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Revision of the Human Rights Act

Summary

1 The UK's continued adherence to the ECHR (European Convention on Human Rights) is an attraction for terrorists to operate in and from Britain, secure in the knowledge that, even if convicted, they can never be deported and that, if they come under suspicion, they cannot be effectively detained. We should therefore give six months notice to withdraw from the Convention and write our own Human Rights law with the same guarantees, except for terrorist offences.

Introduction

2 Britain is now facing a security threat unparalleled in our history. Accordingly, we must amend our laws without delay. Suicidal terrorists (some from overseas and some born in Britain) do not operate alone; others encourage, finance and organise them. It is now essential that the latter be deterred by the certain prospect of immediate expulsion on completion of a sentence for a terrorist offence.

The ECHR

3 Britain acceded to the ECHR more than fifty years ago and in totally different circumstances. Article 3, from which no derogation is permitted, prohibits torture or inhumane treatment. Furthermore, in 1996, the Chahal judgement extended this prohibition to deporting a person to a country where he or she would be at risk of torture or inhumane treatment. While the case law of the Strasbourg court is not strictly binding, it has been held that domestic courts and tribunals should, in the absence of special circumstances, follow the clear and constant jurisprudence of that court.^[1] Unless the government argue special circumstances which, so far as we are aware, they have not done, it seems that it is no longer possible to balance the risk to the deportee against the risk that he might pose to British society. This situation cannot be allowed to continue. Not only does it prevent the deportation of terrorists and other criminals but it also acts as a positive encouragement for them to come to Britain - safe in the knowledge that they can never be returned to their own countries.

4 The inability of the government to deport terrorist suspects and a decision by the Law Lords in 2004 to strike down provisions permitting foreign terrorist suspects to be detained without trial led to the introduction of "control orders" as an alternative. However, other judgements under the ECHR have challenged the Home Secretary's right to impose control orders on the grounds of an insufficient prior hearing. A further judgement challenged control orders themselves as amounting effectively to imprisonment. These judgements are technically not binding on the government but

the court's "declaration of incompatibility" with the ECHR is hard for the government to ignore. As a result, the conditions of the Control Orders were relaxed and seven of those concerned have already absconded.

5 Britain should now withdraw from the ECHR, giving six months notice, as is her right. At the same time, there should be a public announcement that, from the date of withdrawal, any foreign citizen arrested and subsequently convicted of a terrorist offence would be deported to his own country on completion of his sentence and with only a non suspensive right of appeal. If problems were to arise over documentation, the prisoner would remain in detention until the problems were resolved (as is not now possible). Prisoners who had acquired British citizenship (and who still held another citizenship) would have it revoked under the Home Secretary's existing powers prior to deportation.

6 To those who regard it as unthinkable that anyone be placed at risk of torture, the answer would be that terrorists had been given fair warning. Furthermore, there must be an acceptable balance between the risk to foreign terrorists on their return and the risk of their continued presence to our society to which the British state owes a first duty of protection.

7 Convicted terrorists who have no nationality other than British cannot be deported. For them the only answer is very lengthy prison sentences, uninhibited by a Convention drawn up before international terrorism became a major problem.

8 Suspicion of terrorist offences would not be sufficient to justify deportation. However, it must be recognised that, given the suicidal nature of some terrorists and their apparent willingness to employ chemical, biological or radioactive devices, the authorities may well be obliged to disrupt a plot before court room evidence becomes available. This is a new situation which requires that provision be made for lengthy periods of detention in the interests of public safety.

9 In the longer term the indigenous element of the terrorist menace can only be dealt with by effective counter terrorist measures. These require the acquiescence and, preferably the co-operation of, the communities concerned. The majority of those communities who are unsympathetic to terrorist activity in Britain have no interest in the continued presence in Britain of convicted terrorists. Indeed they would wish to see, although possibly not publicly to advocate, very firm measures against terrorists who bring their own communities into disrepute.

A replacement Act

10 The ECHR and the 1998 Human Rights Act (which is based on it) will need to be replaced by a revised Act which, while preserving intact human rights generally, excludes convicted terrorists from its purview and provides for the long term detention of terrorist suspects.

11 The suggestion, often made, that amending Human Rights legislation would be "a victory for terrorists" is absurd. Facilitating their expulsion from Britain and facilitating early pre-emption by the security authorities must be set against any narrowing of the civil rights afforded to foreign citizens.

EU Aspects

12 Similarly, claims that withdrawal from the ECHR would require withdrawal from the EU are entirely misplaced. This was made clear by the official spokesman of the President of the Commission who said on 26 June 2006 that The ECHR is an instrument of the Council of Europe,

and so., strictly speaking, it is not at this stage an instrument of the EU. A fuller account of this key issue is set out in Annex A.

Government Policy

13 The government are hoping that a case raised by the Dutch government, the Ramzi case, now before the ECHR will lead to a modification of the Chahal judgement. They hope that it will permit the risk to the public to be balanced against the risk to the deportee. The outcome of this case will not be clear at least until mid 2007.

Conclusion

14 Whatever the outcome of the Ramzi case, it will not deal with the need to detain dangerous suspects for considerable periods. With thirty terrorist plots already known to the security services, now is the time to tighten the legal framework for the protection of the public which is the governments overriding duty.

1 July, 2007

NOTES

- 1 ***Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions*** [2001] UKHL 23. • This case concerned planning and Article 6, but the principle is the same regardless of which Article is in issue.
 - 2 Oral evidence to the Constitutional Affairs Committee and Home Affairs Committee,
- 31 October 2006. Q96.

ANNEX A

DEPORTATION, THE ECHR AND THE EU

1 In an article in The Times on 11 July 2006 David Pannick, QC, stated that denunciation by the United Kingdom of the European Convention on Human Rights would entail leaving the European Union. This note considers the point further.

2 There is no question that the United Kingdom has the right to denounce the Convention under Article 65.1 which provides for six months notice to be given to the Secretary General of the Council of Europe. So far, the only state to do so was Greece which withdrew under the Colonels regime and subsequently rejoined. Greece was not a member of the European Union at the relevant time.

3 The spokesman for the President of the European Commission was asked on 26th June 2006 (by the BBC's Mark Mardell) whether, if a country left the ECHR, it would also have to leave the EU. Mr Barroso's spokesman replied that "The European Convention on Human Rights is an instrument of the Council of Europe, and so strictly speaking, this is not part of the EU acquis. This being said, the ECHR, which by the way is older than the European Union, and is also the subject of a very elaborate case law, is very largely identical to what is seen as the basic principles of fundamental rights applicable throughout the Member States. It has been used by the jurisprudence of the Court of Justice as an important source for establishing what fundamental rights and standards can be and should be and it is clearly an instrument which also has an impact that goes beyond the Council of Europe proper. But strictly speaking it is not at this stage an instrument of the European Union."

4 This looks unambiguous. The statement makes it clear, however, that the European Court of Justice (ECJ) uses the ECHR as "an important source" for determining what fundamental rights and standards can be and should be (and consequently determines their enforcement at EU level), so any denunciation of the ECHR would have to take into account any use made of it in ECJ jurisprudence, both to date and prospectively (this is also, perhaps, the legal/constitutional consequence of Article 6.2 of Maastricht see below). The significance of the qualification "at this stage" is that adoption of the proposed EU Constitution would bring the ECHR within the Community's acquis.

5 When this quotation was put to Mr Pannick he referred to Article 6.2 of the Maastricht Treaty on European Union 1992:

"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the

Member States, as general principles of community law".

6 He gave it as his opinion that " in the light of this, I think it would be impossible for a country to remain a member of the EU after resigning from the Convention."

7 Article 6.2 of Maastricht calls for the respect of fundamental rights as guaranteed by the ECHR, as general principles of community law. The Treaty does not specifically require adherence to the ECHR by Member States but appears to require observance of the same regime of fundamental rights as if they did so adhere. The obligations of Member States under Article 6.2 do not seem to be affected by adherence or non-adherence to ECHR. There may also be an argument that the reference to ECHR in the Article does not import any obligation to comply with glosses on the ECHR resulting from judgments of the court in Strasbourg. This would be relevant to our main concern which is with the obstacle to deportation of criminals and others created by the decision of the court in the Chahal case. Furthermore, the text of the Convention, as appended to the Human Rights Act 1998, does not in terms require signatory states to treat judgments of the European court as binding precedents. Section 2 of the 1998 Act requires courts and tribunals in the United Kingdom to take into account judgments, decisions etc. of the European Court of Human Rights, which is not the same as treating them as binding. It is therefore, at least theoretically, possible that a British court might decide, in the particular circumstances of a case, not to treat the Chahal case as a binding precedent.

8 Section II of the Convention relates to the establishment and functioning of the European Court of Human Rights, the appointment of judges etc. It is not annexed to the 1998 Act, but it is accepted as a matter of convention. Article 46 is entitled "Binding Force and execution of judgments" and so far as it is material to our concerns simply states: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". There does not appear to be any requirement that Contracting Parties shall treat as binding judgments of the court in cases in which they are not parties. This is what one would expect in a treaty creating a new jurisdiction based on continental rather than Common Law jurisprudence.

9 It is possible that denouncing the ECHR in order to make a significant modification to the rights which case law might be held to prescribe could be challenged at the European Court of Justice. But this is quite different from suggesting that it would be necessary to leave the EU.

10 The point was raised at a Committee hearing of the House of Commons in October 2006. Mr Clappison asked The Lord Chancellor whether, in his view, it was possible for the UK to denounce the European Convention and remain a member of the European Union. Lord Falconer replied In my view, it is in practice not possible. I say in practice because the EU has made it clear that they expect all members to adhere to the ECHR. Indeed we make it a condition as a European Union before anybody who is new joins in. I think the reason why there is some doubt is because the way that the relevant treaties are drafted does not express it as a condition, but to all intents and purposes, I believe it is not possible to be a member of the EU and to have left or denounced the ECHR.[2] (emphasis added)

11 This is set out more specifically in the following Parliamentary Question and Answer dated 27 February 2007:

151 N Mr David Heathcoat-Amory (Wells):

"To ask the Secretary of State for Foreign and Commonwealth Affairs what articles to the EU treaties require membership of the European Convention of Human Rights"

Mr Hoon

"There is no requirement in the EU Treaties for Member States to accede to the European Convention on Human Rights (ECHR). However, all EU Member States are members of the Council of Europe and signatories of the ECHR. There is no provision in the Treaty establishing the European Community which either requires or empowers the European Community to accede to the ECHR. Article 6 of the Treaty on EU, which requires the EU to respect fundamental rights, refers to the ECHR as an instrument containing such rights, but does not require the EU as an organisation to accede to the ECHR."

12 On a wider view, it should be noted that there is no constitutional mechanism for expelling a member state from the EU. It would be difficult for other member states to justify such an attempt, particularly if denunciation of the ECHR were to take place on the basis of a manifesto commitment and a strong popular mandate. In practice, the economic and strategic significance of attempting to expel a major Member State would vastly outweigh the issue at stake in this particular matter.