

2001 No. 4032

HUMAN RIGHTS

**The Human Rights Act 1998 (Amendment No. 2)
Order 2001**

Made - - - - - 19th December 2001
Laid before Parliament 19th December 2001
Coming into force - - 20th December 2001

Whereas the Secretary of State, in exercise of the powers conferred upon him by section 14(1) and (6) of the Human Rights Act 1998(a), has made an Order(b) designating a proposed derogation from Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), agreed by the Council of Europe at Rome on 4th November 1950;

And whereas the United Kingdom Permanent Representative to the Council of Europe has on 18th December 2001, pursuant to Article 15(3) of the Convention, informed the Secretary General of the Council of Europe of this derogation, of the measures which the United Kingdom has taken, and of the reasons therefor;

Now, therefore the Lord Chancellor, in exercise of the powers conferred upon him by section 14(5) of the Human Rights Act 1998(c), hereby makes the following Order:

Citation and commencement

1. This Order may be cited as the Human Rights Act 1998 (Amendment No. 2) Order 2001, and shall come into force on 20th December 2001.

Amendment of Schedule 3 to the Act

2. Before Part II of Schedule 3 to the Human Rights Act 1998 there is inserted, as Part I, the text of the derogation set out in the Schedule to this Order.

Dated 19th December 2001

Irvine of Lairg, C

(a) 1998 c. 42. Section 14(1) was amended by article 2 of the Human Rights Act (Amendment) Order 2001, S.I. 2001/1216.
(b) The Human Rights Act 1998 (Designated Derogation) Order 2001, S.I. 2001/3644.
(c) Section 14(5) was amended by article 8 of, and paragraph 7 of Schedule 2 to, the Transfer of Functions (Miscellaneous) Order 2001, S.I. 2001/3500, to reflect the transfer of the relevant functions of the Secretary of State to the Lord Chancellor made by article 3 of, and paragraph 5 of Schedule 1 to, that Order.

PART I

DEROGATION

United Kingdom's derogation from Article 5(1)

The United Kingdom Permanent Representative to the Council of Europe presents his compliments to the Secretary General of the Council, and has the honour to convey the following information in order to ensure compliance with the obligations of Her Majesty's Government in the United Kingdom under Article 15(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.

Public emergency in the United Kingdom

The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries. In its resolutions 1368 (2001) and 1373 (2001), the United Nations Security Council recognised the attacks as a threat to international peace and security.

The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks.

There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.

As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom.

The Anti-terrorism, Crime and Security Act 2001

As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ("SIAC"), established under the Special Immigration Appeals Commission Act 1997, which will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.

The extended power of arrest and detention in the Anti-terrorism, Crime and Security Act 2001 is a measure which is strictly required by the exigencies of the situation. It is a temporary provision which comes into force for an initial period of 15 months and then expires unless renewed by Parliament. Thereafter, it is subject to annual renewal by Parliament. If, at any time, in the Government's assessment, the public emergency no longer exists or the extended power is no longer strictly required by the exigencies of the situation, then the Secretary of State will, by Order, repeal the provision.

Domestic law powers of detention (other than under the Anti-terrorism, Crime and Security Act 2001)

The Government has powers under the Immigration Act 1971 ("the 1971 Act") to remove or deport persons on the ground that their presence in the United Kingdom is not conducive to the public good on national security grounds. Persons can also be arrested and detained under Schedules 2 and 3 to the 1971 Act pending their removal or deportation. The courts in the United Kingdom have ruled that this power

of detention can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal and that, if it becomes clear that removal is not going to be possible within a reasonable time, detention will be unlawful (*R v Governor of Durham Prison, ex parte Singh* [1984] 1A11 ER 983).

Article 5(1)(f) of the Convention

It is well established that Article 5(1)(f) permits the detention of a person with a view to deportation only in circumstance where “action is being taken with a view to deportation” (*Chahal v United Kingdom* (1996) 23 EHRR 413 at paragraph 112). In that case the European Court of Human Rights indicated that detention will cease to be permissible under Article 5(1)(f) if deportation proceedings are not prosecuted with due diligence and that it was necessary in such cases to determine whether the duration of the deportation proceedings was excessive (paragraph 113).

In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5(1)(f) as interpreted by the Court in the *Chahal* case. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 3 of the Convention. In such circumstances, irrespective of the gravity of the threat to national security posed by the person concerned, it is well established that Article 3 prevents removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article. If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.

Derogation under Article 15 of the Convention

The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security Act 2001 may be inconsistent with the obligations under Article 5(1) of the Convention. As indicated above, there may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that “action is being taken with a view to deportation” within the meaning of Article 5(1)(f) as interpreted by the Court in the *Chahal* case. To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom’s obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.

Strasbourg, 18 December 2001

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made following the making by the United Kingdom of a derogation from Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), agreed by the Council of Europe at Rome on 4th November 1950. Article 5(1) provides that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty save in the cases set out in that Article and in accordance with a procedure prescribed by law. One of the exceptions is contained in sub-paragraph (1)(f) of Article 5 which permits 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.

Section 23 of the Anti-terrorism, Crime and Security Act 2001 contains an extended power to arrest and detain a foreign national where it is intended to remove or deport the person from the United Kingdom because the Secretary of State believes that his presence is a risk to national security and suspects him of being an international terrorist, but where such removal or deportation is not for the time being possible. In such cases, detention may be incompatible with Article 5(1)(f) of the Convention because it is not for the time being possible to take action with a view to deportation, for example, if deportation would result in treatment contrary to Article 3 of the Convention.

This Order amends Schedule 3 to the Human Rights Act 1998, to set out the derogation by the United Kingdom from Article 5(1) of the Convention.

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