

**PROPOSED DEROGATION FROM ARTICLE 5 ECHR  
ANTI-TERRORISM, CRIME AND SECURITY BILL, CLAUSES 21-32**

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**JOINT OPINION**

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**INTRODUCTION**

1. The United Kingdom may derogate from Article 5 of the European Convention of Human Rights (“ECHR”) only:
  - (a) in time of war or other public emergency threatening the life of the nation; and
  - (b) to the extent strictly required by the exigencies of the situation; and
  - (c) to the extent that such measures are not inconsistent with its other obligations under international law

(ECHR Article 15; cf. Human Rights Act 1998, section 14).
2. Derogations from the Convention are extremely rare. Of the 43 Council of Europe contracting States, only Turkey currently has a derogation in force.<sup>1</sup> Furthermore, we understand that no contracting State has so far sought to derogate from Article 5 in the light of the events of 11 September 2001.
3. The proposed derogation<sup>2</sup> would allow the Government to detain certain persons suspected of involvement in international terrorism for indefinite periods (though subject to the scrutiny of the Special Immigration Appeals Commission: SIAC) and without taking any steps to deport them. If valid, it would enable the Government to escape the well-established principle that detention will be permissible under ECHR

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<sup>1</sup> The United Kingdom’s limited derogation from Article 5, justified by events in Northern Ireland, was withdrawn with effect from 26 February 2001: The Human Rights Act (Amendment) Order 2001.

<sup>2</sup> Designated in The Human Rights Act 1998 (Designated Derogation) Order 2001.

Article 5(1)(f) only for as long as deportation proceedings are in progress and are being prosecuted with due diligence.<sup>3</sup>

4. The Government rightly accepts that exercise of the extended detention powers contained in clauses 21-32 of the Anti-Terrorism, Crime and Security Bill (“the Bill”) will be incompatible with Article 5 of the ECHR in circumstances where persons are detained with a view to deportation but without deportation proceedings being commenced or prosecuted.
5. We have been asked by JUSTICE to give our independent opinion on whether - in the light of those extended detention powers - the proposed derogation satisfies the conditions imposed by Article 15 of the ECHR and summarised in paragraph 1 above. We consider them in turn.

### **PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION?**

6. The Government does not claim this to be a “time of war”. Rather, it claims the authority to derogate on the basis that there exists an “other public emergency threatening the life of the nation”. These words, as the European Court of Human Rights has repeatedly held:

“refer 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 part.”<sup>4</sup>

7. The Court will not simply accept, without evidence, that such an emergency exists. It leaves however a wide margin of appreciation to national authorities, who are “in principle better placed than the international judge .. to decide on the presence of such an emergency”,<sup>5</sup> and has never yet taken issue with an assessment by national authorities that such an emergency exists. Thus:

- (a) The Irish Government was held to have been justified in declaring a public emergency threatening the life of the nation, in July 1957, because of the existence of “a secret army” operating both in Ireland and the United Kingdom (thus jeopardising relations

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<sup>3</sup> *Chahal v United Kingdom* (1996) 23 EHRR 413, para 113, and other authority there cited. Article 5(1)(f) allows detention of “a person against whom action is being taken with a view to deportation or extradition”.

<sup>4</sup> *Lawless v Ireland* A 3 (1961) para 28; *Aksoy v Turkey* RJD 1996-VI para 70.

<sup>5</sup> *Aksoy*, para 68.

between Ireland and its neighbour), and because of “the steady and alarming increase in terrorist activities” over the previous year.<sup>6</sup>

- (b) The Court considered the existence of such an emergency to be “perfectly clear” when various special powers (including internment) were introduced to Northern Ireland in August 1971, against the background of “a dramatic upsurge in terrorist activity” in the first half of the year, coupled with serious and prolonged rioting.<sup>7</sup>
  - (c) The Government was held to be justified in taking the view that the situation in Northern Ireland continued to amount to a public emergency threatening the life of the nation in 1988, having regard to the thousands of terrorist deaths in Northern Ireland since 1972, notwithstanding the fact that the emergency was less than in 1984, when a previous derogation had been withdrawn.<sup>8</sup>
  - (d) Having reviewed “the particular extent of PKK terrorist activity in South-East Turkey”, which included killings running at an annual rate of about 300, the Court considered that there was “undoubtedly” a state of public emergency threatening the life of Turkey in 1990.<sup>9</sup>
8. The situation in the United Kingdom following the attacks of 11 September 2001 is distinct from each of the above emergencies, for there have been no Al Qaida attacks or atrocities of any kind on United Kingdom soil. Nor, indeed, has Al Qaida even been unambiguously identified as the perpetrator of the US attacks – though Usama Bin Laden himself has come close to admitting it.<sup>10</sup> Furthermore, and despite the inevitable judicial reticence on such questions, a United Kingdom court might be encouraged to apply a slightly stricter standard of review than does the Strasbourg court – remote as it is from everyday life in the contracting States - to the question of whether there is a public emergency threatening the life of the United Kingdom.
9. We consider however that as things stand, both the courts of the United Kingdom and the Strasbourg court would be likely to accept the Government’s assessment that there is a public emergency threatening the life of the United Kingdom. They would, in particular, be respectful of

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<sup>6</sup> *Lawless*, para 28.

<sup>7</sup> *Ireland v UK* A 25 (1978) paras 32, 205.

<sup>8</sup> *Brannigan and McBride* A 258-B(1993) paras, 12, 47.

<sup>9</sup> *Aksoy v Turkey* RJD 1996-VI p. 2260, paras 31, 70.

<sup>10</sup> Video interview of 20 October 2001.

the Government's clear conclusions, supported as they are by credible if not conclusive evidence, that:

- (a) Bin Laden and Al Qaida planned and carried out the atrocities of 11 September;
- (b) they retain the will and resources to carry out further large-scale atrocities; and that
- (c) as a result of its perceived strong support for the United States and for Israel, the United Kingdom, and United Kingdom nationals, are potential targets.<sup>11</sup>

In those circumstances, the fortunate fact that no atrocities have so far been perpetrated in the United Kingdom is of secondary importance. The threat of very large loss of life is ever-present; and the threat itself – even if not realised - might truly be said to have brought about “an exceptional situation of crisis or emergency”.

10. We would however sound a note of warning. The fact that a sufficiently grave public emergency may reasonably be said to exist at present is no guarantee that such an emergency will exist years, months or even weeks from now. The attacks of 11 September 2001 are central to the Government's attempt to justify the proposed derogation.<sup>12</sup> Furthermore, as the Government reiterated earlier this week:

“No other organisation has both the motivation and the capability to carry out attacks like those of the 11 September – only the Al Qaida network under Usama Bin Laden.”<sup>13</sup>

The claimed emergency is therefore dependent on the continued operational effectiveness of Al Qaida.

11. If Al Qaida is effectively disabled, for example by the capture of its leaders and seizure of its funds, or if the passage of time shows its threats of further action to be empty ones, it will no longer provide a legally acceptable basis for the assertion that there is a state of public

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<sup>11</sup> “Responsibility for the Terrorist Atrocities in the United States, 11.9.01: An Updated Account” (HMG, 15 November 2001). This document quotes the words broadcast by a Bin Laden spokesman on 13 October: “We also say and advise the Muslims in the United States and Britain .. not to travel by plane. We also advise them not to live in high-rise buildings or towers.”

<sup>12</sup> The Human Rights 1998 (Designated Derogation) Order 2001, Schedule.

<sup>13</sup> “Responsibility for the Terrorist Atrocities in the United States, 11.9.01: An Updated Account” (HMG, 15 November 2001), para 73.

emergency threatening the life of the United Kingdom. In that case, and in the absence of some new threat of equivalent magnitude, the derogation would in our opinion cease to be lawful.

### **STRICTLY REQUIRED BY THE EXIGENCIES OF THE SITUATION?**

12. The Strasbourg court has been understanding towards the predicament of States attempting to cope with public emergencies, showing tolerance of initial legislative failures so long as they are promptly corrected, and resisting the temptation to judge the efficacy of measures with the wisdom of hindsight.<sup>14</sup>

13. The phrase “*strictly* required” (emphasis added) is however important. It signals the need for particularly close judicial scrutiny – closer than that which is applied under other parts of the Convention - of any measures that it is sought to justify by way of a derogation. There are parallels with the position under English law, in which:

“the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances”.<sup>15</sup>

14. The cases on derogations afford many examples of such close scrutiny. In *Aksoy*, the Court ruled that not even the undoubted public emergency in south-east Turkey could justify the holding of the applicant in detention for 14 days, without judicial control, on suspicion of involvement in terrorist offences. The Court was influenced in that conclusion by the fact that:

“the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him,”

and by the failure of the Turkish Government to adduce “detailed reasons” justifying the measure.<sup>16</sup>

15. The circumstances of the currently proposed derogation are of course very different. In particular:

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<sup>14</sup> *Ireland v UK*, paras 214, 220.

<sup>15</sup> *Tan te Lam v Tai A Chau Detention Centre (PC)* [1997] A.C. 97 at 111.

<sup>16</sup> *Aksoy*, paras 78 and 83-84.

- (a) The new power of detention is intended to be applicable only to a narrow range of persons: international terrorists whom it is wished to deport as a risk to national security, but who cannot be deported either because they would be exposed to torture, inhuman or degrading treatment in the country of deportation,<sup>17</sup> or for “practical reasons” such as the absence of a travel document.<sup>18</sup>
  - (b) Provision is made in the Bill for immediate appeal to (and subsequent review by) a senior and specialised tribunal, SIAC.
  - (c) Legal advice and representation will be available, as presumably will access to doctors, relatives and friends.
16. On the other hand, the 14 days for which Mr. Aksoy was detained were described by the Court as an “exceptionally long” period; yet under the proposed Bill, persons may be detained without maximum limit of time – perhaps (like Mr. Chahal) for years. Furthermore, although SIAC provides a measure of protection, the remedies of habeas corpus and judicial review are entirely excluded.
17. In these circumstances, we consider that any court will scrutinise the proposed arrangements with particular care. We focus, as we believe the courts would do, on three issues in particular:
- (a) whether new powers of detention are necessary at all;
  - (b) whether (if so) they are excessive in their scope; and
  - (c) the adequacy of the judicial remedies available.

### **Need for new powers**

18. The paradigm case for the new detention power is the suspected Al Qaida member who cannot be deported to his own country because he would be tortured there, who cannot be put on trial in the United Kingdom because there is insufficiently firm evidence to bring a prosecution, yet who is perceived as too dangerous to release on to the streets.

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<sup>17</sup> Cf. *Chahal*, paras 73-82. It is a violation of Article 3 (which permits of no exceptions or derogations) to expel an alien to a country where he would face a real risk of being subjected to torture or inhuman and degrading treatment.

<sup>18</sup> As in *Ali v Switzerland* RJD 1998-V p. 2140, para 41.

19. It might be argued that even in this paradigm case, detention cannot be justified. Even persons suspected of committing terrorist offences overseas can be prosecuted under the Terrorism Act 2000, and be detained pending trial in the normal way. In circumstances where there is insufficient evidence for a prosecution, why should detention be necessary?
20. Such an argument would in our opinion be unlikely to prevail. A court which is prepared to accept the existence of a public emergency threatening the life of the nation is likely also to perceive the necessity for detaining such a person in the limited circumstances described. It would not however be lawful to use detention in circumstances where it would be feasible for a person to be either prosecuted or deported.

### **Scope of new powers**

21. The scope of the proposed new detention power for “international terrorists” goes well beyond the paradigm case just described. In particular:
  - (a) The definition of “international terrorist” extends not only to those belonging to international terrorist groups, but to those with (undefined, and therefore potentially remote) “links” to such groups.
  - (b) The definition of “international terrorist” (which is taken from the Terrorism Act 2000) understands terrorism in a significantly broader sense than the best available international definition, that contained in the 1999 UN Convention for the Suppression of the Financing of Terrorism, Article 2(1)(b). Thus:
    - (1) The UN Convention confines terrorism to acts intended to cause death or serious injury; the Bill (borrowing from the 2000 Act) includes acts intended to cause serious damage to property, a serious risk to the health or safety of the public and serious interference with or disruption of an electronic system.<sup>19</sup>
    - (2) The UN Convention requires the purpose of the act to be to “compel” a Government or international organisation to do or abstain from doing any act; the Bill (borrowing from the 2000

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<sup>19</sup> Cf. the European Union’s Proposal for a Council Framework Decision on Combating Terrorism, 19.9.2001, COM (2001) 521 final.

Act) only requires the purpose to be to “influence” a government.

- (c) The “international terrorists” caught by the Bill include those associated with groups having no connection with Al Qaida or the 11 September attacks.
- (d) The “international terrorists” caught by the Bill include not only those who plot against the United Kingdom but those who pose a direct threat only to a foreign state or states. Although by clause 21(1)(b) the Secretary of State must believe that a person’s presence in the United Kingdom is a risk to “national security”, he could legitimately so believe in the case of (for example) a Tamil Tiger, on the basis of the doctrine that “action against a foreign state may be capable indirectly of affecting the security of the United Kingdom”.<sup>20</sup>

22. In the light of these factors, it seems to us that the Bill catches people whom it is not strictly required to catch by the exigencies of the situation giving rise to the derogation. We do not see that the threat of Al Qaida could justify the indefinite detention of a suspected Tamil Tiger, still less the indefinite detention of a person, who though not herself a Tamil Tiger, has business or family “links” with a suspected Tamil Tiger. Yet that is the effect of clause 21 of the Bill as it stands.

### **Adequacy of review**

23. Clause 29(1) excludes both judicial review and habeas corpus. In their place is a right of appeal to SIAC under clause 25, and a right of periodic review under clause 26. Those rights relate to the Secretary of State’s issue under clause 21 of a certificate stating his belief that a person’s presence in the United Kingdom is a risk to national security, and his suspicion that the person is an international terrorist. SIAC is given what is on its face the power to second-guess the Secretary of State: by clause 25(2), SIAC must cancel the certificate if it does not agree with his belief or suspicion. The established SIAC procedures enable it to consider sensitive security information when scrutinising the Secretary of State’s certificate.

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<sup>20</sup> *Home Secretary v Rehman* [2001] 3 WLR 877, per Lord Slynn (for the majority) at 884E. Lord Hoffmann added that it would be open to the Secretary of State to conclude that “the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security”: 894H.

24. The SIAC appeal and review procedures are to a large extent the functional equivalent of the judicial review procedure and habeas corpus.<sup>21</sup> Indeed the clause 25(2) power, and the procedures for looking at security information, permit closer scrutiny of the Secretary of State's decision than might be possible in the administrative court. Where extraordinary powers of detention are concerned, the law requires the courts to be vigilant, even at times of national crisis.<sup>22</sup> It is particularly important that the factual conclusions of SIAC, as the appointed specialist tribunal, should be unquestioned on appeal, as indeed is required by section 7 of the SIAC Act 1997.<sup>23</sup> On that basis, we do not consider it impermissible for the Bill to provide for appeal and review by SIAC, with subsequent recourse to the Court of Appeal and House of Lords.
25. We are however concerned about two other aspects of the review mechanism.
26. The first of these is the ouster clause 29(3). Though rather obscure, its effect appears to be to render unreviewable, either in SIAC or in any court, the Secretary of State's conclusion that a person cannot be removed from the United Kingdom for Article 3 reasons or for practical considerations. That is because such a conclusion inevitably underlies the use of clause 22 or clause 23, and clause 29(3) states that a certificate that specified action is taken in reliance on clauses 22 or 23 shall be conclusive of the matter certified. This seems unjustifiable. If SIAC can be trusted to review a clause 21 determination, with its sensitive judgments on national security and terrorism, it should also be able to review the less sensitive (though potentially still very important) determination as to the impossibility of deportation. It is after all not inconceivable that a Secretary of State might seek to shelter unjustifiably behind Article 3, or a "practical consideration", in order to justify the

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<sup>21</sup> Despite its great historical importance, habeas corpus has been described on high authority as "a defective process, unnecessarily and unsuccessfully competing with judicial review" (Simon Brown LJ, ALBA lecture 1999). Such advantages as are claimed for habeas corpus – the absence of a requirement for permission, a time bar and a discretion to refuse relief, are shared by the SIAC process provided for in the Bill.

<sup>22</sup> *Liversidge v Anderson* [1942] AC 206, dissenting speech of Lord Atkin, approved by the House of Lords in *R v IRC ex p Rossminster* [1980] AC 952: "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace."

<sup>23</sup> See *Rehman* [2000] 3 WLR 1240 (CA) and [2001] 3 WLR 877 (HL)

continued detention of a person whom he preferred to detain rather than deport.<sup>24</sup>

27. Our second concern relates to the interval of six months that elapses between the determination of an appeal and the initiation of the review procedure. Though a further review may be available in the interim, this will be so only if the Commission considers that it should be held because of a change in circumstances. The six-month period is in our opinion unnecessarily and oppressively long. It should at least be halved.

### **CONSISTENT WITH OTHER OBLIGATIONS IN INTERNATIONAL LAW?**

28. We note that the Government does not propose to derogate from Article 9 of the International Covenant on Civil and Political Rights. Article 9, unlike Article 5 of the ECHR, does not lay down prescribed circumstances in which detention may be lawful, but instead states that detention must not be arbitrary and must be on grounds and in accordance with procedures established by law. There may be an issue as to whether the proposed new detention power might in certain circumstances be used in an “arbitrary” manner, but we do not address that issue further here.

### **CONCLUSION**

29. Our conclusions are as follows:
  - (a) As things stand, the courts are likely to accept the Government’s assessment that there is a public emergency threatening the life of the United Kingdom. This could however change very rapidly. If the Al Qaida organisation is effectively disabled, there will no longer be any legal basis for the proposed derogation.
  - (b) A court which is prepared to accept the existence of a public emergency threatening the life of the nation is also likely to perceive the necessity of detaining a suspected Al Qaida member, though only in circumstances where he can neither be deported nor put on trial.

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<sup>24</sup> An ouster clause of this kind was found to be in violation of Article 6 of the Convention in *Tinnelly and McElduff v United Kingdom* (1999) 27 EHRR 249.

- (c) The scope of the proposed new detention power is however unnecessarily broad, and so inconsistent with Article 15 of the ECHR, in that
- (1) it applies not only to suspected members of international terrorist groups (broadly defined) but to those having “links” with such persons;
  - (2) it applies to persons not associated with Al Qaida in any way; and
  - (3) it applies to those who pose a direct threat only to a foreign state or states (e.g. a Tamil Tiger).
- (d) There is no objection in principle to the SIAC appeal and review procedures. However for Article 15 of the ECHR to be complied with, we consider that:
- (1) The ouster clause 29(3) should be removed; and
  - (2) the interval of six months that elapses between the determination of the appeal and the automatic review is too long and should at least be halved.

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**DAVID ANDERSON Q.C.**

**16 November 2001**

**JEMIMA STRATFORD**