

Since the judgment of the Commission, which has been handed down this afternoon, is a substantial document, we thought it would be of assistance to those who might be interested if we gave a brief summary of our conclusions.

The Anti-terrorism, Crime and Security Act 2001 contains in Part 4 provisions which enable the Home Secretary to certify that a person is an international terrorist if he reasonably

- a. believes that the person's presence in the United Kingdom is a risk to national security, and
- b. suspects that the person is a terrorist.

Anyone so certified is described as a suspected international terrorist. He may be detained under powers contained in the Immigration Act 1971 even though he cannot be removed from the United Kingdom because he is a refugee or he would be treated in such a way as amounted to torture or inhuman or degrading treatment if returned or there is no country to which he could be returned because for example he was stateless or none would accept him. Before the 2001 Act, such people could not be detained since detention could only be pending and for the purpose of removal. If there could be no removal, there could be no lawful detention.

Such detention is also contrary to Article 5 of the ECHR, now incorporated into domestic law by the Human Rights Act 1998. The only way that such detention could be justified was by derogating from the Convention to enable what otherwise would be a breach of the detainee's human rights to be done. On 18 December 2001 the Government did derogate from Article 5 and in particular from the provisions in Article 5 which only permitted detention of aliens against whom action was being taken with a view to their removal.

Article 15 of the Convention, which deals with derogation, is in very strict terms. It only permits derogation if effectively three preconditions are satisfied. These are:

1. There must be a public emergency threatening the life of the nation.
2. The measures which derogate from any obligation under the Convention must only be to the extent strictly required by the exigencies of the situation.
3. The measures must not be inconsistent with the United Kingdom's other obligations under international law.

Section 30 of the 2001 Act confers exclusively on SIAC the powers which otherwise would be held by the High Court to consider a challenge to the derogation relating to someone detained by virtue of the powers in the 2001 Act. It was said by the appellants that none of the three preconditions had been met and further that there were breaches of other Articles of the Convention from which there had been no derogation.

Our task under s.30 has been to review the derogation. The Government makes the decision; the court's power is to review it to determine whether it was lawfully made in that the preconditions are satisfied. Since issues of national security arise, we have considered not only the material referred to in open court but also material which could not be disclosed for reasons of national security. We have been able to do that with the assistance of submissions from special advocates appointed to represent the interests of the appellants. The appellants and their advisers cannot see and have not seen the undisclosed material; the special advocates and we ourselves have seen it.

We have decided that the Government was entitled to form the view that there was and still is a public emergency threatening the life of the nation and that the detention of those reasonably suspected to be international terrorists involved with or with organisations linked to Al Qa'ida is strictly required by the exigencies of the situation. However, there has been no derogation from Article 14 which prohibits discrimination in the application of the ECHR. The Act permits the detention of non-British citizens alone and it is quite clear from the evidence before us that there are British citizens who are likely to be as dangerous as non-British citizens and who have been involved with Al Qa'ida or organisations linked to it. It is not only discriminatory and so unlawful under Article 14 to target non-British citizens but also it is disproportionate in that there is no reasonable relationship between the means employed and the aims sought to be pursued. On that ground, we have decided that the 2001 Act, which is the measure derogating from the obligations under the Convention, to the extent that it permits only the detention of foreign suspected international terrorists is not compatible with the Convention.