



OFFICE OF THE COMMISSIONER
FOR HUMAN RIGHTS

BUREAU DU COMMISSAIRE
AUX DROITS DE L'HOMME



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OPINION 1/2002

OF THE COMMISSIONER FOR HUMAN RIGHTS,
Mr ALVARO GIL-ROBLES,

on certain aspects of the United Kingdom
2001 derogation from Article 5 par. 1 of the
European Convention on Human Rights

I. Introduction

1. By letter of 9th April 2002, the Joint Committee on Human Rights requested the Commissioner for Human Rights of the Council of Europe (the Commissioner) to submit an opinion concerning a number of issues raised by the United Kingdom's derogation from article 5 (1) of the European Convention for Human Rights (the Convention) in respect of certain provisions of the Anti-Terrorism, Crime and Security Act 2001. The call for evidence concerned, in particular, the adequacy of the parliamentary scrutiny of the measures taken by the United Kingdom Government to this effect.
2. The Commissioner submits this opinion in accordance with Articles 3(e), 5 (1) and 8 (1) of Resolution (99) 50 of the Committee of Ministers on the Commissioner for Human Rights. Article 3(e) instructs the Commissioner to "identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe". Article 5(1) states that "the Commissioner may act on any information relevant to the Commissioner's functions", including "information addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions in the field of human rights, individuals and organisations." In accordance with Article 8(1) "the Commissioner may issue recommendations, opinions and reports."

II. Derogations under Article 15 of the ECHR :

3. Article 15 of the Convention allows States to derogate from a number of its articles "in times of war or other public emergency threatening the life of the nation" provided that the measures taken do not exceed those "strictly required by the exigencies of the situation". States seeking to derogate must inform the Secretary-General of the Council of Europe of the measures taken and the reasons therefor.
4. The European Court of Human Rights (the Court) is competent to decide on the validity of derogations. It has, however, granted states a large margin of appreciation in assessing both the existence of a public emergency and the strict necessity of the measures subsequently taken. National authorities are, "by reason of their direct and continuous contact with the pressing needs of the moment, [...] in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of the measures necessary to prevent it"¹
5. The Convention does not expressly require an effective domestic scrutiny of derogations under Article 15, and the Court has not yet had occasion to pronounce on the matter. The requirement is, however, easily discerned.
6. The Court has repeatedly emphasised the close relationship between democracy and the rights guaranteed by the Convention, stating, for instance, that "democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it"².

¹ *Ireland v. UK*, judgment of 18.01.1978, Series A, N°25, para 207

² *United Communist Party of Turkey and Others v. Turkey*, judgment 30.01.1998, Reports 1998-I, para 45.

7. The separation of powers, whereby the Government's legislative proposals are subject to the approval of Parliament and, on enactment, review by the courts, is a constitutive element of democratic governance.
8. Effective domestic scrutiny must, accordingly, be of particular importance in respect of measures purporting to derogate from the Convention: parliamentary scrutiny and judicial review represent essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures.
9. It is, furthermore, precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations³. This is, indeed, the essence of the principle of the subsidiarity of the protection of Convention rights.
10. This opinion is not concerned with the judicial review of derogations.
11. The parliamentary scrutiny of derogations is consistent with the Constitutional norms of several European countries regarding the use of emergency powers. Declarations of different types of emergencies typically require simple or qualified parliamentary majorities, or are subject, along with the related measures, to subsequent parliamentary confirmation⁴.
12. The formal requirement of the parliamentary approval of derogations is not on its own sufficient, however, to guarantee an independent assessment of the existence of an emergency and the necessity of the measures taken to deal with it. It is clear that the effectiveness of the parliamentary scrutiny of derogations depends in large measure on the access of at least some of its members to the information on which the decision to derogate is based.

III. The adequacy of the UK procedure with respect to derogations

13. The rights guaranteed by the Convention were incorporated into United Kingdom domestic law by the Human Rights Act 1998. Section 3 of the Act provides that, in so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with Convention rights. Under Section 4, the court, in this case the Court of Appeal or House of Lords, may make a declaration of incompatibility of a provision of primary or secondary legislation with a right guaranteed by the ECHR. In respect of new legislation, Section 19 requires that the Minister in charge of a Bill make a statement before parliament (a "statement of compatibility") to the effect that the Bill's provisions are compatible with the Convention rights.
14. The Human Rights Act outlines in sections 14 and 16 the procedure for derogating from Convention rights for the purposes of domestic law. The Secretary of State responsible designates the derogation through a statutory instrument in the form of an Order in Council, which must subsequently be included in Schedule 3 of the Act. The order

³ It is interesting to note that the only case in which the Court did not accept a State's assessment regarding the existence of a public emergency was in *the Greek case* [12 YB 1(1969)], in which the derogation was declared by the government set up following the military Putsch in 1967.

⁴ See "Emergency Powers", European Commission for Democracy through Law (the Venice Commission), Science and technique of democracy No. 12.

designating the derogation comes into effect immediately, but expires after a period of 40 days unless both Houses pass a resolution approving it. A designation order may be made in anticipation of a proposed derogation.

15. The Home Secretary first announced proposals to combat the “the threat from international terrorism” on 15th October 2001. On 11th November 2001 the Human Rights Act 1998 (Designated Derogation) Order 2001 was made by the Home Secretary. It came into effect two days later. The Designated Derogation Order was debated in Parliament on 19th November and approved on 21st November 2001. The first draft of the Anti-terrorism, Crime and Security Bill 2001 was laid before Parliament on 12th November 2001 and received Royal Assent on 13th December 2001. The Secretary General of the Council of Europe was informed of the United Kingdom’s derogation by Note verbale on 18th December 2001.
16. It is clear from the related chronology that the United Kingdom Parliament enjoyed, in principle, two separate occasions on which to scrutinise the derogation in question; firstly, on approving the Derogation Order and, secondly, when passing the derogating provisions of the Anti-terrorism, Crime and Security Bill⁵.
17. It is to be noted that the derogation was designated for the purposes of domestic law in anticipation, not merely, as is provided for by Section 14(6) of the Human Rights Act, of the United Kingdom’s derogation from its obligations under the Convention, but prior also to the enactment of the legislation necessitating the derogation, in this case, even, before the proposed Bill had been laid before Parliament. Two related problems would appear to arise in respect of this chronology.
18. It is not clear, firstly, that this sequence is consistent with the legal nature of derogations. A derogation is made in respect of certain measures that would otherwise infringe rights guaranteed by the Convention and is constituted by its formal announcement (under the Convention, through notification of the Secretary General of the Council of Europe) *in relation to* those measures. Indeed the Court has shown some flexibility with regards to the timing of notifications, accepting delays of up to two weeks following the adoption of the measures in question⁶, suggesting that the derogation comes into force not on notification but on promulgation. This is unsurprising since it is only the measures themselves that can define the scope of the derogation. Indeed, the notification or, for the purposes of domestic law, the designation of a derogation will, on its own, be of no legal consequence. The effect of the procedure adopted in respect of the United Kingdom derogation was, therefore, oddly, to invert the formal requirement; instead of the order sanctioning the measures, the measures confirmed the order.
19. There is, secondly, a risk that this sequence will undermine the effectiveness of the parliamentary scrutiny of the derogation. A designated derogation comes into effect immediately, and, therefore, unless the measures themselves have been examined beforehand, prior to any scrutiny whatsoever. The United Kingdom parliament must, however, subsequently approve the order. Parliament’s ability to scrutinise the necessity

⁵ The United Kingdom Parliament exercises no control over the notification of the Secretary General of the Council of Europe of a derogation from the Convention, which, as a treaty obligation, remains a crown prerogative. However, in so far as the United Kingdom Parliament is required to approve the derogating measures themselves this would not appear to be problematic, especially when, as is desirable, the notification of the Secretary-General occurs only after the passage of the relevant Act.

⁶ *Lawless v. Ireland*, judgment of 01.07.1961, Series A N°3, and *Ireland v. UK*, above-mentioned judgement, para. 80.

of the derogation at this stage, might appear, in this case, to have been limited by the fact that the derogating measures had not yet been finalised. Indeed, the first draft of the proposed Bill was laid before Parliament only the day after the designated derogation was made, the House of Commons, having, furthermore, only one week to consider the Bill before being asked to approve the order. It is true that the designated derogation has no effect until the enactment of the attendant measures. However, the practise of designating a derogation prior to the debating of the derogating measures risks not only eliminating an effective scrutiny of the order itself, but also potentially reducing the urgency of a detailed scrutiny of the subsequent measures. This will especially be the case where the derogation order enables the Secretary of State to make a declaration of compatibility in respect of the Bill he wishes to put forward. In effect, two small parliamentary hurdles are substituted for one large one.

20. The Commissioner is of the opinion, therefore, that it would be both more coherent and provide a greater guarantee of effective parliamentary scrutiny if, as a general rule, derogations were designated for the purposes of domestic law - and the Secretary General notified - only after the measures requiring them have been promulgated.
21. In the instant case, the Commons' debates of 19th November suggest that its members were well acquainted with the proposed provisions of the Anti-terrorism, Crime and Security Bill, reasonably precise indications of which were, in any case, already available since 15th October. Nor do the debates during the subsequent passage of the Bill reveal an absence of concern over the real necessity of taking the significant step of derogating from Convention rights. What the latter debates do reveal, however, is that several members of Parliament felt insufficiently informed as to the extent of the threat and unable to assess, therefore, whether it constituted a public emergency and whether the relevant provisions of the Bill were strictly required.
22. An effective parliamentary scrutiny presupposes an informed and independent assessment. The information relevant to proposed derogations is likely, however, to be of a sensitive and perhaps publicly undisclosable nature. Whilst it might, under such circumstances, be acceptable to restrict Parliamentary access to such information, the failure to disclose any information at all, where it is maintained that such information exists, is manifestly incompatible with the requirement of the democratic control of executive authority which is of particular importance in respect of measures limiting rights guaranteed by the Convention.
23. One mechanism amongst many might be to make the information warranting the derogation available to a specially constituted ad hoc Committee. The Committee, made up, perhaps, of selected representatives from a limited number of concerned Parliamentary Committees, could, in turn, report their assessments to both Houses. One might have included, for example, in respect of the derogation in question, the Home Affairs Committee, the Joint Committee on Human Rights and the Joint Committee on Statutory Instruments. It is to be noted in this respect that special parliamentary commissions competent to examine classified information exist in several Council of Europe member States for the control of secret services.⁷

⁷ See *Klass v. Germany*, judgement of 06.09.1978, Series A N°28

IV. The review and renewal of derogations

24. The need for effective parliamentary scrutiny applies equally to the periodic review and possible renewal of derogations. The Human Rights Act 1998 provides, in section 16 1(b), that designated derogations shall lapse 5 years after the initial order is made and, in section 16 (2), that the Secretary of State may extend the order for a further period of 5 years at any time prior to the initial order's expiry. In respect of renewals, the derogation order comes into force, unlike the original order, only on its approval (within 40 days) by Parliament. The Human Rights Act makes no mention of review.
25. In the absence of any review procedure, the Commissioner is of the opinion that the 5 year period provided for by the Human Rights Act 1998 is excessive. It must be recalled that derogations are valid only for so long as the public emergency obtains and that much can change in 5 years. In the opinion of the Commissioner derogations ought to be subject to renewal conditional on the approval of Parliament no later than 12 months after coming into effect.
26. The provisions of the Human Rights Act 1998 are improved upon in respect of the derogating sections of the Anti-terrorism, Crime and Security Act 2001, which, under section 29 (1) of the Act, expire 15 months after the coming in to force of the Act. The Secretary of State may, under section 29 (2), revive the sections for subsequent periods not exceeding 1 year each, subject to the approval of Parliament (Section 29 3(b)). The Secretary of State shall, under section 28 (1) "appoint a person to review the operation" of the derogating measures within 14 months of the Act's coming into force and within 11 months of each of renewal.
27. The review procedure is unclear. Question marks remain over the independence of the reviewer, his or her access to the necessary information and the subsequent availability of his or her conclusions. The requirement that the Secretary of State put the report before Parliament as soon as is practicably possible presents some difficulty. It is hard to foresee a practical obstruction that would justify delaying its immediate disclosure. There is no guarantee, furthermore, that the disclosure of the report would coincide with the request that Parliament approve an extension order.
28. It would perhaps be preferable, therefore, to merge the review and renewal procedures, such that the timeframes were identical for both and the review was conducted by, or in tandem with, a selected number of Committee members who might advise both houses on its approval of the new derogation Order.

V. Considerations on the justification of the United Kingdom 2001 derogation.

29. Sections 21-23 of the Anti-terrorism, Crime and Security Act 2001 provide for the potentially indefinite detention of foreign nationals the Home Secretary suspects of involvement in international terrorism and whom he is unable to deport owing to a well-founded fear of persecution in the country of origin and the inability to secure a third country of destination⁸.

⁸ The lengthy detention of persons that cannot be deported owing to a real risk of a violation of Article 3 in a receiving country was found, in *Chahal v. United Kingdom*, (judgement of 26.05.1993, Series A N°258-B) to constitute a violation of Article 5(1).

30. In his report on his visit to Spain and the Basque Country⁹, the Commissioner recognised the threat of terrorism as "... [affecting] not only the fundamental rights of individuals but also the free exercise of certain civil and political rights which are the basis and foundation of every democracy". States have, as a result, an essential obligation to protect both their institutions and their citizens against terrorist actions. It is important, however, that the threat of terrorism is combated with due respect for the rule of law and without prejudice to the European human rights *acquis*, which constitutes the cornerstone on which our democratic societies are based.
31. The Court has recognised terrorism as a "threat to the organised life of the community of which the State is composed"¹⁰ capable of constituting grounds for derogating and has, as indicated above, given States a large measure of discretion in their assessment regarding the existence of a public emergency and the necessity of the measures taken to deal with it.
32. In the instant case, the Commissioner has not had access to any additional classified information on which the decision to derogate might have been based and is consequently unable to express a firm opinion on the existence of a public emergency within the meaning of Article 15 of the Convention. The Commissioner would, however, like to raise the following considerations.
33. Whilst acknowledging the obligation of governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11th 2001 cannot, on their own, be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the present circumstances. Detailed information pointing to a real and imminent danger to public safety in the United Kingdom will, therefore, have to be shown.
34. Even assuming the existence of a public emergency, it is questionable whether the measures enacted by the United Kingdom are strictly required by the exigencies of the situation.
35. In interpreting the strict necessity requirement, the Court has so far declined to examine the relative effectiveness of competing measures, preferring instead to allow such an assessment to fall within the margin of appreciation enjoyed by national authorities¹¹. This does not exclude the possibility, however, that demonstrable availability of more or equally effective non-derogating alternatives will not cast doubt on the necessity of the derogating measures. This might especially be the case where so important right as the right to liberty and security is at stake. It is, at any rate, not clear that the indefinite detention of certain persons suspected of involvement with international terrorism would be more effective than the monitoring of their activity in accordance with standard surveillance procedures.
36. The proportionality of the derogating measures is further brought into question by the definition of international terrorist organisations provided by section 21(3) of the Act. The section would appear to permit the indefinite detention of an individual suspected of having links with an international terrorist organisation irrespective of its presenting a

⁹ February 2001, CommDH(2001)2

¹⁰ *Lawless v. Ireland* A3 para 28 (1961). See also *Ireland v. United Kingdom* A25 (1978) and *Brannigan and McBride v. United Kingdom* A 258-B (1993)

¹¹ See *Ireland v. UK*, above-mentioned judgement.

direct threat to public security in the United Kingdom and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.

37. Another anomaly arises in so far as an individual detained on suspicion of links with international terrorist organisations must be released and deported to a safe receiving country should one become available. If the suspicion is well founded, and the terrorist organisation a genuine threat to UK security, such individuals will remain, subject to possible controls by the receiving state, at liberty to plan and pursue, albeit at some distance from the United Kingdom, activity potentially prejudicial to its public security.
38. It would appear, therefore, that the derogating measures of the Anti-Terrorism, Crime and Security Act allow both for the detention of those presenting no direct threat to the United Kingdom and for the release of those of whom it is alleged that they do. Such a paradoxical conclusion is hard to reconcile with the strict exigencies of the situation.
39. Whilst detention under the derogating powers of the Anti-Terrorism, Crime and Security Act requires that the individual be an undeportable foreigner, it is triggered, ultimately, only on the suspicion of involvement with an international terrorist organisation. Though the reasonableness of the Home Secretary's suspicion is justiciable, it remains the case that the detention is effected without any formal accusation and subject only to a review in which important procedural guarantees are absent. The indefinite detention under such circumstances represents a severe limitation to the enjoyment of the right to liberty and security and gravely prejudices both the presumption of innocence and the right to a fair trial in the determination of one's rights and obligations or of any criminal charge brought against one. It should be recalled that an ill-founded deprivation of liberty is difficult, indeed impossible, to repair adequately.
40. In so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals.
41. Whilst Article 15 of the Convention does not prohibit derogations tending to this effect or preclude restrictions of the rights outlined above, it is clear that such measures can be justified only under the most limited of circumstances.

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Commissioner for Human Rights