

**THE MUSLIM
SUBMISSION ON THE
ANTI-TERRORISM,
CRIME & SECURITY
BILL 2001**

**PRODUCED BY A CONSORTIUM OF MUSLIM
ORGANISATIONS LISTED AT APPENDIX A
November 2001**

SUBMISSION ON THE ANTI-TERRORISM, CRIME & SECURITY BILL 2001

INTRODUCTION

1. This response is submitted by the organisations listed at Appendix A. It supplements the earlier submission made to the Home Secretary on matters presently contained in Part 5. This submission focuses on the provisions of the Bill of concern to the Muslim community, other than those in Part 5.
2. Given the speed at which this Bill is passing through Parliament, we have not dealt with all parts of the Bill. In developing our response to the different parts of the Bill we have consulted with and drawn heavily on the expertise of various human rights and civil liberties organisations, notably Justice, Liberty and Amnesty International.

GENERAL

3. The events of 11th September were horrific and of the deepest concern to all. The Muslim community in Britain was just as shocked by the events as any other, and condemned the atrocities in no uncertain terms.
4. However, we agree with the UN High Commissioner for Human Rights, Mary Robinson, who in her report to the United Nations General Assembly stated that security concerns since the attack on September 11th, "... should not be used as a pretext to infringe human rights".¹ We concur with Lord Scarman, who observed, over a quarter of a century ago, "it is when fear is stalking the land that the bill of rights is needed most".²
5. We believe that the UK's domestic obligations under the Human Rights Act 1998 (HRA) and its international human rights obligations under the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and other international instruments provide a valuable and necessary framework for evaluating the package of new anti-terrorism provisions in the Bill.
6. We, therefore, urge that any legislative response to the events of 11th September should adhere to the following principles:
 - Any response must be necessary and proportionate bearing in mind powers already available under the ordinary criminal and civil law of this country.
 - At minimum level, adequate safeguards and mechanisms of accountability need to be incorporated into the Bill to ensure that powers are not open to

¹ A/56/36, p.43

² Lord Scarman, as quoted in Klug, F., *Now We Really Need Rights*, The Observer, October 7th 2001.

abuse. Such safeguards are particularly necessary for confidence building in ethnic and religious minority communities towards law enforcement agencies.

- Any new measures adopted must be carefully circumscribed within and limited to the exceptional situation that justifies them.

THE NEED FOR MORE PRECISION AND BETTER SAFEGUARDS

7. We note that some parts of the Bill are very broad and do not provide any or sufficiently pressing national security or law and order reasons that justify the introduction of these additional powers, e.g., the attempt to exclude court supervision of procedures in Clause 29.
8. It appears that the majority of the powers outlined in the Bill are intended to be permanent and are not time-limited by sunset clauses. As such, we have very grave concerns regarding the additional powers contained in Parts 1-4 and Part 10. In view of the gravity of these matters and their implications for individual civil rights, permanent legislation in these matters should only be adopted after extensive consultation and parliamentary scrutiny, and not in such haste.
9. Given the recent introduction of the Terrorism Act 2000, there has not been sufficient justification as to why the powers under that Act are judged to be insufficient at such an early point in its history.
10. We note that the proposals outlined in the present Bill constitute a substantial increase in the powers of law enforcement agencies. It is important to bear in mind that these additional powers are being introduced against the background of pre-existing and increasing tensions between Muslim individuals and law enforcement officers/agencies. Given the current political climate and tone of media coverage there is a substantial risk that these additional powers will be used in a discriminatory manner. This concern is supported by the Macpherson and Denham Reports that confirmed that law enforcement agencies exercise their discretion in a way that discriminates against ethnic minorities.
11. We retain general concerns about the broad and uncertain scope of the term 'terrorism'. It is to be noted, that the use of the term "terrorism" is politically loaded, conceptually confusing and lacking an internationally accepted definition. According to the Terrorism Act 2000, it is widely defined as including the use and the threat of action involving serious violence against a person or serious damage to property or designed to seriously interfere or disrupt an electronic system. The motivation qualifying such an action or threat, i.e. furthering a "political, religious or ideological cause", is also very wide and open to subjective interpretation. The lack of a clear definition of terrorism raises concerns because decisions to use powers under terrorism legislation could be seen to be political.
12. The present bill is being fast-tracked as emergency legislation. We are very concerned with the speed, with the lack of consultation with Muslim and

minority community groups and with the minimal level of parliamentary scrutiny with which such a critical and wide-ranging piece of legislation is being passed through Parliament.

PART 1: TERRORIST PROPERTY

13. Extensive powers are already in place with regards to funds implicated in terrorist or suspected terrorist activities.³ In light of the already existing provisions, we question the necessity for further legislation.

14. We agree with the concerns raised by Justice⁴ with respect to ‘terrorist property’:

“1.1 Part 1 of the Bill, along with Schedule 1, allows for confiscation orders to be made in respect of cash related to terrorist activity. Clause 1(5) gives the Secretary of State the power to modify the code of practice in operation under Schedule 14 of the Terrorism Act 2000, bringing Schedule 1 into force by order. This would appear to circumvent the positive resolution procedure which would normally apply and [which] would ensure better parliamentary scrutiny.”

15. With regards to the seizure and detention of cash, again we agree with concerns raised by Justice as to the problematic nature of such interferences with property rights and the circumvention of the normal criminal procedure (as proposed in this Bill and also the Proceeds of Crime Bill):

“1.2 Under Schedule 1, powers for the seizure of terrorist cash are exercisable whether or not any criminal prosecution has been brought”.

“1.3 Under Part 3 of Schedule 1, cash which is already detained may be permanently forfeited, on an application by a police constable, a customs officer, or an immigration officer⁵ to a magistrates' court. In order to permanently forfeit the cash, it need only be established to a civil standard of proof that the cash is terrorist cash.”

“1.4 The effect of this is that cash may be ‘detained’ for a period of up to two years, whilst an investigation is made into whether or not it belongs to a terrorist organisation. No charges need be brought during that period. At the end of the two year period, the cash may be permanently forfeited in a civil action, where the safeguards of criminal procedure do not apply”.

16. Further, we are concerned that the legislation on financial control will not be sensitive or implemented sensitively to the cultural differences that exist in conducting business in the East and minority communities in Britain. It is important to bear in mind that many minority communities in Britain and

³ Terrorism Act 2000, e.g., Schedule 6

⁴ JUSTICE, Briefing on the Anti-Terrorism Crime and Security Bill House of Commons Second Reading, November 2001.

⁵ Defined as "authorised officers" by Schedule 1, Part 6 para.19(1)

societies abroad tend culturally to conduct religious, business, charitable and other transactions in cash.

Account Monitoring Orders

17. We agree with the concerns raised and safeguards sought by Justice regarding the account monitoring orders:

“1.5 Schedule 2 amends the Terrorism Act to allow for account monitoring orders, lasting for up to 90 days, to be made in the course of a terrorist investigation. Restraint orders are also provided for in Schedule 2, Part 2. Such orders are already provided for under the Terrorism Act 2000, but the Bill would allow for them to be made at any point after an investigation has begun, rather than only where charges are anticipated. Since both these orders are significantly intrusive of privacy rights, it is in Justice's view vital that they be subject to adequate safeguards.”

“1.6 However, the potential scope of account monitoring orders under Schedule 2 is a cause for concern. Under para.2(3)(b) of Schedule 6A as inserted by Schedule 2, the application for an account monitoring order may specify information in relation to ‘a particular description, or particular descriptions of accounts’. This would seem to allow for sweeping trawls for information, on the basis of a terrorist investigation relating to a single individual. **These provisions have a potentially serious impact on the Article 8 rights to respect for private life of innocent third parties and, in Justice's view, their scope should be reconsidered.**”

18. Further, we have concerns about the possible change in the liability test. Under current legislation failure to report suspicion of laundering is already an offence. Modifying the current test of actual suspicion to a test based on negligence will lead to arbitrary exercise of this imposed duty. Bearing in mind that there has been an increase in anti-Muslim prejudice in the post September period, there is a real risk that the different pieces of legislation on financial control will be applied in a significantly disproportionately discriminatory manner towards Muslims.
19. We would strongly recommend that the grounds on which financial records are retained are carefully circumscribed and more clearly stated than is the case in the present Bill. The extent to which such records may become public must also be curtailed and clarified. There is a concern, for instance, among some sections of the Muslim community that the legislation on financial control will enable British companies to access confidential business information on business contacts abroad.⁶

⁶ Steve Boggan, *MI5 offers to spy for British firms*, The Independent, 07. September 2001.

PART 2: FREEZING ORDERS

20. We are concerned that the conditions that trigger the use of the power to make such orders, for instance, Clause 4(2)(a): “action to the detriment of the United Kingdom’s economy (or part of it)” or the extraterritorial link in Clause 4(3) are very broad and are not justified as a necessary and proportionate response within the present context.
21. There is also a substantial risk that the powers delegated may be used as a political tool. Of particular concern in this respect is the widening of the triggers for freezing orders to include targeted action to freeze the assets of overseas governments or residents.
22. Further, we are concerned by the lack of safeguards to prevent the application of freezing orders in a disproportionately discriminatory fashion, potentially affecting the legitimate use of property and assets.
23. We have deep concerns about the retroactive nature of the power to freeze assets. This power, as contained in 5(3)(b) appears to contravene the spirit of the HRA and the ECHR.⁷

PART 3: DISCLOSURE OF INFORMATION

24. We agree with Liberty⁸ that PART 3 “appears to be unconnected with terrorism or the events of 11th September”.

We further agree with Justice⁹ that:

“The provisions of Part 3 are very broadly worded, applying beyond terrorist cases or emergency situations.¹⁰ Under Part 3, it would appear that information about an individual can be sent to investigating authorities abroad at a stage where an investigation has not even been begun in relation to him or her. **This raises questions of whether these powers are sufficiently certain in their scope to be ‘prescribed by law’, one of the essential requirements of a legitimate interference with privacy rights under Article 8 ECHR. Furthermore, such wide powers are not in Justice's view justified as necessary and proportionate.**”

25. We would strongly recommend that the grounds on which information may be disclosed must be clearly stated and carefully circumscribed in any legislation.

⁷ See Art 7.1 and Art 7.2

⁸ LIBERTY, Briefing for the Second Reading in the House of Commons for the Anti-Terrorism, Crime and Security Bill 2001, November 2001.

⁹ JUSTICE, Briefing on the Anti-Terrorism Crime and Security Bill House of Commons Second Reading, November 2001.

¹⁰ The Explanatory Notes on the Anti-Terrorism, Crime and Security Bill state that “Part 3 and Schedule 4 of the Bill create a new gateway giving HM Customs and Excise and the Inland Revenue a general power to disclose information held by them for law enforcement purposes and to the intelligence for their purposes”.

The extent to which such information may become public must also be curtailed and clarified. There is a concern, for instance, among some sections of the Muslim community that confidential information on their business interests may be released to their disadvantage and that the checks or safeguards currently in place for their protection are inadequate.¹¹

26. We are deeply concerned by the extraterritorial reach of Part 3. We are particularly concerned that the authorities will rely on the intelligence of foreign governments as a basis of suspicion. Many of these foreign governments are extremely worryingly deficient in their democratic and human rights credentials. This concern is further amplified by the proposal in Section 17(9) that the use of the term court includes a tribunal of any description.
27. We are also concerned by the proposal that the powers of disclosure delegated to the Secretary of State need not be triggered by the usual requirements of knowledge or suspicion with respect to the purported offence caught under Part 3 of the Bill. Post 11th September there is a perception in the Muslim community that it has been uniquely targeted. It is very likely that the permission by the Secretary of State to disclose information on new or undisclosed grounds will be perceived in the Muslim community as a ‘political’ decision. This could have a negative impact on community relations, particularly at a time when the government is trying to persuade the Muslim community at large that it is not at war with Islam or Muslims.
28. We would strongly advise that safeguards, such as the possibility of review of decisions to allow disclosure of information and redress if information is mistakenly revealed, are necessary for confidence building in minority ethnic and religious communities towards the State and law enforcement agencies, and strongly recommend that such safeguards be instituted.
29. We are concerned by the provision contained in 17(3). Given the right to privacy, any incursions against this right ought only to be taken after full parliamentary scrutiny through primary legislation as opposed to secondary legislation.
30. Further, we are concerned by the retroactive effect of this provision. This would appear to contravene the spirit of Art 7 of the ECHR.

PART 4: IMMIGRATION AND ASYLUM

Derogation

31. We agree with Amnesty International’s¹² analysis of Part 4 and we quote it in full:

¹¹ Steve Boggan, *MI5 offers to spy for British firms*, The Independent, 07. September 2001.

¹² AMNESTY INTERNATIONAL, *Creating a Shadow Criminal Justice System in the Name of “Fighting International Terrorism”*, AI Index: EUR 45/019/2001.

“Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) permits states to take measures suspending some of their obligations to respect and protect some of the human rights of individuals, as set out in the ECHR, "in time of war or other public emergency threatening the life of the nation". Such measures must be time-limited and restricted to "the extent strictly required by the exigencies of the situation". A state that wishes to derogate must inform the Secretary General of the Council of Europe of the measures taken and the reasons for doing so.

The Secretary of State for Home Affairs has laid an Order before Parliament designating a proposed derogation from Article 5(1)¹³ of the ECHR in order to permit the indefinite detention without charge or trial of foreign nationals who allegedly pose a threat to national security and whom the government is unable to remove or deport, under Article 3 of the ECHR. A Schedule to the Order contains the proposed notification of the derogation to the Secretary General of the Council of Europe.

In the proposed notification of the derogation, the Secretary of State advises: "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 European Court of Human Rights has defined the requirement of Article 15 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" (*Lawless v Ireland*).¹⁴

32. The statement of the Secretary of State indicates a situation of serious concern but does not provide evidence that suggests serious and immediate threats to "the life of the nation" or to "the organised life of the community". On the contrary, when the Secretary of State announced the proposals for emergency legislation on 15 October he said: "[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom...".
33. Individually and collectively other European governments are also taking or planning new measures following the attacks in the USA on 11 September. Amnesty International is not aware of any other European government contemplating derogation from international human rights treaty obligations.

¹³ Article 5(1) states: "... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (f) the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation or extradition."

¹⁴ European Court of Human Rights, Series A: Judgments (1 July 1961) para 28.

Indefinite detention

34. Although the temporary provisions permitting certification and detention are for an initial period of 15 months, they can be renewed annually and indefinitely. A person could therefore be detained indefinitely¹⁵.

Under clause 21(1), the Secretary of State may issue a certificate in respect of a person if s/he "believes the person's presence in the UK is a risk to national security, and suspects that the person is an international terrorist". The definition of an "international terrorist" is a person who "is or has been concerned in the commission, preparation or instigation of acts of international terrorism, is a member of or belongs to an international terrorist group, or has links with a person who is a member of or belongs to an international terrorist group" (clause 21(2)). The definition of an "international terrorist group" is a group which "is subject to the control or influence of persons outside the United Kingdom" (clause 21(3)(a)). The definition of "terrorism" is the same as in the Terrorism Act 2000¹⁶.

35. Amnesty International is concerned that the definitions in the Bill are vague and broad. The Bill fails to define precisely what constitutes having "links" with a person who is a member of an "international terrorist group" and what constitutes being subject to the "influence" of persons outside the UK.
36. Amnesty International is concerned that people will be categorized as a "national security risk" and "an international terrorist", the effect of which is tantamount to a criminal conviction, on the basis of the Secretary of State's beliefs or suspicions (clause 21(1)(a) and (b)). The criteria for such beliefs or suspicions are not spelt out in the Bill; moreover, there is no expressed requirement that the suspicion must be "reasonable". Amnesty International is also concerned that the basis for such beliefs or suspicions will be secret information, which the person will be unable to effectively challenge (see SIAC below). Such secret information, obtained in most instances from UK and foreign intelligence services, could be inaccurate or misinterpreted information. This occurred during the Gulf War, when about 90 nationals of Arabic countries were detained in the UK pending deportation on national

¹⁵ Clauses 21 to 23 of Part 4 of the Bill are the only temporary measures, which would expire at the end of 15 months, unless the Secretary of State issued an order to repeal them before the expiry date or to renew them for a period not exceeding one year. It appears that such orders may be renewable annually. Such an order could be made by the Secretary of State without a draft being laid before and approved by a resolution of each House of Parliament, if it contains a declaration by the Secretary of State that "by reason of urgency it is necessary to make the order without laying a draft before Parliament" (clause 28(4)). This order would then have to be approved by Parliament within 40 days.

¹⁶ The Terrorism Act 2000 defines terrorism as "the use or threat of action ... designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause". The action is defined as: "serious violence against a person, serious damage to property"; action which "endangers a person's life ..., creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system". The "action" includes those outside the UK, and "public" and "government" can refer to a country other than the UK.

security grounds. The organization considered many of them to be possible prisoners of conscience.

Detention

37. Under clause 23 of the Bill, once the Secretary of State has certified someone as a national security risk, in those cases where the person cannot be deported or removed s/he can be detained indefinitely.
38. In his notification of the derogation to the Secretary General of the Council of Europe, the Secretary of State advises that the authorities cannot secure the imprisonment of suspected terrorists by prosecuting them for crimes because of "the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required". The rules of evidence and standard of proof in the criminal justice system have been prescribed in order to reduce the risk of innocent individuals being convicted, punished and stigmatized. The system of indefinite detention proposed in this Bill will, in effect, establish an informal criminal justice system but without the safeguards or guarantees of rights required in the formal system. People can be deemed to be threats to national security and "suspected international terrorists" and imprisoned indefinitely on the basis of information which is considered by the authorities to be evidence inadmissible in a trial, and on a significantly lower standard of proof that is not set out in the draft legislation.
39. Amnesty International considers it unacceptable that the government should seek to circumvent the safeguards of the criminal justice system in such a manner. Amnesty International believes that it is a violation of fundamental human rights for states to detain people who the authorities believe are a danger to national security but who they do not intend to prosecute and who cannot be deported¹⁷. People should not be detained unless:
- they are charged with recognizable criminal offences promptly and tried within a reasonable period in proceedings that comply fully with international fair trial standards; or
 - action is being taken to deport within a reasonable period to another country where they would not risk being subjected to an unfair trial, the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment, or other serious human rights abuses. There must be a realistic possibility of deportation being effected.

Special Immigration Appeals Commission

40. Under clause 25(1) of the Bill, "a suspected international terrorist may appeal to the Special Immigration Appeals Commission [SIAC] against his certification under section [clause] 21" within three months of the issue of the

¹⁷ Amnesty International opposes the detention of asylum-seekers and refugees unless they have been charged with a recognizable criminal offence, or unless the authorities can demonstrate in each individual case that the detention is necessary, that it is on grounds prescribed by law, and that it is for one of the specified reasons which international standards recognize may be legitimate grounds for detaining asylum-seekers.

certification¹⁸. The only right of appeal of a SIAC decision would be to the Court of Appeal, and would be limited to points of law. SIAC would also have the powers to grant bail to people suspected of being national security risks and to regularly review at six-monthly intervals the certification of people who are suspected of being national security risks.

41. Amnesty International is concerned that the Bill appears to rule out explicitly any other form of judicial scrutiny of executive decision, e.g. judicial review or *habeas corpus*, under clause 29(2). The Bill omits any reference to the right to be brought promptly before a judge after arrest or detention, as set out in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁹. Although the government has not sought to suspend other ECHR rights, the Bill also excludes the right of a person detained to challenge the lawfulness of detention in a *habeas corpus*-like procedure guaranteed by the ECHR²⁰.
42. Amnesty International is also concerned that the applicable statute and rules permit SIAC to receive secret evidence and the proceedings to take place without the person concerned or their counsel of choice being provided with all of the reasons for the decision to certify the person as a "suspected international terrorist", indefinitely detain, deport or exclude the person from the country. In addition these rules permit SIAC to hold all or part of the proceedings without either the person concerned or their counsel being present. If such *in camera* proceedings are held, an advocate is appointed from a panel chosen by the Attorney General to represent the interests of the person concerned. The advocate, however, may not communicate with the person concerned or their counsel, after they have been provided with information about the case, without leave from SIAC. Before decisions are made on the basis of proceedings from which the person concerned and their counsel have been excluded, a summary of the submissions and evidence and absent information about sensitive material must be provided. Amnesty International believes that the person concerned should be entitled to see and challenge all the evidence used to determine whether they are "national security risks" and/or "suspected international terrorists".

Safeguards

¹⁸ In response to the judgment of the European Court of Human Rights in the case of *Chahal v. United Kingdom*, the Special Immigration Appeals Commission (SIAC) was set up to hear appeals of cases in which the Home Secretary has made a decision to deport or exclude a person, including on national security grounds. The appeal is heard by SIAC and its decision is binding on the Secretary of State though either party may appeal on a point of law to the Court of Appeal.

¹⁹ Amnesty International believes that Article 5(3) of the ECHR would be applicable to indefinite detentions upon certification of the Secretary of State. The organization believes that the nature of such certification and the potential severity of the consequences - including indefinite detention - are tantamount to criminal charges, conviction and punishment under international human rights law, without the required guarantees of a fair trial set out in the ECHR including in Articles 5, 6 and Article 2 of Protocol 7.

²⁰ As required by Article 5(4) of the ECHR.

43. While Amnesty International considers that indefinite detention without prosecution violates international standards, if such a measure is introduced the organization urges that there should be additional safeguards, in compliance with international standards. Such safeguards should include the measures described in the following paragraphs. They are:
- the grounds for detention must be specifically related to the emergency situation described in the derogation;
 - the government should be required to publish regularly information about the application of the law, e.g. how many people are detained and the places of detention.
44. In addition, the detainees must be treated in compliance with all human rights standards, including provisions of the ECHR and other international human rights treaties which remain in full force; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the UN Standard Minimum Rules for the Treatment of Prisoners; and the European Prison Rules. Such safeguards should include the right of detainees:
- to be informed immediately, in a language they understand, of the reasons for their detention and be notified of their rights, including the right of prompt access to and assistance of, and confidential communication with, their lawyer of choice, free of charge if necessary; the right to inform family of detention and place of confinement; the right to communicate and receive visits;
 - to be brought promptly before a judicial authority to determine the lawfulness of and necessity for the detention;
 - to be entitled to challenge their detention [*habeas corpus*];
 - to have the right to appeal on the basis of fact and points of law to an independent, impartial court;
 - not to be detained with people convicted of criminal offences;
 - to have effective judicial remedies, including full reparation, for arbitrary detention and other human rights violations.

Refugee Convention

45. Clauses 33 and 34 of the Bill set out powers which deny those persons, certified to be "international terrorists and national security risks", of their right to seek asylum.

"Acts of terrorism" are not expressly included as one of the recognized grounds for exclusion from refugee status under the 1951 Convention relating to the Status of Refugees (UN Refugee Convention). However, such acts are grounds for exclusion when they constitute crimes against peace, war crimes, crimes against humanity, serious non-political crimes outside the country of refuge, or acts contrary to the purposes and principles of the United Nations.

Under the proposals contained in this Bill, where an asylum-seeker is certified as a threat to national security, an individual assessment on the merits of the claim would not be made if the Secretary of State believes that an asylum-seeker may be excluded from refugee status under Article 1(F) of the UN Refugee Convention.

When such a certificate is made, the only appeal is to SIAC which would not have the power to address asylum questions, thereby suspending the application of the UN Refugee Convention to those appealing to SIAC. Currently when an asylum-seeker, who the Government believes is a national security risk, appears before SIAC, SIAC can review the national security concerns and the asylum claim. Amnesty International believes that SIAC should continue to be permitted to consider both.

46. No one should be prevented from lodging an asylum application. Amnesty International believes that a determination to exclude an individual from refugee status, in application of Article 1(F) of the UN Refugee Convention, should only be made after full consideration of the claim in a fair and satisfactory asylum procedure. Each case should be considered on an individual basis and according to facts and evidence, not suspicions. No one should be forcibly removed without having had their individual need for protection assessed.
47. In view of the serious consequences of determining an individual to be excluded from refugee protection, the procedure should comply with all the safeguards provided in human rights and refugee law. Notably the question of exclusion should not be used to determine admissibility to the asylum procedure; and the individual must be informed that exclusion is under consideration and have the rights to be informed of the evidence, to rebut the evidence and to appeal against a decision to exclude on the above grounds.

The issue of exclusion has been the subject of extensive consultation. As part of the UNHCR's ongoing Global Consultations on International Protection, a meeting of experts took place earlier this year and presented some summary conclusions on the issue of exclusion. One of the clear recommendations coming out of this meeting was the importance of taking a "holistic approach" to refugee status determination, and in this regard determining the inclusion elements of refugee protection before exclusion elements. The reasons for the inclusion before exclusion were:

- "Exclusion before inclusion risks criminalizing refugees;
- Exclusion is exceptional and it is not appropriate to consider an exception first;
- Non-inclusion, without having to address the question of exclusion, is possible in a number of cases, thereby avoiding complex issues;
- Inclusion first enables consideration to be given to protection obligations to family members;
- Inclusion before exclusion allows proper distinction to be drawn between prosecution and persecution;
- Textually, the 1951 Convention would appear to provide more clearly for inclusion before exclusion, such an interpretation being consistent in particular with the language of Article 1F(b);
- Interviews which look at the whole refugee definition allows for information to be collected more broadly and accurately."²¹

²¹ *Summary Conclusions* of the Lisbon Expert Roundtable, 3-4 May 2001

While a decision to exclude a person removes them from the protection of the UN Refugee Convention, it does not follow that a state can remove the individual as a consequence. There is clear support in international human rights law, for example in Article 3 of the Convention against Torture and in the jurisprudence of the ECHR, for taking the position that, where people risk torture or other forms of cruel, inhuman or degrading treatment or punishment, the prohibition of *refoulement* is absolute.

48. The Human Rights Committee, in its concluding observations on 2 November 2001 of the examination of the UK's fifth periodic report on the implementation of the International Covenant on Civil and Political Rights, expressed concern about the government's proposals to derogate: 'The Committee notes with concern that the State Party, in seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant, and which, in the State Party's view, may require derogations from human rights obligations. The State Party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant.'²²

PART 10: POLICE POWERS

Searches

49. We agree with JUSTICE's reservations regarding this provision:

“Where authorisation is given on the grounds that it may link a person with a crime, the power is not limited to the offence for which the person has been arrested or of which they are suspected, and is not limited to serious (or terrorist) offences.

The power can be used simply to establish identity if the person refuses to disclose it, or where there are reasonable grounds for suspecting that the person is not who they claim to be, again irrespective of the offence concerned.

The power applies to a person ‘detained in a police station’ as opposed to a person in ‘police detention’. The latter is used in PACE to include only those

²² In addition to derogating from Article 5 of the ECHR, the government may also have to derogate from Article 9 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR, under Article 4, similarly provides that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law....”

arrested for an offence, so this new power would seem to apply whether or not a person is arrested for an offence e.g. a person arrested for breach of the peace, or under the power of a warrant.”

[T]hese powers, which are seriously intrusive of Article 8 rights to privacy and physical integrity, can only be justified in the context of an exceptional terrorist threat, and should be confined to circumstances where a person has been arrested for or is suspected of a terrorist offence.

50. The increase in Anti-Muslim prejudice in the September 11 period has created a substantial risk that discrimination will taint the exercise of these additional criminal powers. These powers are likely to be discriminatorily applied not only to Muslims, but also to members of visible ethnic minorities.

Fingerprints

51. Similar to our concerns voiced with respect to search powers the taking of fingerprints, without consent, even if to establish identity interferes with the right to privacy and physical integrity as contained in Art 8 of the ECHR. Such a measure (particularly given the possibility that the police will be able to retain the fingerprints regardless of whether the person is persecuted or convicted) does not appear to be justified by reference to terrorism.

Photographs

52. The new Section 64 would appear to put the taking of photographs on a statutory basis, allowing the police to keep the photographs regardless of whether the person is persecuted or convicted. These powers not appear to be justified by the terrorist threat possibility and constitute an unjustifiable interference with Article 8.
53. These powers may be used against Muslim women who wear facial and head coverings as part of their religious obligations as Muslims. We believe that this extension of police powers will discriminatorily impact upon Muslim women.

Removal of facial covering or gloves

54. We have serious concerns regarding this provision as it has the potential to indirectly discriminate against religious and ethnic minorities. These powers will disproportionately impact on Muslim women who wear facial and head coverings as part of their faith.
The use of such powers, especially with regards to facial coverings, may interfere with the rights to privacy and physical integrity as contained in Art 8 of the Human Rights Act , the freedom to manifest one's religion or beliefs as contained in Art 9 and the Art 14 prohibition of discrimination with regards to the enjoyment of the rights and freedoms as set forth in the Human Rights Act.

PART 11: RETENTION OF COMMUNICATIONS DATA

55. Clause 101 provides for a voluntary code on retention of such data by communications service providers, while Clause 102 enables the Secretary of State to make orders as he or she deems 'appropriate'.
56. The Article 8 (2) criterion 'necessary in a democratic society' would appear to require from states to show that there was a 'pressing social need' for the interference with privacy rights. The blanket retention of data under the proposed code does not appear to be justified as a necessary and proportionate response to the 'terrorism justification'
57. We are concerned that the potential uses of information are not clearly identified and circumscribed.

PART 13: MISCELLANEOUS

Third Pillar of the European Union

58. Clause 109 confers on the government extensive powers to implement by means of secondary legislation any obligation under the Justice and Home Affairs pillar.

Effectively, sensitive areas of law relating to individual rights may be legislated upon by means of secondary legislation.

We agree with JUSTICE that the implementation of Justice and Home Affairs measures ought to be subject to the highest levels of parliamentary scrutiny and debate.

Terrorism Act 2000

59. Clause 115 extends liability under the Terrorism Act 2000, making failure to disclose information about acts of terrorism a criminal offence.

As JUSTICE points out because of the broad and uncertain scope of the definition of terrorism in the Terrorist Act 2000, this offence may not be sufficiently certain to satisfy the principle of legal certainty which is incorporated in the ECHR.

Appendix A

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