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The Conflict between Liberty and Security in the United Kingdom since 9.11

Sebastian Payne

Abstract

Questo articolo analizza alcune delle risposte legislative che sono state formulate nel Regno Unito sulla scia degli attacchi terroristici dell'11 settembre 2001, nonché la giurisprudenza emersa in merito a tali misure straordinarie. Le leggi e i casi proposti evidenziano il conflitto con la libertà determinatosi a seguito dell'adozione di queste misure. È stato analizzato l'Anti-terrorism, Crime and Security Act del 2001. Si esaminano due casi concreti: il primo caso riguarda la detenzione a tempo indeterminato senza processo presso il carcere di Belmarsh; il secondo caso riguarda l'ammissibilità di prove ottenute attraverso la tortura. Sono anche brevemente analizzati i "Control Orders". Sono inoltre analizzate la sentenza della Corte d'Appello Binyam Mohamed, che riguarda la divulgazione di informazioni sensibili relative alla sicurezza e la proposta del Governo nel suo Libro verde "Justice and Security" di rendere possibile in tutti i procedimenti civili tenere udienze a porte chiuse quando siano affrontate questioni relative alla sicurezza.

1. Introduction

Ten year after the events of 9.11 in the USA is an appropriate time to reflect on the impact to liberty of governmental reactions to those events. A constant refrain of government and the courts when addressing these issues and commentators more generally is the need to "strike the right balance between security and liberty". "Striking the right balance" is in one sense a reasonable term in that it reflects a serious and practical matter, namely, that government has to try and keep its people secure without turning the country into an authoritarian state which has undermined the rule of law and individual liberty. Nonetheless, the term tells us nothing about how that balance should be struck, nor does it establish what priority or weight the competing

considerations or values ought to have. It is also evident that when supposedly 'striking a balance' the term 'security' is used as a means to add credibility to a particular set of proposals. For instance, the UK Government states in its recent Greenpaper, "The first duty of government is to safeguard our national security"¹ and this assertion is used to indicate that all our liberties are dependent on this security, ergo, the security measures are justified.

This article aims to identify some of the conflicts between liberty and security that have arisen as a result of the government's security related measures in the last ten years and the response of the courts to those measures. This has to be assessed in the context of the UK constitution and the structural strengths and weaknesses that the constitution possesses. The absence of a written constitution gives ultimate legislative authority to Acts of Parliament. The Human Rights Act 1998 introduced into domestic law for the first time the European Convention on Human Rights. Because of the dualist position the UK takes with regard to international treaties, the Convention only became binding on domestic courts in 2000 when the Human Rights Act took effect. The Human Rights Act does not give the courts the power to strike down primary legislation made by Parliament. Instead, the Act gives the courts the power to identify or declare whether the primary legislation is compatible or not with the Convention rights that the UK has ratified. Although not directly rendering primary legislation invalid, declarations of incompatibility by the courts have led governments to change offending legislation, albeit in the security field with legislation that also offends those rights but in a slightly different way. Other important structural features that should be borne in mind are that the Westminster style of government means that the executive controls the majority in the lower chamber (the House of Commons) as this is a precondition for forming a government, and that the executive has the legislative authority through the Parliament Acts 1911 and 1949 to over-ride a legislative veto of the upper chamber (the House of Lords). The significance of this is both simple and reflected

(1) *Justice and Security, Cm 8194* (London: HMSO October 2011) at page XI.

in the course of events. In a strict separation of powers, the legislature would act as a check on the executive. In the UK, contentious legislation of the sort this article will be considering, has been subject to vigorous criticism in both chambers of each House and also by the Select Committees that have scrutinised the legislative proposals. Ultimately, the government has been able to enforce its will and pass its legislation². One consequence of the executive's dominance in the legislature is to have shifted challenges to retrospective ones, namely challenges through the courts once the legislation has been enacted. Those challenges have to be brought by affected individuals and fall within specific human rights breaches of the European Convention. Such challenges are much narrower than debates that question the good sense or desirability of proposed measures, in other words, the sort of arguments that should prevail when the policy is being debated in the context of legislative proposals.

2. The Anti-terrorism, Crime and Security Act 2001

The UK Government's legislative response to the events of 9.11 was to introduce in Parliament the Anti-terrorism, Crime and Security Bill. It should be noted that the UK had prior to 2001 an extensive set of legislative provisions relating to terrorism. This was due to the UK's long history of attempting to combat Irish republican terrorism and the terrorism spawned in opposition to it. Indeed in 2000 an extensive Terrorism Act had been passed extending the definition of terrorism and the battery of powers that the government had at its disposal such as the power to detain under Schedule 8 of that Act and the power to arrest without warrant under Section 4(1). Similarly, the Regulation of Investigatory Powers Act 2000 reviewed and considerably enhanced powers of surveillance of suspects, powers that could be used by both the police and the intelligence and security services³.

(2) Although in one celebrated if untypical episode on the 9th of November 2005 the government was defeated in the House of Commons in its attempt to extend detention without charge of terrorist suspects from 28 to 90 days.

(3) A review of this legislation can be found in C. WALKER, *Blackstone's Guide to the Anti-Terrorism Legislation*, Oxford, Oxford University Press, 2002.

The Anti-terrorism, Crime and Security Act 2001 (hereafter referred to as the Anti-terrorism Act 2001) is an omnibus act that covers diverse areas. Notwithstanding that it was highly contentious and vigorously opposed by many parliamentarians and all the major civil liberty and human rights organisations it was rushed through all its stages in Parliament in just three weeks. Alongside provisions for the detention of suspected international terrorists it is noteworthy that the government took advantage of the perceived emergency to push through a whole range of measures that had met with resistance in the past. For instance, with regard to retention of communication data, the 2001 Act enlarged the powers of government, notably the intelligence and security services and the police, to track the source, location and destination of *all* communications, mainly but not exclusively, electronic and telephonic communications⁴. Part XIII of the Act allowed the co-option by ministerial order of measures adopted under Title VI of the Treaty of European Union relating to police and judicial co-operation in criminal matters. This legislative device, called a Henry VIII clause, effectively by-passes the requirement to put the changes of law into primary legislation made by Parliament. The government tried to suggest it was just regularising an existing procedure relating to Community law obligations under Section 2(2) of the European Communities Act 1972. This was certainly not the view taken by the House of Lords Select Committee on Delegated Powers and Regulatory Reform which stated,

the fundamental issue ... is whether this procedure, which currently applies to economic and regulatory measures, should also apply to the most sensitive areas of policing and criminal justice, with the potential to impinge on individual rights and liberties. Such measures were undoubtedly not contemplated when the 1972 Act procedure was approved by Parliament⁵.

A third strand in the Anti-terrorism Act 2001, powers to disclose information held by public authorities, again demonstrates how a per-

(4) See Part XI, sections 102-107 of the Anti-terrorism Act 2001.

(5) House of Lords Select Committee on Delegated Powers and Regulatory Reform, *7th Report*, HC (Session 2001-2002) at paragraph 7.

ceived crisis can be exploited to extend state powers at the expense of civil liberties. Part III of the Act gives public authorities the powers to disclose information for the purpose of “any criminal investigation whatever”⁶, “any criminal proceedings whatever”⁷ and the “initiation or bringing to an end of any such investigation or proceedings”⁸. It is plainly obvious that these powers are not limited to terrorism. The Government had already tried to introduce similar measures in the Criminal Justice and Police Bill 2001 and had retreated on this⁹. The Anti-terrorism Act 2001 gives the Government and public authorities very wide powers to disclose information on individuals and organisations. Schedule 4 of the Act lists a vast array of existing statutory powers to collect information that these new powers permit disclosure of. The surveillance and intrusion of privacy that these combined powers create is very sinister given that the information is collected on the whole population in the course of everyday life and citizens interactions with the state. These provisions were strongly criticised by the Joint Committee on Human Rights. The Government by way of concession introduced a subsection into the Bill stating that a public authority could only make a disclosure of information if it was satisfied that that the disclosure was “proportionate to what is sought to be achieved”¹⁰. The Joint Committee was not impressed by the concession stating that it did not meet their fundamental concerns in relation to the “sharing of information between agencies for the purposes of an unlimited range of criminal investigations including potential investigations by foreign agencies”¹¹. The Joint Committee also thought that the disclosure powers would violate the right to respect for a

(6) Section 17 (2) (a) Anti-terrorism Act 2001.

(7) Section 17 (2) (b).

(8) Section 17 (2) (c).

(9) Joint Committee on Human Rights. 2nd Report, *Anti-terrorism, Crime and Security Bill*. HL 337 Hc 372 (Session 2001-2002) at paragraph 53.

(10) Section 17 (5) Anti-terrorism Act 2001.

(11) Joint Committee on Human Rights. 5th Report, *Anti-terrorism, Crime and Security Bill: Further Report*. HL 51 Hc 420 (Session 2001-2002) at paragraph 24.

private life under Article 8 of the European Convention as a consequence of the “range of offences covered, and the lack of statutory criteria to guide decisions and the lack of procedural guidelines to be followed”¹².

3. Part IV of the Anti-terrorism Act 2001: Immigration and Asylum

Part IV of the Act attracted the most publicity and criticism during the passage of the Bill through Parliament. It was entirely predictable that it would be subject to challenge in the courts. This part of the Act was disingenuously called ‘Immigration and Asylum’ whereas its true purpose was detention, deportation and the curtailing of asylum claims. For instance, the Home Secretary is empowered to exclude asylum claims where he certifies that the individual’s removal is for the public good and the person in question is not covered by the 1951 Refugee Convention¹³. The most alarming aspect of Part IV was the creation of indefinite detention without trial of individuals certified by the Home Secretary as international terrorists. The defining feature of those powers under Part IV was that they applied only to non-British nationals who were subject to immigration controls. The suspected international terrorists were not subjected to criminal charges in the classic sense of the term, namely charged with specified criminal offences which are tested in an open court in front of a judge and jury under the normal rules of evidence and burden and standard of proof: where the burden of proof is on the prosecution throughout the case and the standard of proof is whether the accused is guilty beyond all reasonable doubt. Under the new arrangements, the absence of a criminal trial was presumably motivated by the wish to detain those against whom there was no hard evidence of any specific criminal wrongdoing or because the intelligence and security services wish to conceal their sources and information or both. At the heart of the material to be used against individuals will be secret intelligence and security assessments of an individual’s alleged involvement with an

(12) *Ibid.* at paragraph 24.

(13) Section 33 Anti-terrorism Act 2001.

organisation. The assessment may be partial, speculative and subject to elements of hearsay that would be inadmissible in a criminal trial on the basis that they are prejudicial without being probative. Such overall assessments would, even if admissible in a criminal trial, most likely fail to attain the requisite standard of proof (even if individual pieces of evidence were probative) and indeed the assessment might fail to even identify a plot or specific set of actions pointing to a crime. Sections 21-23 of the Act gave the Home Secretary the powers referred to above, to certify and detain an individual that he suspected of involvement with international terrorism¹⁴.

Under Section 21(2) a terrorist was defined as a person who is or has been concerned in the commission, preparation or instigation of acts of international terrorism or is a member of or belongs to an international terrorist group or has links with an international terrorist group. A 'link' with a group only occurred if the named individual supported or assisted the group¹⁵. Terrorism as a term was given¹⁶ the expansive meaning created by Section 1(1) of the Terrorism Act 2000, that is: use or threat of action designed to influence the government or intimidate the public or a section of the public made for the purpose of advancing a political, religious or ideological cause.

Another defining feature of the group potentially subject to this indefinite detention procedure was that the Home Secretary would ordinarily have deported the individuals but could not, either because there was no country that would accept them or that the country that it would have been possible to deport them to might torture them. A legal challenge to the certification was subject to stringent limiting factors and procedures. A challenge to certification could only be made to the Special Immigration Appeals Commission (SIAC)¹⁷, a special tribunal which deals with sensitive security related matters

(14) The certificate may be issued if the Home Secretary reasonably believes that the person's presence in the UK is a risk to national security and suspects that the person is a terrorist. See Section 21 (a) and (b) Anti-terrorism Act 2001.

(15) Section 21 (4) Anti-terrorism Act 2001.

(16) Section 21 (5) Anti-terrorism Act 2001.

(17) Section 25 Anti-terrorism Act 2001.

that touch on those subject to immigration controls and are therefore potentially liable to deportation. SIAC had to cancel the certificate if it considered that there were no reasonable grounds for a belief or suspicion in involvement or links with international terrorist activity¹⁸ or it considered that for some other reasons the certificate should not have been issued¹⁹. There was to be a SIAC review of each certificate after the first six months of certification²⁰ and then at three monthly intervals²¹. The Act excluded judicial review or a writ of habeas corpus²². Section 21(8) of the Act specified that a legal challenge was limited to the provisions of Section 25 or 26; these required that challenges were only made to SIAC; thereafter there could be an appeal to the Court of Appeal but limited to a challenge on a point of law²³. SIAC was established by the Special Immigration Appeals Commission Act 1997. It is clearly an improvement on its forerunner, an Advisory Panel which the European Court of Human Rights had determined was not a court within the meaning of Article 5(4) of the Convention²⁴. SIAC has been described as, “the latest attempt to solve the perennial problem of squaring procedural safeguards for the individual with the national security interests of the State”²⁵. The extension of SIAC’s remit to deal with the Anti-terrorism Act 2001 detention cases led to SIAC being subjected to scrutiny as to its function and criticism as to the fairness of its procedures in particular the role of the special advocates and the lack of information supplied to detainees with regard to the substance of the secret case against them²⁶.

(18) Section 25 (2) (a) Anti-terrorism Act 2001.

(19) Section 25 (2) (b) Anti-terrorism Act 2001.

(20) Section 26 (1) Anti-terrorism Act 2001.

(21) Section 26 (3) Anti-terrorism Act 2001.

(22) An ancient right of challenge in the courts against unlawful detention.

(23) Section 27 (1) (b) Anti-terrorism Act 2001.

(24) *Chahal v UK* (1996) 23 EHRR 413 at paragraph 130.

(25) C. WALKER, *Blackstone’s Guide to the Anti-Terrorism Legislation*, Oxford, Oxford University Press, 2002 at page 223.

(26) See the House of Commons Constitutional Affairs Select Committee, 7th Report, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*. HC 323-1 (Session 2004-2005).

It is hardly surprising that the whole apparatus of indefinite detention, being a radical departure from the normal standards of justice, would be in breach of Article 5 of the European Convention, namely that everyone has the right to liberty and security of person. Nor would any of the permitted grounds under Article 5 of depriving an individual of his liberty apply to a scheme of indefinite detention without trial. Bearing in mind that to deport a person to a country where they might be tortured is a breach of Article 3 of the European Convention and that that article is non-derogable, the UK Government had three options: abandon the proposed scheme; withdraw from the Convention and attempt to re-enter with a Reservation against Article 3 or derogate from Article 5. The Government chose to derogate from Article 5 which is permitted under Article 15 which states that, "In time of war or other public emergency threatening the life of the nation", the country in question may take measures derogating from an obligation but only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

Because the obligations under the Convention had been enshrined in domestic law, the Human Rights Act 1998, to derogate the UK Government had to both comply with the Council of Europe requirements and produce a domestic measure to make the derogation effective in UK law. The Government produced an Order in Council to give effect to the derogation²⁷. The Derogation Order specified that the matter in issue was the "extended power to arrest and detain a foreign national" under the Anti-terrorism Act 2001²⁸.

There was immediate criticism of the Derogation Order. The organisation *Liberty* stated that there was "no imminent threat of the complete breakdown of the civil society in the UK". *Liberty* also pointed that of the "forty or so countries signed up to the Convention we are the

(27) The Human Rights Act 1998 (Designated Derogation) Order 2001, Statutory Instrument 2001 (No 3644).

(28) *Ibid.*

only country indicating that we want to opt out”²⁹. Of course, were the conditions of derogation not met this would provide a ground for challenge on a point of law quite apart from any appeal to SIAC against individual certification. Such an appeal could go from SIAC, to the Court of Appeal and on to the highest court, the House of Lords.

4. *The Belmarsh Case: A and others v Secretary of State for the Home Department*³⁰

This case has been described by an eminent public lawyer as, “widely regarded as being one of the most constitutionally significant ever decided by the House of Lords, as evidenced by the fact that it was heard by an unprecedented panel of nine judges rather than the usual five”³¹.

The nine non-British nationals who were detained under Part IV of the Anti-terrorism Act 2001 appealed to SIAC challenging the lawfulness of the scheme of detention (this challenge is to be distinguished from appeals against individual certification). In issue was whether the derogation was justified or not and whether the scheme of indefinite detention was consistent with Convention rights. SIAC had concluded that there was a public emergency threatening the life of the nation which entitled the Government to derogate under Article 15 from its obligations to the extent strictly required by the exigencies of the situation³². But SIAC quashed the 2001 Derogation Order and granted a declaration that Section 23 of the Anti-terrorism Act 2001 was incompatible with Articles 5 and 14 of the European Convention. The reason for this incompatibility was that the scheme was discriminatory because there were British nationals who posed a similar risk but who could not be detained in a similar fashion as the Act made no provision for this. The Court of Appeal reversed this

(29) *Anti-Terrorism, Crime and Security Bill: Briefing For The Second Reading In The House of Commons*. Liberty, London, November 2001.

(30) *A v Secretary of State for the Home Department (HL(E))* [2005] 2 AC 68.

(31) M. LOUGHLIN, *A v Secretary of State for the Home Department*, *Introduction*, *Modern Law Review*, Oxford, (2005) 68 (4) MLR 654-680 at 654.

(32) *A v Secretary of State for the Home Department (HL(E))* [2005] 2 AC 68, at page 68.

decision³³. Before the House of Lords the appellants (i.e. the detainees) argued, inter alia, that the characteristics of a public emergency threatening the life of the nation, “are that (a) the state of affairs relied on is temporary and exceptional (b) the circumstances are grave enough to threaten the organised life of the entire community (c) the emergency is actual or imminent in that the threatened danger is about to occur and (d) the threat is to the life of the nation that seeks to derogate”³⁴. Since those characteristics were not present the threshold for derogation was not met under Article 15³⁵. It was further argued that even if there were an emergency the scheme of executive indefinite detention without trial of foreign nationals was not strictly required by the exigencies of the situation³⁶. The test failed the proportionality test because there was not a rational link between the objective and the means employed³⁷. It was argued on behalf of *Liberty*, that the scheme failed on grounds of proportionality because it excluded those who constituted a risk (i.e. British nationals)³⁸ and, “In applying only to non-nationals the measures are under-inclusive, in that they do not meet the perceived threat; and they are over-inclusive in that they include those non-nationals who, although suspected of international terrorism and irremovable (See *Chahal v United Kingdom* 23 EHRR 413) do not represent a threat to the United Kingdom interests”³⁹. Counsel for *Liberty* added that there had been no derogation from Article 14, the article on non-discrimination. On an important constitutional point, it was submitted that, “the only proper justification for the courts declining to decide an issue is the relative institutional competence of the different branches of the state” where the executive but not the court has

(33) Ibid.

(34) Ibid., page 74 at H, Ben Emmerson Qc.

(35) Ibid., page 75 at A.

(36) Ibid., page 75 at E.

(37) Ibid., page 75 at F.

(38) Ibid., page 81 at F, David Pannick Qc.

(39) Ibid., page 82 at H.

the benefit of specific advice and expertise⁴⁰. “That does not apply to SIAC, which is a specialist tribunal with expertise in the relevant field or to the courts which have more expertise than the legislature or the executive on questions of due process, discrimination and proportionality”⁴¹. By contrast, the Attorney-General representing the Government argued that the Government was democratically accountable to Parliament and was responsible for the protection of the public and that assessing the risk to the public and formulating and implementing of protective measures was primarily for the Government and Parliament⁴². It was not for the court to substitute its view for that of the Government as to the effective measures to be taken⁴³. On the discrimination point the Attorney-General submitted that in the field of immigration control it was legitimate for the state to distinguish between United Kingdom nationals and others⁴⁴. The leading judgment is provided by Lord Bingham. With regard to whether the derogation met the conditions of a public emergency threatening the life of the nation, the court addressed a variety of factors before concluding that the conditions were met, and as indicated in the head note, “the absence of a specific threat of an immediate attack did not invalidate the assessment that there was a risk of a terrorist attack at some unspecified time”⁴⁵.

Lord Bingham stated that it had not been shown that SIAC and the Court of Appeal had misdirected themselves in accepting that there was a public emergency⁴⁶. His second reason was that the case law of the European Court of Human Rights on what constituted a public emergency would clearly encompass the factual scenario pertaining in the UK after the events of 9.11⁴⁷. On the third issue, relating to

(40) *Ibid.*, page 82 at D.

(41) *Ibid.*, page 82 at D.

(42) *Ibid.*, page 85 at A. Lord Goldsmith Qc.

(43) *Ibid.*, page 86 at D.

(44) *Ibid.*, page 86 at H.

(45) *Ibid.*, page 69 at A.

(46) *A v Secretary of State for the Home Department (Hi(E))* [2005] 2 Ac 68. Lord Bingham, paragraph 27.

(47) *Ibid.*, paragraph 28.

relative institutional competence (i.e. who should decide what), Lord Bingham stated that the more purely political a question is the more appropriate it is for political resolution rather than judicial. Similarly, the more the question was a legal one the greater the role of the court. Lord Bingham considered that the public emergency issue was very much a political question⁴⁸. The other judges agreed on this point apart from Lord Hoffman who dissented. Lord Hoffman thought that the Attorney-General's submissions and the judgments of SIAC treating "a threat of serious physical damage and loss of life as necessarily involving a threat to the life of the nation" showed a misunderstanding of what is meant by the term⁴⁹. In a turn of phrase that has been much quoted he stated,

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory⁵⁰.

5. Proportionality

Lord Bingham accepted that the appellants were entitled to seek a review of proportionality and he firmly rebutted the Attorney-General's proposition that these were matters for the executive and not the courts. Lord Bingham stated that, "I do not in particular accept the distinction which he drew between democratic institutions and the courts... the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the democratic state, a cornerstone of the rule of law itself"⁵¹. He went on to quote Professor Jowell who had said, "The courts are charged by Parliament with delineating the boundaries of a rights-based democracy"⁵².

(48) *Ibid.*, paragraph 29.

(49) *Ibid.*, Lord Hoffman at paragraph 95.

(50) *Ibid.*, Lord Hoffman at paragraph 97.

(51) *Ibid.*, Lord Bingham at paragraph 42.

(52) *Ibid.*, quoted at paragraph 42.

On the substance of the proportionality issue Lord Bingham accepted the argument of the appellants and their central complaint that, “the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-Uk suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intention towards the United Kingdom”⁵³. Lord Bingham concluded that the Derogation Order and the Section 23 were disproportionate and that that such a conclusion was irresistible⁵⁴.

6. Discrimination and Article 14

The United Kingdom did not derogate from Article 14 of the European Convention on Human Rights and as Lord Bingham indicated, “The foreign nationality of the appellants does not preclude them from claiming the protection of their Convention rights”⁵⁵. Lord Bingham does not say that given the facts outlined with regard to lack of proportionality, discrimination clearly follows. Nonetheless, that is self evident and also implicit in his analysis. What Lord Bingham is at pains to point out is that the discrimination is not justified because the fundamental comparator for this particular policy should be the total class of people who pose a risk rather than distinguishing people on the grounds of their immigration status. In his judgment he states, “What has to be justified is not the measure in issue but the difference in treatment between one person and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of Article 14”⁵⁶.

Lord Bingham and his fellow judges (Lord Walker dissenting) allowed

(53) Ibid., Lord Bingham at paragraph 43.

(54) Ibid.

(55) Ibid., paragraph 48.

(56) Ibid., paragraph 68.

the appeals and quashed the Derogation Order. The court also issued a declaration under Section 4 of the Human Rights Act that Section 23 of the Anti-terrorism Act 2001 was incompatible with Article 5 and 14 of the ECHR in so far as it was disproportionate and permitted detention of suspected international terrorists in a way that discriminated on the grounds of nationality or immigration status⁵⁷.

7. *Comments on the Case*

Although one might have assumed that the decision of the House of Lords in this case would have been a cause for rejoicing amongst human rights lawyers the decision was subjected to criticism in some quarters. For instance, Tom Hickman described the approach of the court in accepting that there were valid grounds for designating a derogation on the basis of a public emergency as disappointing and that in particular “Lord Bingham’s approach essentially absolves the Government from advancing clear and convincing evidence to Parliament”⁵⁸. Hickman argues that all the steps of Lord Bingham’s reasoning were questionable and that he should not have applied the “extremely deferential Strasbourg case law on Article 15”⁵⁹. Hickman also criticises Lord Bingham for taking the view that the Government’s decision had to be shown to be wrong and unreasonable. Hickman suggests that the burden of proof should fall on the Government who “should be required to advance convincing evidence for derogating from its obligations to observe our human rights”⁶⁰.

By contrast David Dyzenhaus attacked Lord Hoffman’s approach in holding that there was no emergency that justified derogation⁶¹. Lord Hoffman’s apparent reliance on the common law and not providing a

(57) *Ibid.*, paragraph 73.

(58) T. HICKMAN, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism* *Modern Law Review*, Oxford, (2005) 68 (4) MLR 655-668 at page 662.

(59) *Ibid.*, at page 663.

(60) *Ibid.*

(61) D. DYZENHAUS, *An Unfortunate Outburst of Anglo-Saxon Parochialism*, *Modern Law Review*, Oxford, (2005) 68 (4) MLR 673-676.

detailed analysis by way of the Human Rights Act and the European Convention was to be regarded as an “unfortunate outburst of Anglo-Saxon parochialism”⁶². Stephen Tierney comments on the light touch approach adopted by the Strasbourg court with regard to derogation and that the leeway accorded to democracies is based on “the presumption that within these states the designation decision [to derogate] will be subject to internal controls”⁶³.

Whatever the supposed imperfections of the judgments of the House of Lords (traditionally referred to as *opinions*) I would suggest that the decision taken as a whole constitutes a resounding rebuke to the executive for putting in place a scheme that was so far removed from the norms of justice. It is true that the decisions focus on proportionality and discrimination as the defects of the Government’s approach. Arguably, these were the most effective jurisprudential devices available to the court in rejecting the scheme. The courts are bound by prevailing norms to exercise a degree of restraint with regard to the will of Parliament and the Anti-terrorism Act 2001 was passed by Parliament embodying a belief that an emergency existed. Similarly, it is not easy for the courts to simply over-ride the executive’s assessments of security threats. It is wiser for the courts to deploy the legal devices that the executive and parliament have approved by way of the Human Rights Act 1998. In this fashion the court reached the right decision without appearing to over-step their authority relative to the other branches of government.

The *A* case ruling led to the Government abandoning the detention scheme embodied in Part IV of the Act. Since a declaration of incompatibility does not automatically render the domestic law invalid, the Government’s willingness to comply with the court’s declaration attests to the importance and weight of the judgments in this case. The fact that one would expect nothing less from the Government by way of respect and compliance should not lead one to overlook the existence of that respect.

(62) *Ibid.*, at page 673.

(63) S. TIERNEY, *Determining the State of Exception: What Role for Parliament and the Courts?* *Modern Law Review*, Oxford, (2005) 68 (4) MLR 668-672 at page 669.

8. *Control Orders*

The Prevention of Terrorism Act 2005 repealed⁶⁴ Sections 21-32 of the Anti-terrorism Act 2001. The later Act introduced control orders to replace the detention scheme. This article will not address the detail of the control order scheme other than to identify a few distinctive features. The control orders issued by the executive fall into two categories, derogating and non-derogating orders, the former being more restrictive. The Government has relied on non-derogating control orders but even those effect substantial restrictions and have been subject to criticism in the courts for being excessively restrictive⁶⁵. Section 1(4) of the Act provides for extensive restrictions on the individual. Although the individual is not detained in prison the conditions can be highly restrictive. In *Home Secretary v JJ*⁶⁶ Lord Bingham stated that an analogy with an open prison was apt. In this case the individual in question was subjected to an eighteen hour curfew requiring him to stay at home, wear an electronic tag, seek permission for any visitors and outside of the curfew period he was not permitted to go far from his home. The courts have dealt with a stream of control order cases and whether they breach Article 5 of the Convention⁶⁷.

More recently, the ruling in the AF (No 3)⁶⁸ case has led to a reconsideration of the viability of control orders from the point of view of the executive. The crucial point in that case was the absence of sufficient information provided to the 'controlee' so that he could challenge the basis of the control order. In *A v United Kingdom*⁶⁹ the European Court of Human Rights had ruled that whereas it was permissible to restrict the adversarial process on national security grounds, where disclosure was absent or lacking in substance there would be a breach of Article

(64) Prevention of Terrorism Act 2005 Section 16 (2) (a).

(65) C. WALKER, *Blackstone Guide to The Anti-Terrorism Legislation*, Oxford, Oxford University Press, 2009, 2nd Edition, page 29.

(66) [2007] UKHL 45.

(67) For a careful review of the issues relating to control orders see C. WALKER cited at note 65 above, chapter 7.

(68) Secretary of State for the Home Department v AF and another [2009] UKHL 28.

(69) A v United Kingdom (App No 3455/05 19th February 2009).

6⁷⁰. The Strasbourg ruling led the House of Lords in the *AF* (No 3) case to rule that, “the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions” to the special advocate in relation to those allegations⁷¹. In the Government’s recent Green Paper *Justice and Security*⁷² it states that as a result of the *AF* (No 3) case it faces a difficult choice, “as to how best to protect the public interest”⁷³. The Green Paper goes on to say that it will repeal the control order legislation and replace it with a new system of terrorism prevention and investigation measures (TPIM). It also adds that the disclosure requirements established in the *AF* (No 3) case will be applied to the new measures when they are introduced⁷⁴. It is clear that the decisions of the courts both in the UK and in Strasbourg have forced the Government to abandon two restrictive schemes that have breached the Convention⁷⁵.

9. *The A case No 2: and the Admissibility of Evidence Tainted by Torture*⁷⁶

The *A case* (No 2) is a continuation of the litigation in relation to the detainees held under Part IV of the Anti-terrorism Act 2001. The facts of the case are indicated in Lord Bingham’s judgment. The central question was whether SIAC, when hearing an appeal against certification and detention could “receive evidence which has or may have been procured by torture inflicted in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities?”⁷⁷. In the case of one of the detainees it was alleged that the

(70) *Ibid.*, see paragraphs 205, 223 and 224.

(71) *Secretary of State for the Home Department v AF and another* [2009] UKHL 28 at paragraph 59.

(72) *Justice and Security* (October 2011 CM 8194 HMsO).

(73) *Ibid.*, page 54 at paragraph 2.

(74) *Ibid.*, page 54 at paragraph 4.

(75) At the time of writing the *Terrorism Prevention and Investigation Measures Bill 2011* is going through its stages in the House of Lords.

(76) *A and others v Secretary of State for the Home Department* (No 2) [2006] 2 AC 221.

(77) *Ibid.* Lord Bingham, paragraph 1 at A.

Home Secretary had relied upon evidence of a third party which had been extracted by torture by a foreign state. Should such evidence be admitted before SIAC? The appellants argued that it should not be admitted “relying on the common law of England, on the European Convention on Human Rights and on principles of public international law”⁷⁸. The respondent, the Secretary of State, agreed that this would be the correct answer where the torture had been inflicted by or with the complicity of the British authorities⁷⁹. The respondent went on to say that it was not his intention to “rely on, or present to SIAC or to the Administrative Court in relation to control orders, evidence which he knows or believes to have been obtained by a third country by torture”⁸⁰. Lord Bingham noted that such an intention was based on policy and not any acknowledged legal obligation and that such a policy could be altered by the Secretary of State⁸¹.

When the issues were heard before SIAC, on the central question, SIAC gave an affirmative answer, such evidence could be admitted and such third party conduct was relevant to the weight of the evidence but did not render it legally inadmissible⁸². The Court of Appeal went on to affirm that decision.

Seven Law Lords heard this appeal and they unanimously agreed that evidence, be it from a suspect or a witness, that had been obtained by torture was to be treated by the court as unfair, inherently unreliable and a transgression of ordinary standards of humanity and decency. Such evidence was also incompatible with the principles on which the courts should administer justice. Accordingly, such evidence could not lawfully be admitted against a party to a proceeding in a UK court regardless of who authorised or inflicted the torture⁸³.

(78) *Ibid.*

(79) *Ibid.*, paragraph 1 at B.

(80) *Ibid.*

(81) *Ibid.*, paragraph 1 at C.

(82) *Ibid.*, paragraph 8 at H.

(83) *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 at page 222.

The second aspect of this case is that whereas the courts cannot receive evidence obtained by torture what is the position of the Secretary of State? Is it improper for him to use this evidence in forming an opinion as to whether he should issue a certificate against a suspect? Here the court took the view that the Secretary of State did not act unlawfully if he used such evidence to form an opinion. For instance, Lord Hoffman stated,

It is not the function of the courts to place limits upon the information available to the Secretary of State, particularly when he is concerned with national security. Provided that he acts lawfully, he may read whatever he likes. In his dealings with foreign governments, the type of information that he is willing to receive and the questions that he asks or refrains from asking are his own affair. As I have said, there may be cases in which he is required to act urgently and cannot afford to be too nice in judging the methods by which the information has been obtained, although I suspect that such cases are less common in practice than in seminars on moral philosophy⁸⁴.

Although there is a difference of function between the executive and the judiciary the approach taken by Lord Hoffman throws up problems of principle, the most obvious being that if torture is morally wrong and taints the reliability of evidence and is a practice that should be stamped out, why should the 'evidence' be used at any stage at all? The second problem is that when the Home Secretary issues a certificate he is putting into effect the loss of liberty that is normally the function of a court. By acquiring this role it is arguable that he should be bound by judicial standards as he is weighing evidence with a view to depriving someone of their liberty. The third problem is the odd position of SIAC having to rule on certification whilst excluding evidence that the Home Secretary has been permitted to consider. How does SIAC assess the reasonableness of the Home Secretary's suspicion where they are excluding the very evidence that he is using to form his opinion?

(84) *Ibid.* Lord Hoffman, paragraph 93.

Be that as it may, the court also had to consider the issue of what the proper approach should be where there is uncertainty as to whether the evidence was obtained by torture or not. It was on this point that the court was split. The central problem here was that the detainee when appealing to SIAC would not have access to all the evidence as the secret material would be heard in a closed session albeit with the assistance of a special advocate. Lord Bingham dissented from the majority. After noting that, “The appellants contend that it is for a party seeking to adduce evidence to establish its admissibility if this is challenged. The Secretary of State submits that it is for a party seeking to challenge the admissibility of evidence to make good the factual grounds on which he bases his challenge”⁸⁵ he went on to observe that,

I do not for my part think that a conventional approach to the burden of proof is appropriate in a proceeding where the appellant may not know the name or identity of the author of an adverse statement relied on against him, may not see the statement or know what the statement says, may not be able to discuss the adverse evidence with the special advocate appointed (without responsibility) to represent his interests, and may have no means of knowing what witness he should call to rebut assertions of which he is unaware⁸⁶.

These observations make quite clear the substantial problems that exist if one bears in mind that the party in question may be innocent of wrong doing. Put another way, where the burden of proof is placed on the detainee the procedures before SIAC only work if one can assume the suspect’s guilt based on the suspicion of the Home Secretary, the very issue that SIAC is meant to be testing.

The test that Lord Bingham favoured was that it was for the appellant or his special advocate to advance a plausible reason why the evidence may have been procured by torture. It would then be for SIAC, with its expertise, to initiate or direct such inquiry “as is neces-

(85) *Ibid.* Lord Bingham at paragraph 54.

(86) *Ibid.* Lord Bingham at paragraph 55.

sary to enable it to form a fair judgment whether the evidence has, or whether there is a real risk that the evidence may have been obtained by torture or not”⁸⁷. Lord Bingham went on to say that if SIAC was unable to conclude that there is not a real risk that the evidence has been obtained by torture it should refuse to admit it. This was not the test adopted by the majority. Lord Hope, apparently relying on Article 15 of the Convention Against Torture stated that the test should be, “Is it established, by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State was obtained under torture?”⁸⁸. If the answer is “yes”, then the evidence should be excluded. The majority ruling also included the view that where there was doubt as to whether the evidence had been obtained by torture or not, the evidence should be included. Lord Roger taking this approach stated, “SIAC can look at this statement but should bear its doubtful origins in mind when evaluating it”⁸⁹.

Lord Bingham in his judgment gives a devastating analysis of the shortcomings of the majority test on admissibility of evidence,

This is a test which, in the real world, can never be satisfied. The foreign torturer does not boast of his trade. The security services, as the Secretary of State has made clear, do not wish to imperil their relations with regimes where torture is practised. The special advocates have no means or resources to investigate. The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet⁹⁰.

This analysis speaks for itself with regard to the unfairness of the test applied by the majority.

(87) Ibid at paragraph 56.

(88) Ibid. Lord Hope at paragraph 121.

(89) Ibid. Lord Roger at paragraph 145.

(90) Ibid. Lord Bingham at paragraph 59.

10. *The Binyam Mohamed Saga*

There is a series of UK cases relating to Binyam Mohamed's attempts to have information disclosed that would go to show that he was systematically tortured by and at the behest of the US authorities whilst in captivity in the Americas, Pakistan, Afghanistan and Morocco. The evidence was needed by him for his defence to capital charges brought by the US. Binyam Mohamed wished to establish that the confessions that would be used against him in the capital charges were made as a result of lengthy torture. In this article I shall focus on the case in the Court of Appeal⁹¹. The judgments indicate the substance of the previous litigation. By the time that the Court of Appeal heard this case it was evident that a member of the UK Security Service, Agent B, had interviewed Binyam Mohamed whilst in captivity abroad and that the Security Service had supplied questions for his captors and interrogators to pose. At the heart of this appeal case is a protracted attempt by the Foreign Secretary to suppress seven paragraphs of the judgment of the court below, the Divisional Court. The Foreign Secretary had issued a Public Interest Immunity Certificate that stated that publication would lead to a real risk of serious harm to the national security of the UK⁹². The assertion was based on the so called 'control principle', a term used to describe the idea that the supplier of intelligence, country A, gets to determine or control who if anyone it is disclosed to even after that information has been disclosed to country B. The seven paragraphs which the Foreign Secretary wished to suppress were not the original documents but part of the judgment which contained an anodyne summary by the court gleaned from the documents sent by the US authorities to their counterparts in the UK and that related to Binyam Mohamed's treatment whilst directly under US custody. The Foreign Secretary stoutly maintained that disclosure of the paragraphs "would damage the intelligence sharing arrangements between this country and the USA, between this country and

(91) *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

(92) *Ibid.*, Lord Judge CJ at paragraph 2.

our allies, and the USA and its allies” and that the USA would review the intelligence sharing arrangements⁹³. Notwithstanding these assertions a Us court had publicly recorded in the case of *Farbi Saeed Bin Mobamed* that the Us Government “does not challenge or deny the accuracy of Binyam Mohamed’s story of brutal treatment”⁹⁴. The Court of Appeal sets out part of the Us judgement:

(a) [Mr Mohamed’s] trauma lasted for 2 long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans. The Government does not dispute this evidence (p64)

(b) In this case, even though the identity of the individual interrogator changed (from nameless Pakistanis, to Moroccans, to Americans, and to special agent (the identity is redacted)), there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States (p68) ... The court finds that [Mr Mohamed’s] will was overborne by his lengthy prior torture, and therefore his confessions to special agent ... do not represent reliable evidence to detain petitioner⁹⁵.

In the light of the Us court’s finding Sir Anthony May in his judgement stated that the Foreign Secretary sought to defend a principle entirely devoid of factual content on which to hang it and that “it would be quite absurd if the Us Government itself decided to reduce intelligence sharing because a Uk court had decided to publish summary material whose essential content has been found to be true in a Us court”⁹⁶. The court dismissed the appeal of the Foreign Secretary.

(93) *Ibid.*, Lord Judge CJ at paragraph 12.

(94) *Ibid.*, paragraph 23.

(95) *Ibid.*, cited at paragraph 23. The page numbers within the quotation refer to the original Us court judgment.

(96) *Ibid.* Sir Anthony May at paragraph 295.

There are many interesting features of this complex case⁹⁷ which this brief account cannot do justice to but a couple of further aspects relating to the litigation should be addressed. Prior to the judgment being handed down in the Court of Appeal, counsel representing the Government, having received an advanced copy of the judgment, wrote to Lord Neuberger persuading him to remove part of paragraph 168 of his judgment because it contained criticism of the Security Service. That criticism, which counsel argued was untrue and unfair, is contained in the judge's comment with regard to the Security Service's claim that they knew of no instance of ill treatment of prisoners detained by or on behalf of the Us Government, "in this case, that does not seem to have been true: as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of Us officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others"⁹⁸. The judge at first acquiesced in removing part of paragraph 168 when the judgment was first published on the 10th of February 2010. Meanwhile the contents of counsel's letter to the judge appeared in the Guardian newspaper becoming the subject of a national discussion⁹⁹. What was particularly interesting to observe was all the backstairs activity that is normally hidden from view. The full paragraph was finally published by the Court of Appeal on the 26th of February 2010. In this judgment the court gives a lengthy explanation of the context in which the paragraph was redacted and how and why the original version was reinstated subject to some limited amendments¹⁰⁰.

(97) For a detailed account of the protracted litigation see A. TOMKINS, *National Security and the Due Process of Law. Current Legal Problem* (2011) pages 1-39, Oxford, Oxford University Press.

(98) R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65, Lord Neuberger at paragraph 168.

(99) A. Tomkins cited in note 97 above, at page 20.

(100) R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 158.

A further matter of interest is the campaign by the Government to portray the essence of the case as protecting the so called 'control principle'. Unusually, the Director-General of the Security Service published an article in *The Daily Telegraph* on the 11th of February 2010, the day after the redacted first judgment appeared, stating that the reason the British Government had taken the case to the Court of Appeal "was not to cover up supposed British collusion in mistreatment, but in order to protect the vital intelligence relationship with America"¹⁰¹.

The ramifications of the Binyam Mohamed case and the other cases such as *AF (No 3)* continue to play out. The current Foreign Secretary, William Hague, gave a speech at the Foreign Office¹⁰². In the audience were the heads of the three Intelligence and Security Agencies. Although the bulk of the speech was taken up praising the valuable work of the Agencies, the nub of the speech was to commend to the public the Government Green Paper *Justice and Security*. Mr Hague described the Green Paper in these terms, "At its heart are proposals to ensure that cases involving national security information can be heard fairly, fully and safely in our courts, and that we protect British interests by preventing the disclosure of genuinely sensitive material. This includes intelligence information shared with Britain by intelligence partners overseas". Clearly what is driving the 'reform' process is the implications of the *AF (No 3)* ruling that procedural fairness requires the applicant to be given the gist of the case against him in security related cases where the evidence is heard partly in secret and where the special advocate has limited or no means to communicate with the detainee or controlee. The Green Paper outlines broad proposals and invites comments from the public. Posed as a 'Question' the Green Paper states, "If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the 'AF (No 3)' 'gisting' requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out

(101) Quoted in A. TOMKINS, cited in note 97 above, at page 23.

(102) W. HAGUE, *Securing our Future: The Role of Secret Intelligence in Foreign Policy*, Whitehall, London, 16th November 2011.

in AF (No 3) does not apply?”¹⁰³. The Government wishes to extend to all civil proceedings, where a security matter arises, a Closed Material Procedure (CMP)¹⁰⁴. This technique was introduced originally in 1997 in the Special Immigration Appeals Commission Act 1997 and applied to deportation cases which had a security related element¹⁰⁵. In essence the Closed Material Procedure means that the secret material in the hearing is not revealed to the applicant but revealed to the court and the special advocate appointed by the Attorney-General¹⁰⁶. In contrast to the Foreign Secretary’s characterisation of these proposals as fair, the organisation *Liberty* said of the proposals, “The Green Paper’s proposals would allow a Government to defend accusations of complicity in torture without revealing information which may be crucial to a fair hearing for the victim and to the public interest in media scrutiny of alleged abuses of power”¹⁰⁷.

11. Conclusion

In the last ten years government responses to terrorist threats run the risk of creating a permanent security state in which liberty is gradually eroded and the norms of justice undermined. The scheme for indefinite detention without trial was just such a departure from the norms of justice. Extending the Closed Material Procedure to all civil proceedings would enshrine this transformation. I agree with those who argue that the danger with exceptional temporary measures is that they soon cease to be either temporary or exceptional much to the detriment of the political and legal culture of a society.

Those who attack the record of the Courts as inadequate have, I believe, misjudged the substantial contribution they have made to uphold the rule of law. By contrast, successive governments have im-

(103) *Justice and Security, Cm 8194* (London: HMSO October 2011) at 2.46, page 28.

(104) *Ibid.*, 2.3, page 21.

(105) *Ibid.*, 1.27, page 10.

(106) *Ibid.*, 1.28, page 10.

(107) *Liberty warns against “secret justice” in civil cases against the Government. Liberty Press Release*, London, 19th October 2011.

plied, and their legal representatives have stated, that the courts owe to the executive due deference. If due deference is owed anywhere it is owed by the executive to the courts. Lord Hoffman summed up perfectly the risk of over responding to terrorist threats by way of exceptional legal measures, the real threat came, “not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory”¹⁰⁸.

(108) See note 50 above.