

UNITED KINGDOM

Creating a shadow criminal justice system in the name of “fighting international terrorism”

In the wake of the attacks of 11 September 2001 in the United States, the government issued an Order, to come into force on 13 November 2001, on the UK’s derogation from Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹ On 13 November the government also published the “Anti-terrorism, Crime and Security Bill” which will have its second reading on 19 November 2001, and the legislation may be enacted as quickly as by the end of the year. Amnesty International is concerned about the extraordinarily short time made available for parliamentary and public scrutiny of this Bill, particularly as most of the provisions of this complex Bill are permanent, and the temporary provisions could result in the indefinite deprivation of a person’s liberty without charge or trial.

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.

The Terrorism Act 2000 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.

Amnesty International is concerned that some of the measures in the Anti-terrorism, Crime and Security Bill, if implemented, may contravene internationally recognized human rights standards -- including the rights to liberty, fair trial and freedom of association -- and 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”.²

¹ The Human Rights Act 1998 (Designated Derogation) Order 2001, laid before Parliament on 12 November 2001.

² A/56/36, p.43

This briefing focuses on Part 4 of the Anti-terrorism, Crime and Security Bill, which is entitled "Immigration and Asylum". Part 4 lays out procedures for Executive certification of a person as a suspected international terrorist and a risk to national security, and their consequent indefinite detention, as well as the exclusion from asylum procedures for people certified by the Executive as being suspected international terrorists.

Derogation

Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) permits states to take measures suspending some of their obligations to respect and protect some of the human rights of individuals, as set out in the ECHR, "in time of war or other public emergency threatening the life of the nation". Such measures must be time-limited and restricted to "the extent strictly required by the exigencies of the situation". A state that wishes to derogate must inform the Secretary General of the Council of Europe of the measures taken and the reasons for doing so.

The Secretary of State for Home Affairs has laid an Order before Parliament designating a proposed derogation from Article 5(1)³ of the ECHR in order to permit the indefinite detention without charge or trial 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. A Schedule to the Order contains the proposed notification of the derogation to the Secretary General of the Council of Europe.

Is there a public emergency threatening the life of the nation?

In the proposed notification of the derogation, the Secretary of State advises:

"There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom. As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom."

³ 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."

The European Court of Human Rights has defined the requirement of Article 15 as “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*).⁴

The statement of the Secretary of State indicates a situation of serious concern but does not provide evidence that suggests serious and immediate threats to “the life of the nation” or to “the organised life of the community”. On the contrary, when the Secretary of State announced the proposals for emergency legislation on 15 October he said: “[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom...”.

Individually and collectively other European governments are also taking or planning new measures following the attacks in the USA on 11 September. Amnesty International is not aware of any other European government contemplating derogation from international human rights treaty obligations.

Indefinite detention

Although the temporary provisions permitting certification and detention are for an initial period of 15 months, they can be renewed annually and indefinitely. A person could therefore be detained indefinitely.⁵

Certification

⁴ European Court of Human Rights, Series A: Judgments (1 July 1961) para 28.

⁵ Clauses 21 to 23 of Part 4 of the Bill are the only temporary measures, which would expire at the end of 15 months, unless the Secretary of State issued an order to repeal them before the expiry date or to renew them for a period not exceeding one year. It appears that such orders may be renewable annually. Such an order could be made by the Secretary of State without a draft being laid before and approved by a resolution of each House of Parliament, if it contains a declaration by the Secretary of State that “by reason of urgency it is necessary to make the order without laying a draft before Parliament” (clause 28(4)). This order would then have to be approved by Parliament within 40 days.

Under clause 21(1), the Secretary of State may issue a certificate in respect of a person if s/he "believes the person's presence in the UK is a risk to national security, and suspects that the person is an international terrorist". The definition of an "international terrorist" is a person who "is or has been concerned in the commission, preparation or instigation of acts of international terrorism, is a member of or belongs to an international terrorist group, or has links with a person who is a member of or belongs to an international terrorist group" (clause 21(2)). The definition of an "international terrorist group" is a group which "is subject to the control or influence of persons outside the United Kingdom" (clause 21(3)(a)). The definition of "terrorism" is the same as in the Terrorism Act 2000.⁶

Amnesty International is concerned that the definitions in the Bill are vague and broad. The Bill fails to define precisely what constitutes having "links" with a person who is a member of an "international terrorist group" and what constitutes being subject to the "influence" of persons outside the UK.

Amnesty International is concerned that people will be categorized as a "national security risk" and "an international terrorist", the effect of which is tantamount to a criminal conviction, on the basis of the Secretary of State's beliefs or suspicions (clause 21(1)(a) and (b)). The criteria for such beliefs or suspicions are not spelt out in the Bill; moreover, there is no expressed requirement that the suspicion must be "reasonable". Amnesty International is also concerned that the basis for such beliefs or suspicions will be secret information, which the person will be unable to effectively challenge (see SIAC below). Such secret information, obtained in most instances from UK and foreign intelligence services, could be inaccurate or misinterpreted information. This occurred during the Gulf War, when about 90 nationals of Arabic countries were detained in the UK pending deportation on national security grounds. The organization considered many of them to be possible prisoners of conscience.

Detention

⁶ The Terrorism Act 2000 defines terrorism as "the use or threat of action ... designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause". The action is defined as: "serious violence against a person, serious damage to property"; action which "endangers a person's life ..., creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system". The "action" includes those outside the UK, and "public" and "government" can refer to a country other than the UK. (For Amnesty International's comments on the Terrorism Act 2000, see AI Index: EUR 45/007/2001.)

Under clause 23 of the Bill, once the Secretary of State has certified someone as a national security risk, in those cases where the person cannot be deported or removed s/he can be detained indefinitely.

In his notification of the derogation to the Secretary General of the Council of Europe, the Secretary of State advises that the authorities cannot secure the imprisonment of suspected terrorists by prosecuting them for crimes because of "the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required". The rules of evidence and standard of proof in the criminal justice system have been prescribed in order to reduce the risk of innocent individuals being convicted, punished and stigmatized. The system of indefinite detention proposed in this Bill will, in effect, establish an informal criminal justice system but without the safeguards or guarantees of rights required in the formal system. People can be deemed to be threats to national security and "suspected international terrorists" and imprisoned indefinitely on the basis of information which is considered by the authorities to be evidence inadmissible in a trial, and on a significantly lower standard of proof that is not set out in the draft legislation.

Amnesty International considers it unacceptable that the government should seek to circumvent the safeguards of the criminal justice system in such a manner. Amnesty International believes that it is a violation of fundamental human rights for states to detain people who the authorities believe are a danger to national security but who they do not intend to prosecute and who cannot be deported.⁷ People should not be detained unless:

- they are charged with recognizable criminal offences promptly and tried within a reasonable period in proceedings that comply fully with international fair trial standards; or
- action is being taken to deport within a reasonable period to another country where they would not risk being subjected to an unfair trial, the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment, or other serious human rights abuses. There must be a realistic possibility of deportation being effected.

Special Immigration Appeals Commission

⁷ 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.

Under clause 25(1) of the Bill, "a suspected international terrorist may appeal to the Special Immigration Appeals Commission [SIAC] against his certification under section [clause] 21" within three months of the issue of the certification.⁸ The only right of appeal of a SIAC decision would be to the Court of Appeal, and would be limited to points of law. SIAC would also have the powers to grant bail to people suspected of being national security risks and to regularly review at six-monthly intervals the certification of people who are suspected of being national security risks.

Amnesty International is concerned that the Bill appears to rule out explicitly any other form of judicial scrutiny of executive decision, e.g. judicial review or *habeas corpus*, under clause 29(2). The Bill omits any reference to the right to be brought promptly before a judge after arrest or detention, as set out in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁹ Although the government has not sought to suspend other ECHR rights, the Bill also excludes the right of a person detained to challenge the lawfulness of detention in a *habeas corpus*-like procedure guaranteed by the ECHR.¹⁰

Amnesty International is also concerned that the applicable statute and rules permit SIAC to receive secret evidence and the proceedings to take place without the person concerned or their counsel of choice being provided with all of the reasons for the decision to certify the person as a "suspected international terrorist", indefinitely detain, deport or exclude the person from the country. In addition these rules permit SIAC to hold all or part of the proceedings without either the person concerned 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 person concerned. The advocate, however, may not communicate with the person concerned 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 person concerned and their counsel have been excluded, a summary of the submissions and

⁸ 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.

⁹ Amnesty International believes that Article 5(3) of the ECHR would be applicable to indefinite detentions upon certification of the Secretary of State. The organization believes that the nature of such certification and the potential severity of the consequences - including indefinite detention - are tantamount to criminal charges, conviction and punishment under international human rights law, without the required guarantees of a fair trial set out in the ECHR including in Articles 5, 6 and Article 2 of Protocol 7.

¹⁰ As required by Article 5(4) of the ECHR.

evidence and absent information about sensitive material must be provided. Amnesty International believes that the person concerned should be entitled to see and challenge all the evidence used to determine whether they are “national security risks” and/or “suspected international terrorists”.

Safeguards

While Amnesty International considers that indefinite detention without prosecution violates international standards, if such a measure is introduced the organization urges that there should be additional safeguards, in compliance with international standards. Such safeguards should include the measures described in the following paragraphs. They are:

- the grounds for detention must be specifically related to the emergency situation described in the derogation;
- 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;
- to be entitled to challenge their detention [*habeas corpus*];
- to have the right to appeal on the basis of fact and points of law to an independent, impartial court;
- not to be detained with people convicted of criminal offences;
- to have effective judicial remedies, including full reparation, for arbitrary detention and other human rights violations.

Refugee Convention

Clauses 33 and 34 of the Bill set out powers which deny those persons, certified to be “international terrorists and national security risks”, of their right to seek asylum.

“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.

Under the proposals contained in this Bill, where an asylum-seeker is certified as a threat to national security, an individual assessment on the merits of the claim would not be made if the Secretary of State believes that an asylum-seeker may be excluded from refugee status under Article 1(F) of the UN Refugee Convention.

When such a certificate is made, the only appeal is to SIAC which would not have the power to address asylum questions, thereby suspending the application of the UN Refugee Convention to those appealing to SIAC. Currently when an asylum-seeker, who the Government believes is a national security risk, appears before SIAC, SIAC can review the national security concerns and the asylum claim. Amnesty International believes that SIAC should continue to be permitted to consider both.

No one 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 asylum procedure. Each case should be considered on an individual basis and according to facts and evidence, not suspicions. 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 should not be 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.”¹¹

While a decision to exclude a person removes them from the protection of the 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.

Conclusion

Amnesty International is concerned that the proposed legislation will lead to the violation of fundamental human rights. The Bill permits indefinite detention without trial, in other words “internment”, which creates a serious risk that it will lead to the imprisonment of innocent people without charge or trial. The system of indefinite detention proposed in this Bill would, in effect, establish an informal criminal justice system without the safeguards of the formal system. People could be deemed to be threats to national security and imprisoned indefinitely on the basis of evidence inadmissible in a trial, and on a significantly lower standard of proof. Amnesty International considers that everyone should have the right to defend themselves against serious allegations that they are a threat to national security in a court of law in full and fair proceedings. UK laws should be tightened where necessary in order to allow the prosecution and trials of people, suspected of involvement in human rights abuses, including the killing of civilians in violent criminal acts. Amnesty International believes that a determination to exclude an individual from refugee status, in application of Article 1(F) of the UN Refugee

¹¹ *Summary Conclusions* of the Lisbon Expert Roundtable, 3-4 May 2001 (<http://www.unhcr.ch/cgi-bin/teaxis/vtx/home/pendoc.pdf?tbl=PROTECTION&PAGE=protect&id=3b38938a4>)

Convention, should only be made after full consideration of the claim in a fair and satisfactory asylum procedure.

The Human Rights Committee¹², 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, 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."¹³

¹² The expert body which monitors states parties' implementation of the International Covenant on Civil and Political Rights.

¹³ *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...@.*