

Anti-Terrorism Legislation in the United Kingdom and the Human Rights concerns arising from it

John Wadham, Director Liberty & Kavita Modi

Background

Terrorism legislation in the United Kingdom is nothing new. Liberty was established in 1934 and by 1936, had written its first report on such provisions (then called the Special Powers Act) and since the outbreak of political violence in Northern Ireland, in the late sixties, we have witnessed the birth of two monumental statutes which paved the way for modern counter terrorist powers.

Liberty's concerns about terrorism measures are reflected in the fact that of the more than 7,000 people detained in Britain under the Prevention of Terrorism Act (1974 to 1992), the vast majority have been released without charge and only a tiny fraction have ever been charged with anything remotely resembling terrorism. Almost without exception these people could have been arrested under the ordinary criminal law. To take an example in 1992, when the activities of the IRA and others were still at their height, 160 people were arrested under the Act in Britain. Of these, eight were charged with murder, conspiracy or possession of explosives, three were deported or excluded, twelve were charged with theft or fraud and eight with other minor offences. There is no evidence to suggest that the people charged could not have been arrested under ordinary criminal law. However all of the others arrested, none of whom were convicted of any crime, were subjected to unnecessary arrest and detention.

A **Two-tier system** of criminal law and anti-terrorist provisions exists with fewer rights and safeguards under the latter. Is this necessary? Can it be justified? Only so far as is necessary to protect democracy – human rights should not go so far that they undermine the very system that they are designed to protect.

Terrorism Act 2000

- 1. Expanded definition of terrorism** – Section 1 of the Act – “terrorist” equals any act or threat of action which involves serious violence against a person or serious damage to property, endangers a person's life (but not just the life of the person committing the act), creates a serious risk to the health or safety of the public or, finally, is designed to seriously interfere with or disrupt an electronic system. Any such act must furthermore be “designed to influence the government or to intimidate the public or a section of the public”, and to further the advancement of a “political, religious, or ideological cause”.

However, action involving firearms or explosives are always terrorist actions, even if they are not designed to influence the government or intimidate the public.

This is important because the definition of terrorism determines the scope of the legislation. Falling under the terrorist legislation severely limits the rights of a defendant, and therefore, such measures should be narrowly tailored so that they only apply where necessary. The definition in the Terrorism Act is broad and vague. It is expansive enough to include animal rights activists and tree protestors in certain circumstances.

- 2. Proscribed Organisations** - Part 2 of the Terrorism Act deals with proscribed organisations – being a member of which is an offence punishable by up to 10 years imprisonment (s.11(1)). Schedule 2 lists 21 such organisations and section 3 grants the Secretary of State power to ban an organisation by order if he believes it engages in acts of terrorism. S.11(1) also applies to those who, though not a member of the organisation, support or further the activities of the organisation in any way. The wide scope of this offence damages freedom of expression and freedom of assembly – as it subjects political activities to criminal sanctions, even where there has been no criminal activity.

The appeal procedure to challenge proscription can only take place in front of the Proscribed Organisations Appeal Committee (POAC), not in front of regular court. Schedule 3 provides all the details relating to the Committee. The Commission is made up of three members appointed by the Lord Chancellor. The Lord Chancellor has the power to:

- a. decide how to regulate the right of appeal
- b. decide the procedure to be followed
- c. decide whether or not to conduct the proceedings through an oral hearing
- d. design rules concerning evidence (including burden of proof and admissibility questions)

The decision as to whether or not the applicant can be legally represented is entirely discretionary, and it is possible to exclude the appellant and/or the representative from all or part of the proceedings. It is also possible to withhold the reasons for proscription or refusal to de-proscribe from the applicant and his legal representative, and to enable a summary of evidence to be disclosed in the applicant's absence. Finally, the ambiguously worded paragraph (g) allows POAC to 'make different provision for different parties or descriptions of party', meaning, quite simply, that any rules which are considered necessary may be included.

These provisions seem to completely ignore the provisions of Article 6 – the right to a fair trial – there is no intention to achieve equality between the parties as the discretion as to whether the applicant can have legal representation shows. However, there is some controversy over whether Article 6 does apply to such proceeding – as proscription itself is not a charge

against anyone (although it is directly linked) – and it is unclear whether proscription would relate to a “civil right” in the way that phrase is used in ECHR jurisprudence.

3. Part VI - Terrorist offences:

- (i) Directing a terrorist organisation – s.56. Again, this relates to a political activity, not a terrorist action. Conviction of this offence can lead to a maximum sentence of life imprisonment. The wording of this section is vague – directing a terrorist organisation ‘at any level’ – and this could lead to speculation about what ‘any level’ is seeking to cover.
- (ii) Possession for terrorist purposes – s.57. This offence only requires suspicion that possession of the article in question – and doesn’t need to be proven that these were the accused’s actual intention. Given that the item in question may be perfectly harmless and the maximum sentence is 10 years imprisonment, this offence seems to offer the police dangerously wide powers which could be used with little justification. Recently, police powers under the Criminal Justice and Public Order Act were used to prevent an anti-war protest – the powers used included confiscating food and clothing – because the participants may have used such articles to hide behind!
- (iii) Collecting information – s.57. The information must be of a kind likely to be useful to a person committing or preparing an act of terrorism. This too, is a very broadly worded offence – and could conceivably cover collecting newspaper cuttings – or publicly available information about the location and entrances to buildings. The maximum sentence is 10 years.
- (iv) Inciting terrorism abroad – s.59. The structure of the offence is as follows: the act of inciting must be committed within the United Kingdom, but those incited must be based outside the UK, even though at the time of the inciting it is immaterial whether they are inside or outside the UK. A further qualification is that the crime incited must be a recognised crime in the United Kingdom as listed in subsection 2 in order to be captured by the section. The penalty attached to this offence is rather important because of its far-reaching nature: the penalty is that which would have applied had the “inciter” been convicted of the offence corresponding to the act which he incites.

This is a narrow, inchoate offence based, quite literally, on “speaking”. Issues relating to freedom of expression will most certainly surface, as it can easily be perceived as an offence committed by words alone. This leads to the concern that the provision may be exploited by repressive regimes overseas who

may encourage prosecutions of political opponents based in the United Kingdom. The opposition to these regimes may well be in the form of non-violent activities. Many groups may voice resistance against authoritarian governments who routinely deploy torture and institutionalised killings to quash any form of opposition in their own country. Once again, when an offence opens the accused to a maximum penalty of life imprisonment, one would hope that the provision is drafted meticulously and clearly. However, this provision is anything but unequivocal.

The offences of collecting information and possession for terrorist purposes both use reverse burdens to a certain extent. The accused must prove their innocence. But this burden is only evidential (s.118) - the burden then switches to the prosecution to prove beyond reasonable doubt that the defence is not satisfied.

- 4. Duty to disclose information** – where suspicion that another person has committed a terrorist offence in s.15 – 18 (funding for terrorist purposes or money laundering) and where suspicion based on information gathered in the course of a trade, profession, business or employment. This is intended to apply to journalists, not just banks but exemption is given to lawyers. Failure to disclose information without a reasonable excuse is punishable by a fine and/or up to five years imprisonment.

Also, s.117 of the Anti-Terrorism Crime and Security Act 2001 adds another subsection which establishes a wider duty to disclose information about acts of terrorism in general, as soon as reasonably practicable – this includes any information which can be of material assistance in preventing an act of terrorism or leading to the apprehension, prosecution or conviction of a person involved in acts of terrorism.

Equivalent power under the Prevention of Terrorism Act has been used against the families of those involved in terrorist activities generating a chill effect among journalists – this may breach Article 10.

- 5. Diplock courts** - Part VII of the Act provides for Northern Ireland-specific provisions including the use of a Diplock Court for ‘scheduled offences’ – in which the judge acts as judge and jury. The rules for the admissibility of oral evidence are also different. These provisions lapse after one year; however, they may be renewed by statutory instrument by order of the Home Secretary. The vast majority of provisions under Part VII have been continuously renewed since the Act came into force, and are currently in force until 18th February 2004.¹

¹ The Terrorism Act 2000 (Continuance of Part VII) Order 2003

6. Counter-terrorist powers: extended periods of detention and restricted rights. Prolonged detention under the anti-terrorism legislation, however, has violated the Convention.² However, the United Kingdom subsequently derogated from Article 5(3), so far as inconsistent with powers of extended detention, allowing the practice to continue.³ This derogation has been withdrawn⁴ following the revision of these powers by the Terrorism Act 2000.⁵ The new scheme allows extended detention for up to seven days but, crucially, requires the police to apply to a 'judicial authority' for a 'warrant of further detention' if the detention is to continue for more than 48 hours. More recently, the United Kingdom has entered a derogation⁶ in respect of Article 5(1)(f) to allow the government to detain suspected terrorists, who are not British nationals, without charge⁷ where it is not possible to deport them because to do so would violate Article 3.⁸

There are also extended powers of arrest under s.41 – suspicion of involvement in terrorism is sufficient grounds for arrest – a specific offence does not have to be specified.

Article 6(3) gives a right to legal representation and to have time and facilities to prepare your defence. The Terrorism Act permits access to a solicitor to be delayed for up to 48 hours where a person is arrested under s.41 if there are reasonable grounds for believing that consultation with a solicitor may lead to any of the following consequences⁹:

- interference with evidence of a serious arrestable offence
- interference or physical injury to anyone
- alerting of person suspected of committing a serious arrestable offence
- hindering of recovery of proceeds of crime
- interference with gathering of information about the commission, preparation or instigation of acts of terrorism
- alerting of a person thereby making it more difficult to prevent an act of terrorism
- alerting of a person making it more difficult to apprehend, prosecute or convict a person in connection with the commission, preparation or instigation of an act of terrorism.

²*Brogan and Others v United Kingdom* (1988) 11 EHRR 117, where detention of 4 days and 6 hours under s.12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 was found to breach Article 5(3).

³ See Human Rights Act 1998, Schedule 3, Part 1

⁴ On February 2001, but only in relation to the United Kingdom territory. See the Human Rights Act (Amendment) Order 2001, No. 1216

⁵ s.41 and Schedule 8.

⁶ See the Schedule to the Human Rights Act 1998 (Designated Derogation) Order 2001

⁷ Part IV of the Anti-Terrorism, Crime and Security Act 2001

⁸ I.e. where the country to which they would be deported may torture them: *Chahal v United Kingdom* (1996) 23 EHRR 413

⁹ Schedule 8 to the Terrorism Act 2000, paragraph 8

This dilution of rights may well be incompatible with Article 6(3).¹⁰ The European Court has held that where the right to silence is no longer protected (as is the case the United Kingdom), the right of access to a solicitor becomes “of paramount importance”¹¹, and any delay will violate Article 6.

Article 6(3)(c) implies a right to have the confidentiality of communications between a detainee and his lawyer fully respected.¹² The European Court recently found a violation of Article 6 when the applicant’s first conversation with his solicitor took place in the presence of a police officer.¹³ However, a person arrested under s.41 may only be permitted to consult his solicitor in the sight and hearing of a qualified officer, if a Commander or Assistant Chief Constable of Police has reasonable grounds for believing that such a direction is necessary to prevent any of the consequences listed above.¹⁴

- 7. Stop and Search powers** - Section 44 and s.45 of the Terrorism Act 2000 permits unlimited stop and search powers in a particular area in order to search for articles which could be used in connection with terrorism. Authorisation for the use of such powers must be given by a police officer of at least the rank of Assistant Chief Constable, and must be confirmed by the Home Secretary within 48 hours. The grounds for such authorisation are that the use of such powers must be considered expedient for the prevention of acts of terrorism. The powers can last for up to 28 days, and can be renewed after the expiry of this period. Unlike most of the stop and search powers under the criminal law, there is no need for a police officer to have reasonable grounds for suspecting that a person may be carrying certain articles before they exercise their powers of stop and search. In addition, the phrase “...articles of a kind which could be used in connection with terrorism..” is so vague that it could be used to search for almost any object.

The extended powers to stop and search could violate Article 5, the right to liberty. However, Article 5 is not an absolute right, and the powers in s.44 and s.45 could be justified under Article 5(1)(b). This permits detention “...in order to secure the fulfilment of any obligation prescribed by law.” This provision has usually been interpreted as only applying where there is a specific obligation, not to a general obligation to obey the law. However, in *McVeigh, O’Neill and Evans v UK*¹⁵ the European Commission found that detention pending ‘examination’ under the Prevention of Terrorism (Supplemental Temporary Provisions) Act 1976 was justified under 5(1)(b). The Commission was careful to distinguish this case on the grounds of the context of terrorism; ordinarily, there must have been a prior opportunity to fulfil the obligation before 5(1)(b) applies.¹⁶

¹⁰ Cheney, D., Dickson, L., Fitzpatrick, J. & Uglow, S. 1999, *Criminal Justice and the Human Rights Act 1998*, Jordans Publishing, Bristol, p59

¹¹ *Murray v United Kingdom* (1996) 22 E.H.R.R. 29

¹² *S v Switzerland* (1992) 14 E.H.R.R. 670

¹³ *Brennan v United Kingdom*, Judgment given on 16 October 2001

¹⁴ Schedule 8 of the Terrorism Act 2000, paragraph 9

¹⁵ (1981) 5 EHRR 71

¹⁶ They also said “It is necessary to consider whether its fulfilment is a matter of immediate necessity and whether the circumstances are such that no other means of securing fulfilment is reasonably

- 8. Terrorist property:** this is defined broadly to include all resources of a proscribed organisation, regardless of whether they are actually used for terrorist purposes.¹⁷ The Act creates various offences relating to fundraising and money-laundering. Section 15 makes it an offence to provide money or property which that person knows, or has reasonable cause to know will or may be used for terrorist purposes. It is also an offence to invite people to make donations for terrorist purposes, or to receive, possess or use money for terrorist purposes.¹⁸ To enter into funding arrangements with persons who will or may use the property for terrorist purposes is also illegal.¹⁹ Money laundering is dealt with in s.18. As with the provisions above, the defence is formulated as a reverse onus provision – the accused must prove that they did not know or had reasonable cause to suspect that the arrangement related to terrorist property. The maximum penalty is 14 years imprisonment.

Anti-Terrorism Crime and Security Act 2001

- 1. Introduction** - The Anti-Terrorism Crime and Security Act 2001, passed in the wake of September 11th, is a ragbag of diverse provisions, some of which are completely unrelated to terrorism. The Government used the opportunity to ride on the wave of sentiment pervading Parliament and the public to add even more anti-terrorist provisions, even though the law in this area had been reformed and consolidated only a year previously. It also slipped in unrelated pieces of legislation that would otherwise have been difficult to pass, confident in the knowledge that the political climate would prevent anything labelled anti-terrorist from not being supported.
- 2. Internment** - The most worrying provisions in the Act are those which allow the internment of foreign nationals suspected of involvement in terrorist activities. This allows the Government to detain those who cannot be deported²⁰ indefinitely, and without charge. The relevant provisions are contained in Part IV of the Act. In order to protect the Act from challenge, the Government entered a derogation²¹ in respect of Article 5(1)(f)²² of the

practicable. A balance must be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty. The duration of the period of detention is also a relevant factor in drawing such a balance.”

¹⁷ Section 14

¹⁸ Sections 15 and 16

¹⁹ Section 17

²⁰ Because they would be at risk of torture or death if they were deported, and so their deportation would violate Article 3 of the European Convention (the right to be free from torture) - see *Chahal v United Kingdom* (1996) 23 EHRR 413

²¹ See the Schedule to the Human Rights Act 1998 (Designated Derogation) Order 2001. Derogation is only permitted under Article 15 of the Convention in “time of war or other public emergency threatening the life of the nation... to the extent strictly required by the exigencies of the situation..” There has been much debate about whether September 11th created a public emergency in the United

European Convention on Human Rights. The legislation has been challenged in the courts under the Human Rights Act, and at first instance was found to be incompatible with Article 14 (the right to non-discrimination in respect of Convention rights) because it discriminated between nationals and non-nationals. However, this decision was overturned by the Court of Appeal, on policy grounds.

The process by which internment takes place begins with certification²³ by the Home Secretary that he reasonably suspects the person in question to be a terrorist, or reasonably believes that they are a threat to national security. A person is a terrorist for these purposes if they are, or have been involved in committing, preparing or instigating acts of international terrorism, or are, or have been a member of a terrorist group. A person can also be a terrorist if they have “links with” an international terrorist group. Section 21(4) specifies that a person has “links” only if he supports or assists that group; this should rule out mere association by implication.

Section 23(1) then allows for the detention of a person certified as a suspected international terrorist, despite the fact that his removal from the United Kingdom because of an international treaty requirement, or a practical consideration. The section is worded in this way because UK immigration law does ordinarily allow for the detention of non-nationals, but only prior to deportation, or where there is a likelihood that the person will abscond.

S.23 is controversial because it considerably expands the circumstances in which detention of non-nationals is permitted, and because it does so indefinitely, with little opportunity for a detainee to challenge the grounds upon which he has been detained. The Home Secretary does not have to provide any substantial proof of his accusations, and certainly not to the criminal standard of beyond a reasonable doubt, even though the indefinite nature of the detention makes it far more severe than imprisonment following conviction. The conditions of detention have been disgraceful; detainees have been imprisoned in Belmarsh, one of Britain’s high security prisons, and have little contact with their solicitors, let alone their family – conditions which are unheard of in the United Kingdom and clearly flout Article 6 (the right to a fair trial which include access to a legal adviser). Of course, there may well be international terrorists in the United Kingdom that the Government does not want roaming the streets, but is unable to deport. However, the question remains why such people cannot be prosecuted in the usual way, particularly as the Terrorism Act has expanded the list of terrorist offences so widely, and has subverted the usual requirements of the criminal process in order to make

Kingdom, and also whether any such emergency required internment procedures, particularly as no other European country felt obliged to resort to such drastic measures. The Government claimed that the UN recognition of the threat to international peace and security following September 11th, and that action to combat terrorism should include denying safe haven to terrorists (Security Council Resolution 1373 (2001)) gives support to its decision to intern foreign nationals.

²² Article 5(1)(f) creates an exception to the right to liberty, where prescribed by law, for “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

²³ Section 21

it easier to obtain a conviction for such offences. It is difficult to imagine an international terrorist who would not fit under one or more of these offences.

Certification can be challenged at the Special Immigration Appeals Commission (SIAC)²⁴. The Lord Chancellor has a very wide discretion to make rules concerning the procedure to be followed by the Commission: the hearing can take place in the absence of the applicant and their legal representative, the applicant need not be given the full reasons of any decision the Commission makes and the Commission may take evidence in the absence of the applicant.²⁵ SIAC must also hold a review of the certificate after 6 months, and then every 3 months, or if the applicant applies for a review and there has been a change of circumstances.²⁶ However, cancellation of a certificate by SIAC in no way prevents the Secretary of State from issuing a new certificate.²⁷

The ability of SIAC to properly consider the certificate is questionable as the courts generally take a deferential view in cases involving national security. For example, in *Secretary of State for the Home Department v Rehman*²⁸, the Home Secretary believed that Mr Rehman was a danger to national security and that therefore his deportation would be “conducive to public good”. The House of Lords held that the assessment of the threat to national security was essentially a matter for the executive rather than the courts. It would therefore be very difficult for someone who has been mistakenly certified as a suspected international terrorist to have the certificate cancelled and his detention ended.

Sections 21-23 are only temporary provisions²⁹: they were due to expire 15 months after they came into force but were renewed for a one year period by a statutory instrument by the Home Secretary. The provisions have now been renewed and will remain in force until 13th March 2004.³⁰ They can also be renewed without parliamentary approval in case of emergency. Crucially, there is a sunset clause to sections 21-23: section 29(7) provides that they will have cease to have effect on 10th November 2006.

Despite the derogation, these provisions have been challenged under the Human Rights Act as being incompatible with Article 14, the prohibition of discrimination in the enjoyment of Convention rights. In *A and Others v Home Secretary*, SIAC found that the legislation did violate Article 14 as it discriminated between nationals and non-nationals. Under Article 14 jurisprudence, it is permissible to draw a distinction between two groups of people, but only if there is an objective justification for the distinction. SIAC found that there was no objective justification here, as the stated aim of the provisions was to protect the security of the United Kingdom against

²⁴ Section 25

²⁵ Special Immigration and Appeals Commission Act 1997, s.5

²⁶ Section 26

²⁷ Section 27(9)

²⁸ [2001] UKHL 47

²⁹ Section 29

³⁰ The Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2003

international terrorism, but the evidence clearly showed that such a threat emanated from British nationals, as well as foreign nationals. The legislation was also disproportionate because means were not well-tailored to the aim. As well as being under-inclusive, in not including British nationals, they were also over-inclusive because s.21 is so broad that it is likely to cover people who, although they may be suspected international terrorists, had no links to Al-Qu'eda or September 11th – the threats upon which the current state of public emergency was based.

SIAC's ruling was overturned by the Court of Appeal³¹. On the last point of over-breadth, the Secretary of State gave an undertaking that the powers would only be exercised for the purposes of the emergency which was the subject of the derogation. In an excessively deferential judgment, Lord Woolf said that the question of whether it was only necessary to detain foreign nationals and not British nationals "...is an issue on which it is impossible for this court in this case to differ from the Secretary of State." This is because the issue came under the head of national security.

There was no violation of Article 14, in the Court's opinion, because there was a justifiable distinction between foreign national and British nationals. The distinction was that British nationals have a right to remain in the United Kingdom, whereas foreign national only have a right not be removed. Merely because some foreign nationals cannot be deported does not place them in the same situation as a British national, who obviously cannot be deported. The measures were proportionate, and rationally connected to their aim, which was deportation, even though that could not currently take place. Brooke LJ went on to note that international law has always allowed a distinction to be drawn between nationals and non-nationals, especially in times of public emergency. In addition, under Article 15 the derogation must only be to the extent necessary; therefore if it was unnecessary to detain British nationals, as the Home Secretary contended, then this would not be permissible under the derogation.

- 2. Disclosure by public authorities** - The Act extends the circumstances whereby public authorities can disclose information to agencies involved in a criminal investigation – these powers are not limited to use in terrorist investigations. Section 29 of the Data Protection Act 1998 already contained an exemption to non-disclosure of electronic personal information from a government department to the police for the purpose of a criminal investigation. However, this was deemed to be insufficient for the purposes of countering terrorism as it requires the disclosing authority to assess the legality of disclosure. In terrorist cases, the disclosing authority may not have all the information it would need to make such an assessment. Also, the 1998 Act requires that disclosure to countries outside of the European Economic Area should only occur where the recipient country has adequate protection mechanisms in place for data processing – in terrorist cases, the countries that the UK is working with may well have limited data protection measures. The

³¹ [2002] All ER (D) 386

Government claims that the restrictions of the 1998 Act in relation to recipient countries still apply under s.17 of the ATCSA – but s.17 does not refer to this.

Section 17 amends 66 existing provisions to extend the purposes for which disclosure by or on behalf of a public authority to:

- (i) the purposes of any criminal investigation whatever which is being carried out, whether in the United Kingdom or elsewhere;
- (ii) the purposes of any criminal proceedings whatever which have been or may be initiated, whether in the United Kingdom or elsewhere;
- (iii) the purposes of the initiation or bringing to an end of any such investigation or proceedings;
- (iv) the purpose of facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end.

Clearly, these amendments allow disclosure in a very wide range of situations, particularly as there is no requirement of any kind of suspicion, reasonable or otherwise, or even that any crime has been, or is likely to be committed. The Treasury has power to add any subordinate legislation to the list of provisions to which s.17 applies. The only restriction to the s.17 is s.17(5) which provides that the public authority which makes the disclosure must be satisfied that the making of the disclosure is proportionate to what is being sought to be achieved by it. But this is not the same as having a requirement that there be reasonable grounds to show that the information would be useful to the criminal investigation/proceedings.

Section 19 is specific to the Inland Revenue and Customs and Excise. These bodies are usually subject to an obligation of secrecy regarding the information that they collect. Section 19 releases these bodies from that obligation for the following purposes:

- (i) facilitating the carrying out by any of the intelligence services of any of that service's functions.
- (ii) the purposes of any criminal investigation whatever which is being carried out, whether in the United Kingdom or elsewhere;
- (iii) the purposes of any criminal proceedings whatever which have been or may be initiated, whether in the United Kingdom or elsewhere;
- (iv) the purposes of the initiation or bringing to an end of any such investigation or proceedings;
- (v) the purpose of facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end.

Again, there is the minimal safeguard that no disclosure should be made unless the person making it is satisfied that the disclosure is proportionate to what is sought to be achieved by it³², and the authority of the relevant Commissioner is required before a disclosure is made.³³ S.19 is retrospective – it applies to all information held by the Commissioners, including that

³² s.19(3)

³³ s.19(4)

collected before the Act came into force. Other protections are the Data Protection Act, which continues to apply, and the Human Rights Act – which means disclosure would have to be justified under Article 8, if challenged.

- 3. Police Powers** - The Act extends police powers beyond that already available under the Terrorism Act. Police officers can now require fingerprinting without consent if he or she is satisfied that it will help ascertain the individual's identity, if the person has not disclosed his identity or there are reasonable grounds to believe he is not who he says he is (s.89). Under the Terrorism Act 2000 these powers could be used only in connection with terrorist investigations. Under this Act physical data obtained under these sections can be used for purposes connected to “the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution”. This provision applies to investigations both inside and outside the UK.

An amendment to s.60 of the Public Order Act 1994 allows police officers to remove any item which he reasonably believes to be worn in order to conceal identity. There have been concerns that such powers, used against Muslim women wearing a headscarf, could lead to a disproportionate interference with their dignity, and could therefore lead to issues under Article 9 – freedom of religion.

- 4. Retention of Communications Data** - Part 11 of the Act concerns retention of communications data, by which communications providers such as Internet providers and telephone companies are asked to keep customer records. This would give the police and services access to emails, websites consulted, phone bills, information such as the duration of phone calls, and so on. Technically, it operates on the basis of a voluntary code of practice elaborated by the Home Secretary, by which the providers have to enter into agreements to determine the manner in which the retention must be carried out. It can be described as voluntary in the sense that a failure to abide by the code of practice will not give rise to liability in civil or criminal proceedings. The code of practice can furthermore be used as evidence in proceedings relating to the justifiability of retention requests. This must all be done in compliance with the Regulation of Investigatory Powers Act 2000.

Saadi v Home Secretary

The increasingly hostile attitude to asylum seekers in the United Kingdom, combined with Islamophobia and the terrorist threat, has led to an equivalence being drawn between asylum seekers and terrorists.

Prior to September 11th, the Government had begun a policy of detaining asylum seekers – who presented no risk of absconding and were not due to be deported or extradited – but merely in order that their asylum claims could be processed faster because they would all be in the same place and always available. This detention

was challenged in the case of *Saadi v Home Secretary*³⁴ (also known as *Oakington*). The first instance decision, which was given just days before the twin towers were hit, ruled in favour of the applicants and found that there had been a breach of Article 5 (the right to liberty). Although Article 5(1)(f) allows for detention "...to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." Collins J. found that detention in these cases did not fall under either of these situations. He also found that even if it had been found that detention was in order to prevent unauthorised entry, in the case of those who were not likely to abscond, detention was a disproportionate response to the aim of speed decision-making.

The Court of Appeal judgment, given after September 11th, allowed the Home Secretary's appeal. The House of Lords agreed. Their judgment was clearly policy based – Lord Slynn (who gave the sole reasoned judgment) begins by focussing on the numbers of asylum seekers – and influenced by the political climate – and perhaps also by direct pressure on the judiciary by Ministers of the Government. In contrast to Collins J., Lord Slynn saw unauthorised entry as being any entry which has not yet been authorised by the State – the issue of whether someone is trying to enter the country *unlawfully* is irrelevant. The detention therefore falls under the first part of Article 5(1)(f). Because that particular section does not mention the word "necessary", it was also irrelevant whether this form of detention was necessary. Lord Slynn found that because getting a speedy decision is in the interests of both asylum seeker and State and conditions were reasonable and the length of detention not excessive, detention under the Oakington system was proportionate and reasonable.

The International situation

According to the CIA, over 3,000 alleged al-Qa'ida 'operatives and associates' have been arrested in more than 100 countries. Amnesty International has repeatedly raised concerns that the US has been transferring suspects to countries with fewer protections against torture and ill-treatment than exist in the USA, and there have also been reports of prisoners being ill-treated. Most notoriously, the US has been detaining suspected al-Qa'ida and Taleban prisoners in Guantanamo Bay in appalling conditions. The US says that the Geneva Convention does not apply, even though those held are enemy combatants taken prisoner during the war on Afghanistan. Prisoners in Guantanamo Bay have had no access to lawyers, or any court or tribunal.

Amongst those held in Guantanamo Bay are several British prisoners. In *Abbassi v Foreign Secretary*, two British prisoners sought judicial review of the Foreign Secretary's decision not to make representations on their behalf to the US government. It was argued that this non-action by the Foreign Secretary breached the fundamental human rights principle of not being arbitrarily detained. Despite

³⁴ [2002] UKHL 41

the Foreign Secretary's submissions that a court could not review the actions of another state, the Court of Appeal condemned the "legal black hole" that the applicants were in, and decided that it could express a view when there was a clear breach of international law, particularly where it was a matter that concerned human rights. It was objectionable that he should be subjected to indefinite detention in territory over which the US had exclusive control with no opportunity, unlike a US citizen, to challenge his detention in a court or tribunal. However, although the discretion of the Foreign Secretary to decide whether or not to make representations was reviewable if it was irrational or contrary to legitimate expectation, the court could not examine areas of foreign policy.

Kavita Modi and John Wadham, *Liberty*, March 2003