

# UNITED KINGDOM

## Comments on initial proposals for emergency legislation

In the wake of the attacks of 11 September 2001 in the United States, on 15 October 2001 the Home Secretary announced a package of emergency measures which will be placed before Parliament in mid-November.

UK emergency legislation has been of grave concern to Amnesty International since the 1980s. The organization has documented throughout the years how provisions of such temporary legislation facilitated serious abuse of human rights, including torture and cruel, inhuman or degrading treatment, and unfair trials.

Although the Terrorism Act has been in force for less than a year and provides the authorities with far-reaching powers, some of which Amnesty International believes may contravene UK obligations under international human rights law and are open to abuse by law enforcement officials, the government is proposing additional emergency measures.

Amnesty International is concerned that some of the measures, as outlined by the Home Secretary on 15 October, may contravene internationally recognized human rights standards or facilitate the violation of individuals' human rights. It is the obligation of the government to ensure the protection of human rights of all people in the jurisdiction.

The UN High Commissioner for Human Rights, Mary Robinson, in her report to the UN General Assembly, stated, in considering the implications of the attack on the US, that "in face of the strong security concerns, all States must cooperate against terrorism, this however should not be used as a pretext to infringe on human rights".<sup>1</sup>

Amnesty International's comments are based on the following extract from the Home Office media release on the Home Secretary's statement to the House of Commons 15 October 2001:

"The Bill would also contain robust and streamlined procedures for dealing with those suspected of terrorist acts who seek to misuse our asylum and immigration system. These measures will:

- Remove access to judicial review in decision made by the Special Immigration Appeals Commission, the body that deals with suspected terrorists' asylum claims
- Enable asylum claims to be rejected where the Secretary of State certifies the person is a threat to national security, and

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<sup>1</sup> A/56/36, p.43

- Detain those who are a terrorist threat but who cannot be removed from the country, whilst retaining a right of appeal. This will require a limited suspension from Article 5 of the ECHR, using ECHR Article 15 which allows for suspension in the event of a public emergency. This will ensure we remain consistent with our international obligations, including the 1951 Geneva Convention on refugees.”

### **Derogation**

The Government is seeking to derogate from Article 5<sup>2</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in order to permit the indefinite detention of foreign nationals, who allegedly pose a threat to national security and whom the government is unable to remove or deport, under Article 3 of the ECHR.

Article 15 of the ECHR allows states in some exceptional circumstances to suspend its obligations under specific provisions of the ECHR, as are “strictly required by the exigencies of the situation”. These exceptional circumstances, in which derogations are permitted, are “in time of war or other public emergency threatening the life of the nation”. Any state wishing to derogate must inform the Secretary General of the Council of Europe fully of the measures taken and the reasons therefor.

On 15 October, during the House of Commons session on the Home Secretary's announcement of proposals for emergency legislation, the Home Secretary said: “There is no immediate intelligence pointing to a specific threat to the United Kingdom but we remain alert, domestically as well as internationally.”

In view of this statement, it is the government's responsibility to give precise details of:

\* why it believes that there is a public emergency threatening the life of the nation in the UK<sup>3</sup>;

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<sup>2</sup> Article 5(1) states: “... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (f) the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation or extradition.”

<sup>3</sup> *The European Court of Human Rights has stated that Article 15 refers to 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.* [Lawless v Ireland]

\* why it believes that it needs the extraordinary powers, which violate international human rights law, leading to a derogation;

\* whether these powers are strictly required by the exigencies of the situation.

*Amnesty International is not aware of other European governments contemplating derogation from the ECHR, despite their introduction of new anti-terrorist legislation or measures.*

The Human Rights Committee<sup>4</sup>, in its concluding observations on 2 November 2001 of the examination of the UK's fifth periodic report on the implementation of the International Covenant on Civil and Political Rights (ICCPR), expressed concern about the government's proposals to derogate:

“The Committee notes with concern that the State Party, in seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant, and which, in the State Party's view, may require derogations from human rights obligations. The State Party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant.”<sup>5</sup>

### **Indefinite detention**

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<sup>4</sup> The expert body which monitors states parties' implementation of the International Covenant on Civil and Political Rights.

<sup>5</sup> In addition to derogating from Article 5 of the ECHR, the government may also have to derogate from Article 9 of the International Covenant on Civil and Political Rights (ICCPR). *The ICCPR, under Article 4, similarly provides that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law...@.*

Amnesty International is opposed to states detaining people who are considered to be a threat to national security unless

- the people are charged with and prosecuted for recognisable criminal offences without delay;
- action is being taken to deport within a reasonable period to another country where the person will not risk serious human rights abuse including torture, unfair trial or the death penalty - there must be a realistic possibility of deportation being effected.

*Amnesty International believes that it is a violation of fundamental human rights to detain people who the authorities do not intend to prosecute and whom they cannot deport.<sup>6</sup> People should be charged with a recognizable criminal offence within a reasonable period or released.*

*The government has, to date, not provided evidence demonstrating that any inadequacies which may exist in current criminal laws cannot be rectified to permit prosecution of people whose conduct threatens the UK or the prosecution of individuals for crimes which took place outside of the UK.*

*Amnesty International is concerned that people will be categorized as a national security risk or a "terrorist", the effect of which is tantamount to a criminal conviction, on the basis of secret and therefore possibly inaccurate or misinterpreted information. This occurred during the Gulf War, when about 90 nationals of Arabic countries were detained pending deportation on national security*

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<sup>6</sup> Amnesty International opposes the detention of asylum-seekers and refugees unless they have been charged with a recognizable criminal offence, or unless the authorities can demonstrate in each individual case that the detention is necessary, that it is on grounds prescribed by law, and that it is for one of the specified reasons which international standards recognize may be legitimate grounds for detaining asylum-seekers.

grounds. The organization considered many of them to be possible prisoners of conscience.

If the government proceeds with the derogation and the introduction of the proposed measure, then Amnesty International considers that the legislation must contain safeguards that comply with international standards. Such safeguards should include:

- the grounds for detention must be specifically related to the emergency situation;
- the detainees should be entitled to see and challenge all the evidence used to determine whether they are “national security risks”;
- the emergency law must be temporary, subject to renewal by Parliament;
- the government should be required to publish regularly information about the application of the law, e.g. how many people are detained and the places of detention.

In addition, the detainees must be treated in compliance with all human rights standards, including provisions of the ECHR and other international human rights treaties which remain in full force; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules. Such safeguards should include the right of detainees:

- to be informed immediately, in a language they understand, of the reasons for their detention and be notified of their rights, including the right of prompt access to and assistance of, and confidential communication with, their lawyer of choice, free of charge if necessary; the right to inform family of detention and place of confinement; the right to communicate and receive visits;
- to be brought promptly before a judicial authority to determine the lawfulness of and necessity for the detention and regular periodic reviews of the lawfulness and continuing necessity of the detention by an independent impartial court;

- to be entitled to challenge their detention [*habeas corpus*];
- to have the right to appeal to an independent, impartial court;
- to not be detained with people convicted of crimes;
- to have effective judicial remedies, including full reparation, for arbitrary detention and other human rights violations;
- to be treated in compliance with all human rights standards for conditions of detention.

### **Exclusion from protection under the UN Refugee Convention**

The Home Secretary stated that he was “looking to take power to deny substantive asylum claims to those who were suspected of terrorist associations”.

“Acts of terrorism” are not expressly included as one of the recognized grounds for exclusion from refugee status under the 1951 Convention relating to the Status of Refugees (UN Refugee Convention). However, such acts are grounds for exclusion when they constitute crimes against peace, war crimes, crimes against humanity, serious non-political crimes outside the country of refuge, or acts contrary to the purposes and principles of the United Nations.

Nobody should be prevented from lodging an asylum application. Amnesty International believes that a determination to exclude an individual from refugee status in application of Article 1(F) of the UN Refugee Convention should only be made after full consideration of the claim in a fair and satisfactory procedure. A preliminary consideration that someone might fall under the provisions of the exclusion clauses should not hinder the full examination of the claim for asylum. No one should be forcibly removed without having had their individual need for protection assessed. In view of the serious consequences of determining an individual to be excluded from refugee protection, the procedure should comply with all the safeguards provided in human rights and refugee law.

Notably the question of exclusion is not used to determine admissibility to the asylum procedure; and the individual must be informed that exclusion is under consideration and have the rights to be informed of the evidence, to rebut the evidence and to appeal against a decision to exclude on the above grounds.

The issue of exclusion has been the subject of extensive consultation. As part of the UNHCR’s ongoing Global Consultations on International Protection, a meeting of experts took place earlier this year and presented some summary conclusions on the issue of exclusion. One of the clear recommendations coming out of this meeting was the importance of taking a “holistic approach” to refugee status determination, and in this regard determining the inclusion elements of refugee protection before exclusion elements. The reasons for the inclusion before exclusion were:

“: Exclusion before inclusion risks criminalizing refugees;

- Exclusion is exceptional and it is not appropriate to consider an exception first;
- Non-inclusion, without having to address the question of exclusion, is possible in a number of cases, thereby avoiding complex issues;
- Inclusion first enables consideration to be given to protection obligations to family members;
- Inclusion before exclusion allows proper distinction to be drawn between prosecution and persecution;
- Textually, the 1951 Convention would appear to provide more clearly for inclusion before exclusion, such an interpretation being consistent in particular with the language of Article 1F(b);
- Interviews which look at the whole refugee definition allows for information to be collected more broadly and accurately.”<sup>7</sup>

While a decision to exclude a person removes them from the protection of UN Refugee Convention, it does not follow that a state can remove the individual as a consequence. There is clear support in international human rights law for example in Article 3 of the Convention against Torture and in the jurisprudence of the ECHR, for taking the position that, where people risk torture or other forms of cruel, inhuman or degrading treatment or punishment, the prohibition of *refoulement* is absolute.

### **Special Immigration Appeals Commission**

In response to the judgment of the European Court of Human Rights in the case of *Chahal v. United Kingdom*, the Special Immigration Appeals Commission (SIAC) was set up to hear appeals of cases in which the Home Secretary has made a decision to deport or exclude a person, including on national security grounds. The appeal is heard by SIAC and its decision is binding on the Secretary of State though either party may appeal on a point of law to the Court of Appeal.

Amnesty International is concerned by reports that where an asylum applicant has been excluded from refugee status in application of Article 1(F) of the UN Refugee Convention, under the proposed measures SIAC may not have the power to address asylum questions.

Amnesty International has previously noted with concern that the applicable statute and rules permit SIAC to receive secret evidence and the proceedings to take place without the potential deportee or their counsel of choice being provided with all of the

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reasons for the decision to deport or exclude. In addition these rules permit SIAC to hold all or part of the proceedings without either the potential deportee or their counsel being present. If such *in camera* proceedings are held, an advocate is appointed from a panel chosen by the Attorney General to represent the interests of the potential deportee. The advocate, however, may not communicate with the potential deportee or their counsel, after they have been provided with information about the case, without leave from SIAC. Before decisions are made on the basis of proceedings from which the potential deportee and their counsel have been excluded, a summary of the submissions and evidence and absent information about sensitive material must be provided.