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Detention of suspected international terrorists – Part 4 of the *Anti-Terrorism Crime and Security Act 2001*

This paper examines Part 4 of the *Anti-Terrorism Crime and Security Act 2001*. The Act was passed in response to the terrorist attacks in the USA of 11 September 2001. Part 4 of the Act contains some of the most controversial provisions of the Act which enable some terrorist suspects to be detained indefinitely.

Initially, the paper puts the Act in context by outlining the law governing immigration detention. Then the Government's response to September 11th proposing new legislation is set out, before the provisions of the *Anti-terrorism Crime and Security Act 2001* are considered in detail. The UK's derogation from Article 5 of the European Convention on Human Rights, which came about as a result of the Act, is discussed. Different perspectives on the Act are presented.

The paper then looks at the use of the Part 4 powers since the Act came into force. Finally, the recent challenge to the legality of the provisions before the Special Immigration Appeals Commission is considered.

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Summary

This paper examines Part 4 of the *Anti-Terrorism Crime and Security Act 2001* which contains some of the most controversial provisions of the legislation. Firstly, the Act allows for indefinite detention without trial of certain suspected international terrorists. Secondly, it excludes the courts' customary powers of judicial review. Thirdly, in order to be compatible with the UK's international obligations under the European Convention of Human Rights (ECHR), the Government derogated from Article 5 which provides for an individual's right to liberty and security.

Part I of this paper puts the Act in context. The provisions of detention in Part 4 are based upon an extension of the powers of immigration detention which existed before the Act came into force. Thus, an overview of law and policy on immigration detention is presented, including the general powers which the immigration service and the Secretary of State have to detain those subject to immigration control. The limits which have been imposed on the power to detain, both by the domestic courts, and also by the ECHR are considered.

Part II of this paper sets out the Government's initial response to the terrorist attacks in the USA on 11 September 2001, and its view on why the legislation is necessary.

Part III of this paper analyses the provisions of the *Anti-terrorism Crime and Security Act 2001* in detail. The role of the Special Immigration Appeals Commission (SIAC) is explained.

In order for the Act to comply with the UK's international obligations under the ECHR, the Government entered a derogation to Article 5 which provides for the right to liberty and security. **Part IV** of this paper looks at the mechanism for entering such a derogation, the requirements which must be met for the derogation to be valid, the terms of the derogation entered by the Government, and some of the reactions to the derogation.

Part V presents different perspectives on Part 4, including the Joint Committee on Human Rights, the Home Affairs Select Committee, various interest groups, and some members of the judiciary.

Part VI of this paper examines the use of the powers in Part 4 since the Act came into force in December 2001. Since that time eleven individuals have been detained. Two have left the UK while the others remain in detention pending their appeals before the Commission.

Part VII of this paper discusses a recent challenge to the legality of the Act which was heard before the Special Immigration Appeals Commission. In that case, the Commission found that the legislation was discriminatory under Article 14 of the ECHR because only non-British nationals could be detained under the Act. As such, the Commission found the detention of suspected international terrorists to be unlawful. The Government is appealing the decision to the Court of Appeal.

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I Overview of Immigration Detention

A. Introduction

This part of the paper is intended to put Part 4 of the *Anti-Terrorism Crime and Security Act 2001* in context. The provisions of detention in Part 4 are based upon an extension of the powers of immigration detention which existed before the Act came into force. As such, they apply only to those persons who are subject to immigration control and not to British nationals. Thus, an overview of law and policy on immigration detention is useful for an understanding of the basis of the Part 4 provisions and their implications. In particular, the general powers which the immigration service and the Secretary of State have to detain those subject to immigration control are set out. The limits which have been imposed on the power to detain, both by the domestic courts, and also by the European Convention of Human Rights are considered.

Both immigration officers and the Home Secretary have wide powers to detain persons subject to immigration control under the *Immigration Act 1971*.[1] There are no specific time limits on how long a person can be detained for immigration reasons. There is no automatic judicial oversight of detention, and unlike in criminal cases, there is no presumption in favour of bail.

In an announcement to the House of Commons on 29 October 2001, the Home Secretary stated that the existing 1,900 detention places available for immigration purposes were to increase to 2,800 by Spring 2002. The Government intends to expand the capacity by a further 40 per cent to 4,000 places.[2] As of 30 September 2001, the figures for the length of detention of the 1,425 existing detainees (excluding Oakington reception centre, which operates according to different principles)[3] are set out in the following table.[4]

Length of time in detention	**Number of detainees**
Less than 1 month	440
1 to 2 months	275
2 to 4 months	290
4 to 6 months	180
6 to 12 months	140
Over 12 months	100

1 Those who are not subject to immigration control include, principally, British citizens.
2 HC Deb 29 October 2001 Col 628-9
3 See below, **part I. F**.
4 Page 488 JCWI *Immigration, Nationality and Asylum Handbook* 2002

B. Powers of immigration officers

For immigration officers, the power to detain is incidental to their power to question or remove a non-national. Under the *Immigration Act 1971*[5], immigration officers are authorised to detain various categories of people. Broadly speaking, the different powers are tied to situations where a person who is subject to immigration control is an illegal entrant, has been or may be refused leave to enter the UK, or when directions have been made, or may be made, for his removal from the UK.[6] In some cases, the families of a person whose removal has been directed may also be detained. A person may be detained anywhere that the Secretary of State directs[7] and there are associated powers of arrest.[8]

In the case of a person who claims asylum at a port, or who has entered illegally and then claims asylum, the effect of the 1971 Act is that the person can be detained for the whole of the time it takes to determine the claim for asylum. This may take months, or in some cases, years.[9] However, it is subject to the limits imposed by the courts and by the ECHR which are discussed below.

As an alternative to detention, asylum seekers may be granted temporary admission which is a lesser status than leave to enter. Technically speaking, those with temporary admission have not been granted official leave to enter the country. Those who are temporarily admitted may be subject to conditions of residence, reporting and such like.

C. Powers of the Secretary of State

Schedule 3 to the 1971 Act provides that people who are subject to deportation orders may be detained at the Secretary of State's direction. A person may also be detained pending the making of a deportation order. As an alternative to detention, the Secretary of State may subject a person to a restriction order which imposes conditions of residence, reporting akin to temporary admission discussed above. The *Nationality Immigration and Asylum Bill*, currently before Parliament, seeks to extend the powers of the Home Secretary so he can detain in the same circumstances as the immigration service, as well as under his existing powers.[10]

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5 Paragraph 16 Schedule 2

6 See Page 779 *Macdonald's Immigration Law and Practice (2001)* Butterworths London, for further details.

7 *Immigration Act 1971* Schedule 2 Paragraph 18(1)

8 Ibid. Schedule 2 Paragraph 17

9 Page 780 *Macdonald's Immigration Law and Practice (2001)* Butterworths London

10 For further discussion, please see Library Research Paper on the *Nationality Immigration and Asylum Bill* 2002 RP 02/26 at page 59

D. Detention criteria

Neither the legislation not the immigration rules state what criteria should be applied in deciding whether to detain a person. The criteria for detention can be found in various Home Office policy statements which are consolidated in guidance to immigration service staff.[11] These instructions state that detention should be authorised "only when there is no alternative" and that "the overriding consideration is whether the person is likely to comply voluntarily with any restrictions imposed, including any arrangements for removal."[12] The 1998 White Paper, *Fairer Faster Firmer* confirmed there is a presumption in favour of temporary admission or release. The paper set out the criteria as follows:[13]

> **Detention criteria**
>
> **12.3** It is regrettable that detention is necessary to ensure the integrity of our immigration control. The Government has decided that, whilst there is a presumption in favour of temporary admission or release, detention is normally justified in the following circumstances:
>
> - where there is a reasonable belief that the individual will fail to keep the terms of temporary admission or temporary release;
> - initially, to clarify a person's identity and the basis of their claim; or
> - where removal is imminent.
>
> In particular, where there is a systematic attempt to breach the immigration control, detention is justified wherever one or more of these criteria is satisfied.
>
> **12.4** The Government also recognises the need to exercise particular care in the consideration of physical and mental health when deciding to detain. Evidence of a history of torture should weigh strongly in favour of temporary admission or temporary release whilst an individual's asylum claim is being considered.
>
> **12.5** The detention of families and children is particularly regrettable, but is also sometimes necessary to effect the removal of those who have no authority to remain in the UK, and who refuse to leave voluntarily. Such detention should be planned to be effected as close to removal as possible so as to ensure that families are not normally detained for more than a few days.
>
> **12.6** Unaccompanied minors should never be detained other than in the most exceptional circumstances and then only overnight with appropriate care if they, for example, arrive unaccompanied at an airport. Where they cannot be cared for

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[11] Page 502, JCWI *Immigration, Nationality and Refugee Law Handbook* (2002)

[12] Instructions to immigration staff dated 3 December 1991 and 20 September 1994 cited in JCWI *Handbook* (2002) Page 503.

[13] Page 53, Cm 4018 July 1998

> by responsible family or friends in the community, they should be placed in the care of the local authority whilst the circumstances of their case are determined. But the age of a person is not easily determined in every case. This is especially so where individuals enter the country with documents which suggest that they are an adult and later claim to be a minor. Sometimes people over 18 claim to be minors in order to be released from detention. In all cases, people who claim to be under the age of 18 are referred to the Refugee Council Children's Panel. Where reliable medical evidence indicates that a person is under 18 years of age they will be treated as minors and will therefore not normally be detained.

These criteria were modified in March 2000 to accommodate detention at Oakington reception centre (discussed below under **F**).[14]

E. Limits on the power to detain

Although the powers of detention set out in the legislation are wide, limitations on the powers have been imposed by the courts, and by the ECHR.

1. The courts

Where powers of detention exist, the courts have generally interpreted them narrowly with the minimum restriction on liberty. In *R v Governor of Durham Prison, ex parte Hardial Singh (1984) 1 WLR 704*, Woolf J (as he then was) said:

> Whilst of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred, the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court to high standards.

Woolf J then found that the powers to detain were subject to the following four implied limitations:[15]

- Detention can only be used for the purpose of the particular immigration action for which the legislation allows it to be used, for example, pending examination by an immigration officer, or pending removal;
- A person may be detained only for as long as it is reasonably necessary to carry out the immigration action for which the power was given;
- The immigration authorities must act with speed to ensure that the immigration action is carried out within a reasonable time;
- If it appears that the purpose cannot be carried out within a reasonable time, that detention will no longer be lawful and the person must be released.

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[14] Page 66, *Secure Borders Safe Haven* Cm 5387

[15] Page 498, JCWI *Immigration, Nationality and Refugee Law Handbook* (2002)

It follows from this decision that excessive delay renders the use of the power unlawful. Equally, it decides that where a person is detained pending removal but there is no practical prospect of removal within a reasonable time, the detention is unlawful. These principles are important to bear in mind in the context of Part 4 of the *Anti-terrorism Crime and Security Act 2001* where indefinite detention is permitted.

2. Article 5 of the European Convention on Human Rights

Detention is also subject to the requirements of Article 5 ECHR which provides for the right to liberty, subject to the exceptions listed in the Article. Article 5 says:

> 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.

The Article then goes on to list the exceptions where it is permissible to restrict the right to liberty. Article 5(1)(f) is the exception which relates to immigration detention. Detention is permitted if it comprises:

> …the lawful arrest and 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

Thus Article 5 permits detention for the purposes of immigration control in two circumstances. A person may be detained to prevent him from entering the UK unlawfully. Secondly, a person may be detained pending his enforced departure from the UK. It is for the immigration authority to justify detention by showing that it is to prevent unlawful entry or to expel a person from the UK. The immigration authority must also show that detention is in accordance with domestic law, and is proportionate to its aim.[16]

The European Court decided in the case of *Chahal* that detention was justified under the second head only if deportation proceedings were in progress.[17] This relevant to the *Anti-Terrorism Crime and Security Act 2001* which conversely permits indefinite detention.

F. Oakington reception centre

Oakington reception centre is a detention centre which operates according to different principles from the other centre, as it is designed to fast-track straightforward claims deemed to be without merit by the immigration authorities. The applications are supposed to be dealt with within 7 to 10 days. According to Government figures, up to 250 applications can be processed at the centre each week.[18] Detention at Oakington has

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[16] Page 789 *Macdonald's Immigration Law and Practice (2001)* Butterworths
[17] Chahal v UK (1996) 23 EHRR 413
[18] *Secure Borders, Safe Haven* Cm 5387 page 65

been criticised as simply for the administrative convenience of the immigration authorities.[19]

In 2001 the lawfulness of such detention in Oakington was challenged in the Administrative Court by four Kurds who had been detained in Oakington upon their arrival into the UK. On 7 September Mr Justice Collins gave judgement in favour of the asylum seekers.[20] They had been detained for a period not exceeding ten days in Oakington Reception Centre. Mr Justice Collins held that this detention was unlawful because 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.[21] The Court of Appeal held that the short-term detention of asylum seekers was held to be reasonable and not unlawful.[22] The case was appealed to the House of Lords, and was heard in May 2002. The judgement is awaited.

G. Bail

Most of those who have been detained under the *Immigration Act 1971* may seek bail.[23] This includes those detained pending examination by an immigration officer, and also those detained pending an appeal. Bail may be granted by a chief immigration officer, a police officer, or by an adjudicator or tribunal. In certain cases, bail may be granted by the Special Immigration Appeals Commission.[24] Conditions may be imposed, and those who breach the conditions may be arrested.

Under Part III of the *Immigration and Asylum Act 1999*, a system of automatic bail hearings and a statutory presumption in favour of bail was to be introduced. However, Part III has never been brought into force. The *Nationality Immigration and Asylum Bill 2002* will repeal Part III.[25]

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[19] ILPA's comments on the white paper *Secure Borders Safe Haven* available from http://www.ilpa.org.uk/ under "Latest News"

[20] Source: Lawtel 7 September 2001 (unreported elsewhere)

[21] *R v Secretary of State for the Home Department ex parte Shayan Baram Saadi, Zhenar Fazi Maged, Dilshad Hassan Osman and Rizgan Mohammed* [2001] 4 All ER 961

[22] Full text of the judgement is available from the Court Service web-site at http://porch.ccta.gov.uk/courtser/judgements.nsf/5cbcc578c01a9c02802567170061b8c6/77c2f8b7fd6dd62580256aea0034b57f/$FILE/Saadi_%26_Ors_v_SSHD_appeal.htm

[23] Under paragraph 22 of Schedule 2 of the 1971 Act as amended by the *Asylum and Immigration Act 1996* and the *Immigration and Asylum Act 1999*. Further information on precisely whom is entitled to bail can be found on Page 796 of *Macdonald's Immigration Law and Practice* (2001) Butterworths London

[24] See below for discussion at **III:B**

[25] Further information on the repeal of Part III of the 1999 Act can be found in the Library Research Paper RP 02/26 at page 61

H. Location of the detention centres

Detainees can be held at ports, prisons, detention centres, police stations and appeal hearing centres. The current detention centres are at Campsfield House, Kidlington near Oxford; Harmondsworth, near Heathrow airport; Tinsley house near Gatwick airport; Oakington, Cambridgeshire; Yarl's Wood in Bedfordshire; Dungavel in Scotland.

Until January 2002, Prison Service accommodation had been used to accommodate asylum seekers, instead of immigration detention centres. Asylum seekers (who were not accused/convicted of any crime) were held in the same conditions as remand prisoners.

At the Labour Party conference in October 2001, David Blunkett announced that the Government would end the practice of detaining asylum seekers in prison. This was reiterated by Angela Eagle, the former Home Office minister, later that month.[26] In view of the change in policy, a number of prisons were formally re-designated as immigration removal centres on 8th February 2002. They continue to house asylum seekers but are required to operate under immigration detention rules rather than prison rules.[27] However, following the fire at Yarl's Wood detention centre[28] in February 2002 some detainees are again being held in prisons.[29]

I. Internment under UK law

This part of the research paper examines when internment of terrorists has been permitted in the UK under previous legislation. Internment is a different issue from the foregoing discussion on immigration detention because, historically, it has not been restricted to those subject to immigration control. In the UK, internment measures have been directed at controlling potential terrorists irrespective of whether they are a British national or alternatively subject to immigration control. An overview of the UK law relating to internment is relevant in the context of the *Anti-Terrorism Crime and Security Act 2001* because the provisions of Part 4 have been criticised as amounting to internment without trial. This is strongly denied by the Home Secretary David Blunkett. For further discussion of debate, please see below under **V**.

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:[30]

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26 HC Deb 24 October 2001 Co109WH
27 HC Deb 20th March 2002 Col 410W
28 For further discussion, please see Library Research paper 02/26 at page 52
29 Immigration Law Practitioners' Association response to the Government's White Paper *Secure Borders Safe Haven*, page 12. Available from: www.ilpa.org.uk under "Latest news."
30 Paul Wilkinson (1986) T*errorism and the Liberal State* 2nd ed

> 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 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.

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:[31]

> 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

[31] HL Deb 12 January 1998 Col 889-90

> 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:[32]

> 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.
>
> 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

32 HC Deb 18 November 1997 Col 181-82

> 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:[33]

> 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 arguable that any future re-introduction of internment might lead to court challenges alleging breaches of Articles 5 and 6 the ECHR. Article 5 provides the right to liberty and security (discussed above under **I:E:2**) whilst Article 6 provides the right to a fair and public hearing 'within a reasonable time' by an independent and impartial tribunal established by law.

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

[33] Cm 3420 Vol 1, para.18.14

> (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.[34] 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.

II Response to the terrorist attacks in the USA – the *Anti-Terrorism Crime and Security Bill*

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 to be introduced by the *Anti-terrorism Crime and Security Bill.*[35] In his statement, the Home Secretary said:[36]

> It is the first job of Government and the essence of our democracy that we safeguard rights and freedoms, the most basic of which is to live safely and in peace. It is now necessary that we look afresh, in a measured and proportionate manner, at whether our legal framework is adequate and our security sufficient.
>
> Although the nature and the level of the threat is different from what was previously envisaged, wholesale revision of our anti-terrorism laws is unnecessary. That is also the view of the law enforcement agencies. However, we do need specific and targeted measures, which is why I intend to introduce an emergency anti-terrorism Bill. I am determined to strike a balance between respecting our fundamental civil liberties and ensuring that they are not exploited.

At Second Reading of the Bill, David Blunkett, expanded on the Government's view that Part 4 of the *Anti-terrorism Crime and Security Bill* was a necessary response to the events of 11 September.[37] He referred to an article in *The Times* newspaper:

> An article in *The Times* on 15 September stated:
>
> "Despite fine promises and emergency legislation, Britain is still home to hundreds of extremists who have made this country one of the centres for the

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[34] personal communications 18 September and 11 October 2001

[35] Bill 49 2001-02. Further Research Papers on the *Anti-terrorism Crime and Security Bill* are available from the Parliamentary intranet from the following link: http://hcl1.hclibrary.parliament.uk/sections/terrorism.htm

[36] HC Deb 15 October 2001 Col 924

[37] HC Deb 19 November 2001 Col 22

> violent transnational network that inspired and encouraged the barbarism in New York and Washington."
>
> That is just one of hundreds of statements that have been made over the past 10 weeks about what people perceive to be the situation in our country. Again and again, people—including people in the United States—have illustrated the real dangers that exist, and it is on that basis that I shall spell out today why we felt it necessary to act.
>
> Let us recall for a moment not just what happened on 11 September, but what has happened since. Let us recall the interviews given and the video recordings made by bin Laden and the al-Qaeda group, which have spelt out their determination not simply to threaten once, but to threaten the civilian populations of the United States and those working with it. It is for that reason that we are proposing measures allowing us to take rational, reasonable and proportionate steps to deal with an internal threat and an external, organised terrorist group that could threaten at any time not just our population, but the populations of other friendly countries.

The full text of the Second Reading debate can be found at HC Deb 19 November 2001 Col 22.

Amongst the Government's proposals, changes to the existing powers of immigration detention were put forward to enable the indefinite detention of suspected international terrorists.

In evidence before the Joint Committee on Human Rights, David Blunkett explained the particular situation which these provisions were intended to address.[38] An individual may be suspected to be an international terrorist, and thus a threat to UK security. However, there may be insufficient evidence to charge and convict him of a criminal offence. Equally, it may not be possible to deport the person to his home country. Deportation would be impossible, for example, if on the person's return he would face torture contrary to the UK's obligations under Article 3 ECHR. Another obstacle might be if it was not practically possible to arrange transport back to the home country. The Home Secretary said:[39]

> 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

[38] Joint Committee on Human Rights 14 November 2001: Uncorrected evidence
[39] Ibid.

> 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.

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.

The Government's solution to the security threat presented by such an individual in the scenario as outlined above was to introduce measures in Part 4 of the *Anti-terrorism Crime and Security Bill*[40] to enable the suspected terrorist to be detained indefinitely until such time as he could be tried or deported. However, as discussed above,[41] under the law as it stood before the Act, indefinite detention was unlawful according to the case law of the UK courts, and also under Article 5 of the ECHR.

The conflict with the case law of the courts was overcome simply through the principle of parliamentary sovereignty. By passing the new legislation, the provisions of Part 4 would supersede the case law of the courts. Thus, indefinite detention in the circumstances provided for by the new Act would no longer be unlawful. However, the problem remained that indefinite detention would almost certainly contravene the UK's obligations under Article 5 of the ECHR as the person would not be detained *with a view to deportation*. As a result, the Home Secretary announced that a derogation from Article 5 of the ECHR would be entered before the Bill became law.[42]

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40 Bill 49 2001-02. For full analysis, please see Library research paper RP 02/96 which is available from the Parliamentary intranet.

41 **I:E**

42 The derogation is discussed further below under **IV**

Speaking in the Commons on 15 October 2001, David Blunkett said:[43]

> 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.[44]

One alternative course of action which was favoured by the Conservatives during the Bill's passage through Parliament was to withdraw from or de-ratify the ECHR entirely, and then to re-enter the ECHR with a reservation to Article 3 (protection from torture, inhuman or degrading treatment). This would have enabled suspected terrorists to be deported back to their home countries even when they would face torture contrary to Article 3. In an article in the *Daily Telegraph*, the shadow Home Secretary Oliver Letwin said that the proposed detention of foreign nationals could make Britain a target for reprisals or hostage taking:[45]

> Internment may actually threaten our public safety. If we have to detain significant numbers of dangerous foreign nationals in Britain, there is a severe risk of inviting reprisals in which, for example, British subjects might be taken hostage in an attempt to trade their freedom for the release of the suspects.

Instead, he argued that Britain should suspend the operation of Article 3 and deport suspected terrorists to their home country.

However, in his original announcement to the House of Commons, the Home Secretary had discounted this option:[46]

> 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

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[43] HC Deb 15 October 2001 Col 924

[44] For a discussion of Article 1f of the 1951 Convention, see above at **I:J**

[45] "Internment A 'Threat To Pillar Of Freedom'" *Daily Telegraph* 16 November 2001

[46] HC Deb 15 October 2001 Col 927 - 8

> 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.

An initial response to the Home Secretary’s announcement was reported by the *Guardian* which quoted the views of John Wadham of Liberty:[47]

> […]
>
> 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."

The provisions of the Act, the role of the Special Immigration Appeals Commission, and the derogation from the ECHR will now be examined in greater detail in sections **III** and **IV**.

III The *Anti-Terrorism Crime and Security Act 2001*

A. Overview

As a preliminary point, it is important to note that the provisions of Part 4 which enable a suspected international terrorist to be detained apply only to those subject to immigration control. As such they do not apply to British citizens who cannot be subject to UK immigration control, and so cannot be deported or removed from the UK, or detained pending removal.[48]

In summary, the Act allows the Secretary of State to certify an individual as a suspected international terrorist. Even if that individual cannot actually be removed from the UK (for example, for practical considerations or because removal would breach Article 3 ECHR) the Secretary of State may make various decisions which authorise the

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[47] “UK To Intern Terrorist Suspects” *Guardian* 16 October 2001

[48] For discussion please see :
S Payne, *Britain’s new anti-terrorist legal framework*, RUSI Journal 147(8) p45, 1 June 2002

individual's removal. Thus, for example, a deportation order can be made, or removal directions issued. Once the decision has been taken to authorise the individual's removal, the powers of the Secretary of State or the immigration service to detain under the *Immigration Act 1971* come into play. As a result, the individual may be detained under the immigration detention provisions discussed above under **I:B** and **C**).

However, previously, *indefinite* detention would have been unlawful according to the case law of the courts, and also under Article 5 ECHR (see discussion under **I:E** above). Thus the Government had to adopt specific mechanisms to ensure the new provisions were compatible with domestic case law, and the ECHR.

The conflict with the case law of the courts was overcome simply by the principle of parliamentary sovereignty. By passing the new legislation, the provisions of Part 4 of the Act automatically supersede the case law of the courts. Thus indefinite detention in the circumstances provided for by the Act is no longer unlawful. However, to avoid the Act being in contravention of the UK's international obligations under the ECHR, the Government had to use a different mechanism. A derogation to Article 5 of the ECHR under Article 15 ECHR was entered.

The Act itself provides for the right of appeal to the Special Immigration Appeals Commission with a right of appeal to the Court of Appeal on a point of law. The Commission has the right to hear applications for bail. The Act provides that the Commission must automatically review the lawfulness of each detention every six months. The legality of the derogation from Article 5 ECHR can be challenged only before the Commission, and the Commission alone has jurisdiction to deal with any challenge to certification or detention at first instance. Controversially, judicial review and *habeas corpus* are not available.

The provisions of the Act are examined in greater detail under **III:C**. Before this, the role and procedure of the Special Immigration Appeals Commission is outlined.

B. Special Immigration Appeals Commission

Before 1998, there was no right of appeal to an independent tribunal if the basis for an immigration decision (such as refusal of leave to remain, or the decision to deport an individual) were national security or political grounds. This lack of appeal was criticised by the European Court of Human Rights.[49] As a result, the Special Immigration Appeals Commission was established by the *Special Immigration Appeals Commission Act 1997*. This Act provides a right of appeal to the Commission against almost all immigration decisions made on national security or political grounds.

[49] *Chahal v UK* (1996) 23 EHRR

Special procedures[50] apply, which are designed to enable a proper review of executive power, but also to prevent the disclosure of sensitive information which might threaten national security. Essentially, an appellant is entitled to two sets of representatives. They are entitled to the usual representation by a lawyer. In addition, they are allocated a "special advocate" who has been security vetted. The role of each lawyer depends on the type of evidence which is being presented to the Commission. Material which is not sensitive to national security is disclosed to the ordinary lawyer in the usual way. All non-sensitive evidence (called "open" material) is heard before the Commission in public. The appellant's lawyer has the opportunity to cross examine witnesses and make representations on this open evidence.

The role of the special advocate relates to the evidence which contains material sensitive to national security. Such material will be disclosed to the special advocate only. Sensitive evidence (called the "closed" material) will be heard before the Commission at a private hearing where the special advocate is present, but in the absence of the appellant and the appellant's ordinary lawyers. The special advocate then has the chance to cross examine witnesses and make representations on behalf of the appellant in respect of the closed material. Once the special advocate has seen the sensitive material he can have no further contact with the appellant without the leave of the Commission.[51]

The special advocate represents the appellant's interests on appeal but is not instructed by or responsible to the appellant. In other words, the special advocate has no professional obligation to tell the appellant what he has seen in the sensitive material. This may be contrasted with the professional duty of the ordinary lawyer who would have to appraise his client of all material in the case. An appeal lies from the Commission to the Court of Appeal with leave.

C. Detailed analysis of Part 4 of the Act

Sections 22 to 23 of the Act extend the powers to detain under the *Immigration Act 1971* to cases where the Secretary of State is seeking to remove a suspected international terrorist but where such removal is not currently possible. The obstacle to removal may arise from the UK's international obligations (notably under the ECHR), or from practical considerations (for example, when there is no country which is willing to receive the individual).

Section 22 provides that certain actions may be taken in respect of a certified international terrorist despite the fact that the individual cannot be removed from the country. Thus the individual may be refused leave to enter or remain in the UK, and

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50 Contained in the *Special Immigration Appeals Procedure Rules* 1998 SI 1998/1881 as amended by the *Special Immigration Appeals Commission (Procedure) (Amendment) Rules* 2000.

51 For a full discussion on the role of SIAC please see *Macdonald's Immigration Law and Practice* (2001) Butterworths London at page 914

existing leave may be cancelled. A recommendation for a deportation order may be made, as may a decision by the Home Secretary to deport. Directions for the removal of the individual from the UK may be made.

The reason it is necessary to enable such actions to be taken even though they cannot, for the time being, result in a removal is that the immigration detention powers are tied to such actions having been taken.

Section 23 provides that a suspected international terrorist may be detained under the *Immigration Act 1971* despite the fact that his removal from the UK is prevented by an international agreement or practical considerations.

The Explanatory Notes summarise the effect of the provisions in the following terms:[52]

> **73.** 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 is 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.
>
> **74.** 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 sections 21 to 23 needs to be taken to safeguard national security against the threat posed by suspected international terrorists whom the UK wishes to but cannot remove.
>
> **75.** Sections 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 has on 18 December 2001 notified the Secretary General of the Council of Europe of a derogation from Article 5 of the ECHR (right to liberty and security) to the extent necessary to ensure that the measures contained in sections 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.

Section 24 provides that the Special Immigration Appeals Commission is to decide bail applications for detained suspected international terrorists.

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[52] Available from:
http://www.hmso.gov.uk/acts/en/01en24-a.htm

Sections 21 and **25** to **26** provide the procedure by which the Secretary of State may certify someone to be a suspected international terrorist. Provision is made for appeal against the certificate and for review of detention.

The Secretary of State may issue a certificate in respect of a person if he reasonably believes that the person's presence in the UK is a risk to national security, and suspects that the person is a terrorist. A terrorist is defined as a person who:[53]

> a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism.
> b) is a member of or belongs to an international terrorist group;
> c) has links with an international terrorist group.

A person has links with an international terrorist group only if he supports or assists it.[54] The original Bill did not contain any definition of "links" with an international terrorist group. A definition was subsequently added following criticisms that the term was too broad.[55]

A group is defined as an international terrorist group if it is subject to the control or influence of persons outside the UK, and the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.[56]

Terrorism in this part of the Act has the meaning given by the *Terrorism Act 2000* – the use or threat of action[57] designed to influence the government or to intimidate the public or a section of the public and made for the purpose of advancing a political, religious or ideological cause.[58] In addition, terrorism occurs when firearms or explosives are used or threatened in the above circumstances even without the desire to influence the government or intimidate the public.[59]

Where the Secretary of State issues a certificate under this Part, he must take steps to notify the person certified as soon as reasonably practicable. He must also send a copy of the certificate to the Special Immigration Appeals Commission.[60]

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[53] Section 21(2)
[54] Section 21(4)
[55] See discussion of the issue between Sean Woodward and David Blunkett in evidence to the Joint Committee on Human Rights: uncorrected evidence 14 November 2001.
[56] Section 21(3)
[57] The action must (a) involve serious violence against a person; (b) involve serious damage to property; (c) endanger a person's life, other than that of the person committing the action; (d)create a serious risk to the health or safety of the public or a section of the public; or (e) be designed seriously to interfere with or seriously to disrupt an electronic system *Terrorism Act 2000* s1(2)
[58] Section 1(1), 2000 Act
[59] Section 1(2) or (3), 2000 Act
[60] Section 21(6), 2001 Act

The Act provides for the right to appeal against a certificate to the Commission.

The Explanatory notes elaborate on how the appeal system works:

> **85.** Section 25 provides for an appeal against the decision of the Secretary of State to make a certificate under section 21. 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 or, with leave of SIAC, after three months but before the commencement of the first review under section 26. SIAC will consider whether or not there are reasonable grounds for a belief or suspicion of a kind referred to in section 21(1). If SIAC considers that there are not reasonable grounds 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. Otherwise it will dismiss the appeal. For either outcome, there will by virtue of section 27(1) (b)be the right to seek leave to appeal to the Court of Appeal (or its equivalents in Scotland and Northern Ireland).

The Act specifically (and controversially) excludes the usual legal safeguards of judicial review and *habeas corpus*.[61]

In addition to a possible appeal, each certificate must be reviewed periodically by the Special Immigration Appeals Commission. The review process is automatic, and the detainee does not have to apply for it to take place. If an appeal has been lodged, the review must take place as soon as reasonably practicable six months after the final determination of the appeal. If no appeal has been brought, the review must take place as soon as reasonably practicable six months after the certificate's issue.[62] After the first review, subsequent reviews must take place at three-monthly intervals. On review, the Commission has the power to cancel the certificate if it believes there are no reasonable grounds for a belief or suspicion that the person is an international terrorist. However, the Act also provides that cancellation by the Commission of a certificate issued under **Section 21** shall not prevent the Secretary of State from issuing another certificate whether on the grounds of change of circumstances or otherwise.[63]

Section 28 provides that the Secretary of State shall appoint a person to review the operation of **sections 21** to **23**. The review must take place before fourteen months have elapsed since the passing of the Act. This provision was added to the Bill during the course of its passage through Parliament.

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[61] Section 21(8) and (9)
[62] Section 26
[63] Section 27(9)

In addition, a committee of Privy Councillors has been appointed under **section 122** of the Act to review the whole Act and present a report on it within two years of the Act being passed – ie. by 14 December 2003. In a highly unusual provision, any section of the Act specified by this committee will cease to have effect six months after the report was laid before Parliament (unless a motion is made in each House of Parliament considering the report).[64]

Section 29 provides for the duration of **Sections 21** to **23**. Subject to **Section 29(2)** these provisions will expire at the end of the period of fifteen months beginning with the day on which the Act was passed – in other words, once these sections have been reviewed under **section 28.** However, **Section 29(2)** provides that the Secretary of State may by order:

- repeal sections 21 to 23
- revive those provisions for a period not exceeding one year
- provide that those sections shall not expire at the end of the 15 months period but shall continue in force for a period not exceeding one year

Such an order by the Home Secretary must be laid in draft before Parliament and is subject to affirmative resolution. However, an order may be made without laying a draft before Parliament if it contains a declaration by the Secretary of State that by reason of urgency it is necessary to make the order without doing so. In this case, the order itself must be laid before Parliament and shall cease to have effect unless it is approved within 40 days.

Section 29(7) contains a sunset clause which provides that **sections 21** to **23** shall cease to have effect at the end of 10 November 2006. This is the day on which the derogation from Article 5 ECHR will cease to have effect for the purposes of the *Human Rights Act 1998*. To continue, Part 4 would have to be re-enacted or extended by primary legislation. The derogation would have to be extended by another order.

Section 30 provides that any legal proceedings which call into question the validity of the UK's derogation from Article 5 of the ECHR can only be heard before the Special Immigration Appeals Commission, and not before another court or tribunal (such as the High Court in judicial review proceedings).

The Explanatory Notes say:[65]

> **91.** Section 30 is concerned with proceedings which to any extent challenge the UK's derogation from Article 5 of the ECHR or the designation under section 14(1) of the Human Rights Act 1998 which reflects that derogation. These are

[64] **Section 123**
[65] http://www.hmso.gov.uk/acts/en/01en24-a.htm

> referred to as derogation matter. Section 30 provides that a derogation matter may be questioned only in proceedings before SIAC. One effect of this is that SIAC is the appropriate venue for hearing proceedings relating to derogation matter which are brought under section 7 of the Human Rights Act 1998. Ancillary provisions are made to enable SIAC to hear proceedings which, but for this section, could be brought in the High Court or the Court of Appeal; and to enable SIAC to award costs in relation to the derogation matter. An appeal against the decision of SIAC would go to the Court of Appeal (or its equivalents in Scotland and Northern Ireland).

Section 33 enables the Home Secretary to certify an individual as not being entitled to asylum under the terms of the Refugee Convention Relating to the Status of Refugees 1951. The Home Secretary may present the Special Immigration Appeals Commissioner with a certificate to the effect that an asylum appellant is not entitled to the protection of the 1951 Refugee Convention, because Article 1(f) or Article 33(2) apply to him, and that the individual's removal from the UK is conducive to the public good. Although the section is drafted in more general terms, the section is intended to enable the Secretary of State to prevent a suspected international terrorist from delaying their removal from the UK on asylum grounds.

Article 1(f) provides:

> The Provisions of this Convention shall not apply to any person 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.
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as refugee
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 33(2) provides that the protection which a refugee receives under the Refugee Convention against return to a country where he will be persecuted

> …may not be claimed by a refuge whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The effect of a certificate by the Home Secretary that one or both of these sections applies is to compel the Special Immigration Appeals Commission to dismiss the part of the appeal which related to asylum without considering whether the individual is at risk from persecution under the Refugee Convention 1951. Appeals against the Commission's

decision can be taken to the Court of Appeal or its equivalents in Scotland and Northern Ireland.

The Explanatory Notes observe:[66]

> **93.** Section 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.
>
> **94.** Article 33(1) - often termed the *non-refoulement* provision - prevents the removal of a refugee where this would lead to their life or freedom being threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. Article 33(2) provides an exception to this protection where there are reasonable grounds for regarding the refugee as a danger to the security of the country. Article 1(F) states that the provisions of the Convention are not to apply to persons with respect to whom there are serious grounds for considering that they have committed an offence or action listed in that Article. These include acts contrary to the purposes and principles of the United Nations, which is taken to include terrorist acts - see, for example, Article 3(3) of UN Security Council Resolution 1373, passed on 28 September 2001, which required States to "Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts".
>
> **95.** So if either or both of Article 1(F) or 33(2) apply then a person can be removed without contravening the UK's obligations under the Refugee Convention. The Government is therefore of the view that it is 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 section 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.
>
> **96.** 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.

[66] http://www.hmso.gov.uk/acts/en/01en24-a.htm

> **97.** 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).
>
> **98.** The section 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 prevents legal proceedings being take against 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.

Section 36 removes the requirement within the *Immigration and Asylum Act 1999* to destroy fingerprints which have been taken from various persons subject to immigration control upon the resolution of their asylum or immigration claim. This applies to fingerprints already on record as well as those which might be taken in the future.

IV Derogation from the European Convention on Human Rights[67]

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 of the paper looks at the derogation provision in the ECHR, how it has been used in the past and how the European Court of Human Rights (and the Commission of Human Rights before 1998) has approached its use.

B. Article 15 of the ECHR

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

[67] Contributed by Vaughne Miller of IADS, House of Commons Library

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 first use of derogations arose in two applications brought by the Greek Government against the UK concerning Cyprus when it was under British rule.[68] 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".[69] 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:[70]

> 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.[71]

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

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

[69] *Greece v UK*, No. 176/57.

[70] *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.

[71] Judgment, 1 July 1961, Para. 2.

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 other 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.

D. How the European 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:[72]

> … 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:[73]

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[72] *Lawless* judgment, 1 July 1961, Para. 28.
[73] *Ibid*, Para. 207.

> 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 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.[74] 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.[75] 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.[76]

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

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[74] *Greek Case*, (1969), 2YB, 32.
[75] *Ibid*. 76.
[76] *Greek Case*, 135-6 & 148-9.

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.[77]

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.[78] 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.[79]

The Court also required that "the interpretation of Article 15 must leave a place for progressive adaptation".[80]

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.[81] 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.[82]

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

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[77] *Lawless* judgment, 1 July 1961, paras. 31-8.
[78] *Ireland v UK*, judgment, 18 January 1978, Series A, No.25; (1979-80) 2 EHRR 25.
[79] *Ireland v UK* (1978) 2 EHRR 25:
[80] *Ireland v UK*, judgment 18 January 1978, Para. 83.
[81] *Brannigan and McBride v UK*, judgment 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539.
[82] *Brannigan and McBride v UK*, judgment 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539, Para. 43.

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.[83,84] Since 1987 ten of the eleven provinces of 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.[85] 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: [86]

> 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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[83] Application 00021987/93, judgment 18 December 1996.

[84] Around 4,000 in each case, according to figures supplied by the Turkish Government in 1994.

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

[86] *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*[87]

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*.[88]

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[87] UP 638 2001/02.

[88] 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).

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*.[89] 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. Notification to the Council of Europe

On the 18 December 2001, the UK provided the Secretary General of the Council of Europe with a *note verbale* which provided the information required by article 15(3) to be notified to the Council. The content of the *note verbale* can be found in the Schedule to the *Human Rights Act 1998 (Designated Derogation) Order 2001* discussed above.

G. Challenge to the derogation

At the time the question of derogating from the ECHR was first raised by the Home Secretary, the likelihood of a challenge to the lawfulness of such a derogation was contemplated. A challenge could be mounted in the domestic courts or in the European Court of Human Rights. John Wadham and Shami Chakrabarti[90] considered the lawfulness of a UK derogation from the ECHR in an article in the *New Law Journal* in October 2001:[91]

> Although the atrocities in the United States were shocking and substantial, and although some groups have identified the United Kingdom as a legitimate target

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89 *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".

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

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

> of similar attacks, it is not clear whether the [European Court of Human Rights] 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*.

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 Qa'ida 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".[92] 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.[93]

Under the Act, the derogation can only be challenged in the domestic courts before the Special Immigration Appeals Commission.[94]

For details of the recent challenge to the lawfulness of the derogation before the Special Immigration Appeals Commission, please see discussion below.

H. 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.[95] Article 16 of the French Constitution confers wide-ranging powers on the President in the event of a state of emergency. Article 16 provides:

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[92] *Guardian* 13 November 2001.
[93] HC Deb 12 November 2001 Col 572-3
[94] section 30(2)
[95] Jacobs and White (1996) *The European Convention on Human Rights* 2nd edition

> 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:

> 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.[96]

Jacobs and White comment:[97]

> 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.

V Perspectives on Part 4 of the Act

A. Introduction

Many of the following perspectives were put forward in response to the Bill[98] rather than final version of Part 4 contained in the Act itself. Nevertheless, the following comments consider issues which continue to be relevant to an evaluation of the Act. For the sake of clarity, any references to the provisions of the Bill have been substituted with their equivalent sections in the Act. However, it should be remembered that the Bill underwent substantial changes from the original published Bill, to the version which ultimately passed onto the statute books.

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

[97] Jacobs and White, p.324.

[98] Bill 49 2001-02

B. Evidence to the Joint Committee on Human Rights

Issues arising from Part 4 were aired during the evidence given by the Home Secretary, David Blunkett, to the Joint Committee on Human Rights on 14 November 2001, shortly after the publication of the Bill. 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.[99]

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:[100]

> **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 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,

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99 Joint Committee on Human Rights 14 November 2001: Uncorrected evidence
100 Joint Committee on Human Rights 14 November 2001: Uncorrected evidence

> 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:[101]

> **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.

On this basis, the Home Secretary argued that Part 4 did not amount to internment.

C. Home Affairs Select Committee

In its report on the Bill, the Home Affairs Committee described the "intractable problem" of dealing with those terrorist suspects who cannot be removed or extradited from the United Kingdom and suggested that the Government should work with European neighbours to find a solution:[102]

> **20.** Whilst we do not, for a moment, suggest that the Government should send people back to countries where they would be at risk of torture or ill-treatment, we do think that the Government should engage in a review with our European partners, with a view to finding some acceptable solution that might avoid the need to exercise a power of indefinite detention. It would be desirable for the Home Secretary, who is accountable to Parliament, to be able to exercise his discretion within the framework of Article 3.

The Committee accepted with reluctance that some suspected international terrorists might have to be detained, but argued that this should be used as a measure of last resort:

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

[102] Home Affairs Committee: First Report Session 2000-01 *Terrorism, Crime and Security Bill 2001* Report with Minutes of Proceedings, together with Minutes of Evidence and Appendices HC 351 19 November 2001

> **27.** We reluctantly accept that there may be a small category of persons who are suspected international terrorists who cannot be prosecuted, extradited or deported and therefore will have to be detained.
>
> […]
>
> **34.** We are concerned that the power of detention is exercised only as a last resort, *i.e.,* in circumstances where it is clearly not possible to proceed with prosecution, extradition or deportation. The Committee understands that, in some cases, prosecutions do not proceed because certain types of intelligence, such as telephone intercepts, cannot be admitted in court. We believe that within the law enforcement community there is a variety of views on whether such evidence should be used in court. We suggest that the Government conduct a review of the law and procedure relating to the admissibility of intercept evidence in court, with a view to extending the circumstances in which such evidence could be admitted.

The Committee then went on to consider the safeguards in the Bill including the availability of an appeal, review by the Commission, and the provision for bail.

They said:

> **36.** The proposed safeguards about the process for individual cases are acceptable in the circumstances. Given the previous experience with similar powers of detention, we shall take a close interest in the way this power is implemented.
>
> **37.** [Section 29] provides the additional safeguard of a time-limit on the duration of the certification and detention provisions in [sections 21 to 23], with the effect that these [sections] will expire after a period of 15 months, unless renewed (or revived) for periods not exceeding one year, by statutory instrument, approved by affirmative resolution.

The Committee also suggested that the need for continuing powers of detention should be reviewed by an independent commissioner and that there should be "sunset clauses" within the legislation. These suggestions were later introduced as the Bill passed through its Parliamentary stages.[103]

The Home Affairs Committee also accepted that removal of judicial review was justified:

> **53.** We are reluctantly persuaded of the case for removal of judicial review in decisions made by the Special Immigration Appeals Commission.

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[103] Now section 28 and section 29(7) of the Act

D. Other views on Part 4

1. Liberty

Liberty (the National Council for Civil Liberties) has argued that the proposals to detain suspected international terrorists amount to internment. They argued such measures are wrong in principle and disproportionate to the threat facing the United Kingdom:[104]

> "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. Liberty indicated that they would seek to challenge what they saw as the unnecessary and unjust detention of suspected international terrorists. On the asylum and immigration issues dealt with in this paper, Liberty argued:[105]

> 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. 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.

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104 *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/

105 *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

> **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.
>
> […]
>
> **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. In an article in the *Independent* David Blunkett reportedly stressed that the only other option was to withdraw from the ECHR entirely to allow suspects to be sent back to countries where their life would be threatened. [106]

2. Immigration Law Practitioners Association

ILPA is the UK's professional association of lawyers and academics practicing, or concerned with, immigration asylum and nationality law and policy.

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

During the passage of *Anti-terrorism Crime and Security Bill* through Parliament, ILPA produced a briefing[107] on the provisions of the Bill. On Part 4 of the Bill, they made the following comments:[108]

> **3.** ILPA objects to the premise of the proposals in Part IV of the Bill which is predicated on the discriminatory treatment of non British nationals. The exercise by the Home Secretary of the power of indefinite detention of those whom he reasonably *believes* to be a risk to national security and reasonably *suspects* to be international terrorists can only be exercised in respect of those subject to immigration control. For others, the normal application of the criminal law with all its attendant safeguards mean the possibility of arrest only where there is evidence which is objectively verifiable.

The briefing continued:

> **4.** ILPA opposes derogation from the right to liberty contained within Article 5 ECHR; this is a fundamental human right which underpins a democratic and free society. Derogation under Article 15 is permissible only where a state of emergency threatens the life of the nation and measures taken are strictly required by the exigencies of the situation. It is precisely because of the extensive powers contained in the Terrorism Act 2000 – which have not themselves been shown deficient where British citizens are concerned since the scope of derogation does not apply to them - that ILPA considers derogation to be unnecessary. If persons are reasonably suspected of involvement in terrorism they must be prosecuted – not indefinitely detained by administrative decision.

ILPA also said that "a glaring omission [from the Bill] is the absence of reference to PACE." In their view, those arrested under the Act should have the same protection under the *Police and Criminal Evidence Act 1984* as those arrested and detained on suspicion of crime.

Later in the briefing, ILPA analysed the provisions of Part 4 in greater detail. On what is now section 23, which provides for indefinite detention of suspected international terrorists, ILPA commented that it opposes such indefinite detention:[109]

> **9.** The right to liberty contained within Article 5 of the ECHR is a fundamental human right which underpins a democratic and free society. It is for this reason that Article 5 only permits detention in certain narrow circumstances and that the European Court of Human Rights has jealously guarded the right to liberty for individuals.

[107] Footnotes from the briefing are not reproduced in the following extracts. Full text is available from ILPA at www.ilpa.org.uk

[108] ILPA briefing on the *Anti-terrorism Crime and Security Bill* available from ILPA at www.ilpa.org.uk

[109] Paragraph 9 et seq.

> **10.** ILPA is opposed to the use of long term detention and considers that it is not necessary or proportionate. A derogation under Article 15 will only be permissible where there is a state of emergency threatening the life of the nation and measures taken strictly required by the exigencies of the situation. Parliament must scrutinise scrupulously whether there is sufficient evidence of such a state of emergency.
>
> **11.** As far as the necessity of the measures proposed, ILPA calls into question the rationale for such measures. In order to be *justified* any such detention would have to be based on cogent evidence of the terrorist links or activities. The Terrorism Act 2000 provides extensive powers for the arrest and prosecution of those reasonably suspected of involvement in terrorism. As already observed, that Act's threshold of reasonable suspicion is both necessary and appropriate, lest administrative detention will come to be used in preference to trial under the Terrorism Act. Given that the Home Secretary has now conceded need for "reasonableness" in his belief or suspicions there can be no reason why the evidence founding that belief or suspicion can not be used in a prosecution. The lack of evidence to sustain prosecution can not be the excuse for indeterminate administrative detention without trial.
>
> **12.** Further, if derogation is relied on detention in such circumstances must be necessary. Again, such threshold requires at the very least evidence of reasonable suspicion of the commission of terrorist offences. In these circumstances it is difficult to see how administrative detention as opposed to prosecution can ever be justified. ILPA's concern is not the prosecution of persons reasonably suspected to have committed terrorist acts; rather it is the administrative detention of such persons where there is insufficient evidence to justify prosecution.
>
> **13.** It is self evident that derogation under Article 15 will not automatically render the proposed detention measures lawful. The Government will have to be prepared for a close degree of scrutiny for such a wide reaching and disproportionate measure both in the United Kingdom and in Strasbourg.
>
> **14.** Parliament must ensure that whatever detention measure is enacted is accompanied by appropriate safeguards; for reasons given elsewhere ILPA has concerns about such safeguards.

ILPA then recommended that the clause (as it was) be removed from the Bill.

On the exclusion of the courts customary power of judicial review and habeas corpus, ILPA commented that provisions which purport to exclude the jurisdiction of the Courts have traditionally been unsuccessful since they "ignore both our constitutional history and our separation of powers:[110]

[110] Paragraph 19

> **19.** […] These principles vouchsafe the right of the Court to protect the individual's rights against the State and apply with the greatest force in circumstances such as the present where the fundamental common law right to liberty is at stake. [The exclusion of the court's supervisory jurisdiction] is objectionable on this ground alone. It seeks to destroy the right of habeas corpus.

Finally ILPA made the following comments on what is now section 33 of the Act, which provides that the Secretary of State may certify an asylum appeal as one where Article 1F and Article 33(2) of the Refugee Convention 1951 applies. The effect of the certificate is to prevent the substantive merits of the asylum appeal from being considered (see above for further discussion **III:C**):

> **20.** The combined effect of these clauses is to preclude consideration of what as a matter of refugee law is the primary question where a person makes an asylum claim, namely whether s/he has a well founded fear of persecution for a refugee convention reason. This question must always first be scrupulously examined in a full, fair and transparent determination procedure. Only thereafter do questions of exclusion properly arise.
>
> **21.** ILPA considers there to be no justification for this approach. The assessment of the primary question may be relevant to exclusion – whether under Article 1F and/or under Article 33(2).
>
> **22.** More important, the consequence of these clauses as drafted may prevent the putative refugee from being able to contest that their removal would be to face persecution. Take the following example: *X* claims asylum and the Home Secretary certifies that he is excluded by Article 1F. *X* is detained because removal is not practical since he has no travel document and there are no flights to his country of nationality. His appeal to SIAC is dismissed because SIAC considers him to be excluded;, yet by the terms of the clause there has been no risk assessment. Three months later a travel document has been obtained and there are flights. He has no outstanding appeal and faces return without the merits of his asylum claim having been considered.
>
> **23.** Further, whether or not the Home Secretary considers the asylum claim, ILPA objects to SIAC being precluded from considering whether the appellant has a well founded fear of persecution.

3. The AIRE Centre

The AIRE Centre (Advice on Individual Rights in Europe) is a human rights organisation based in London. The AIRE centre provides advice on international human rights law. In this context is it often called upon by international bodies such as the Council of Europe as experts on the implementation of the ECHR.

During the passage of the *Anti-terrorism Crime and Security Bill* through Parliament, the AIRE Centre prepared the following response[111] to the provisions of Part 4 of the Bill which enable the detention of suspected international terrorists:

> **4.** The consequences of the Home Secretary being able to certify that a person is a national security risk or a suspected international terrorist are that he may detain that person indefinitely. In order for such detention to be "permissible" the Home Secretary has laid before Parliament the Human Rights Act 1998 (Designated Derogation) Order 2001. The AIRE Centre considers that the use of indefinite detention will contravene the United Kingdom's obligations under the European Convention on Human Rights in spite of the power to derogate in that it is not necessary nor is it proportionate.
>
> […]
>
> **5.** The AIRE Centre is alarmed at the discriminatory nature of these provisions, which apply only to those who are subject to immigration control. The consequences of these provisions are that non-British nationals are subject to an administrative decision made on the basis of suspicions and can thereby be indefinitely detained, without the proper protection of the law whilst British nationals must be prosecuted on the basis of that suspicion and enjoy all the safeguards of a fair trial under criminal law. Not only it is reprehensible but also is it contrary to the United Kingdom's obligation under international human rights law.

The briefing then went on to consider the derogation from Article 5 ECHR under Article 15 ECHR.

> **Derogation to Article 5 of the Convention under Article 15**
>
> **6.** Article 15 of the Convention permits a Contracting State to derogate from its obligations under the Convention, excepting Article 2, 3, 4 and 7 in time of war or other public emergency threatening the life of the nation. There are two general considerations in assessing whether the breach of a Convention right is justified by the right of derogation:-
>
> 1. Is there a public emergency threatening the life of the nation?
> 2. Are the measures proposed strictly required by the exigencies of the situation?
>
> **State of emergency threatening the life of a nation**

111 Footnotes are not included. The complete original text of the briefing is available from aire@btinternet.com

7. This refers to an exceptional situation of crisis or emergency which presently affects the whole population and constitutes a threat to the organised life of the community. The Strasbourg Court will examine whether the facts and circumstances which lead a Contracting Party to enter a derogation come within this conception. The Strasbourg Court, in exercising its supervision, will give appropriate weight to relevant factors such as the circumstances leading to and the duration of the emergency situation. The AIRE Centre considers it unlikely that the Strasbourg court would accept the use of so serious an invasion of human rights as indefinite detention in anticipation of an emergency particular as the fear of terrorism will no doubt continue long into the future.

8. The Home Secretary undoubtedly presently considers that there is such a state of emergency. It should be recalled that firstly there have been no publicised attacks on the United Kingdom; that if the threat is "global terrorism" the United Kingdom is in no different position than the rest of the world; that if the matter came before the Strasbourg Court it would be entitled to demand evidence as to the state of emergency effecting the United Kingdom which might be difficult to provide and the Government may not wish have that evidence examined.

Whether the measures taken in derogation from obligation under the Convention were "strictly required by the exigencies of the situation"

9. In the determination of the "strictly required" character of the derogating measures various elements may play a role, notably the necessity of the derogations to cope with the threat and the proportionality of the measures in view of the threat. The Strasbourg Court will require that the Contracting State proves that the existing legislation and the normal procedures for the maintenance of the legal order are not sufficient to respond to the situation.

10. In the past the UK has entered derogations for the purposes of prolonging detention for a limited period of time in order to obtain information from terrorist suspects from Northern Ireland. The UK has also derogated in very exceptional circumstances involving extensive loss of life such in Kenya for prolonged detention. Such indefinite detention is obviously more of an infringement and would require clear justification and the detention of an individual would have to be on the basis of clear evidence. It is therefore entirely questionable why the Secretary of State would seek to detain rather than prosecute, particularly given the wide powers to prosecute under the Terrorism Act 2000. If the failure to prosecute is a consequence of lack of evidence against a person, that evidence would be unlikely to satisfy the need to detain.

11. The evidence of the past, without exception, indicates that security organisations invariably make serious errors when given a power of indefinite detention, much to the embarrassment of Governments which use them.

12. The AIRE Centre considers that the use of indefinite detention is an extremely serious breach of Article 5 ECHR and the fundamental right to liberty. The AIRE Centre does not believe that Article 15 ECHR gives the power of unlimited derogation from that right. We consider that the proposals are a clear mechanism for circumventing the proper application of criminal law with its

attendant safeguards rather than a measure which is required by the strict exigencies of the situation.

The AIRE Centre then criticized what they saw as a serious lack of safeguards and recourse to the courts provided for in Part 4 of the Bill:

> **13.** […] The AIRE Centre considers it is essential that the following safeguards are specifically included in the Bill:-
>
> a) that a person detained under [section 23] is informed immediately, in a language which they understand, of the reasons for their detention
> b) that the person is notified of their rights, including rights of access to the courts
> c) that they be given prompt access to a lawyer and where they can not afford one, free legal advice
>
> […]
>
> **15.** Furthermore the AIRE Centre is concerned that the measures as a whole are not subject to more regular review than the 15 months laid down by [section 29]. Article 15 ECHR does not give the Home Secretary *carte blanche* to derogate from Article 5 and he must continually justify the necessity of the measures in place. A review after a period as long as 15 months can not possibly satisfy the need to continually justify the measures. This must be particularly so given the very fast pace of events since 11 September 2001.
>
> **16.** The AIRE Centre is extremely concerned by the attempt in [section 30] to exclude judicial scrutiny of executive decisions. Not only does such judicial scrutiny underpin the United Kingdom's constitution but also it acts an extremely important check against the exercise of administrative powers. When those powers are as wide and severe as the ones set out in these proposals, that check becomes all the more necessary and important.

4. Lord Donaldson of Lymington – former Master of the Rolls

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." David Blunkett is reported as dismissing the views of his critics by saying:[112]

> We could live in a world which is airy fairy, libertarian, where everybody does precisely what they like and we believe the best of everybody, and then they destroy us.
>
> […]

[112] "Blunkett Faces Anger On Human Rights" *Daily Telegraph* 12 November 2001

> 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.

The Home Secretary went on to emphasise that Parliament would be able to remove the power to detain as the Act must be evaluated on an annual basis. He added:

> We would want to withdraw it ourselves if the situation improved to a point where we no longer required it.

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:[113]

> 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.
>
> 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.

5. Academic articles and comment

The following comprise some of the recent comments by academics and professionals on Part 4 of the *Anti-terrorism Crime and Security Act 2001*:

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

- *Acting on Terror*, Law Society Gazette, 2001, Vol 98 Part 38
- *Human Rights: John Wadham and Shami Chakrabarti report on the human rights issues associated with the Government's proposed anti-terrorism measures*, New Law Journal, 26 October 2001
- *And throw away the Key,* Economist, November 2001
- *The Anti-terrorism Bill –what happened?*, M Zander, New Law Journal, 21 December 2001
- *Anti-terror Law*, N Pelham, Middle East International, 21 December 2001
- *Pitfalls of Anti-terrorism*, B Crozier, Salisbury review, Winter 2001
- *Britain's new anti-terrorist legal framework*, S Payne, June 2002, Rusi Journal 147(8)

VI The use of Part 4 powers after implementation

The *Anti-terrorism Crime and Security Act 2001* received Royal Assent on 13th December 2001. On 19 December (shortly after the notification of the derogation from Article 5 ECHR to the Council of Europe), the immigration service arrested a number of individuals and detained them under the Part 4 powers. The position was set out by David Blunkett in his answer to a parliamentary question of 18 December 2001:[114]

> **Mr Rammell:** To ask the Secretary of State for the Home Department if he will make a statement about the use of powers under the Anti-terrorism Crime and Security Act 2001
>
> **Mr Blunkett:** Earlier today, on the basis of certificates I signed under Part 4 of the Act, following careful and detailed consideration, the Immigration Service detained eight foreign nationals whom I suspect to be international terrorists. they were detained earlier today and will be held in secure prison accommodation. I shall not disclose their names unless they themselves first do so.
>
> Part 4 of the Act gives me powers to issue a certificate in respect of someone whom I believe to be a risk to national security and suspect to be an international terrorist. the Act also gives powers for his deportation and, where his removal or departure from the UK is prevented (whether temporarily or indefinitely) for his detention.
>
> A person detained has the right to apply for bail to the Special Immigration Appeals Commission which is a superior court of record under the Act. He may also appeal to the Commission to have the certificate cancelled. In these circumstances it would be inappropriate for me to comment further. A person detained is free to leave the UK at any time. I shall continue to keep the exercise of the powers in Part 4 of the Act under close review.

[114] HC Deb 18 December 2002 Col 484W

Further foreign nationals were then arrested during the first half of 2002. In a PQ of the 11 June 2002, the Home Secretary stated that eleven foreign nationals in total had been detained using the powers in Part 4:[115]

> …Eight were detained in December 2001, one in February 2002, and a further two in April 2002. Of those detained, two have left the UK voluntarily. The other nine remain in detention. Normal prison service rules apply in respect of all aspects of the detention. It is long standing government practice not to discuss individual cases or the immigration status of individuals. If, however, an individual chooses to publicise their case, we would be able to confirm their name and nationality. This is a matter for the individual and their legal representative in the first instance.

An article in *the Observer* newspaper reports the names of two of the detainees as a Moroccan, Jamal Ajouaju, who returned to Morocco after his arrest, and an Algerian, Abu Rideh who remains in detention.[116] The other unnamed detainee who voluntarily left the UK is reported as having returned to France where he was apparently a citizen.[117] The remaining detainees however, have reportedly refused to return to their home country on the basis that their life would be threatened by the regimes they came to Britain to seek asylum from.[118]

An article in *The Guardian* in April 2002 reported that the National Council for the Welfare of Muslim Prisoners had written to the Home Secretary to raise concerns over the conditions of the detainees being held in the high security wing of Belmarsh prison. The Council issued the following statement:[119]

> The NCWMP is of the opinion that the detention of these individuals in conditions which entail prolonged periods of solitary confinement poses a serious moral dilemma and ethnical challenge to the civilised values of society.

Following this statement, a spokesperson for the Council said the situation had improved.

A later newspaper report from *the Independent on Sunday* stated that the detainees were being held in the following conditions:[120]

> The detainees are being held in a separate block at Belmarsh, with several still in solitary confinement. They are locked in their cells for 22 hours a day, and given brief periods of exercise in a small yard.

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[115] HC Deb 10 June 2002 Col 806W
[116] "Without prejudice," *The Observer* 4 August 2002
[117] "Muslims seek talks over terror detainees," *The Guardian*, 15 April 2002
[118] Ibid.
[119] "Muslims seek talks over terror detainees," *The Guardian*, 15 April 2002
[120] "Court Challenge to UK Anti-terror laws", *Independent on Sunday*, 13 July 2002

The detention of one particular detainee, Abu Rideh, was discussed in the media after it was reported that he had had a mental breakdown during his detention in Belmarsh prison, and was now a suicide risk. Mr Rideh had previously suffered from psychiatric problems including self-harm stemming from when he was tortured in Israel. He was believed to have been arrested, according to an article in *The Observer*, because of his association with Abu Hazma, the "controversial iman of London's Finsbury Park mosque."[121] The article pointed out that Abu Hazma is not liable for detention under the Act as he is a British national. After Mr Rideh's arrest under the *Anti-terrorism Crime and Disorder Act 2001*, he began a hunger strike. In July 2002 he was transferred to Broadmoor. The article reported that doctors at Broadmoor had accused David Blunkett of 'unprecedented political interference.' It was said that the Home Secretary ignored the doctors' advice by ordering them to take charge of Mr Rideh:[122]

> Medical experts who have examined Abu Rideh, 30, said they had difficulty securing permission to visit him. They believe he should be placed close to his family in a hospital with less oppressive security measures.
>
> […]
>
> Despite advice from psychiatrists that Abu Rideh poses no threat to the public, the Home Secretary this weekend overruled Broadmoor staff and forced them to admit the dying Palestinian, The Observer has learnt. Amnesty International and the European Union's committee on torture have described the conditions under which Abu Rideh and his fellow detainees have been kept as 'barbaric'.

An article in *The Times* also reported that Mr Rideh was a suicide risk. Whilst on hunger strike his weight had dropped from 14 stone to 9 stone.[123] The doctor treating Mr Rideh reportedly said:[124]

> He would rather die than endure any more of this. This man is far more danger to himself than he is to the state. If al-Qaeda is made up of men like this, we should all feel relieved, because he poses no terrorist menace to anybody. I have told the Home Office this, but nobody is prepared to listen."

He continued:

> What is so damaging for these suspects is that nobody has told them why they have been detained, and they have no idea how long their incarceration will last. This is far worse then serving a specific sentence where you know what the end point is.

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[121] "Without Prejudice", *The Observer*, 4 August 2002
[122] Ibid.
[123] "Terror detainees at risk of suicide, say lawyers", *The Times,* 5 August 2002
[124] Ibid.

VII Challenge to the legality of the Act

A. Background

In July 2002, the lawyers for Rideh and the other unnamed detainees challenged the legality of the *Anti-terrorism, Crime and Security Act 2001* before the Special Immigration Appeals Commission.[125] The organisation Liberty was represented as an interested party. Under the Act, the Commission has the same powers of judicial review as are usually exercised by the High Court.

The Commission held two days of public hearings to hear representations on whether the detentions were lawful. After this, the tribunal comprising three judges went into private session to hear submissions from the security services.[126]

The lawyers for the detainees argued the following points:[127]

1) the present tribunal had to consider for itself whether there existed a public emergency threatening the life of the UK that justified derogation from the Convention

2) there had been no acts associated with Al Qa'ida or any related organisation in the UK

3) no other signatory to the Convention had derogated from any obligation in it because of terrorist activities by or linked to Al Qa'ida

4) The Secretary of State had made factual errors in the links he concluded existed between various terrorist and other organisations

5) there was no rational connection between the measures adopted and the objectives sought to be attained by the Government

6) the Order was over inclusive

7) the Act allowed even certified terrorist suspects to leave the UK's detention if they chose to return to their own country

8) it was irrational to confine the detention provisions to foreign nationals

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[125] *A and others v Secretary of State for the Home Department (2002)* (SIAC) Lawtel 1 August 2002
[126] "Hearing on terror suspects' status," *Financial Times*, 13 July 2002
[127] *A and ors v SSSHD* 1 August 2002, Lawtel

9) Articles 3, 6 and 14 of the Convention had been breached.

The Government, represented at the hearing by the Attorney-General Lord Goldsmith, maintained the powers are needed because of the threat posed by Al Qa'ida.[128] He submitted that the attacks of September 11 'changed forever the landscape of terrorism' and that Britain, as an ally of the United States, was a potential target for attacks. He said that opponents of the legislation were missing the gravity of the situation faced by the British Government.[129]

The position on behalf of the Home Secretary was summarised in a statement which explained the threat to UK national security by Al Qa'ida and associated groups:[130]

> 25. Collectively, extremists in the United Kingdom present a potent force. They include those who are lying dormant for specific tasking from Bin Laden as well as those who have been instructed to establish themselves in the country against a future occasion when needed. Plans for terrorist attacks such as those of September 11 take a long time to develop. Terrorist cells consisting of a small number of individuals prepared to involve themselves in any such attack may therefore lie dormant over long periods. In addition, others continue to provide support activity, a core component of terrorism linked to bin Laden. On past experience, it is likely that these others may participate more directly in terrorist-related activity in the future.
>
> 26. The attacks of September 11 produced fatalities on an unprecedented high scale and by unprecedented means. Further terrorist attacks are highly likely. Reporting demonstrates a firm intention to acquire and use weapons of mass destruction in such attacks. It is assessed that the UK, in addition, is at risk from attack, with immense political consequences for the safety and well-being for its citizens. However, the impact on the world economy, wherever an attack takes place will be significant. Extremists in the UK have the skills opportunity and intent to further and provide material support to Al Qa'ida's campaign against the US and its allies; the military campaign in Afghanistan may provide a rallying call to action. The presence of such extremists here at this time, and for the foreseeable future, creates a situation of public emergency threatening the life of the nation.

B. The Commission's judgement

In its judgement of 31 July 2002, the Commission ruled firstly on the question as to whether there was a state of emergency. It held that the evidence demonstrated that the

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[128] "Sept 11 powers 'break basic human rights'" *The Daily Telegraph*, 18 July 2002
[129] "Doctors attack Blunkett over dying terror suspect," *The Observer* 21 July 2002
[130] Paragraph 28, Judgement in A and others (SIAC)

UK, as the closest ally of the US is a more obvious target than other European States for terrorist attacks. The Commission concluded:[131]

> We are satisfied that what has been put before us in the open generic statements and the other material in the bundles which are available to the parties does justify the conclusion that there does exist a public emergency threatening the life of the nation within Article 15.
>
> […]
>
> The United Kingdom is a prime target, second only to the United States of America, and the history of events both before and after 11 September 2001, as well as on that fateful day, does show that if one attack were to take place it could well occur without warning and be on such a scale as to threaten the life of the nation.

The Commission went on to say that the closed material confirmed their view that the emergency had been established.

The Commission then went on to examine whether the measures taken were "strictly required by the exigencies of the situation." The Commission accepted the Government's view that the measures were limited to what was required in the circumstances.

The Commission examined whether the measures were in accordance with the UK's obligations under international law. In so far as the court felt it necessary to rule on the matter, it concluded that the provisions were in accordance with international law.

Finally, the Commission examined whether the legislation breached any other ECHR rights apart from Article 5. The Commission found that there had been no breach of Article 3 (prohibition on torture, inhuman or degrading treatment) nor Article 6 (right to a fair trial). However, the Commission then went on to examine whether there had been a breach of Article 14. Article 14 provides:

> The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is not a free-standing right as it must be considered in tandem with one of the other Convention rights, in this case Article 5. In essence, the detainees alleged that as the Act only allowed the detention of non British nationals this constituted unlawful discrimination in the application of Article 5's right to liberty on the grounds of nationality. The Commission found, as preliminary matter, that the fact that a derogation

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[131] Paragraph 35

to Article 5 had been entered did not prevent them considering whether Article 5 rights had been infringed in a discriminatory manner contrary to Article 14.

The Commission then set out the main considerations which arise in relation to Article 14 as follows:[132]

> 1) Whether persons in similar circumstances have been treated differently in an area covered by the Convention
> 2) Whether the difference of treatment has been on a ground such a national origin
> 3) Whether the difference of treatment has a legitimate aim
> 4) If so, whether according to the principle of proportionality there is a reasonable relationship between the means employed and the aims sought to be pursued

The Commission continued:[133]

> Undoubtedly the right to liberty (Article 5) is an area covered by the Convention, and it is equally clear that the 2001 Act provides for the different treatment of individuals on the ground of national origin. No British national can be detained pursuant to that Act. The difference of treatment is said by the respondent to have a legitimate aim, namely the protection against terrorism, and there is no reason to doubt that aim, but the question remains as to whether there is a reasonable relationship between the means employed and the aims sought to be pursued.

The Commission found that the Act was discriminatory in its provisions, and that the terrorist threat was not limited to those who were non-British nationals. Mr Justice Collins said:[134]

> It is quite clear that there are British citizens who are likely to be as dangerous as non-British citizens and who have been involved with Al Qa'ida or organisations linked to it

The Commission concluded:

> …the detention of appellants breaches their Convention rights under the Human Rights Act 1998, for the detention is discriminatory and there is no scheduled derogation from Article 14. Merely scheduling such a derogation would not assist however for in our judgement in any event there is not a reasonable relationship between the means employed and the aims sought to be pursued and

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[132] Paragraph 79
[133] Paragraph 79
[134] "Suspects' win terror crackdown," *The Times*, 31 July 2002

> accordingly we must make the declaration of incompatibility which has been sought.

However, the Commission went on to recognise that the Act would no longer be unlawful on the basis of Article 14 if Parliament extended the power of detention to include British nationals. However if it were the case that the Government extended the Act to include British citizens, this would arguably re-introduce internment as British nationals would generally not have the right to leave the UK as an alternative to detention.

C. Responses to the judgement

The Home Office indicated that it would appeal against the judgement of the Commission.[135] *The Financial Times* is reported as saying:[136]

> …"Our law has always distinguished between UK citizens and foreign nationals." The Anti-terrorism Act provided "for the extended detention of non-UK nationals whom we are currently unable to deport…those detained are free to leave the UK voluntarily at any time," it added.

The same article reported the Shadow Home Secretary, Oliver Letwin as saying that the ruling:

> …represented "exactly the sort of legal problem" the government had been warned about. "I continue to believe that we shall have to find a way of making it legal to repatriate some of these individuals, instead of trying to detain them in the UK."

John Wadham, the director of the civil rights group Liberty, is reported as saying:[137]

> The government knows it cannot intern British citizens, but thinks it is acceptable to intern foreign nationals.

The following comprise further newspaper articles on the Commission's judgement:

- Suspects' win hits terror crackdown, *The Times*, 31 July 2002
- Detention of 11 foreign terror suspects unlawful, judges rule, *The Guardian*, 31 July 2002
- Anti-terror act declared unlawful, *Financial Times*, 31 July 2002

[135] "Anti-terror Act declared unlawful," *Financial Times*, 31 July 2002
[136] Ibid.
[137] Ibid.

The detainees will not be released while an appeal to the Court of Appeal is pending. In addition, the individual appeals by each detainee against the validity of the certification and detention in their respective cases are also outstanding.