

**ANTI-TERRORISM, CRIME AND
SECURITY ACT 2001
PART IV SECTION 28
REVIEW 2004**

by
LORD CARLILE OF BERRIEW Q.C.

**ANTI-TERRORISM, CRIME AND
SECURITY ACT 2001
PART IV SECTION 28
REVIEW 2004**

**by
LORD CARLILE OF BERRIEW Q.C.**

CONTENTS

Chapter I	Introduction and background	1
Chapter II	The Review Process	5
Chapter III	Derogation: Powers under sections 21 - 23	7
Chapter IV	The sunset provisions; and the new legislation	10
Chapter V	The Part 4 Powers	16
Chapter VI	ATCSA2001 section 21	17
	What is a suspected terrorist?	17
	Quality of certifications	20
	Procedural difficulties under sections 21 and 26	22
	Decision and revocation	22
Chapter VII	The Special Immigration Appeals Commission	23
	SIAC	23
	Special Advocates	24
	Special Advocates and future legislation	31
	Disclosure	31
	SIAC Rules	32
Chapter VIII	ATCSA2001 section 22	33
Chapter IX	ATCSA2001 section 23	35
Chapter X	Conclusions	37
Annex	Current text of ATCSA2001 sections 21-29	39

**ANTI-TERRORISM, CRIME AND
SECURITY ACT 2001, PART 4
SECTION 28 REVIEW OF OPERATION IN 2004**

I INTRODUCTION AND BACKGROUND

1. Pursuant to section 28 of the Anti-Terrorism, Crime and Security Act 2001 [ATCSA2001] the Secretary of State was required to appoint a person to review the operation of sections 21 to 23. An up to date copy¹ of the sections in Part 4 of ATCSA2001 material to this report, including sections 21 to 23, can be found in the Annex to the report. Those are the sections providing the Home Secretary with the power to certify that a resident alien is a suspected international terrorist, and to order the detention of that person if he cannot be expelled in the normal way (for example, because removal would expose him to inhuman or degrading treatment).

2. I was appointed as the section 28 reviewer on the coming into law of the Act. The section provided for the first review to be completed not later than the expiry of 14 months beginning with the day on which the Act was passed, with subsequent reviews not later than one month before the end of any extension period permitted in respect of sections 21 to 23 by section 29(2) following an affirmative resolution by each House of Parliament². The Act received the Royal Assent on the 14th December 2001.

¹ As at the 20th January 2005. I repeat yet again a plea made by me elsewhere that the Home Office should at least provide on its website up to date copies of the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001, for the benefit of users faced by fairly frequent amendments scattered in other legislation. This reasonable request has remained frustratingly unfulfilled.

² Section 29(3)

3. Following my first report, Part 4 was extended by Parliament with effect from the 4th April 2003, and later to the 14th March 2004. The present expiry date is the 13th March 2005³. This is my third report as independent reviewer. This year the issue of renewal was thrown into high relief by the decision of the House of Lords in the case of *A (FC) and others v Secretary of State for the Home Department*⁴. Following that decision the Home Secretary Charles Clarke announced in the House of Commons on the 26th January 2005 that the detention provisions would be replaced and that sections 21 to 23 should come to an end on the enactment of the replacement legislation⁵.

4. Assuming that the new legislation proposed by the Home Secretary is enacted, even with amendments, this is likely to be my last report on a whole year of the detention provisions. Given the recent announcement, I am as yet uncertain as to whether renewal of the Part 4 provisions will be required, though it seems likely. If renewal is for a period of less than a year, I shall report again on the operation of the provisions during such lesser period. In any event, I shall report in due course on whatever period of the provisions remains up to their repeal and replacement.

5. I am also the independent reviewer of the Terrorism Act 2000, and prepare reports annually on, respectively, the working of that Act as a whole and the working of Part VII (which contains temporary and renewable provisions relating to Northern Ireland). That task has extended my knowledge of the many issues facing government and law enforcement agencies arising from the activities of terrorist individuals and groups. The experience gained has fortified in me the importance of ensuring so far as is possible that the prevention of domestic and international terrorism is achieved without compromising unacceptably the rights and freedoms of individuals.

³ SI 2004/751

⁴ [2004] UKHL 56

⁵ House of Commons Official Report (Hansard) 26/01/2005 Col. 306; to be read with Home Secretary's written statement of same date on evidence from intercepted communications.

6. I have observed that the techniques and extent of the analysis and reporting to the relevant authorities of terrorism risk has improved significantly in the past two years. The Joint Terrorism Analysis Centre [JTAC] contains a very busy and high quality group of people. Their output is now sophisticated and considerable. They play a beneficial part in the protection of the public from harm from terrorist organisations. Their efforts should reduce the risk of wrongful accusations of terrorist activity against individuals and groups. I have no doubt that they have played a significant part in the understanding of terrorist movements, and thereby in the successful intervention in planned terrorist actions, as described on several occasions by the retiring Metropolitan Police Commissioner Sir John Stevens.
7. As I reminded readers last year, mine has not been the only statutory reviewing process in relation to ATCSA2001. By section 122 a committee of at least 7 Members of the Privy Council was to be appointed “*to conduct a review of this Act*”⁶. That committee, under the chairmanship of The Rt. Hon. Lord Newton of Braintree, reported on the 18th December 2003⁷. I discussed their conclusions in my report last year. The committee has not been reconvened, nor was there provision that it should be. Its comments have proved and remain influential.
8. It was for the Privy Council Committee to advise as to whether they considered that sections 21 to 23 should remain in effect. My task is to report, those sections having continued in effect, on their operation⁸. I take that responsibility to mean that I should report as to whether the provisions operate effectively and as fairly as is compatible with legislation of its type.

⁶ Section 122(1)

⁷ Anti-Terrorism, Crime and Security Act 2001 Review: Report of the Privy Counsellor Review Committee; TSO HC100; 18th December 2003 [referred to hereafter as ‘Report’]

⁸ Section 28(1)

9. I have continued to have contact with the Joint Committee on Human Rights. ATCSA2001 is but one of many statutes falling for the Joint Committee's consideration. As I reminded readers last year, they have devoted considerable specific attention to it⁹. In their second report¹⁰ they focused upon the human rights aspects of what was then the Bill, and concluded that there were risks of arbitrariness and discrimination inherent in sections 21 to 23. Doubtless their views and those of the Newton Committee will have been part of the Home Secretary's considerations following the decision of the House of Lords cited above - especially as discrimination against foreign nationals was a significant part of the rationale of that decision. I pay close attention to all reports by the Joint Committee: their output provides a valuable insight into Parliamentary thinking on human rights issues at any given moment.

⁹ See the Committee's Second Report, Session 2001-2, HL Paper 37/HC372; and Fifth Report 2001-2, HL Paper 51/HC420

¹⁰ Paragraphs 31-52

II THE REVIEW PROCESS

10. As in previous years, in the process of preparing this review I have received trenchant criticism of the review process. In a continuing effort to enhance the objectivity of my own work and the solidity of its foundations, I have made comparisons with some of the copious amounts of counter-terrorism legislation elsewhere in the world. In particular, I have continued to examine US and Canadian legislation through literature – statutes, government and independent publications, newspaper articles and the Internet. I was able to take advantage of a private visit to the USA to attend a meeting in Oklahoma City of American terrorism and human rights law specialists. In addition, I have visited Spain in the aftermath of the March 11th Madrid bombings, and have examined the anti-terrorism laws and procedures used there. I have looked too at Spanish investigation and trial processes in terrorism cases.
11. In the normal course it would be my intention to continue with these comparisons. There are other partner states in the EU and Council of Europe whose procedures merit detailed consideration. There is considerable experience of terrorist risks elsewhere in the World, and some progress has been made internationally to confront the risks in a lawful and fair way.
12. I have paid close attention to strong and direct criticism by the detainees themselves of the review procedure. Once again this year some refused to meet me; but others did and were clear and frank in their criticisms of Part 4 and of my report for the previous year. I thank them for taking the trouble to meet me, and for their courtesy.

13. The criticisms by the detainees themselves and their representatives have been reinforced by many articles in legal journals and newspapers¹¹.
14. It is not part of my responsibility under section 28 to give a judgment of the effectiveness of this review process. However, what I can say is that I have not been inhibited in any way in carrying out my review, either by restraint on my own part or hindrance on the part of officials or government.
15. I have been given access to Ministers and officials at senior level. I have been able to meet detainees privately and without limit of time. I have been shown as much closed information as I requested. On occasions my views have been sought out by the Home Office, as they have by other stakeholders and interlocutors. I should like to commend particularly the preparedness of the organisation *Liberty* to engage in active and constructive conversation on the complex issues underlying the legislation and its putative successor.
16. For reasons of public interest and confidentiality I have decided that it is not appropriate to include as part of this report a detailed list of the persons with whom I have held discussions. Anybody who wishes to contribute to this review process is very welcome to do so either by writing to me (at The House of Lords, London SW1A 0PW) or by email (carlilea@parliament.uk).
17. I have interspersed my ATCSA2001 reviewing activities with my work on the Terrorism Act 2000, and as a result have seen ATCSA as part of a bigger picture. Whilst my work as reviewer is a part-time activity, I consider that I have been able to spend a sufficient number of days on it to gain an informed view.

¹¹ For example, *Terrorism and Criminal Justice - Past, present and Future*; Professor Clive Walker; 50th Anniversary edition of *the Criminal Law Review*, 2004, page 55; and *No Detention Please, We're British*; Paul Mendelle, *New Law Journal*, [2005] 155 NLJ 77

III DEROGATION: THE POWERS UNDER SECTIONS 21 TO 23.

18. The measures in sections 21 to 23 are designed to address the government's concern about the inability to try suspected international terrorists because of one or more of (i) insufficient admissible evidence (as opposed to intelligence), (ii) the difficulty of putting sensitive intelligence before a criminal court, and (iii) international treaty obligations affecting the possibility of deportation in particular cases. The power to detain given under section 23 involved derogation¹² from the right of liberty contained in Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR]. The Joint Committee on Human Rights was not persuaded that the conditions for derogation from the ECHR had been met. The derogation remained an issue subject to litigation until the decision of the House of Lords cited above - and could still find its way to the European Court of Human Rights on the application of the UK government. For present purposes I treat that matter as concluded by the House of Lords decision.
19. As a matter of record, the Special Immigration Appeals Commission [SIAC] held the derogation to be unlawful, on the basis that it was incompatible with articles 5 and 14 of the ECHR. That decision was reversed on appeal brought by persons detained under section 23¹³. The Court of Appeal concluded that there was ample material to justify the derogation and the statutory provisions created in the context of the derogation. As stated, the House of Lords has now reversed that decision. The principal grounds of that decision were that the measures involving derogation were not "*Strictly required by the exigencies of the situation*"¹⁴; that the government's measures were not a proportionate response to the

¹² Human Rights Act 1998 (Designated Derogation) Order 2001

¹³ *A and ors v Secretary of State for the Home Department [2002] EWCA Civ 1502 C.A.*

¹⁴ As required to justify derogation under Article 15

terrorist threat as they addressed only foreign nationals posing such a threat and not UK nationals too; and that they were discriminatory because they affected only foreign nationals.

20. However, as I have repeatedly striven to make clear, the merits, content and method of the derogation from the ECHR are not part of my responsibility as reviewer of the operation of sections 21 to 23, under section 28.

21. ATCSA2001 was introduced in response to the events of September 11th 2001. As the government has put it:

“The purpose of the Act is to build on legislation in a number of areas to ensure that the Government, in the light of the new situation arising from the September 11 terrorist attacks on New York and Washington, have the necessary powers to counter the threat to the UK.”¹⁵

22. As a result of that threat, the powers given to the Home Secretary under sections 21 to 23 are wide in their scope and have a significant impact on a particular group of the resident community. The members of that group are all persons who do not hold British nationality. As in past years, there has been continuing evidence of resentment among parts of the Muslim community who are both residents and nationals of the United Kingdom. Against that one must place the paramountcy of public safety, and that it is the government for the time being that is held to account if terrorist attacks are the result of inadequate public protection. One could not sensibly claim that the balance is easy or the solutions clear, as is evident from the differing views of judges in the Court of Appeal as compared with the House of Lords.

¹⁵ Explanatory Notes to the Act, The Stationery Office, 2002

23. There is an informed consensus shared by police and other control authorities around the world that terrorist attacks connected with Usama Bin Laden have continued and are likely to do so. The apparently authentic broadcast on the Al-Jazeera television station on the 4th January 2004 provided evidence of his encouragement of terrorism. Further broadcasts have supported this view.
24. I believe from the material I have seen and heard that terrorist incidents have been prevented, possibly including some within the shores of Great Britain. It is to be hoped that the public will be told as much as is possible within state security considerations of what has been prevented. It is in my view important for the public to be fully informed, so that they can make their own assessment of the necessity for what might otherwise be seen as unusual laws.
25. The complexity and reality of Al Qaeda and its connections were described in instructive detail in the first open generic judgment of SIAC on the 29th October 2003¹⁶. The same judgment contains a comprehensive survey of the legislation contained in Part 4, its meaning and the rigour with which evidence is scrutinised given the relatively low standard of proof (reasonable suspicion that the person detained is a terrorist) required of the Home Secretary for a detention to be held lawful under section 21(1)¹⁷. I am satisfied that the same level of rigour has been maintained in 2004. It is worth noting that at the time of writing SIAC was about to be scrutinised in a short inquiry by the House of Commons Select Committee on Constitutional Affairs.

¹⁶ *Ajouau and A,B,C and D [2003] Appeal Nos SC/1/2002; SC/6/2002; SC/7/2002; SC/9/2002; SC/10/2002* - referred to below as 'generic judgment'

¹⁷ There is a great deal of information about AQ terrorism in the various SIAC items to be found via the Department of Constitutional Affairs website www.dca.gov.uk

IV. THE SUNSET PROVISIONS; AND THE NEW LEGISLATION.

26. Irrespective of the Home Secretary's Parliamentary Statement of the 26th January 2005, pursuant to section 29(7) sections 21-23 of ATCSA2001 would cease to have effect at the end of the 10th November 2006. New primary legislation would be required if identical or similar powers were to continue after that date. Thus the detention powers would lapse on the 10th November 2006.
27. Last year I suggested that, as the sunset provision approaches, we should be ready for whatever is to follow. I urged the government and all other interested parties to give anxious consideration to what should happen then. I suggested that the risks detainees held for several years would pose by then, and possible ways of dealing with such risks, would require the most careful assessment. The government issued a formal consultation paper in 2004, and I am aware that officials in the Home Office have considered a range of responses including my own, and have been working intensively with Ministers to produce comprehensive proposals for successor legislation. The recent House of Lords decision has hastened the process of consideration.
28. I agree with SIAC's view¹⁸ that what may be reasonable for an arrest for a short period of detention may be insufficient for indefinite detention. Taking into account all the circumstances as one should, the passage of time may alter significantly the threat posed by an individual or even a group or former cell. That one detainee was released during 2004 without further legal proceedings may be evidence of this.

¹⁸ See generic judgment paragraphs 46-48

29. So far as the Home Secretary's response of the 26th January 2005 is concerned, I would offer the following comments, albeit at the very edge of my terms of reference.
30. The response to the House of Lords' view that the ATCSA2001 provisions are discriminatory against foreign nationals has been met by the government with what one might call a mathematically accurate response. It is proposed that the new provisions should apply to UK and foreign nationals alike. If there are to be such provisions, logically UK or foreign nationality is not an indicator in itself of the extent of danger posed: indeed, UK nationals are likely to be less easy to detect as terrorists simply because their freedom of activity is unimpeded by considerations of immigration legality or status. However, the proposals inevitably create the risk of a far larger group of people being the subject of the suggested new civil control orders. The orders, if they follow the broad picture painted in the Home Secretary's recent statement, are likely to be available (if applied for) in relation to all forms of terrorism, including that connected with Northern Ireland, animal rights activism at its extremes, Sikh separatism, Tamil separatism, any resurgence of extreme Welsh nationalism, to name but a few. However, it has been observed that, for some days at least, there was doubt among some Ministers as to whether the proposed control orders would apply to suspected international terrorists only, or to all terrorist suspects. The government's intentions on this should be made crystal clear as soon as possible.
31. At the end of January 2005, contrary to some ill-informed media stories there were in fact only 7 persons held in prison solely under part 4 of ATCSA2001 as such. The number has been reduced by a few being charged with conventional crime and transferred to remand status pending Crown Court trial, one release on bail subject to strict conditions amounting to house arrest, one unconditional release, and two transfers to secure hospitals. When I first became independent reviewer on the enactment of ATCSA2001, I expected a much larger number. The number has been reduced further by the government's decision not to oppose bail (albeit under stringent conditions including house arrest in some cases) in relation to all

remaining detainees. The factual situation, therefore, is that there is a real possibility that by the time this report is published there will be no detainees left in Belmarsh or Woodhill prisons, though it is likely that part 4 'home detentions' will have replaced them.

32. I risk no contradiction by saying that it is desirable that as few persons as possible should be subject to non-criminal sanctions without a conviction by a criminal court. The breadth of the proposed new legislation raises the spectre of much larger numbers of detainees. All those detained at present are male. If female detainees were to be added, this would place further strain on the prison service.
33. Having said that, there is every reason to respect the rights of the public to be proportionally protected against all forms of terrorism. The effect of a letter bomb may be equally deadly, whatever its origin or motive.
34. In all prosecution and similar functions there is an important area of discretion. A significant proportion of crimes is detected but not formally prosecuted, a caution being regarded as appropriate. By analogy, there may be many persons on the fringes of terrorism whose activities can be dealt with adequately by warning, observation, surveillance of various kinds, and other measures falling short of court orders. Generally the executive has used discretions of this kind carefully - otherwise there would indeed be far more ATCSA2001 detainees now than the 7 referred to above. Given that the government has rejected (for now at least) the idea of revising the criminal law on terrorism to introduce new offences, I express the hope that the proposed control orders would be used only when absolutely necessary in the interests of national security or to avoid serious harm to an identifiable person or group, and not as a soft alternative to prosecution.

35. I remain of the view I have expressed before that criminal charge, trial and conviction offer the most transparent and fair system for dealing with terrorist acts. The criminal standard of proof is a great protection against arbitrariness and injustice. In every case where it is possible given all the considerations, the criminal process should be used. A new criminal offence, of knowingly doing acts or providing services or facilities connected with terrorism, would in my view provide a useful additional weapon in the fight against terrorism related crime. It would keep more terrorist activity within the criminal justice process. I recognise the difficulties inherent in the current criminal process in connection with the disclosure of methods and identities used in countering terrorism. A new form of criminal tribunal, similar in its approach to SIAC but with a significant and truly lay judicial element, might have to be devised, to protect national security. This would inevitably involve an improved version of the SIAC special advocate system. The total devotion of many, especially lawyers, to the jury system is not entirely without its critics in cases where emotions may be running high, as can happen in terrorism cases. Juries arguably are extremely good at the analysis of discrete incidents, and in determining issues such as honesty/dishonesty. However, a simple analysis of decisions in the Court of Appeal in recent years reveals less reliability for the methodology of jury trial in emotionally charged cases (such as those involving infant homicide or historical child abuse). A three judge court with the obligation to give full reasons for its factual decisions has its attractions, and in my view could be effective for terrorism trials where the public interest requires a significant degree of secrecy affecting Parts of the evidence.

36. Having said that, the notion of civil control orders has perhaps caused more surprise and opposition than has been warranted. A private citizen, for example a director of a pharmaceutical company using animal experimentation for the development of human drug treatments, may be able to identify persons whom he has reason to believe may attack him physically. If he can establish this risk to the requisite civil standard, he may be able to obtain an injunction in the civil courts with quite severe restrictions on the respondent, and with

penal sanctions. This could lead to imprisonment for breach of the injunction. If the state has information along the same lines, it seems reasonable that the state should be able to take the steps to ensure his protection in a similar way. Subject to comment about the lower standard of proof (“*reasonably suspects*”) in the proposed control orders, the Home Secretary has not produced an astounding new principle.

37. A major difference between the current proposals and the ATCSA2001 detention provisions relates to detention in prison. In response to the House of Lords criticism on proportionality, the new proposals involve a wide range of measures, from the slightest to the extreme of house arrest. This is again a clear and intentionally accurate measure of what is required to meet that criticism. Detention may be involved, in two circumstances. One is house arrest itself which, though doubtless preferable to prison, is nevertheless detention. The other is imprisonment for contumelious disobedience of a court order. If there is to be the sanction of imprisonment following disobedience of a control order, logic dictates that such imprisonment should be imposed if at all by a court or tribunal with full knowledge of the facts: this would have to be the tribunal given the task of reviewing control orders (a court or tribunal with a jurisdiction similar to the current jurisdiction in this area of SIAC). I can see the force in the preference for the breach of a control order to be made a criminal offence, so that any imprisonment would be for that criminal offence in a criminal court and therefore less susceptible to ECHR challenge. However, it would be unrealistic to place such a criminal offence before a court that was unable to look at all the evidence (including the closed evidence) that had led to the control order, as without a full view of the evidence it would be unable to make an informed assessment with a view to sentence of the heinousness or otherwise of any breaches complained of. In my view it is likely that both forms of detention/imprisonment described above will require derogation from the ECHR as before. However, I would expect derogation in those circumstances to be far more likely to survive challenge in the UK courts than the existing detention provisions.

38. The fact of derogation has caused difficulty, particularly when set aside the undoubted fact that France, Spain and others have not derogated. In my view the comparative argument conceals the reality of what has happened in at least some other countries. Under the protection of the role of investigating magistrates in the non Common Law jurisdictions, it has been decided that it is unnecessary to derogate. However, the reality is that very long periods of detention without trial are available and used in other countries; and that the UK systems of judicial review and the existence here of more active civil liberties groups provide at least as effective scrutiny of the use of such powers as in any country.
39. I think it right to express disappointment that the government has decided to remain opposed to the *possible* use as evidence in criminal trials of intercepted communications on public telephone systems. The issue of the use of intercept material in court was discussed in the Lloyd Report in 1996¹⁹, which provided the foundations of the Terrorism Act 2000. The United Kingdom's protective view of such evidence is not held in comparable countries other than Ireland. The Rt. Hon. Lord Lloyd of Berwick and his colleagues identified at least 20 cases in which the admissibility of intercept evidence would have enabled a prosecution to be brought for serious offences²⁰. Lord Lloyd has not changed his mind in the intervening years. In the context of the present detainees, it is self-evident that the availability of intercept evidence to SIAC and to the special advocate, but not to the certified person or his own lawyers, leaves the certified person at a disadvantage in knowing and dealing with the true issues. It is not suggested by anybody responsible that there should be any *obligation* to rely on such evidence, nor to disclose it unless it materially assists the defence or materially undermines the prosecution. I hope that the government will reconsider its approach on this issue, possibly in response to amendments to new legislation shortly to be debated in Parliament.

¹⁹ *Inquiry into Legislation Against Terrorism*, Cm3420, 1996

²⁰ *ibid.* vol. I page 35

V THE PART 4 POWERS

40. Below I deal with each part of the powers in turn. They can be summarised as:

Section 21 Definition of terrorism and terrorist; certification and notification; appeal and review

Section 22 Actions in connection with deportation and removal made statutorily available against certified persons despite the fact that for various reasons they cannot in practice be removed from the United Kingdom.

Section 23 Detention of certified persons without charge.

VI ATCSA2001 SECTION 21

41. This and the following sections include some repetition of material contained in previous years' corresponding reports. I include the repetition because it seems to me useful that readers should have the opportunity to see the legislation commented upon in an orderly way. It provides too the opportunity of reflecting upon and reviewing more recent events, and to view current legislative proposals in context.

42. **What is a suspected terrorist?** Section 21 empowers (but does not oblige) the Secretary of State to issue a certificate if he:

“reasonably -

(a) believes that the person’s presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist”²¹

43. It is therefore a pre-requisite for certification that the person should be the object of reasonable suspicion that he is a terrorist.

44. Section 21(2)(a) and (b) define a terrorist by reference to various acts and allegiances, all directly connected with the actions of what is called “*an international terrorist group*”. Such a group is defined by reference to section 1 of the Terrorism Act 2000. The limitation

²¹ Section 21(1)

to those linked to Al Qaeda and its associated groups is not contained in the Act. It flows from the terms of the derogation from the ECHR, which was founded upon the terrorism threat by Al Qaeda. In my view no serious operational difficulties are caused by the definitions so far described, broad as they are.

45. Section 21(2)(c) does cause some difficulty. It includes in the definition of “*terrorist*” a person who –

“has links with an international terrorist group”.

46. Section 21(2)(c) is softened by section 21(4), which provides –

“For the purposes of subsection (2)(c) a person has links with an international terrorist organisation only if he supports or assists it”.

47. In the debates on the Bill some reassurance was given on the issue of links²². The presence of the word ‘*it*’ in section 21(4) is helpful in this regard. The court always construes a provision affecting the liberty of the subject in a way as consistent with continuing liberty as possible: more than mere social or professional association would have to be demonstrated before certification could be justified under the section. The wife of a terrorist suspect would probably be outside the scope of ‘links’ in the context of the section.

²² Lord Rooker, then a Home Office Minister, colourfully accepted at HL Debs col. 502 29th November 2001 that Usama Bin Laden’s distant family relatives, about ten times removed, do not have a sufficient ‘*link*’

48. In 2003 I suggested that the Act should be amended by the addition of words that would not have altered the substance of the law, and might even be open to criticism as being of symbolic value only, but could have been seen as consistent with an effort to maintain clear definitive standards. I suggested that such a change be considered.

49. In 2004 I expressed myself satisfied that the change was considered fully. It was rejected by Ministers. I accepted that rejection, especially in the light of the way in which SIAC has approached the provisions. The government will doubtless have noted part of the first generic judgment of SIAC in which it said²³:

'The act itself does not contain any reference to the significance of the risk as part of the certification process. It would be possible for someone to come within it on the basis of comparatively minor activities in respect of which indefinite detention would be inappropriate. It should be open to someone so detained to contend that even if what is said against him were true, recourse to so draconian a power was disproportionate in the light of other circumstances. Such an approach is within the scope of section 25(2)(b).'

50. Nothing in 2004 has altered my view that it is now clear that the 'links' provision has, by proper judicial interpretation of the statutory provision, been set in an acceptable context.

51. Nevertheless, I would hope that the new legislation will be explicit enough to avoid the concerns aroused by the "links" provision in ATCSA2001.

²³ Generic judgment paragraph 24

52. **The quality of the certifications made.**As part of my review I have attempted to replicate the exercise carried out by the Home Secretary. In relation to each certified and detained person I have been shown the material (including closed material) placed before him, and I was therefore able to assess for myself whether each person concerned fell within the section 21(1) criteria. In 2004 there was one certification. I am satisfied that the statutory criteria were met.
53. There is a problem for non-participants, and for some participants including some of the detainees and their lawyers, in gaining a full understanding of the SIAC determinations. This is not the fault of SIAC, but rather a result of the need to protect intelligence sources, methodology and actions. In each case and in dealing with the general picture there is an open and a separate closed judgment. The publication of the closed judgment would risk compromise to national security and the effective use of covert methods in detecting terrorism. I have seen all the closed judgments so far. Those judgments contain in some cases important additional material. Having read them, I can advise that they provide further support for the conclusions I have reached on the process of certification conducted by the Home Secretary.
54. Of course, the papers for a proposed certification are prepared by civil servants. I have regular contact with the group concerned. During the past year I have witnessed further growth in the size and structure of the group. They have continued to perform their difficult work with dedication and judgment.
55. The previous Home Secretary, when presented with potential certifications, considered each on the merits and sometimes requested and received further information before reaching a decision. His role in the procedure was active and inquiring. The current Home Secretary has been in post only a short time, and has made no certifications. However, as recent events demanded and have shown, he has given much of his attention to these issues.

56. With one continuing reservation, I advise that what I regard as appropriate levels of political and executive judgment are being applied to decisions under the certification process. The reservation relates to the assessment of risk under ECHR Articles 2 and 3. This is dealt with in paragraphs 86 to 88 below.
57. Whilst in each of the cases I have seen over the past 3 years it was clear to me that the person was properly suspected on strong grounds of being a member of, supporter or assisting an international terrorist group, I was far less certain that one could be precise as to their exact group affiliation. This has been an issue for SIAC, which in the first generic judgment produced a comprehensive and useful analysis of the history of Al Qaeda and the related activities of the 5 Appellants under consideration.
58. From the material I have seen, I remain of the view expressed in my previous reports that there remain in the United Kingdom individuals and groups who pose a present and real threat to the safety of the public here and abroad.
59. The public safety context includes the unavoidable premise that it may be difficult to predict likely methods or targets of terrorist attacks, as the bombing of a nightclub full of holidaymakers in Bali showed. The risk of chemical attacks is completely realistic, and its consequences potentially horrible. In the extremely dangerous context in which anti-terrorism legislation is now working, I accept that public protection must be quite flexible against international terrorists who often work in small 'cells', are frequently difficult to categorise as part of any particular known groups, and are part of an international terrorist picture in which new groups can appear suddenly.
60. In carrying out my role as Reviewer, I have been kept abreast of at least some of the issues giving rise to counter-terrorism operations that have become public knowledge. Many other operations take place. The level of counter-terrorism policing is high. I have no doubt that

the control authorities are working closely with foreign intelligence and police agencies. Specific and general threats have been addressed. To date, the success of the British authorities in preventing terrorist acts within our shores has been highly commendable.

61. In this context, I take the opportunity of paying a tribute to the work of Sir David Veness, who leaves the Metropolitan Police (for a new role at the United Nations General Assembly) with a record of unrivalled distinction in policing terrorism.

62. **Procedural difficulties under sections 21 and 26.** In past years I reported on difficulties arising under these sections. No serious difficulties occurred during 2004. No useful purpose would be served by repeating past reports in this context.

63. **Decision and revocation.** Section 21(7) permits the Secretary of State to revoke a certificate. He did so in one case during 2004. Unconditional release occurred, and the person concerned has returned to ordinary life within the UK.

VII THE SPECIAL IMMIGRATION APPEALS COMMISSION

64. **SIAC.** Section 21(8) and (9) provide that decisions and actions by the Secretary of State in connection with certification under the section may be questioned in legal proceedings only before SIAC. This means that conventional judicial review proceedings are not open to a certified person. SIAC is part of the High Court, and by sections 26 and 27 is obliged to cancel a certificate in the absence of evidence to meet the requirements of section 21(1). Once again, in order to deal with SIAC issues I have held discussions with persons involved in the SIAC process, including several of the current detainees, and have considered SIAC's procedural rules.
65. There has been considerable SIAC activity in the past year. I have followed it closely, and have seen transcripts of open and closed sessions. In so far as it falls within my remit under the Act, I am in a position to review the effect of the SIAC process on the general fairness of the Part 4 process.
66. As last year, SIAC itself has proceeded with a determined and managed timetable. One appeal has been successful, and the detainee released. Another was granted bail on terms amounting to house arrest, following evidence related to his mental condition.
67. The detainees who have lost their substantive appeals, themselves and through their legal advisers have been severely critical of decisions and the process. Particularly singled out for criticism has been the undoubtedly unusual procedure in matters with a strong criminal analogy of a closed hearing from which the Appellant and his personal legal representatives are excluded, containing evidence of which they are unaware, and producing (in addition to the open judgment) a closed judgment they are not permitted to see. This is understandable criticism. There has too been criticism of the efficacy of the periodic reviews of detainees'

cases. In several of the cases the review has been against a background of very little in the way of change of circumstances. Nevertheless it is right that there should be regular reviews, providing as they do the opportunity for changes to be focused upon.

68. Overall I consider that the process operates effectively and proportionately to the risks of national security, especially in the light of the disclosure and hearing constraints applicable.
69. Senior judges with special experience chair the hearings. In my view it is a significant advantage if they are serving (rather than retired) judges. I believe this to be more than an issue of perception.
70. SIAC has the enviable flexibility pursuant to section 27(6) to modify its own procedural rules even in relation to individual cases.
71. **Special advocates.** Very recently two of the special advocates, Ian Macdonald Q.C. and Rick Scannell, have resigned. They have described the procedure as an ineffective protection of the rights of the detained individual. One must take very seriously the public and reasoned resignations of two highly regarded barristers with considerable experience as special advocates. This is especially so as I have received written representations from another expressing real concern about the effectiveness of the role.
72. To understand the position of the special advocate it is necessary to have at least a basic knowledge of the governing rules. Under The *Special Immigration Appeals Commission (Procedure) Rules 2003*²⁴ it is provided:

²⁴ SI 2003/1034

Appointment of special advocate

34. - (1) Subject to paragraph (2), the Secretary of State must, upon being served with a copy of a notice of appeal or application under these Rules, give notice of the proceedings to the relevant law officer.

(2) Paragraph (1) applies unless -

(a) the Secretary of State does not intend to -

(i) oppose the appeal or application; or

(ii) object to the disclosure of any material to the appellant; or

(b) a special advocate has already been appointed to represent the interests of the appellant in the proceedings.

(3) Where notice is given to the relevant law officer under paragraph (1), the relevant law officer may appoint a special advocate to represent the interests of the appellant in proceedings before the Commission.

(4) Where any proceedings before the Commission are pending but no special advocate has been appointed, the appellant or the Secretary of State may at any time request the relevant law officer to appoint a special advocate.

Functions of special advocate

35. The functions of a special advocate are to represent the interests of the appellant by -

(a) making submissions to the Commission at any hearings from which the appellant and his representatives are excluded;

(b) cross-examining witnesses at any such hearings; and

(c) making written submissions to the Commission.

Special advocate: communicating about proceedings

36. (1) The special advocate may communicate with the appellant or his representative at any time before the Secretary of State serves material on him which he objects to being disclosed to the appellant.

(2) After the Secretary of State serves material on the special advocate as mentioned in paragraph (1), the special advocate must not communicate with any person about any matter connected with the proceedings, except in accordance with paragraph (3) or a direction of the Commission pursuant to a request under paragraph (4).

(3) The special advocate may, without directions from the Commission, communicate about the proceedings with -

(a) the Commission;

(b) the Secretary of State, or any person acting for him;

(c) the relevant law officer, or any person acting for him;

(d) any other person, except for the appellant or his representative, with whom it is necessary for administrative purposes for him to communicate about matters not connected with the substance of the proceedings.

(4) The special advocate may request directions from the Commission authorising him to communicate with the appellant or his representative or with any other person.

(5) Where the special advocate makes a request for directions under paragraph (4) -

(a) the Commission must notify the Secretary of State of the request; and

(b) the Secretary of State must, within a period specified by the Commission, file with the Commission and serve on the special advocate notice of any objection which he has to the proposed communication, or to the form in which it is proposed to be made.

(6) Paragraph (2) does not prohibit the appellant from communicating with the special advocate after the Secretary of State has served material on him as mentioned in paragraph (1), but -

(a) the appellant may only communicate with the special advocate through a legal representative in writing; and

(b) the special advocate must not reply to the communication other than in accordance with directions of the Commission, except that he may without such directions send a written acknowledgment of receipt to the appellant's legal representative.

73. The special advocate remains a relatively new and different creature in court proceedings. He is not the traditional and well-understood ‘friend of the court’ (*amicus curiae*), whose role is to assist the Court by seeking out and presenting arguments of assistance to all parties to the instant litigation. The special advocate has a statutory and partisan role, to enhance the interests of the detainee, but without a lawyer/client relationship and without communication with the detainee at all meaningful times in the proceedings save with hard-won permission. This is a challenging task, demanding high degrees of forensic skill, judgment and tactical appreciation. These attributes have been evident in the closed proceedings I have read. The special advocates have fought hard on law and fact for their detainees. In practice the role of the special advocates has been greater than the strictest reading of the rules would suggest. For example, they have played a significant part in scrutinising and enlarging the most appropriate arguments on the disclosure of documents. This is important, as the special advocates have access to the closed material.

74. Special advocates have taken important points of law on disclosure, and as to the admissibility and weight to be given to material obtained as a result of the actions of foreign intelligence agencies. Their analysis and examination of factual matters has been rigorous. SIAC itself has highlighted the value of their contribution²⁵.
75. The special advocates instructed so far have been small in number and all especially experienced in administrative law. For operational reasons it is not possible for them to be instructed in several cases running at around the same time. These are briefs that cannot be returned to others in the event of unexpected unavailability. The tremendous amount of work involved in their task, and their busy schedules, may have been a contributory factor to delay. These problems could and in my view should be alleviated. I believe that the criticisms can be met, and am slightly surprised to have to repeat unfulfilled suggestions from my report a year ago. The special advocate procedure was novel within our jurisdictions, and is not set in stone. It was bound to have to evolve, and that evolution should now be catalysed energetically.
76. The first measure required in my view is that there should be organised training at which those on the list of special advocates can discuss and share common problems, resolve their approach to procedural and formidable ethical issues, and receive the kind of help typically given in courses run by the Judicial Studies Board for full and part time judges. The organisation of such training might be placed in the hands of the Law Officers' Secretariat, but that is merely one suggestion among many that might be made for their management. It could equally be handled through the good offices of a university law department with academic specialists in terrorism law.

²⁵ For example, see the judgment SCB/3 *Mabmoud Suliman Ahmed Abu Rideh* February 2005.

77. The second step I would advise strongly is as to the way in which papers are presented to and organised for the special advocates. At present they are often presented with boxes of files containing papers which they then have to sift, sort and assess with little prior instruction. It is now in my view demonstrated beyond argument that a security-cleared case assistant should be provided for every case. That person could categorise all the papers in consultation with the special advocate and provide some degree of assistance and act as a conduit of information to deal with queries by the advocate. This would mean that the advocate would have something approximating to a conventional instructing solicitor or paralegal assistant, thereby enhancing knowledge and saving time and cost.
78. My third suggestion is that there should be available to special advocates an easier and closer relationship with the individuals whose interests they represent, and their private lawyers. In some cases such contact would have to be subject to the approval or direction of SIAC, especially in the absence of agreement between the special advocate and the police etc as to the nature and extent of the issues to be raised. There must be factual issues, about where the detainee was and when, or about the reasons for association with certain persons, on which direct discussion with the detainee or his private lawyers would assist in the doing of justice. I believe that such contact, on a careful basis, would meet many of the concerns expressed by Mr Macdonald and others.
79. The fourth suggestion I have is that the range of appointees as special advocates should be widened well beyond those with detailed knowledge of administrative law. As can be seen from the first generic judgment, many if not most of the issues of human rights and administrative law have been argued fully and adjudicated upon. The examination of cases by special advocates is akin to the everyday work of the many criminal advocates who appear routinely in difficult cases. From that cohort I remain confident that many could be identified as suitable both to the work of the special advocate and the high degree of confidentiality required.

80. The measures suggested in paragraphs 76 to 79 above hopefully would lead to a more efficient throughput of the Part 4 cases coming before SIAC, without any dilution of quality, were the present legislation to continue.
81. **Special advocates and future legislation.** In the event of the current legislation being replaced along the lines proposed by the government, a tribunal will be established to consider the civil control orders certified by the Home Secretary. It is likely to be similar to SIAC in composition and procedure. So far as composition is concerned, I believe that public confidence would be reassured if part of its membership were genuinely lay, albeit positively vetted for security reasons. So far as procedure is concerned, in my opinion the special advocate procedure with the improvements suggested above would work reasonably well and should provide a valuable measure of protection.
82. It might well be useful if one of the special advocates was appointed as their liaison advocate, and was required to produce for the Law Officers an annual report on their procedures and effectiveness.
83. Despite the resignations, in the light of the evidence I have seen and heard, including the compelling closed material, I have concluded that the special advocate system achieves the purpose of assisting SIAC to reach decisions correct in fact and law. Attention to the specific concerns addressed above would hopefully improve what was bound to be an evolving process, given the innovation that the special advocate system has been.
84. **Disclosure.** I have made further inquiries during the past year as to the disclosure regime followed for the SIAC hearings. As a year ago, I am satisfied that every effort is made to follow a procedure analogous to that followed in criminal cases. In a criminal trial (subject to Public Interest Immunity rulings by the judge) there is a formal staged route involving primary disclosure, the filing of a defence case statement, secondary disclosure, and a continuing

duty to keep disclosure under continuous review. In proceedings where the Appellant does not see a substantial section of the evidence, his power to obtain disclosure is severely limited. This places a considerable burden on SIAC itself, the Secretary of State, and perhaps especially the special advocate. It is a function the special advocate is currently ill-equipped to achieve satisfactorily, in the absence of the additional measures suggested in paragraphs 76 to 79 above.

85. SIAC highlighted this in their first generic judgment.²⁶ They revealed in open session that there exists in the Security Service SIAC team a guide about disclosure which includes a requirement that any exculpatory material should be disclosed. A more formalised system for checking documents has been accepted as a requirement, especially as responsibility for checking and scrutiny is in reality controlled by one party.
86. From the transcripts I have read, I believe that there has been meticulous attention to the importance of disclosure in an appropriate way of material adverse to the Secretary of State's case or otherwise of assistance to the Appellant. I doubt that a useful published protocol could be devised for the SIAC cases. However, I remain concerned about this issue, which should be considered for the purposes of whatever new procedure is introduced.
87. **SIAC rules.** Following consultation (in which I was one of a wide group of consultees) about changes in the SIAC rules, the *Special Immigration Appeals Commission (Procedure) Rules 2003*²⁷ came into force on the 1st April 2003. Therefore they were effective for the substantive SIAC proceedings to date. The new Rules appear to be fit for purpose. I make the assumption that there would be a speedy response if problems with the new Rules became evident and were highlighted by SIAC itself.

²⁶ Generic judgement paragraphs 52 - 54

²⁷ SI 2003/1034

VIII ATCSA2001 SECTION 22

88. Section 22 lists, in subsection (2), actions that 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.
89. This is a real issue. ECHR article 3 prevents the removal from the United Kingdom of a person who would be at risk of torture or inhuman or degrading treatment or punishment in the country to which they were sent. There are no exceptions to this rule.
90. Practical considerations would include the unavailability of direct flight routes to the country of intended removal, or a lack of any appropriate travel documentation.
91. In relation to article 3, among the group of certified persons currently detained are Algeria and Egypt passport holders. For article 3 reasons we do not return certified persons to Algeria, as they are all perceived to be potential victims of article 3 unacceptable treatment if returned, on account of their political beliefs. From what they told me they do not wish to be sent there. Some left their country of origin as teenagers, and are now twice as old as then. These are unlikely to be at serious risk for anything they have done in the past in their own countries, and should not face accusation in the future if they comply with the law. France and Germany do sometimes send people back to Algeria, after considering individual cases on their merits and by reason of a differently nuanced interpretation of the *1967 Protocol Relating to the Status of Refugees*. This difference between our own approach and that taken by fellow members of both the Council of Europe and the European Union can seem puzzling, and is easily over-simplified. At present it is consistent with the wishes of the certified detainees.

92. The Home Secretary's statement to Parliament of the 26th January 2005, referred to above, contained a short passage to the general effect that bilateral negotiations towards safe return are being considered with a number of countries. Baroness Symonds, a Foreign and Commonwealth Office Minister, has been involved directly in material discussions to that end. I consider that it is realistic to expect that such returns can be negotiated with the reasonable expectation that countries with significant economic and diplomatic relationships with the UK would honour their obligations. It has to be said, however, that government departments have been slow to awake to this possibility. I am not optimistic that such deals could be concluded quickly, but on a case by case basis they now merit considerable energy and urgency. I urged the same a year ago.
93. The actions listed in section 22(2) do not permit a person to be removed contrary to article 3 or any other international obligations. They do permit actions to be taken with a view to future removal which, but for the certification under section 21, the courts might be able to set aside. The provisions of section 22 are largely procedural, to enable immigration detention powers to be used for detentions under section 23.

IX ATCSA2001 SECTION 23

94. Section 23 provides for the detention of a certified international terrorist under the provisions of the Immigration Act 1971. This applies even if their removal is temporarily or indefinitely prevented by a point of law relating to an international agreement or practical considerations (as discussed in chapter VIII above).
95. Again this past year I have visited HMP Belmarsh and HMP Woodhill, where the detained certified persons are kept. I was able to speak privately to several. I am grateful for the courtesy and total co-operation of the several who changed their minds and allowed discussion in private.
96. HMP Belmarsh is an unattractive place, though this year I observed much improved standards of cleanliness and a decidedly calmer atmosphere. The detainees I saw there and at Woodhill are held in very high category conditions. Woodhill is a less unpleasant prison, with natural light and space to move around even in the high security setting.
97. As last year all complained to me of the fact that they were treated in the same way as men convicted of the most serious crimes, indeed were locked up alongside such men. Generally they have the opportunity to fraternise with each other, an opportunity that would not necessarily be permitted in all other countries. However, their position and status is unenviable. All told me of the real and, in my view understandable difficulty of dealing with incarceration without either trial, conviction or an indication of when if ever it would come to an end. The 2006 closure date for the legislation does not reassure them, and surprisingly was not known to them all. Some contrasted their position unfavourably with that of life sentence prisoners, who at least know their tariff and when they will be considered for parole. They have no remission, and no parole.

98. The Home Office has again assured me that criminal charges are brought in every case in which it is possible to do so without compromising security matters. This has been put into practice. Of course, if the criminal law was amended to include a broadly drawn offence of acts connected with terrorism, all could be prosecuted for criminal offences and none would suffer executive detention.
99. This year detainees made few detailed complaints to me about prison procedures. The Prison Service has responded well to complaints about detailed issues. There were some particular complaints about the availability/quality of Halal food at Belmarsh. I believe this problem has now been addressed. The situation was not improved by a weekly menu issued there with an option of "Halal pork chop", perhaps a candidate for a book of last year's greatest mistakes. An appropriate apology has been given. At Woodhill the Halal food apparently is good. Perhaps this is because the Mufti there, a prison chaplain, is also an author of a successful guide to good Halal food. The Mufti in question provides impressive wisdom and calm to an extent that has affected beneficially the lives of the detainees and all Muslim prisoners there.
100. During the course of the year solicitors acting for the detainees raised publicly concerns about their clients' mental health. They asserted, with the support of experts in psychiatry, that there had been a deterioration of mental state caused directly by the absence of any known release date. That there should be such a cause and effect relationship seems unsurprising, but not inevitable. Some of the detainees have led difficult and at times dangerous lives. Some have suffered serious physical injury before their detention. Some if terrorists may have been troubled by the effect of their experiences. The congeries of possible causes and emotions led me to invite the solicitors concerned to supply me with some medical reports (anonymised if required) so as to enable me to report whether any individual cases were demonstrated as justifying the conclusions claimed. They sent me a copy of the issued press pack. Unfortunately I received no further information (or reply to my request for it). I regret not being able to report further on this aspect.

X CONCLUSIONS

My main conclusions are as follows –

1. The Secretary of State has exercised a proper attitude towards the issue of certification.
2. The Secretary of State has exercised his independent judgment in each case, giving due regard to advice from officials.
3. SIAC has dealt efficiently and clearly with substantive cases.
4. The training, role and effectiveness of the special advocates as protectors of the rights of detained persons should be given urgent attention.
5. Continuing attention should be given to disclosure issues relevant to SIAC hearings.
6. More energetic efforts on an individualised basis should be made to secure the deportation of detainees to third countries willing to respect their ECHR Articles 2 and 3 rights.
7. The pending proposals for new laws following the derogation decision by the House of Lords are an accurate response to the concerns raised in that decision.
8. Lessons can be learned from the ATCSA2001 detention provisions to enable new laws to be subject to a fair and acceptable system of law, including a more developed special advocate procedure and tribunals with a lay element.

9. Intercept evidence from public telephone systems should be admissible in criminal courts.

10. A new criminal offence arising from acts connected with terrorism is worthy of consideration, together with a court procedure consistent with both fair trial and the security of the state.

Alex Carlile

House of Lords, London SW1A 0PW

February 2005

ANNEX

Anti-Terrorism, Crime and Security Act, 2001

Part 4 Sections 21 - 29

Immigration and Asylum

SUSPECTED INTERNATIONAL TERRORISTS

21 SUSPECTED INTERNATIONAL TERRORIST: CERTIFICATION

- (1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably—

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist.

- (2) In subsection (1)(b) “terrorist” means a person who—

(a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,

(b) is a member of or belongs to an international terrorist group, or

(c) has links with an international terrorist group.

- (3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if—

(a) it is subject to the control or influence of persons outside the United Kingdom, and

(b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part—

“terrorism” has the meaning given by section 1 of the Terrorism Act 2000 (c 11), and

“suspected international terrorist” means a person certified under subsection (1).

(6) Where the Secretary of State issues a certificate under subsection (1) he shall as soon as is reasonably practicable—

(a) take reasonable steps to notify the person certified, and

(b) send a copy of the certificate to the Special Immigration Appeals Commission.

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) A decision of the Secretary of State in connection with certification under this section may be questioned in legal proceedings only under section 25 or 26.

- (9) An action of the Secretary of State taken wholly or partly in reliance on a certificate under this section may be questioned in legal proceedings only by or in the course of proceedings under—

(a) section 25 or 26, or

*(b) section 2 of the Special Immigration Appeals Commission Act 1997 (c 68)
(appeal).*

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

Amendment

This section expires on the 14 March 2005: see SI 2004/751, art 2.

Effective from: 14 March 2005: see SI 2004/751, arts 1, 2.

22 DEPORTATION, REMOVAL, &C

- (1) An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of—

(a) a point of law which wholly or partly relates to an international agreement,

or

(b) a practical consideration.

- (2) The actions mentioned in subsection (1) are—

(a) refusing leave to enter or remain in the United Kingdom in accordance with provision made by or by virtue of any of sections 3 to 3B of the Immigration Act 1971 (c 77) (control of entry to United Kingdom),

(b) varying a limited leave to enter or remain in the United Kingdom in accordance with provision made by or by virtue of any of those sections,

(c) recommending deportation in accordance with section 3(6) of that Act (recommendation by court),

(d) taking a decision to make a deportation order under section 5(1) of that Act (deportation by Secretary of State),

(e) making a deportation order under section 5(1) of that Act,

- (f) refusing to revoke a deportation order,*

- (g) cancelling leave to enter the United Kingdom in accordance with paragraph 2A of Schedule 2 to that Act (person arriving with continuous leave),*

- (h) giving directions for a person's removal from the United Kingdom under any of paragraphs 8 to [10A] or 12 to 14 of Schedule 2 to that Act (control of entry to United Kingdom),*

- (i) giving directions for a person's removal from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 (c 33) (person unlawfully in United Kingdom), and*

- (j) giving notice to a person in accordance with regulations under [section 105 of the Nationality, Immigration and Asylum Act 2002] of a decision to make a deportation order against him.*

(3) Action of a kind specified in subsection (2) which has effect in respect of a suspected international terrorist at the time of his certification under section 21 shall be treated as taken again (in reliance on subsection (1) above) immediately after certification.

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

Amendment

This section expires on the 14 March 2005: see SI 2004/751, art 2.

Effective from: 14 March 2005: see SI 2004/751, arts 1, 2.

Sub-s (2): reference to “10A” in square brackets substituted by SI 2003/1016, art 3, Schedule, paras 14, 15(1).

Date in force: 4 April 2003: see SI 2003/1016, art 2(2).

Sub-s (2): words “section 105 of the Nationality, Immigration and Asylum Act 2002” in square brackets substituted by SI 2003/1016, art 3, Schedule, paras 14, 15(2).

Date in force: 4 April 2003: see SI 2003/1016, art 2(2).

23 DETENTION

- (1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by—

(a) a point of law which wholly or partly relates to an international agreement,

or

(b) a practical consideration.

- (2) The provisions mentioned in subsection (1) are—

(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c 77) (detention of persons liable to examination or removal), and

(b) paragraph 2 of Schedule 3 to that Act (detention pending deportation) [, and

(c) section 62 of the Nationality, Immigration and Asylum Act 2002 (detention by Secretary of State)].

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

Amendment

This section expires on the 14 March 2005: see SI 2004/751, art 2.

Effective from: 14 March 2005: see SI 2004/751, arts 1, 2.

Sub-s (2): para (c) and word “, and” immediately preceding it inserted by the Nationality, Immigration and Asylum Act 2002, s 62(15)(b).

Date in force: 10 February 2003: see SI 2003/1, art 2, Schedule.

24 BAIL

- (1) A suspected international terrorist who is detained under a provision of the Immigration Act 1971[, or under section 62 of the Nationality, Immigration and Asylum Act 2002,] may be released on bail.

- (2) For the purpose of subsection (1) the following provisions of Schedule 2 to the Immigration Act 1971 (control on entry) shall apply with the modifications specified in Schedule 3 to the Special Immigration Appeals Commission Act 1997 (c 68) (bail to be determined by Special Immigration Appeals Commission) and with any other necessary modifications—

(a) paragraph 22(1A), (2) and (3) (release),

(b) paragraph 23 (forfeiture),

(c) paragraph 24 (arrest), and

(d) paragraph 30(1) (requirement of Secretary of State's consent).

(3) Rules of procedure under the Special Immigration Appeals Commission Act 1997 (c 68)—

*(a) may make provision in relation to release on bail by virtue of this section,
and*

*(b) subject to provision made by virtue of paragraph (a), shall apply in relation
to release on bail by virtue of this section as they apply in relation to release
on bail by virtue of that Act subject to any modification which the
Commission considers necessary.*

(4) Where the Special Immigration Appeals Commission determines an application for bail, the applicant or a person who made representations to the Commission about the application may appeal on a question of law to the appropriate appeal court.

(5) Section 7(2) and (3) of the Special Immigration Appeals Commission Act 1997 (c 68) (appeals from Commission) shall have effect for the purposes of an appeal under subsection (4) above.

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

Amendment

Sub-s (1): words “, or under section 62 of the Nationality, Immigration and Asylum Act 2002,” in square brackets inserted by the Nationality, Immigration and Asylum Act 2002, s 62(16).

Date in force: 10 February 2003: see SI 2003/1, art 2, Schedule.

Sub-ss (4), (5): inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 32(1).

Date in force: 22 September 2004: see the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 48(2).

Subordinate Legislation

Special Immigration Appeals Commission (Procedure) Rules 2003, SI 2003/1034 (made under sub-s (3)).

25 CERTIFICATION: APPEAL

(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

(2) On an appeal the Commission must cancel the certificate if—

(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or

(b) it considers that for some other reason the certificate should not have been issued.

(3) If the Commission determines not to cancel a certificate it must dismiss the appeal.

(4) Where a certificate is cancelled under subsection (2) it shall be treated as never having been issued.

(5) An appeal against certification may be commenced only—

(a) within the period of three months beginning with the date on which the certificate is issued, or

(b) with the leave of the Commission, after the end of that period but before the commencement of the first review under section 26.

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

26 CERTIFICATION: REVIEW

(1) The Special Immigration Appeals Commission must hold a first review of each certificate issued under section 21 as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the certificate is issued.

(2) But—

(a) in a case where before the first review would fall to be held in accordance with subsection (1) an appeal under section 25 is commenced (whether or not it is finally determined before that time) or leave to appeal is given under section 25(5)(b), the first review shall be held as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the appeal is finally determined, and

(b) in a case where an application for leave under section 25(5)(b) has been commenced but not determined at the time when the first review would fall to be held in accordance with subsection (1), if leave is granted the first review shall be held as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the appeal is finally determined.

(3) The Commission must review each certificate issued under section 21 as soon as is reasonably practicable after the expiry of the period of three months beginning with the date on which the first review or a review under this subsection is finally determined.

(4) The Commission may review a certificate during a period mentioned in subsection (1), (2) or (3) if—

(a) the person certified applies for a review, and

(b) the Commission considers that a review should be held because of a change in circumstance.

(5) On a review the Commission—

(a) must cancel the certificate if it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), and

(b) otherwise, may not make any order (save as to leave to appeal).

(6) A certificate cancelled by order of the Commission under subsection (5) ceases to have effect at the end of the day on which the order is made.

(7) Where the Commission reviews a certificate under subsection (4), the period for determining the next review of the certificate under subsection (3) shall begin with the date of the final determination of the review under subsection (4).

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

27 APPEAL AND REVIEW: SUPPLEMENTARY

- (1) The following provisions of the Special Immigration Appeals Commission Act 1997 (c 68) shall apply in relation to an appeal or review under section 25 or 26 as they apply in relation to an appeal under section 2 of that Act—

(a) section 6 (person to represent appellant's interests),

(b) section 7 (further appeal on point of law), and

(c) section 7A (pending appeal).

- (2) The reference in subsection (1) to an appeal or review does not include a reference to a decision made or action taken on or in connection with—

(a) an application under section 25(5)(b) or 26(4)(a) of this Act, or

(b) subsection (8) below.

- (3) Subsection (4) applies where—

(a) a further appeal is brought by virtue of subsection (1)(b) in connection with an appeal or review, and

(b) the Secretary of State notifies the Commission that in his opinion the further appeal is confined to calling into question one or more derogation matters within the meaning of section 30 of this Act.

- (4) For the purpose of the application of section 26(2) and (3) of this Act the determination by the Commission of the appeal or review in connection with which the further appeal is brought shall be treated as a final determination.
- (5) Rules under section 5 or 8 of the Special Immigration Appeals Commission Act 1997 (general procedure; and leave to appeal) may make provision about an appeal, review or application under [section 24, 25 or 26 of this Act].
- (6) Subject to any provision made by virtue of subsection (5), rules under section 5 or 8 of that Act shall apply in relation to an appeal, review or application under [section 24, 25 or 26 of this Act] with any modification which the Commission considers necessary.
- (7) Subsection (8) applies where the Commission considers that an appeal or review under section 25 or 26 which relates to a person's certification under section 21 is likely to raise an issue which is also likely to be raised in other proceedings before the Commission which relate to the same person.
- (8) The Commission shall so far as is reasonably practicable—
- (a) deal with the two sets of proceedings together; and*
- (b) avoid or minimise delay to either set of proceedings as a result of compliance with paragraph (a).*
- (9) Cancellation by the Commission of a certificate issued under section 21 shall not prevent the Secretary of State from issuing another certificate, whether on the grounds of a change of circumstance or otherwise.

- (10) The reference in section 110 of the Nationality, Immigration and Asylum Act 2002 (immigration and asylum appeal: grant to voluntary organisation) to persons who have rights of appeal under Part 5 of that Act shall be treated as including a reference to suspected international terrorists.

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

Amendment

Sub-s (5): words “section 24, 25 or 26 of this Act” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 32(2).

Date in force: 22 September 2004 (with effect in relation to determinations of the Special Immigration Appeals Commission made after that date): see the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 48(1).

Sub-s (6): words “section 24, 25 or 26 of this Act” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 32(2).

Date in force: 22 September 2004 (with effect in relation to determinations of the Special Immigration Appeals Commission made after that date): see the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 48(1).

Sub-s (10): substituted by the Nationality, Immigration and Asylum Act 2002, s 114(3), Sch 7, para 30.

Date in force: 1 April 2003: see SI 2003/754, arts 2(1), 3(1), Sch 1.

Subordinate Legislation

Special Immigration Appeals Commission (Procedure) Rules 2003, SI 2003/1034 (made under sub-s (5)).

28 Review of sections 21 to 23

- (1) The Secretary of State shall appoint a person to review the operation of sections 21 to 23.

- (2) The person appointed under subsection (1) shall review the operation of those sections not later than—
 - (a) the expiry of the period of 14 months beginning with the day on which this Act is passed;*

 - (b) one month before the expiry of a period specified in accordance with section 29(2)(b) or (c).*

- (3) Where that person conducts a review under subsection (2) he shall send a report to the Secretary of State as soon as is reasonably practicable.

- (4) Where the Secretary of State receives a report under subsection (3) he shall lay a copy of it before Parliament as soon as is reasonably practicable.

- (5) The Secretary of State may make payments to a person appointed under subsection (1).

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

29 DURATION OF SECTIONS 21 TO 23

(1) Sections 21 to 23 shall, subject to the following provisions of this section, expire at the end of the period of 15 months beginning with the day on which this Act is passed.

(2) The Secretary of State may by order—

(a) repeal sections 21 to 23;

(b) revive those sections for a period not exceeding one year;

(c) provide that those sections shall not expire in accordance with subsection (1) or an order under paragraph (b) or this paragraph, but shall continue in force for a period not exceeding one year.

(3) An order under subsection (2)—

(a) must be made by statutory instrument, and

(b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

(4) An order may be made without compliance with subsection (3)(b) 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; in which case the order—

(a) must be laid before Parliament, and

(b) shall cease to have effect at the end of the period specified in subsection (5) unless the order is approved during that period by resolution of each House of Parliament.

(5) The period referred to in subsection (4)(b) is the period of 40 days—

(a) beginning with the day on which the order is made, and

(b) ignoring any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(6) The fact that an order ceases to have effect by virtue of subsection (4)—

(a) shall not affect the lawfulness of anything done before the order ceases to have effect, and

(b) shall not prevent the making of a new order.

- (7) Sections 21 to 23 shall by virtue of this subsection cease to have effect at the end of 10th November 2006.

NOTES

Initial Commencement

Specified date

Specified date: 14 December 2001: see s 127(2)(a).

Subordinate Legislation

Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23)
Order 2004, SI 2004/751 (made under sub-s (3)).

