

# **ANTI-TERRORISM, CRIME AND SECURITY ACT 2001**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 4: Immigration and Asylum**

69. This Part contains measures concerned with the capacity of the UK's immigration and asylum procedures to deal with people whose presence in the UK is not conducive to the public good.
70. The first two measures – extended powers to detain foreign nationals who are suspected international terrorists (sections 21 to 32) and non-consideration of the substance of an asylum claim made by certain people whose removal from the UK is conducive to the public good (sections 33 and 34) – are fairly narrow in their focus. They apply only to those cases where any appeal against a decision taken by the Secretary of State is to the Special Immigration Appeals Commission (SIAC). SIAC is an independent judicial body set up by the Special Immigration Appeals Commission Act 1997 to hear appeals which involve a public interest provision. A “public interest provision” is a provision by which a person's presence in the UK is considered not to be conducive to the public good for reasons of national security, or the relations between the UK and any other country, or for other reasons of a political nature.
71. The third measure allows the Secretary of State to retain fingerprints taken in asylum and certain immigration cases which were previously destroyed once the case was decided.

#### **Suspected international terrorists**

##### ***Sections 21 to 23***

72. These three sections extend the application of existing detention powers under the Immigration Act 1971 (the “1971 Act”) to cases where the Secretary of State is seeking to remove a suspected international terrorist but where such removal is not currently possible.
73. Although there are powers to detain people where the intention is to remove them, case law in the UK is that if removal is not going to be possible within a reasonable period of time, detention is unlawful. Similarly, the European Court of Human Rights has established that the relevant part of Article 5(1)(f) of the European Convention on Human Rights (ECHR) permits the detention of a person only in circumstances where action is being taken with a view to deportation.
74. The Government has concluded that, following the events of 11 September 2001 in the USA, there is a heightened threat from international terrorists, and that a public emergency exists in the UK. It has further concluded that in these circumstances action in the form set out in sections 21 to 23 needs to be taken to safeguard national security

against the threat posed by suspected international terrorists whom the UK wishes to but cannot remove.

75. Sections 21 to 23 enable suspected international terrorists to be detained in circumstances where either a legal impediment derived from an international obligation or a practical consideration prevents removal. In parallel with these provisions, the UK has on 18 December 2001 notified the Secretary General of the Council of Europe of a derogation from Article 5 of the ECHR (right to liberty and security) to the extent necessary to ensure that the measures contained in sections 21 to 23 are not in breach of our obligations under the ECHR. Article 15 of the ECHR permits a derogation from Article 5 in a time of public emergency to the extent strictly required by that emergency.
76. The Human Rights Act (Designated Derogation) Order 2001 was made under powers in section 14(1) and (6) of the Human Rights Act 1998 on 11 November 2001 in anticipation of the making of a proposed derogation. It was approved by resolutions passed by each House of Parliament following debates on 19 November. This Order means that the Convention rights under the Human Rights Act 1998 have effect subject to the proposed derogation.

### ***Section 21 Suspected international terrorist: certification***

77. Section 21 provides for the certification by the Secretary of State of a suspected international terrorist. A “suspected international terrorist” is defined as a person whose presence in the UK the Secretary of State reasonably believes to be a risk to national security and whom he reasonably suspects is a terrorist. The section also defines the terms “terrorism” (which is as defined in section 1 of the Terrorism Act 2000), and “terrorist”. It also provides that legal proceedings questioning the decision of the Secretary of State in connection with a certificate under this section, or actions of the Secretary of State taken wholly or partly in reliance on that certificate, may be brought only before SIAC in the course of proceedings under section 25 or 26 of this Act, or section 2 of the Special Immigration Appeals Commission Act 1997.

### ***Section 22 Deportation, removal &c.***

78. Section 22 lists, in subsection (2), actions which may be taken in respect of a suspected international terrorist despite the fact that those actions cannot at present result in the actual removal of that person because either a point of law relating to an international agreement or a practical consideration prevents this. The international agreement most likely to apply is the ECHR: case law from the European Court of Human Rights is clear that a person may not be removed where this would place them at a real risk of torture or inhuman or degrading treatment or punishment, contrary to Article 3 of the ECHR. There are no exceptions. By contrast the 1951 Convention and 1967 Protocol relating to the Status of Refugees (the “Refugee Convention”) contains provisions which exclude from its protection people whom it would be possible for the Secretary of State to certify under section 21.
79. A “practical consideration” might be the unavailability of routes to the country of intended removal (there may, for example, be no commercial flights to that country) or a lack of appropriate travel documentation.
80. The actions listed in subsection (2) relate to the refusal of entry, the refusal to vary leave to enter or remain, the giving of removal directions and various actions connected with deportation. This section does not permit a person to be removed contrary to any international obligations but enables actions to be taken with a view to future removal which, but for the person being certified as a suspected international terrorist, the courts might be able to set aside. The reason it is necessary to enable such actions to be taken even though they cannot, for the time being, result in a removal is that the immigration detention powers are tied to such actions (see section 23 below).

81. *Subsection (3)* provides that where a certificate is made under section 21 after one of the actions listed in subsection (2) has been taken, that action is to be treated as having been taken again immediately after certification. This means that where SIAC or a court is hearing a challenge against any of those actions it will do so on the basis that a certificate had been made immediately prior to the taking of such actions.

### ***Section 23 Detention***

82. *Section 23* provides that a suspected international terrorist may be detained under certain provisions in the 1971 Act even though their removal is temporarily or indefinitely prevented by a point of law relating to an international agreement or a practical consideration. These provisions are paragraph 16 of Schedule 2 to the 1971 Act (detention of persons liable to examination or removal) and paragraph 2 of Schedule 3 to that Act (detention pending deportation).

### ***Sections 24 to 27***

83. These four sections set out the role of SIAC and the higher courts in overseeing the use of the extended detention powers provided for in sections 21 to 23.

### ***Section 24 Bail***

84. *Section 24* is concerned with bail. Where an appeal is pending before it, SIAC is the body responsible for hearing bail applications. The effect of section 24 is to give SIAC the jurisdiction to hear bail applications for so long as a suspected international terrorist is detained under a provision of the 1971 Act, including a provision as extended by this Part.

### ***Section 25 Certification: appeal***

85. *Section 25* provides for an appeal against the decision of the Secretary of State to make a certificate under section 21. A person against whom such a certificate is made may appeal within three months of the date of the certificate against that decision to SIAC or, with leave of SIAC, after three months but before the commencement of the first review under section 26. SIAC will consider whether or not there are reasonable grounds for a belief or suspicion of a kind referred to in section 21(1). If SIAC considers that there are not reasonable grounds or if it finds any other reason why the certificate should not have been issued, it will cancel the certificate, in which case the certificate will be treated as having never been made. Otherwise it will dismiss the appeal. For either outcome, there will by virtue of section 27(1) (b) be the right to seek leave to appeal to the Court of Appeal (or its equivalents in Scotland and Northern Ireland).

### ***Section 26 Certification: review***

86. *Section 26* provides that for so long as a suspected international terrorist remains in detention there will be an automatic review of the certificate by SIAC. The first review will happen six months after the appeal (if there is one) is finally determined or after the date on which the certificate was issued (if there is not an appeal). Subsequent reviews will occur every three months beginning with the date on which the previous review is finally determined. As with the appeal, SIAC will be able to cancel the certificate on review if it does not consider there are reasonable grounds for a suspicion or belief. There is provision for a review to be brought forward, on application from the person certified, if SIAC considers that a change of circumstances warrants this. If a review is brought forward in this manner, the period for determining the date of the next review begins with the date of the final determination of the review which was brought forward.

### ***Section 27 Appeal and review: supplementary***

87. *Section 27* makes various supplementary provisions relating to the appeal and review. In particular, it provides that an appeal to the Court of Appeal (or its equivalents in

Scotland and Northern Ireland) may be made on a point of law against a decision by SIAC in respect of an appeal or review of the certificate. It also provides that the Secretary of State is not prevented from issuing another certificate after the original one has been cancelled (for example, if new circumstances or new evidence justify such action).

88. As an appeal on the certificate may raise similar issues to those raised in the substantive appeal (that is, the appeal against any of the actions listed in section 22 which have been taken against the individual concerned), subsections (7) and (8) provide that SIAC should make every effort to hear those two appeals together, and to avoid or minimise delay resulting from this.

### ***Section 28 Review of sections 21 to 23***

89. This section requires the Secretary of State to appoint a person to review the operation of sections 21 to 23. That person will be required to conduct a review within 14 months of Royal Assent and thereafter at least one month prior to the expiry date set by an order made under section 29(2)(b) or (c). Following such a review, the person will send a report to the Secretary of State who will lay a copy of it before Parliament. The timings have been designed to ensure that a report is available to inform debates that would accompany consideration of an order made under section 29(2).

### ***Section 29 Duration of sections 21 to 23***

90. **Section 29** sets out the time limitations on sections 21 to 23. These sections will expire fifteen months after Royal Assent unless the Secretary of State renews them by order. Such an order may only extend the life of the sections by up to a year. This order needs to be approved by a resolution in both Houses of Parliament. In addition, section 29 enables the Secretary of State to repeal sections 21 to 23 at any time. Sections 21 to 23 will cease to have effect at the end of 10 November 2006. This is the day on which the derogation designated by the order made on 11 November 2001 will cease to have effect for the purposes of the Human Rights Act 1998 (unless extended by another order).

### ***Section 30 Legal proceedings: derogation***

91. **Section 30** is concerned with proceedings which to any extent challenge the UK's derogation from Article 5 of the ECHR or the designation under section 14(1) of the Human Rights Act 1998 which reflects that derogation. These are referred to as derogation matter. Section 30 provides that a derogation matter may be questioned only in proceedings before SIAC. One effect of this is that SIAC is the appropriate venue for hearing proceedings relating to derogation matter which are brought under section 7 of the Human Rights Act 1998. Ancillary provisions are made to enable SIAC to hear proceedings which, but for this section, could be brought in the High Court or the Court of Appeal; and to enable SIAC to award costs in relation to the derogation matter. An appeal against the decision of SIAC would go to the Court of Appeal (or its equivalents in Scotland and Northern Ireland).

### ***Section 32 Channel Islands and Isle of Man***

92. **Section 32** provides that sections 21 to 31 may with appropriate modification be extended by Order in Council to any of the Channel Islands or the Isle of Man.

## **Refugee convention**

### ***Section 33 Certificate that Convention does not apply***

93. **Section 33** introduces new arrangements for the consideration and associated appeal to SIAC of asylum claims made by certain individuals. These are individuals whom the Secretary of State has certified as being excluded from refugee status or not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1(F) and/

or Article 33(2) of that Convention apply, and whose removal from the UK would be conducive to the public good. Where such a certificate is made, SIAC will, in hearing the asylum appeal, be able to consider only the statements made in that certificate, and will not be able to consider whether a person has a well-founded fear of persecution.

94. **Article 33(1)** - often termed the *non-refoulement* provision - prevents the removal of a refugee where this would lead to their life or freedom being threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. Article 33(2) provides an exception to this protection where there are reasonable grounds for regarding the refugee as a danger to the security of the country. Article 1(F) states that the provisions of the Convention are not to apply to persons with respect to whom there are serious grounds for considering that they have committed an offence or action listed in that Article. These include acts contrary to the purposes and principles of the United Nations, which is taken to include terrorist acts – see, for example, Article 3(3) of UN Security Council Resolution 1373, passed on 28 September 2001, which required States to “Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts”.
95. So if either or both of Article 1(F) or 33(2) applies then a person can be removed without contravening the UK’s obligations under the Refugee Convention. The Government is therefore of the view that it is not necessary to consider whether, had a person not been so excluded, he would have qualified for refugee status based on a well-founded fear of persecution. The purpose of this section is to reflect this by enabling an asylum claim to be refused solely on the basis that the applicant is excluded from the protection of the Refugee Convention.
96. Accordingly, where SIAC upholds the Secretary of State’s certificate it must dismiss such part of the appeal as amounts to a claim for asylum. If there are other elements to the appeal SIAC would proceed to consider those elements.
97. Should SIAC allow the appeal, the case would return to the Secretary of State who would have to consider the substance of the asylum claim. If the claim was still refused any appeal would lie to the Immigration Appellate Authority in the normal way (under the Immigration and Asylum Act 1999), assuming that no public interest provision applied (in which case the appeal would go back to SIAC).
98. The section provides for appeals against decisions of SIAC to be made to the Court of Appeal (or its equivalents in Scotland and Northern Ireland). It also prevents legal proceedings being taken against a decision or action of the Secretary of State in connection with a certification except through SIAC; and enables, with appropriate modifications, the clause to be extended by Order in Council to any of the Channel Islands or the Isle of Man.

### **Section 34 Construction**

99. This section provides that in considering whether or not Article 1F or Article 33(2) applies, there is no requirement to consider the fear of persecution the person may have or the threat to their life or freedom they may face if removed from the UK. That is, consideration of whether a person comes within the scope of Article 1F or 33(2) will be determined solely by reference to the appropriate Article.

### **Section 35 Special Immigration Appeals Commission**

100. This section inserts two new provisions into section 1 of the Special Immigration Appeals Commission Act 1997. First, it provides that SIAC is to be a superior court of record. This means that the tribunal enjoys the same status as the High Court and the Court of Appeal. Second, it provides that decisions of SIAC may be challenged only

*These notes refer to the Anti-terrorism, Crime and Security Act 2001 (c.24) which received Royal Assent on 14th December 2001*

on appeal to the Court of Appeal (or its equivalents in Scotland and Northern Ireland), as set out in section 7 of the 1997 Act and section 30(5)(a) of this Act.

## **Fingerprints**

### ***Section 36 Destruction of Fingerprints***

101. Section 141 of the Immigration and Asylum Act 1999 allows fingerprints to be taken in certain circumstances relating to immigration and asylum. Section 143 requires the fingerprints to be destroyed within a certain time. Section 36 removes this requirement, both for fingerprints taken in future and ones already held. Such fingerprints will now be retained for 10 years