

# UNITED KINGDOM

## Justice perverted under the Anti-terrorism, Crime and Security Act 2001

### *Introduction*

Amnesty International considers that the application of Part 4 of the Anti-terrorism, Crime and Security Act 2001 (ATCSA) amounts to a perversion of justice. The organization believes that the emergency provisions of the ATCSA are inconsistent with international human rights law and standards, including treaty provisions by which the United Kingdom (UK) is bound.

Amnesty International is concerned about serious human rights violations that have taken place in the UK as a consequence of the implementation of the ATCSA since its enactment on 14 December 2001.<sup>1</sup>

Under Part 4 of the ATCSA the Secretary of State can certify a non-UK national as a “suspected international terrorist” if s/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”.<sup>2</sup> The basis for these determinations may include secret information that is never revealed to the person concerned or their lawyer of choice. In addition, under the powers granted to the Executive in Part 4 of the ATCSA, it can order the detention without charge or trial, i.e. internment, exclusively of people who are non-UK nationals.

As of 18 November of 2003, the Home Secretary had certified 17 people as “suspected international terrorists” and there were 14 people -- all non-UK nationals -- detained under the ATCSA in the UK.<sup>3</sup> They have been detained in high security

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<sup>1</sup> For more information about the ATCSA and Amnesty International’s concerns in relation to serious human rights violations that have taken place as a consequence of its enactment, see, *inter alia*, “Amnesty International’s Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001” and “UNITED KINGDOM - Rights Denied: the UK’s Response to 11 September 2001”, both published on 5 September 2002

<sup>2</sup> See section 21(1), Part 4 of the ATCSA.

<sup>3</sup> See the written statement of the Secretary of State for the Home Department of 18 November 2003, “Sixteen foreign nationals have so far been detained using powers in Part IV of the Anti-terrorism Crime and Security Act 2001. Eight were detained in December 2001, one in February 2002, two in April 2002, one in October 2002, one in November 2002, two in January 2002 and one in October 2003. One further individual has been certified under Part IV of the ATCS Act in August 2003 but is detained under other powers. Of the total detained, two have voluntarily left the United Kingdom. The other fourteen remain in detention.”, Home Department – Anti-terrorism, Crime and Security Act (Detentions), Hansard, Column 27WS.

establishments, two high security prisons (Belmarsh and Woodhill) and a high security mental hospital (Broadmoor), under severely restricted regimes.

The organization believes that, for all intents and purposes, in applying Part 4 of the ATCSA people have been effectively “charged” with a criminal offence, and have been “convicted” and sentenced to an indefinite term of imprisonment without a trial. In addition, in light of the fact that these powers can only be applied to non-UK nationals, Amnesty International considers that Part 4 of the ATCSA violates the prohibition of discrimination enshrined in international law.

In May, June and July 2003, the Special Immigration Appeals Commission (SIAC)<sup>4</sup> heard appeals brought by 10 individuals against their certification by the UK Secretary of State for the Home Department (hereinafter referred to as the Home Secretary) as “suspected international terrorists and national security risks”, and against their consequent detention under ATCSA.<sup>5</sup>

An Amnesty International delegate attended a number of hearings of these appeals before the SIAC which were open to the public to monitor the judicial proceedings in light of international fair trial standards. It should be noted that the hearings of the appeals consisted of both open and closed sessions. Neither Amnesty International nor the internees nor the lawyers of their choice were permitted to attend the closed sessions.

Judgments on the 10 appeals were handed down in a public session on 29 October 2003.<sup>6</sup> Each judgment confirmed the certification of the individual concerned as a “suspected international terrorist” and dismissed his appeal. The judgment of 29 October indicates that the generic evidence of general relevance to all the appellants and the evidence relating to each of the individuals which was considered in the closed sessions is dealt with in a separate

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<sup>4</sup> Under the ATCSA, Part 4 -- Immigration and Asylum -- section 35(3), the SIAC has been established as a tribunal with the same status as the High Court. The SIAC is empowered to grant bail to ATCSA detainees (for the organization’s concerns in relation to the scope of bail under the ATCSA, see below). Under the ATCSA, the SIAC also hears appeals against certification by the Secretary of State of non-UK nationals as “suspected international terrorists”. In addition, the SIAC is mandated to review the certificate issued by the Secretary of State on a periodic basis. The SIAC is also empowered to hear challenges to the legislation. The SIAC is chaired by a High Court judge who sits with two others on appeals.

<sup>5</sup> Under the ATCSA, Part 4, section 23(1) “A suspected international terrorist may be detained under a provision specified in subsection (2)”.

<sup>6</sup> See, “*United Kingdom: Proceedings amount to a perversion of justice*”, (AI Index: EUR 45/025/2003) press release issued by Amnesty International on 29 October 2003.

judgment which has not been made public or disclosed to the appellants of the lawyers of their choice.<sup>7</sup>

Amnesty International is concerned that the proceedings before the SIAC fell far short of international fair trial standards, including the right to the presumption of innocence, the right to a defence and the right to counsel. The organization is also alarmed at the SIAC's reliance on secret evidence, and at the SIAC's willingness to rely on evidence alleged to have been adduced as a result of torture, in reaching its judgments.

In the course of the SIAC appeals the individuals concerned did not benefit from the presumption of innocence, given that the SIAC, disconcertingly, ruled that under the ATCSA the burden of proof that the Home Secretary has to meet to justify internment is not the criminal standard of "beyond reasonable doubt"<sup>8</sup> but, instead, is even lower than that in a civil case. This means that anyone involved in a civil claim to recover damages (for example as a result of a car accident) must prove their case to a standard higher than that required of the Home Secretary under the ATCSA in order to have his decision to intern people -- potentially indefinitely -- confirmed by the SIAC.

In addition, Amnesty International was also alarmed that in reaching judgment on the appeals the SIAC may have relied on evidence extracted under torture. Such reliance would seriously undermine the rule of law and it would amount to a further perversion of justice.

Amnesty International opposes detention under the Part 4 of the ATCSA. It is detention ordered by the executive, without charge or trial, for an unspecified and potentially unlimited period of time, principally on the basis of secret evidence which the people concerned have never heard or seen, and which they were therefore unable to effectively challenge. Amnesty International has repeatedly expressed concern that Part 4 of the ATCSA has created a shadow criminal justice system devoid of a number of crucial components and safeguards present in both the ordinary criminal justice system and national procedures for the determination of refugee status. The human rights violations that have taken place in the course of the ATCSA's enforcement over two years have deepened Amnesty International's concern in this respect.

The organization continues to call on the UK government to release all persons detained under the ATCSA unless they are charged with a recognizably criminal offence and tried by an independent and impartial court in proceedings which meet international standards of fairness.

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<sup>7</sup> Special Immigration Appeals Commission - named person and A, B, C and D (Appellant) and Secretary of State for the Home Department (Respondent). Appeals Nos: SC/1/2002, SC/6/2002, SC/7/2002, SC/9/2002, SC/10/2002. Date of Judgment: 29 October 2003, p. 38, para. 119.

<sup>8</sup> See, for example, General Comment on Article 14 of the International Covenant on Civil and Political Rights by the Human Rights Committee cited at 23 below.

## **Background**

Emergency legislation in the UK has been of concern to Amnesty International since the 1970s. The organization has documented throughout the years how provisions of such legislation have violated international human rights law and have facilitated abuses of human rights, including torture, cruel, inhuman or degrading treatment and unfair trials.

The UK government asserted that, in the aftermath of the 11 September 2001 attacks in the United States of America, the threat posed to the UK by the *al-Qa'ida* network amounted to “a public emergency” that, in turn, made it necessary for the authorities to enact new “anti-terrorist” legislative measures. As a result of this “public emergency”, the ATCSA was passed by the UK Parliament and enacted on 14 December 2001.

Both prior to and in the wake of the ATCSA's enactment, Amnesty International expressed grave concern that some of its emergency provisions were draconian and would have far-reaching repercussions for the protection of human rights in the UK.<sup>9</sup>

Under the ATCSA, non-UK nationals, whose removal or deportation from the UK cannot be effected,<sup>10</sup> can be certified as “suspected international terrorists” by the Secretary of State and immediately detained without charge or trial -- that is, interned -- for an unspecified and potentially unlimited period of time, principally on the basis of secret evidence. The “reasonableness” of the Secretary of State's belief and suspicion upon which someone is so certified may be based, in part or entirely, on evidence not disclosed to the person concerned or her or his lawyer of choice. The Secretary of State's certification that someone is “a suspected international terrorist” may then be confirmed by the SIAC, again on the basis of secret evidence which the Secretary of State is entitled to introduce before the SIAC in the course of closed hearings from which the ATCSA detainees and their legal representatives of choice are excluded.

The Home Secretary has repeatedly reiterated that in the UK there continues to be “a public emergency”, and has stated that:

*[s]o long as the public emergency subsists, where a person is suspected of terrorism but cannot currently be removed and for whom a criminal prosecution is not an*

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<sup>9</sup> See at footnote 1.

<sup>10</sup> Under Part 4 of the ATCSA, upon certification as “a suspected international terrorist”, section 23(1) provides that a non-UK national certified as “[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.”

*option, we believe that it is necessary and proportionate to provide for extended detention, pending removal.*<sup>11</sup>

Removal or deportation from the UK may not be possible, for example, as a result of the fact that the individual concerned may be a stateless person or because the UK authorities are unable to find another country willing to accept him or her. The fact that the individual concerned has been certified by the Home Secretary as a “suspected international terrorist” may make finding a country willing to accept the person a difficult task. The UK government may also be prevented from effecting deportation or removal of anyone certified as a “suspected international terrorist” as a result of the UK’s international obligations such as the obligation not to return a person to a country where s/he may be at risk of serious human rights abuses, including Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which prohibits the return of a person to a state where there are substantial grounds for believing that s/he would be tortured, and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), prohibiting torture or other ill-treatment.<sup>12</sup> In addition, removal or deportation to a country where the individual concerned may face the death penalty is also prevented by the UK’s obligations under Protocol 6 to the ECHR.<sup>13</sup>

Since internment in these circumstances is inconsistent with the right to liberty and security of person guaranteed under international human rights treaty provisions by which the UK is bound, the UK government has derogated from (i.e. temporarily suspended) its obligations under these provisions. The UK remains the only country that has derogated from the ECHR in the aftermath of the 11 September 2001. In particular, the UK has derogated from Article 5(1) of the ECHR and Article 9<sup>14</sup> of the International Covenant on Civil and Political Rights (ICCPR).

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<sup>11</sup> See footnote 3.

<sup>12</sup> In November 1996, the European Court of Human Rights ruled that the UK government’s attempt to deport Karamjit Singh Chahal to India violated Article 3 of the ECHR. Karamjit Singh Chahal had been detained pending deportation on “national security” grounds since 1990. The Court stated that the prohibition of torture was absolute and that allegations of national security risk were immaterial to a determination of whether a person faced “a real risk” of torture if returned. See, *Chahal v. United Kingdom* (1997) 23 E.H.R.R. 413.

<sup>13</sup> The UK is a party to Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty.

<sup>14</sup> Article 9 of the ICCPR states: “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody,

In May, June and July of this year, the SIAC heard appeals against the certification as “suspected international terrorists” and “risks to national security” brought by the first 10 people who had been detained under the ATCSA. On 29 October 2003, the SIAC issued judgments dismissing these appeals.

The bulk of the Home Secretary’s case against the 10 individuals is that they had “links” to the *al-Qa’ida* network and/or to other “terrorist” organizations which associated with that network.<sup>15</sup>

Two of the 10 whose appeals were dismissed and who were among the first people detained under the ATCSA on 19 December 2001 have since “voluntarily” left the UK as they were able to go to another country, and preferred doing so rather than facing potentially indefinite detention in the UK under the ATCSA. Nonetheless, the SIAC allowed them to lodge their appeal against certification as “suspected international terrorists” from abroad as it concurred with them that it “was the only means available to [them] to try to remove the certification and the stigma which goes with it”.<sup>16</sup>

This was not a “choice” that was available to the other eight men, who, as a result of the dismissal of their appeals by the SIAC, remain in detention, together with six other people whose appeals to the SIAC are pending. On 19 December of this year, six of the internees will in fact mark their second anniversary in detention. None of the internees has any realistic prospect of being released at any point in the foreseeable future.

### ***Amnesty International’s concerns about the SIAC appeals***

Having observed a number of the hearings of the appeals brought by 10 individuals in May, June and July of this year before the SIAC that were open to the appellants, their lawyers of choice and the public, Amnesty International believes that these proceedings failed to guarantee fundamental fair trial rights, and violated the appellants’ rights to be free from discrimination.

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but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

<sup>15</sup> Part 4, section 21(4) of the ATCSA reads as follows: “a person has links to international terrorist group only if he supports or assists it”.

<sup>16</sup> See, the judgment issued by the SIAC on 29 October 2003, page 2, paragraph 4, cited at footnote 7.

The organization considers that, as judicial proceedings, the appeals against the Home Secretary's certification of non-UK nationals as "suspected international terrorists" and risks to national security before the SIAC amount to a perversion of justice. Amnesty International believes that the SIAC appeals proceedings were inconsistent with a number of international human rights standards, including treaty provisions by which the UK is bound.

The 10 individuals who had their appeals against certification by the Secretary of State as "suspected international terrorists" dismissed by the SIAC have been deprived of their liberty for an unspecified and potentially indefinite period of time. Amnesty International considers that indefinite detention without charge or trial under the ATCSA is tantamount to charging a person with a criminal offence, convicting the person concerned without a trial, and imposing on him/her an open-ended sentence.

Amnesty International considers that the certification of the internees as "suspected international terrorists" amounts to a "criminal charge" and its actual and potential effect are "criminal" in nature. In determining whether a charge and proceedings are "criminal" in nature, international human rights law, including the jurisprudence of the ECHR,<sup>17</sup> considers not only the domestic qualification of a "charge" and its consequences as "criminal" or not, but the nature of the "charge" and the nature and severity of the potential and actual penalties. It considers whether the charge and/or the proceedings are capable of leading to the deprivation of liberty of the individuals concerned for an appreciable length of time, thereby being seriously detrimental to the person. It is the nature of the charge ("suspected international terrorist") and the potential penalty (i.e. potentially indefinite internment) and the risk thereof that qualify the certification under the ATCSA and the proceedings before the SIAC as criminal under international human rights law, irrespective of their categorization under UK law.

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<sup>17</sup> Since its judgment in the case *Engel v. Netherlands*, the European Court of Human Rights has established that, under the ECHR, there exists an autonomous meaning of the term "criminal" applicable to any proceedings instituted to determine the veracity of an accusation, irrespective of the way in which such proceedings are characterized domestically. One of the criteria established by the European Court in *Engel v. Netherlands* to determine whether proceedings are "criminal" for Convention purposes hinges on the severity of the potential penalty. In the context of the Convention jurisprudence, this criterion is often decisive, especially when deprivation of liberty is at stake. In *Engel* the Court held that, as far as the Convention is concerned, proceedings have to be deemed "criminal" in nature unless their potential outcome by its "nature, duration or manner of execution, cannot be appreciably detrimental" for the individual concerned (*Engel v. Netherlands*, at para. 82). If, in light of the test established by the Court in *Engel*, the proceedings in point are criminal, then all the due process guarantees applicable in the context of criminal proceedings should be accorded to the individual concerned. See, *Engel v. Netherlands* (1979-80) 1 E.H.R.R. 647. In its Grand Chamber judgment in the case of *Ezeh and Connors v. the United Kingdom*, the European Court has recently reiterated that irrespective of the domestic categorization, it is the nature of the charges and the nature and severity of the potential and actual penalties which would determine whether the proceedings in point are to be considered criminal within the meaning of Article 6(1) of the ECHR.

In light of the qualification of the certification under Part 4 of the ATCSA and of its effects as criminal, under international law those certified must be afforded fair trial guarantees set out in Article 6 of the ECHR and Article 14 of the ICCPR. However, the organization believes that the SIAC appeals proceedings under the ATCSA denied the appellants the right to a fair trial, enshrined in, *inter alia*, Article 6<sup>18</sup> of the ECHR and Article 14 of the ICCPR. Full enjoyment of the right to a fair trial entitles anyone to benefit from it from the first moment that officials raise suspicions against the person concerned, through the moment of arrest, in pre-trial detention, during the trial, during all appeals, right through to the imposition of any punishment.

### Dispensing with key fair trial guarantees

Among the key fair trial guarantees, pertaining to the period between arrest and trial, are the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power, and the right to trial within a reasonable time or to release.<sup>19</sup> The purposes of the review before a judge or judicial authority include: to assess whether sufficient legal reason exists for the arrest; to assess whether detention before trial is necessary; to safeguard the well-being of the detainee; and to prevent violations of the detainee's fundamental rights.

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<sup>18</sup> Article 6 of the ECHR states: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

<sup>19</sup> See, for example, Article 5(3) of the ECHR, which states: "[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial"; see also Article 9(3) of the ICCPR.

This procedure often provides detained persons with their first opportunity to challenge the lawfulness of their detention and to secure release if the arrest or detention violated their rights.

In this connection, Amnesty International is extremely concerned at the fact that none of the internees currently detained under the ATCSA has ever even been questioned by the police and/or by the Crown Prosecution Service -- i.e. the prosecution authorities in England and Wales -- let alone being brought promptly before a judge. The organization understands that the internees have never been informed, let alone promptly or in detail, of the nature and cause of the accusations against them.

In addition, their chances of getting bail are next to nil. Under the ATCSA, the SIAC is empowered to grant bail to the ATCSA detainees.<sup>20</sup> However, having monitored bail proceedings before the SIAC in the past,<sup>21</sup> Amnesty International is concerned about the content of the right to bail under the ATCSA which is more restrictive than that provided for under international law. The organization understands that under the ATCSA, bail could only be granted if the detention conditions were such as to fall within the ambit of Article 3 of the ECHR, which enshrines the prohibition of torture or other ill-treatment. In light of the fact that the internees have been detained for a very long time prior to the commencement of their appeals before the SIAC, and for some of them that time has not come yet, such a narrow remit of the content of the right to apply for bail appears to be inconsistent with the presumption of release pending trial, given that a trial within a reasonable time was not secured. This presumption gives effect to the right to personal liberty by normally entitling people charged with a criminal offence not to be detained pending trial.<sup>22</sup> All of the above-mentioned pre-trial safeguards are part and parcel of the right to a fair trial.

## **Denial of the presumption of innocence**

Under international human rights law the right to the presumption of innocence which applies to all persons charged with a criminal offence, including during times of emergency, requires the state to prove the charge "beyond reasonable doubt".<sup>23</sup>

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<sup>20</sup> ATCSA, Part 4, section 24 entitled "Bail", subsection (1), which states: "[a] suspected international terrorist who is detained .... may be released on bail".

<sup>21</sup> For example, on 24 June 2002 Amnesty International observed the bail proceedings before the SIAC brought on behalf of Mahmoud Abu Rideh, one of the 14 non-UK nationals currently detained under the ATCSA.

<sup>22</sup> For example, Article 9(3) of the ICCPR reads as follows: "... It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

<sup>23</sup> In its General Comment on Article 14 of the ICCPR, the Human Rights Committee has stated that "[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved

However, in one its most disconcerting rulings the SIAC ruled that under the ATCSA the burden of proof that the Home Secretary has to meet in order that the SIAC may confirm the certification of individuals as “suspected international terrorists” falls well short of “beyond reasonable doubt”. Furthermore, according to the SIAC, under the ATCSA the onus upon the Home Secretary is lower than that needed in a civil case, such as cases involving contractual disputes. The SIAC stated:

*The standard of proof is below a balance of probabilities [i.e. the standard in civil cases] because of the nature of the risk facing the United Kingdom, and the nature of the evidence which inevitably would be used to detain these Appellants.*<sup>24</sup>

### ***Lack of effective judicial scrutiny of executive action in matters concerning national security***

The SIAC judgments also relied on the alarming precedent set by the House of Lords in *Rehman* with respect to the latitude that should be afforded to the Home Secretary in cases involving national security. With respect to this, Amnesty International is concerned at the degree and extent of discretion that the ATCSA proceedings afford to the Home Secretary in the context of appeals against or reviews of certifications.<sup>25</sup> The organization is concerned

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beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle.” See, General Comment 13, “Equality before the courts and the right to a fair and public hearing by an independent court established by law” adopted by the Human Rights Committee on 13 April 1984.

<sup>24</sup> The SIAC judgment, 29 October 2003, see at 7 supra, p. 14, para. 48. In making this ruling the SIAC relied on the precedent set in the case of *Secretary of State for the Home Department v Rehman* (2001) UKHL 47, in which the House of Lords concluded that no particular standard of proof was required of the Secretary of State in reaching his judgment or assessment that an individual’s deportation was conducive to the public good. The court held that this was simply a matter of a reasonable and proportionate judgment on the basis of the material available to the Secretary of State. As a result of the *Rehman* judgment, both the Secretary of State and the SIAC are relying on a low threshold with respect to the standard of proof required in order for the former to certify individuals -- pursuant to which they are interned -- and for the latter to confirm that certification.

<sup>25</sup> In *Rehman*, the House of Lords held that the SIAC should have granted the primary decision-maker, i.e. the Home Secretary, considerable discretion with respect to his decision to remove *Rehman* from the UK on national security grounds. See *Home Secretary v Rehman* [2001] 3 W.L.R. 877. This doctrine of judicial deference to the executive in relation to national security issues was reiterated by the Court of Appeal of England and Wales in its October 2002 judgment in *A, X and Y, & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 1502 (25 October 2002). In that judgment the Court of Appeal held that “the Court must also recognise that the Executive is in a better position than a Court to assess both the situation and the action which is necessary to address it. The Court, therefore, accords a degree of deference to the views of the Executive”. In that case, the Court of Appeal allowed the appeal by the Secretary of State against the original decision of the SIAC. The case concerned a challenge to the lawfulness of the Anti-Terrorism, Crime and Security Act 2001 and of the Human Rights Act 1998 (Designated Derogation) Order 2001. In July 2002, the SIAC had held

that the *Rehman* precedent may prevent an effective judicial scrutiny of executive decisions in cases involving national security. In light of the SIAC judgments, Amnesty International's concern in this respect has greatly deepened.

In light of the above, Amnesty International believes that one of the most fundamental fair trial guarantees, the presumption of innocence, was completely disregarded and the appellants did not benefit from it in the course of their appeals before the SIAC. As such, the ATCSA proceedings violate the presumption of innocence -- guaranteed in Article 6(2) of the ECHR and Article 14(2) of the ICCPR. Furthermore, Amnesty International notes that the presumption of innocence has been deemed non-derogable (i.e. that cannot be suspended) at all times.<sup>26</sup>

### **Secret "evidence" adduced in closed hearings**

A serious undermining of the internees' right to a fair trial is the use of secret "evidence" allowed by the ATCSA. Under the ATCSA, the SIAC proceedings can be held in closed session. Hearings are held before the judge/s in the absence of the appellants and their legal representatives of choice who are barred from attending the proceedings in order to prevent them from gaining any knowledge of the content of the Home Secretary's submissions. Members of the public are also excluded from the closed sessions. Furthermore, under this legislation, the reasonableness of the Home Secretary's belief and suspicion upon which someone is certified as a "suspected international terrorist" may be based, in part or entirely, on "evidence" not disclosed to the person concerned or their lawyer of choice. As a result, in the context of a challenge against certification, the Home Secretary's certification that someone is "a suspected international terrorist" may then be confirmed by the SIAC, again on the basis of secret evidence which the Home Secretary is entitled to introduce before the SIAC in the course of secret hearings from which the ATCSA detainees and their legal representatives of choice are excluded. Given that secret "evidence" can be withheld from those against whom it has been adduced, the SIAC proceedings violate the right to a fair hearing.

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that the targeting of non-UK nationals was discriminatory and disproportionate. The SIAC had determined that the detention measures (i.e. the ATCSA) were not compatible with the UK's obligations under the ECHR. See the SIAC judgment in *A and others v Secretary of State for the Home Department*, 30 July 2002, Appeal No: SC/ 1-7/2002.

<sup>26</sup> The Human Rights Committee has stated in its General Comment 29 on states of emergency (Article 4 of the ICCPR) that "[s]tates parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by ....deviating from fundamental principles of fair trial, including the presumption of innocence." See General Comment 29 adopted by the Human Rights Committee on 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11.

On a number of occasions while observing the SIAC appeals, Amnesty International heard the Crown state before the SIAC that as far as the Home Secretary's case was concerned, most of what was disclosed in the open hearings merely comprised assertions, in turn backed up by "evidence" presented in closed hearings, i.e. to which neither the internees nor their legal counsel of choice nor the public had any access whatsoever. Evidence which the internees had not seen, heard and which they were, therefore, unable to challenge. In this respect the secrecy of the evidence and the fact that the some of the hearings are closed violates the internees' right to defend themselves and their right to counsel.

With respect to the use of secret "evidence" and the recourse to closed sessions, Amnesty International considers that a public hearing of the evidence helps ensure the integrity of the judicial process. Public monitoring influences both judge and prosecutor to carry out their duties with impartiality and professionalism. A public trial may facilitate accurate fact-finding -- encouraging witnesses to tell the truth. In addition, there is a public interest in an open trial beyond the rights of the accused. The public has a right to know how justice is administered, and what decisions are reached by the judicial system.

## **The Special Advocates**

Despite the appointment under the ATCSA of Special Advocates "to represent the interests" of the ATCSA detainees, Amnesty International believes that Special Advocates are no substitute for legal counsel of one's choice. The organization further considers that the appointment of the Special Advocates is intended to give a veneer of legality to the proceedings under the ATCSA. Pretence it is nonetheless. Their operation cannot substitute fundamental fair trial safeguards as far as the representation of the interests of the appellants in ATCSA proceedings is concerned. The Special Advocates are so restricted in what they can and cannot do so as to fatally undermine their ability to represent the internees' interests. For example, once the Special Advocate sees the secret evidence, s/he cannot discuss it with the individual concerned or her or his legal representatives unless SIAC gives her/him permission to do so. This secrecy undermines the ATCSA detainees' ability to challenge effectively the evidence on which they may be held indefinitely. Moreover, if the Special Advocate is not permitted to discuss the content of the evidence with the individual concerned, it is not possible for the Special Advocate effectively "to represent the interests" of the detainee.

Furthermore, Special Advocates are appointed by the Attorney General, a UK government minister. Amnesty International believes that these appointments by a member of the executive are a further incursion in the right to counsel of choice. The organization considers that the Special Advocate system established under the ATCSA undermines the idea that justice should not only be done but be seen to be done and it leads to a reasonable apprehension of bias inherent in the whole system.

## “Evidence”?

As far as the nature of the “evidence” adduced by the Home Secretary is concerned, Amnesty International notes that repeatedly during the course of the SIAC appeals, the Crown made it clear that none of the internees could be convicted of a criminal offence in a UK court.<sup>27</sup> This is because the material adduced in the SIAC appeals would not be admissible in a normal trial in the UK, as it would most likely consist of hearsay evidence of an unidentified informant of the Crown and/or intercepted material, which may have been illegally obtained. In the SIAC judgments this is rather euphemistically referred to “as inadmissible or not usable for criminal trial purposes”.<sup>28</sup>

In this respect, Amnesty International is concerned that the SIAC has heard, considered and reached decisions on the basis of evidence which criminal tribunals in the UK would deem inadmissible. For example, some have pointed out how intercepted material may indeed contain information over which a claim for legal professional privilege may be made.

In summary, the nature of the “evidence” which under the ATCSA the SIAC is prepared to hear, consider and reach decisions upon represents another departure from the normal criminal procedures used domestically, including with respect to the rules on admissibility of evidence. As such it, therefore, amounts to a further undermining of the internees’ right to a fair trial, including in particular, their rights to equality before the law and equal protection of the law without any discrimination, enshrined in, *inter alia*, Articles 2(1)<sup>29</sup> and 26 of the ICCPR,<sup>30</sup> and in Articles 1<sup>31</sup> and 14 of the ECHR.<sup>32</sup> The UK has not derogated from any of these provisions.

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<sup>27</sup> The SIAC judgment states: “it is indeed the Respondent’s [the Secretary of State] case that none of these Appellants could be convicted of terrorist offences in a United Kingdom court”, *ibid*, p.14, para. 49, see footnote 7.

<sup>28</sup> *Ibid*.

<sup>29</sup> Article 2(1) of the ICCPR states: “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>30</sup> Article 26 of the ICCPR states: “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>31</sup> Article 1 of the ECHR states: “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

<sup>32</sup> Article 14 of the ECHR states: “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

## **Admissibility of, and reliance on, evidence extracted under torture**

Amnesty International is also deeply disturbed at the likely reliance of the Home Secretary on “evidence” that was procured under torture of a third party (i.e. not the appellants), in his presentation of such “evidence” before the SIAC. For example, in July, in the course of one of the appeals, counsel for the internee concerned cross-examined an MI5 (security services) witness known as witness A. A’s voice was audible in the court, but A’s demeanour in answering questions was not because A was screened behind curtains. A was not visible either to the public or to the internees and their lawyers though the SIAC judges had a clear view of A. In the context of A’s cross-examination, A made statements to the following effect: that it was possible that evidence extracted under torture could still be assessed as reliable by MI5, and that, therefore, it could be relied upon by the Home Secretary in the context of the SIAC proceedings. In addition, A denied any previous knowledge of two deaths in US custody at Bagram Air Base, Afghanistan, during interrogations. These deaths are currently subject to a homicide investigation following the military coroner’s findings that they were homicide, having found evidence of blunt force trauma to each of them. A was not aware of any concern that the UK security service may have about the way in which the US investigators were obtaining information.

In light of the above, Amnesty International is also deeply disturbed at ruling made by the SIAC that “evidence” extracted under torture of a third party is not only admissible in judicial proceedings but may also be relied on by the SIAC in reaching judgment. In this connection, the SIAC judgments state that the SIAC is not bound by any rules of evidence and that “the means by which information is obtained [including torture] goes to its reliability and weight and not to its admissibility”.<sup>33</sup> In another passage the SIAC stated:

*it may well appear that to admit such evidence [i.e. evidence incontrovertibly extracted under torture] would result in unfairness. But it does not in our view justify the conclusion that information obtained from a third party by methods which breached Article 3 [of the ECHR, enshrining the prohibition of torture or other ill-treatment] is inadmissible.*<sup>34</sup>

Amnesty International reminds the UK authorities, including the judiciary, of the fundamental prohibition on the use of torture in any judicial proceedings, enshrined, *inter alia*, in Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which the UK is a State Party. Article 15 reads as follows: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” The organization considers that

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<sup>33</sup> The SIAC generic judgment, see footnote 7, p. 26, para. 84.

<sup>34</sup> *Ibid*, p. 26, para. 83.

the use of evidence obtained under torture undermines the rule of law and makes a mockery of justice. Torture not only debases humanity and is contrary to any notion of human rights, but it can also lead to decisions based on totally unreliable evidence. The willingness of the SIAC and the UK government to rely on evidence extracted under torture fundamentally undermines any claim to legitimacy and the rule of law and it contravenes international human rights law and standards. Amnesty International considers that in showing such a willingness to rely on evidence extracted under torture the UK government and the SIAC have given a green light to torturers world-wide.

### **Amnesty International's recommendations to the UK government**

In light of the above-mentioned serious concerns about the judicial proceedings under the ATCSA and the serious violations of international human rights law and standards which they have given rise to, Amnesty International calls on the UK government to:

- immediately release all those currently detained under the ATCSA unless they are charged with a recognizably criminal offence and tried by an independent and impartial court in proceedings which meet international standards of fairness;
- repeal Part 4 of the ATCSA; and
- ban outright the admissibility of any evidence extracted under torture and comply with relevant international law in this respect.