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Detention without trial: the UK's derogation from Art.5

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Introduction

"Sovereign is he", said Carl Schmitt (the German conservative legal theorist writing in the inter-war period), "who decides on the state of exception",[i] which is to say that the sovereign is the one who decides on the nature of the emergency as well as on how to respond to it.

Schmitt would have said of our anti-terrorism legislation that it exemplifies the inability of liberal democracies to deal with fundamental political threats. If they seek to defend themselves, they have to give up on their own fundamental commitments, including their commitment to the rule of law. That goes to show, he thought, that liberal democracy is a sham. David Dyzenhaus has compared this view to that of Montesquieu when he said that "The practice of the freest nation that ever existed induces me to think that there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods."[ii]

As David Pannick put it in a lecture he gave after September 11, 'Do Terrorists have Human Rights': "A liberal democracy must confront the difficult question of what rights it should accord to those whose aim is to destroy the civilisation which confers those very freedoms. Can western society protect itself without abandoning the values which define its identity and so make it worth protecting? … The Human Rights Act is not simply a chocolate box of treats to be enjoyed on special occasions."

The main topic that I would like to address is one which I believe presents the greatest challenge for the rule of law at this time in this country: the detention without trial of people who are suspected of being international terrorists.

In July 2002 the Special Immigration Appeals Commission ("SIAC") considered the issue of the lawfulness of the United Kingdom's derogation from Article 5 of the European Convention on Human Rights ("the Convention").

The measures which require a derogation from the United Kingdom's obligations under Article 5 are contained in Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"), sections 21-31, and take the form of extended powers to detain foreign nationals who are suspected international terrorists. The relevant provisions provide for the indefinite detention of certain suspected international terrorists who are not brought to trial in this country, and whom the Secretary of State would wish to deport or remove from the United Kingdom, but who for legal or practical reasons cannot be deported or removed: see in particular section 23 of the 2001 Act.

In my view, the Derogation Order and the derogation to which it purports to give effect are unlawful under section 6(1) of the Human Rights Act 1998 ("the HRA") on the ground that they are incompatible with Article 5 of the Convention because the conditions in Article 15 for derogating from that right are not satisfied for the following reasons:

(1) the Secretary of State has failed to demonstrate that there exists a "public emergency threatening the life of the nation";

(2) the derogation measures go beyond "the extent strictly required by the exigencies of the situation."

(3) the derogation measures violate another rule of international law, in particular the principle of equality in Article 14 of the ECHR and Article 26 of the ICCPR.

SIAC rejected the first argument; accepted the third in relation to Article 14 and, for the same reason, accepted the second argument in part. As a result it quashed the Derogation Order and made a declaration on incompatibility in relation to section 23 of the 2001 Act. In October 2002 the Court of Appeal allowed the Secretary of State's appeal and held there to be no incompatibility between the derogation and the Convention.

Background

On 13 November 2001 the Human Rights Act (Designated Derogation) Order 2001 (SI 2001 No. 3644) ("the Derogation Order") came into force. The effect of the Derogation Order – if lawful – would be to modify the meaning of "the Convention rights" for the purposes of the HRA. In particular, it would have the effect of making the rights in Article 5 of the Convention subject to the provisions of the derogation. It is to be noted that no express derogation from Article 14 has been made, although before SIAC it was suggested on behalf of the Secretary of State that it should, if necessary, conclude that there has been an implied derogation. The

argument was rejected by SIAC and was not revived before the Court of Appeal. Whatever the merits of such an argument, it is clear that any derogation from the ICCPR has to be express: see Article 4(3). There has been no express derogation from Article 26 of the ICCPR.

On 18 December 2001 the United Kingdom sent a Note Verbale to the Secretary General of the Council of Europe notifying him of its (then proposed) derogation under Article 15 of the Convention.

On 14 December 2001 the 2001 Act Royal Assent. The relevant provisions, which are contained in Part 4, came into force on that date.

Shortly afterwards, eight individuals were detained pursuant to the powers conferred on the Secretary of State under Part 4 of the 2001 Act and others have been detained since. At least two have left the country voluntarily as they are entitled to do under the legislation.

Article 15 ECHR

Article 15 provides:

"15(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

The European Court of Human Rights could plainly review such a derogation. In *Lawless v. Ireland (No.3)* 1 EHRR 15, at para. 22, the European Court of Human Rights described its role as follows:

> "It is for *the Court* to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case." (Emphasis added)

Under the law of the Convention, a Contracting State which has purported to derogate from a Convention right acts incompatibly with that underlying right to the extent that the derogation is not lawful under Article 15: see e.g. *Aksoy v. Turkey* (1997) 23 EHRR 553.

It follows that the obligation to act compatibly with Convention rights in section 6(1) of the HRA includes an obligation only to derogate from a Convention right to the extent lawfully permitted by Article 15 of the Convention. To the extent that the conditions for derogation contained in Article 15 are not satisfied, the derogation is not lawful and public authorities will therefore be acting incompatibly with the relevant Convention right.

Jurisdiction of SIAC/the Courts

Subject to the express provisions of the 2001 Act, there can be no doubt that the ordinary courts would have jurisdiction to determine the lawfulness of the derogation. This follows from the fact that the Designation Order is a piece of secondary legislation, not primary legislation. It is made pursuant to powers conferred by section 14 of the HRA. If the conditions precedent for making it are not in fact satisfied, the courts could in principle decide that it was ultra vires and of no effect. In that event, the purported modification of the meaning of "the Convention rights" in the HRA by way of the derogation would be ineffective and, in any relevant proceedings, a person who claimed that he or she was or would be a victim of a breach of a Convention right would be able to rely on the Convention rights in their unmodified form, under section 7(1) of the HRA.

The only difference which the 2001 Act makes is that it confers jurisdiction on the Commission to do what the High Court could have done in such proceedings under the HRA: see section 30(2)(a) and (b). Indeed, the 2001 Act appears to make the Commission's jurisdiction to determine a "derogation matter" an exclusive one: see section 30(2). It is unnecessary for present purposes to consider whether such an apparent ouster clause is effective; it suffices to note that Parliament has clearly envisaged that the Commission itself can determine a "derogation matter." The words of section 30(2)(a) of the 2001 Act could not be clearer:

> "[the Commission] is the appropriate tribunal for the purpose of section 7 of the Human Rights Act 1998 in relation to proceedings all or part of which call a derogation matter into question".

(1): Is there a public emergency threatening the life of the nation?

In *Lawless (No.3)*, at para. 28, the European Court of Human Rights defined a "public emergency threatening the life of the nation" 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."

The Court went on, in the same paragraph, to state that:

> "the *Court must determine* whether the facts and circumstances which led the Irish Government to make their Proclamation of 5 July 1957 come within this conception." (Emphasis added)

In subsequent cases under Article 15, the European Court of Human Rights has always conducted its own examination of the facts to determine whether they fall within the meaning of public emergency in that Article, while affording the Contracting State a "margin of appreciation." See *Ireland v. United Kingdom* 2 EHRR 25, paras. 202-224; *Brannigan and McBride v. United Kingdom* (1994) 17 EHRR 539, para. 47; and *Aksoy v. Turkey* (1997) 23 EHRR 553, paras. 68-70.

There is an onus on the State to produce evidence demonstrating the scale and nature of the threat in order to satisfy the Commission that it is of sufficient seriousness to cross the high threshold of an emergency threatening the life of the nation.

However, the application of such a margin of appreciation by the domestic courts would not be warranted. The contrast being struck by the European Court of Human Rights in the above cases is between itself as an international court, by its nature exercising a supervisory and supranational jurisdiction, and the "national authorities", not between the relevant domestic authorities (in the United Kingdom, the Secretaries of State) and the domestic courts: see *Porter v. South Buckinghamshire District Council* [2001] All ER (D) 184 (Court of Appeal, 12 October 2001), at paras. 25-27.

A national court (including the Commission) reviewing the legality of a derogation from a Convention right under Article 15 is therefore not constrained in the same way as the supranational Strasbourg Court and, being itself one of the "national authorities" which is nearer to the vital forces of the nation, should apply a more stringent standard than the

Strasbourg court when deciding whether the relevant domestic authorities have discharged the onus upon them of demonstrating that a state of emergency threatening the life of the nation in fact exists.

While the doctrine of margin of appreciation is not a doctrine of national law under the HRA, I accept that some deference may be due to the Government which is accountable to the electorate: see e.g. *Brown v. Stott* [2001] 2 WLR 817, at 834-5 (Lord Bingham of Cornhill) and 842 (Lord Steyn). However, even allowing for any due deference, the national courts nevertheless should subject the facts to careful scrutiny in order to be sure that the condition precedent for making a derogation is satisfied, i.e. that there is a public emergency within the meaning of Article 15. Otherwise, there is a danger that, however much governments act in good faith, they will resort to the power of derogation in situations which are not true emergencies but in which the strict requirements of the Convention have been found to be inconvenient. As I shall be saying later, it is inherent in the scheme of a charter of fundamental human rights such as the Convention that the rights of individuals and minorities are to be protected even if this would, on occasion, be inconvenient for the majority in society.

The courts should be particularly cautious in accepting that there is a public emergency when it is public knowledge that one of the reasons why the derogation was introduced was that the jurisprudence on Article 3 (which cannot be derogated from) prevents the deportation of suspected terrorists to third states where they may face torture or inhuman or degrading treatment: see *Chahal v. United Kingdom* (1997) 23 EHRR 413. This is plain from the terms of the Note Verbale communicating the proposed derogation to the Secretary General of the Council of Europe. The courts should be cautious before accepting that a public emergency exists when it may be that the true objective of the derogation is to avoid an apparently inconvenient result which itself flows from the requirements of another provision of the Convention which is non-derogable.

After considering the evidence, including closed material in private session when the legal representatives of the detainees and Liberty were excluded but two Special Advocates were present as well as the Government's representatives, SIAC was satisfied that there was a public emergency threatening the life of the nation. It afforded the Secretary of State a wide discretionary area of judgment in this area, in particular because of his access to expert advice on matters of national security. The Court of Appeal dismissed the cross-appeal against this part of SIAC's decision on the ground that it was a finding of fact which it was entitled to reach.

(2): Measures not "strictly required"

The jurisprudence of the Strasbourg institutions has consistently made it clear that the fact that there is a public emergency under Article 15 does not mean that a Contracting State is relieved of all its obligations under the relevant provision of the Convention. Only those measures which are "strictly required" to meet the exigencies of the situation are lawful under Article 15.

In *Ireland v. United Kingdom* 19 YB 512 the European Commission of Human Rights said that:

> "There must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other. Moreover, the obligations under the Convention do not entirely disappear. They can only be suspended or modified 'to the extent that is strictly required' as provided in Article 15."

In *Aksoy* the European Court of Human Rights held that the detention of a person for 14 days without judicial intervention was not strictly required to meet the emergency which was found to exist in South-east Turkey at that time. The Court also held that Turkey had failed to put in place adequate safeguards to prevent abuse.

The principle of proportionality to be applied in human rights cases is now well-established. See *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 532, para. 27 (Lord Steyn):

> "The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
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> 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'"

It should be noted that the language of Article 15 – "strictly required" –demands an even more rigorous scrutiny than might be appropriate in applying Articles 8-11 of the Convention (which use the term "necessary"). This would be consistent with a purposive approach to Article 15, which should be construed narrowly in view of the fact that it allows for derogation

from some of the most fundamental rights in the Convention. The importance of Article 5 in the scheme of the Convention has frequently been stressed by the European Court of Human Rights. For example, in *Kurt v. Turkey* (1999) 27 EHRR 373, para. 122, the Court said:

> "The Court notes … the *fundamental importance* of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. … This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5(1) circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to *a most basic guarantee* of individual freedom." (Emphasis added)

In the present context, my view is that, even if there were a public emergency in principle, the derogation from Article 5(1) of the Convention is not lawful under Article 15 because it is not "strictly required" to meet the exigencies of the situation:

(1) The fact that the public emergency relied on is so general and vague means that it is difficult to assess why the specific measure of detention without trial is strictly required by it. There is no link between the vague emergency relied on and the alleged need to have a power to detain a person suspected of terrorism indefinitely and without trial.

(2) The definitions used in the 2001 Act are very broad and, at every stage, create the risk of arbitrary detention.

  (a) The meaning of "terrorism" itself is very broad: section 21(5) of the 2001 Act read with section 1 of the Terrorism Act 2000 ("the 2000 Act"). That definition is not confined to the use or threat of serious violence or serious damage to property: it can include action "designed seriously to interfere with or seriously to disrupt an electronic system" (section 1(2)(e) of the 2000 Act). It can include action outside the United Kingdom (section 1(4)(a) of the 2000 Act). It can include the use or threat of action designed to influence the government of a country other than the United Kingdom or part of the United Kingdom (section 1(1)(b) and 1(4)(d) of the 2000 Act).

  (b) A group may be an "international terrorist group" within the meaning of the 2001 Act simply because the Secretary of State "suspects" (not even "believes" or "has reasonable ground to believe") that it is concerned in the commission,

preparation or instigation of international terrorism: section 21(3)(b) of the 2001 Act.

(c) A person falls within the definition of "terrorist" if he or she has "links" with an international terrorist group as so defined and has links with it if he or she merely "supports" it: section 21(2)(c) and 21(4) of the 2001 Act.

(d) A person may be the subject of a certificate by the Secretary of State provided only that the Secretary of State has reasonable grounds to believe that that person's presence in the United Kingdom is a risk to national security and to "suspect" (not believe) that that person is a "terrorist": section 21(1) of the 2001 Act. It is clear from the decision of the House of Lords in *Secretary of State for the Home Department v. Rehman* [2001] 3 WLR 877, paras. 15-20 (Lord Slynn of Hadley), 28 (Lord Steyn), 53 (Lord Hoffmann) and 64 (Lord Hutton), that the definition of "national security" could be satisfied even if the alleged terrorist poses no direct threat to the United Kingdom because the threat to other countries can fall within the concept of this country's national security.

(3) The power of detention without trial is not confined to the threat of international terrorism associated with 11 September. The power can be used, for example, to detain a person who is a member of the LTTE (Tamil Tigers) or some other organisation that poses a threat to the life of another nation, not the United Kingdom. Before SIAC and the Court of Appeal, the Attorney General had to give an assurance that in practice the power would not be used to detain people who are not suspected to be associated with the Al Qaida network. It is possible that the apparently wide terms of the legislation could be read down pursuant to the interpretative obligation in section 3 of the HRA. However, the Court of Appeal did not feel it necessary to go into that question in the light of the Attorney General's assurance and because the wider issue did not arise on the facts.

(4) The 2001 Act came barely a year after the 2000 Act. Both Acts create new offences and confer new powers on the police and other agencies. No major terrorist incident has occurred in the United Kingdom since the 2000 Act; it cannot realistically be said that it had proved ineffective, since it had hardly been given the chance to be tested. As the Joint Committee noted at para. 6 of its Second Report, the powers of the police and other agencies to deal with terrorism were thoroughly overhauled and extended in the 2000 Act, which makes it a criminal offence triable in the United Kingdom to do anything to finance, prepare for or carry out acts of terrorism anywhere in the world. The United Kingdom's armoury of anti-terrorism powers is already widely regarded as

among the most rigorous in Europe, yet no other Member State of the Council of Europe has felt it necessary to derogate from Article 5 in order to maintain their security against terrorist threats (see para. 30 of the Joint Committee's Second Report). Existing offences are sufficiently broadly defined to enable those suspected of international terrorism to be prosecuted in the ordinary way, and, if there is sufficient evidence of the threat they pose, to be detained pending trial.

(5) The detention power fails even the basic requirement that it should be rationally linked to the legislative aim. If that aim is to prevent the planning and execution of acts of international terrorism by foreign nationals who may attack the United Kingdom, it is difficult to see how that aim is achieved by permitting a detained person to leave the country voluntarily. The Note Verbale makes it clear that the detained person is free at any time to leave the United Kingdom voluntarily. Once released, that person would be free to resume any links that he or she may have with an organisation like Al Qaida abroad and plan acts of terrorism against the United Kingdom (if there is such a threat).

(6) At the same time, as well as being "over-inclusive", the measure is "under-inclusive": it has too narrow a focus to achieve its declared aim. The power of detention can be used only in respect of foreign nationals who cannot be deported or returned to another country. But the person concerned may be in exactly the same position as a British citizen who may be planning acts of terrorism against the United Kingdom. Several of those who are detained by the United States in connection with the events of 11 September or since are British citizens: without prejudging whether the allegations against them are true, it suffices to note that there could be a threat from British citizens against the United Kingdom and yet they would have to be treated (rightly) under the ordinary criminal law and, if appropriate, would have to be brought to trial.

(7) Indeed, for the same reasons, the measure discriminates on the ground of nationality, contrary to Article 14 of the Convention, from which there has been no derogation. Nor has there been a derogation from Article 26 of the International Covenant on Civil and Political Rights.

(8) Finally, no other Contracting State has felt the need to enact a power to detain without trial, although many parties to the Convention have passed new legislation to meet the threat of terrorism since 11 September. Indeed, the Parliamentary Assembly of the Council of Europe has passed Resolution 1271 (2002), clause 9 of which is in categorical terms:

> "In their fight against terrorism, Council of Europe member states should not provide for any derogations to the European Convention on Human Rights."

(3): Breach of the principle of equality

It was arguments (6) and (7) which were accepted by SIAC and which led to its conclusion that section 23 of the 2001 Act was incompatible in so far as it permitted detention on a basis which discriminates on the ground of nationality.

The Court of Appeal disagreed. The Court held that a foreign national is not in an analogous position to a British citizen and therefore could be detained in circumstances where it was intended to deport him or her (but for the time being deportation was impossible). A British citizen, of course, cannot be deported and so detention pending deportation is simply unavailable.

This is unlikely to be the last word on the subject. In particular what is troubling is that the Court appears to accept that, because a foreign national does not have the right to remain in this country, it follows that even other rights such as the right to a fair trial can be removed in relation to that person. This is said to be because it is not detention on suspicion of a criminal offence but detention pending deportation – but in a case where by definition deportation is impossible. Standing back from the legal technicalities the lay person might be forgiven for thinking that what has happened is that the executive can send someone to prison who is suspected of being an international terrorist without the inconvenience of a trial and conviction – but only if they are foreign.

[i] Carl Schmitt, *Political Theology* (Cambridge, Mass.: MIT Press, 1988, George Schwab trans., first pub. 1922), 1.

[ii] Quotation from Negretto and Aguilar Rivera, where it is the epigraph.