Oona King** (Bethnal Green and Bow): Does the Prime Minister agree that one of the most precious things in this country is the right to free speech? Is not the only thing more precious the right to life? Given that, and in the light of the recent atrocities in my constituency and elsewhere in London, will he look at tightening the laws governing incitement to racial hatred so that individuals - or groups - who are guilty of it face penalties, and, in this country, the only thing that we nail is intolerance?
>
> **The Prime Minister:** It is precisely for that reason that we are considering how we extend the law, in order to ensure that incitement to racial hatred is a crime. We shall do everything that we can to make it clear that, although we live in a tolerant democracy, we shall be intolerant of racial prejudice and racial bigotry. Wherever these people rear their ugly heads, the forces of democracy will be there, ready to deal with them.

D. Terrorist attacks in the USA on 11 September: proposals for new legislation

In the aftermath of the terrorist attacks in the USA on 11 September 2001, the Home Secretary David Blunkett announced a package of anti-terrorism measures. He said that the Government intended to widen the law on incitement to include religious hatred as

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[98] HC Deb 5 May 1999 Col 934

well as racial hatred and would consider the creation of a new category of offences aggravated by religious hatred to complement the racially aggravated offences created by the Crime and Disorder Act.

Mr Blunkett said:[99]

> "I am determined to protect our country and its democratic values from those who seek to undermine and attack them.
>
> "I am equally determined to ensure that religion is not used to divide and fragment communities in our country in this difficult time. That is why I will toughen up our incitement laws to ensure attention- seekers and extremists cannot abuse our rights of free speech to stir up tensions in our cities and towns."

Also at the Labour Party conference, John Reid (Secretary of State for Northern Ireland) confirmed that similar new laws would be vigorously applied in Northern Ireland:[100]

> "I am working closely with David Blunkett on his package of measures to ensure that as many as possible can be used to good effect in bringing the residual terrorist violence we face in Northern Ireland to an end."

The Times suggested that the Scottish Executive, in contrast, was unenthusiastic about such legislation:[101]

> The Scottish Executive last night appeared to step back from introducing legislation to make incitement to religious hatred a specific criminal offence, as proposed by the Home Secretary for England and Wales.
>
> […]
>
> Donald Gorrie, the Liberal Democrat MSP for Central Scotland, is preparing a Private Member's Bill for the Scottish Parliament covering much the same ground as Mr Blunkett's proposed measure. Mr Gorrie's Bill has been sparked, in part, by repeated incidents of Protestant/Roman Catholic sectarian violence in Glasgow before, during and after "Old Firm" football matches between Rangers and Celtic. Only last weekend after the latest meeting of the clubs, there were several reports of stabbings, slashings and fights in and around Glasgow city centre.
>
> […]
>
> The Executive distanced itself from the Blunkett Bill, although it did say that it would "look closely" at Mr Gorrie's proposed measure.

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[99] *New Anti-Terrorist Measures Announced By David Blunkett* Home Office Press Notice 236/2001 3 October 2001

[100] "Reid Takes Tough Line On Weapons Handover" *Times* 4 October 2001

[101] "Scots Reluctant To Toe Line On Religion Bill" *Times* 4 October 2001

> One source said: "Mr Blunkett has identified that the existing law is not sufficient down south. We have no indication of that up here. The existing law in Scotland as regards violence and incitement is flexible and robust enough to deal with such offences."

A leading article in the *Guardian* suggested that the proposals to reform the law on racial hatred, although seemingly liberal, might enable religious extremists to escape scrutiny:[102]

> […]
>
> There are questions to ask too about Mr Blunkett's more apparently liberal reforms. His decision to widen the law on incitement to include religious hatred as well as racial hatred raises concern that religious extremists might be able to use the law to deflect examination of their activities. This reform needs to be drafted with great care to ensure that robust criticism of religion and religions is not outlawed. The law banning incitement of racial hatred shows it can be done without infringing free speech.
>
> […] But there are too many questions for any kind of comfort. Parliament needs to hear a more measured presentation of the new measures than Mr Blunkett gave in Brighton.

Before the *Anti-Terrorism, Crime And Security Bill* was published, the Government had indicated that, in framing the offence of incitement to religious hatred, it would not attempt to define *religion* on the face of the Bill:[103]

> **Mr. Blunkett:** […] I can give my hon. Friend the assurance that she seeks in relation to free speech, dialogue, debate and attitude. What we are dealing with, in changing the law on race and religion, is hatred. I take the inference of her intervention, so I shall examine carefully the question of atheists and--I say this wryly--consider whether unpleasant and unhelpful comments about atheists could be included.
>
> **Mr. Edward Garnier (Harborough):** Can the Home Secretary tell us today whether the new legislation on incitement to racial hatred will include either a definition of religion or a list of those religions against which it will be illegal to incite hatred?
>
> **Mr. Blunkett:** It is not our intention to include in the Bill a definition of religion, for all the reasons that many in the House will be familiar with. The Attorney-General and I would wish to assure ourselves that we were handling the matter sensitively, bearing in mind the fact that the existing law in relation to race provides for those religions that have a direct relationship with the race of the

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[102] "Restraining Blunkett: Commons Must Monitor Asylum Changes" *Guardian* 4 October 2001
[103] HC Deb 15 October 2001 Col 932

> individual concerned. We want to extend that facility to people who follow Islam and Christianity. The measures will also enable us to deal with those who deliberately use the current law to stir up dissension and hate, which we would all find unacceptable.

Likewise, the Leader of the House, Robin Cook had suggested that the lack of any definition of *religion* should not be a problem:[104]

> **Mr. Paul Goodman (Wycombe):** Could the Leader of the House provide the House with an opportunity to debate the Government's proposals to legislate against religious hatred so that Opposition Members and, perhaps, Government Members can inquire how they are going to do so without a definition of religion in the Bill?
>
> […]
>
> **Mr. Cook:** […] The Bill will be published, we hope, in the middle of November, when the hon. Member for Wycombe (Mr. Goodman) will be able to see its full terms. However, an awful meal is being made of issues of definition. Personally, I see no problem whatever with understanding the difference between a joke about a religion and inciting religious hatred and violence. Indeed, we ourselves tackled those questions in the past. I remember when people said that legislation against incitement to race hatred was impossible because it could not be adequately defined. We managed that; the legislation was passed and plays a useful role. I see no reason why we should not do the same with religious hatred.

[104] HC Deb 18 October 2001 Column 1317-8

E. The *Anti-Terrorism, Crime and Security Bill* [Bill 49 of 2001-02]

Clause 36 would amend the definition of *racial hatred* within section 17 of the *Public Order Act 1986*, which currently restricts the offence to stirring up hatred against groups within Great Britain. Under the new definition, *racial hatred* would include racial hatred which, whilst expressed in Great Britain, was targeted at racial or religious groups abroad. **Clause 37** would make similar provisions for Northern Ireland, by deleting the reference in the *Public Order (Northern Ireland) Order 1987* to groups 'in Northern Ireland'.[105]

Clause 38 would amend the definition of Part 3 of the *Public Order Act 1986*, creating a new heading of *racial or religious hatred*. A new section would be inserted, which, although it would not define *religion*, would define *religious hatred*. The Explanatory Notes suggest that:[106]

> 106. *Subsection (3)* inserts a definition of religious hatred after section 17 of the 1986 Act. Religious hatred is defined as hatred against a group of persons defined by reference to religious belief or lack of religious belief. This definition is designed to cover a wide range of religious beliefs but does not seek to define either what amounts to a religion or a religious belief.
>
> 107. The definition covers hatred directed against a group defined by reference to lack of religious belief, which will include hatred of those who have no belief, such as atheists. The definition is also designed to include hatred of a group where the hatred is not directed against the religious beliefs of the group or to a lack of any belief but to the fact that the group do not share the particular religious beliefs of the perpetrator.
>
> 108. The reference to lack of religious belief does not mean that a group identified by any other factors, such as political opinion, would be caught. The group does not have to have an independent existence as such.
>
> 109. *Subsection (4)* makes a number of amendments to sections 18 to 23 of the 1986 Act. The effect is that the offences under Part 3 of the 1986 Act can be committed by reference to religious hatred as well as racial hatred.
>
> 110. *Subsection (7)* amends section 24(2) of the Police and Criminal Evidence Act 1984 to reflect the fact that the arrestable offence under section 19 of the 1986 Act extends to religious hatred as well as to racial hatred.

Clause 39 makes similar amendments in respect of the provisions within the *Crime and*

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[105] Statutory Instrument 1987/463 (NI 7)

[106] *Anti-Terrorism, Crime and Security Bill* Bill 49–EN Explanatory Notes - available at http://pubs1.tso.parliament.uk/pa/cm200102/cmbills/049/en/02049x--.htm

Disorder Act 1998 on racially aggravated offences, which would now also include offences aggravated by religious factors. According to the Explanatory Notes:[107]

> 112. *Subsections (3)* and *(4)* amend section 28 of the 1998 Act so that it provides for when an offence is racially or religiously aggravated. The effect of the changes is that an offence will be an aggravated offence under the 1998 Act if there is evidence of hostility towards the victim of the offence by the perpetrator at the time of committing the offence or immediately before or after doing so and that hostility is based on the victim's membership of a racial or religious group. Alternatively, an offence will be aggravated if there is evidence that it was motivated by hostility towards members of a racial or religious group. The nine aggravated offences in sections 29 to 32 of the Crime and Disorder Act 1998 carry higher maximum penalties than the offences they are based upon.

The Explanatory Notes describe the practical effect of these measures:[108]

> 115. As with the amendments to Part 3 of the Public Order Act 1986, the definition means that offences can be aggravated if the hostility that is shown, or which motivates them, is based on the victim's membership of a group defined by reference to a particular religious belief, lack of a particular religious belief, or lack of any religious belief. This will cover those who have no belief, such as atheists, and also cases where the hostility is based on the fact that the victim does not share the particular religious beliefs of the perpetrator.

Clauses 40 and 41 would increase the maximum penalty for racial or religious hatred offences in Great Britain and Northern Ireland from two to seven years.

F. Reactions to Part 5 of the Bill

When the Government's plans for legislation on incitement to religious hatred were being discussed, the comedian Rowan Atkinson suggested that the proposals could leave comedians vulnerable to prosecution. In his letter to the *Times*, Mr Atkinson said:[109]

> I hope that I am not the only person in the creative arts who feels great disquiet about the proposals outlined by the Home Secretary in the Commons today, to introduce legislation to outlaw what has been described as "incitement to religious hatred" (reports, October 16). Having spent a substantial part of my career parodying religious figures from my own Christian background, I am

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[107] *Anti-Terrorism, Crime and Security Bill* Bill 49–EN Explanatory Notes - available at http://pubs1.tso.parliament.uk/pa/cm200102/cmbills/049/en/02049x--.htm

[108] *Anti-Terrorism, Crime and Security Bill* Bill 49–EN Explanatory Notes

[109] "Religion As A Fit Subject For Comedy" *Times* 17 October 2001

> aghast at the notion that it could, in effect, be made illegal to imply ridicule of a religion or to lampoon religious figures.
>
> Supporters of the proposed legislation would presumably say that neither I, nor any of my colleagues in the comedy world, are its intended targets, but laws governing highly subjective or moral issues tend to drag a very fine net, and some of the most basic freedoms of speech and expression can get caught up in it. I have always believed that there should be no subject about which one cannot make jokes, religion included. Clearly, one is always constricted by contemporary mores and trends because, after all, what one seeks above all is an appreciative audience. However, how would a film like Monty Python's Life of Brian, criticised at the time of its release for being anti-Christian, be judged under the proposed law? Or that excellent joke in Not the Nine O'Clock News all those years ago, showing worshippers in a mosque simultaneously bowing to the ground with the voiceover: "And the search goes on for the Ayatollah Khomeini's contact lens"? Not respectful, but comedy takes no prisoners. However, in period and in context it was extremely funny and I believe that it is the reaction of the audience that should decide the appropriateness of a joke, not the law of the land.
>
> For telling a good and incisive religious joke, you should be praised. For telling a bad one, you should be ridiculed and reviled. The idea that you could be prosecuted for the telling of either is quite fantastic.

Other comedians voiced similar concerns, although some suggested that the fears were exaggerated and other commentators dismissed the notion that comedians might be prosecuted: [110]

> […]
>
> Defiant comics ranging from Bernard Manning to Stephen Fry have criticised the Home Office proposals, which will be incorporated into the new anti- terrorism Bill being drafted in the wake of last month's attacks. Outspoken northern comic Bernard Manning condemned what he said amounted to the "censorship" of humour. "There's only one thing that's taboo with me and that's jokes about the handicapped," he said. "If we can't laugh at ourselves and the barmy things we believe in, what can we laugh at?" Irish comic Frank Carson added: "Does this mean that if we have jokes that mention the word boobs women are going to get a new law to protect them?"
>
> […]
>
> John Cleese said that what concerned him about the proposed legislation was its emphasis on the word "hatred", a term culled from the 1986 Public Order Act, which banned incitement to racial hatred. The Fawlty Towers co-writer and star

[110] "Attack On Afghanistan: Did You Hear The One About The Comic Who Was Jailed For A Joke About The Pope?" *Independent on Sunday* 21 October 2001

> said this could potentially threaten the many satirists who invited their audience to view their targets with "contempt". He said that he would prefer a ban on incitement to "violence" based on religion. Comic actor and writer Stephen Fry also backed Mr Atkinson's argument, but added a note of caution: "When you laugh at a Brahmin, you come close to mocking an alien culture whose nuances shoot over your head."
>
> […]
>
> But Omid Djalili, a British-Iranian comedian, described the Blackadder star's fears as "hot air". "I think he misunderstood the whole thing," he said. "It's not to do with comedy. It's to do with all the fundamentalists that, I think people don't appreciate, are preaching hatred."
>
> Legal opinion is divided over whether extending the law would carry any practical threat to performers. Hugh Tomlinson, a human rights lawyer at the Matrix chambers in London, said that, though unlikely, it was possible an offence of "religious hatred" could be inadvertently committed by a comedian.
>
> The barrister Geoffrey Robertson said: "The real danger to free speech in passing such a law is not from the courts, but from the quangos which regulate 'taste' and 'decency'." The Broadcasting Standards Commission could use the act as "an excuse to uphold complaints from the religious fringe".
>
> A Home Office spokeswoman said the new proposals were aimed at genuine cases of incitement. "It's not about satire," she said. "No comedian has ever been indicted for incitement to racial hatred."

On the Bill's proposals on dealing with religious hatred, Liberty has argued:[111]

> **Religious hatred:**
> Protecting Muslims and others from attacks requires leadership from our politicians and needs to be more of a priority for the police. There are already laws which could be better used to protect all of our communities. Given the discrimination that exists in the police and criminal justice system and in the current climate it is more likely that Muslims will be prosecuted than those who vilify them. What we need is stronger anti-discrimination laws to protect that will prevent anyone from being sacked or harassed on the grounds of religion alone, not more criminal offences.

In a letter to the *Times*, the vice president of the British Humanist Association argued that criticising a religion was unlike criticising a racial group and so the law should treat such issues differently:[112]

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[111] *Home Secretary's Antiterrorism Bill – Internment Power The Worst Of An Alarming Bill* Liberty response 13 November 2001 – available on Liberty website at http://www.liberty-human-rights.org.uk/mpress74.html

[112] "Religious Intolerance" *Times* 10 November 2001

Criticising a religious group is profoundly unlike criticising a racial group. To say that any racial group is morally inferior is always wrong: racial groups do not have moral attributes, good or bad. But it is sometimes right to criticise a religious group, if it makes claims which are morally intolerable; for example, if it justifies violence against a doctor because he performs legal abortions, or if it infringes the natural rights of women. Such claims must be open for discussion, not least if this involves strong condemnations.

Mr David Blunkett's proposed legislation against "inciting religious hatred" (letters, October 30, etc) will require exact definitions to distinguish these ambiguous and tendentious words from moral condemnation. Otherwise it will prevent an essential part of our freedom of expression.

Harry Stopes-Roe