Meeting the challenge of terrorism: The experience of English and other courts

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This article deals with the legal issues that arise from terrorism in relation to counter-terrorist legislation across the world by examining major developments in the jurisprudence, including examples from, the European Court of Human Rights, the United Kingdom, the United States, South Africa, India, Canada and Australia. Through these cases, the path from deportation to detention, to torture, control orders and finally, special trial procedures is examined. The article considers how the law must adapt to the new challenges it now faces; how courts, while being the guardians of individual rights, have to also take into account the seriousness of the terrorist threat. The article then draws some conclusions regarding lessons for the future, questioning whether the incomplete security which counter-terrorist measures provide, justifies their effect on the liberty of the individual and of the need to hold on to the fundamental values of a plural, democratic society, subject to the rule of law, in order to defeat terrorism.

INTRODUCTION

It is an honour to be giving this the fourth lecture in memory of the late Justice John Lehane, Justice of the Federal Court of Australia and co-author of the first three editions of that great work, Meagher, Gummow and Lehane on *Equitable Doctrines and Remedies*. It is also a pleasure to see Dr Rosalind Lehane and Felicity Lehane here this evening. I did not myself have the privilege of meeting Justice Lehane, but I have read the glowing tribute paid to him by Justice Dyson Heydon of his rock-like integrity and scholarship and commitment to the public service, how he was one of the ablest judges in this country, how his judgments revealed his serene, impassive and cool intelligence and how he was a man of tolerance and goodwill. He would have been well equipped to analyse the legal issues now arising from terrorism. It is those issues that I propose to address in this Memorial Lecture.

SCHEME OF THE LECTURE

I first came to Australia in April 2003 and during my visit I gave a lecture on terrorism and human rights. The circumstances were very different. 9/11 has been followed by stringent counter-terrorist legislation across the world, including Australia. In October 2001, the United States and its allies had entered Afghanistan to prevent the Taliban regime from supporting terrorists. The appalling bombing incident in Bali, in which 202 people lost their lives, had by then occurred. The United Kingdom legislation for the executive detention of suspected terrorists had just begun its way up the English courts and the United States courts were starting to engage with the problems of Guantanamo Bay. The invasion of Iraq had started (on 23 March 2003). But things have moved on. In March 2004, some 173 people were killed in terrorist bomb attacks in Madrid. In September 2004, nine people were killed when a bomb exploded outside the Australian Embassy in Jakarta. In July 2005, 52 people were killed in suicide bombs on the London Underground, followed two weeks later by the Stockwell killing in which a person was fatally wounded by the police on the Tube because it was thought that he was a suicide bomber. In July 2006, 207 people were killed in bombs by bombs left on trains in Mumbai. There have been many other incidents and in all these incidents many people have also suffered serious injury.

In addition, the British and the Australian Parliaments have both been busy enacting new anti-terrorist laws. There are political and other developments day in and day out. There are many

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ways of tackling the problem of terrorism. For example, one way of tackling it, and I suggest the best way there is at the moment, is by improving our intelligence capability so that the authorities can stop terrorist plots before they are executed. Another way is to control terrorist funding by imposing strict controls on the movement of large sums of money. A further way is to impose strict immigration control so that suspected terrorists with no right of entry are denied entry. People can of course seek to hide their identity at ports of entry but the techniques to prevent this are improving through use of biometric information and information as to the vital measurements of a person's face. But it will also be necessary to use other more obvious measures such as imposing restraints on the use of information, creating new offences for activities associated with terrorism, and detaining or deporting persons suspected of connections with terrorism and bringing them to trial. I will call these "law and order measures" to distinguish them from intelligence and hi-tech measures such as the interception of communications.

It is inevitable that governments will wish to control terrorism through law and order measures of this kind. It is the duty of governments to take reasonable steps to keep persons within their control secure from threats to life. The European Court of Human Rights, which I will call the Strasbourg court, has indeed held that the right to life means that for a government not to take such action could result in a violation of the right to life conferred by the European Convention on Human Rights.[1] I refer below to the *European Convention on Human Rights* as "the Convention".

My basic thesis is that the courts cannot respond to the situation posed by terrorism in a totally inflexible way. They are the guardians of individual rights, but at the same time they have to take account of the seriousness of the terrorist threat. I will seek to draw an analogy with an expansion joint. Since we are here in Sydney, I invite you to bring to mind the expansion joint in the Sydney Harbour Bridge. There has to be an expansion capability so that the structure can endure changes of temperature. The bridge has to be able to expand and contract in line with those changes. So it is with the law and threats such as the threat of terrorism. As I will endeavour to show you, there are ways in which the law must adapt to the new challenges that it now faces. I will return to the analogy of the Sydney Harbour Bridge in due course.

The legal issues raised by law and order measures are extensive, and they would take far more than one hour to explain. When I started to prepare this lecture, I had a choice as to whether to present my material chronologically, or by topic, or by country or region. In the end my choice was not to confine myself to any particular topic or type of terrorist measure, but to choose pairs or groups of cases that would serve two purposes. Those two purposes are as follows. The first purpose is to convey information about some of the major developments in the jurisprudence in this field. The second purpose is to use the material to draw conclusions about lessons for the future. So, once I have outlined the cases in question, I will seek to draw some conclusions and to conclude with some ideas for further consideration and discussion.

The cases I have chosen concern a number of different legal topics within terrorism. They are not confined to any single legal system. The comparison of cases from different jurisdictions needs to be done with caution. Different legal systems are likely to have different rules and benchmarks for the validity or constitutionality of rules. Additionally, each legal system lives within a particular social and political context and thus the driving factors behind the jurisprudence of the courts will vary. But I am concerned not with the first tier question that arises in any case of establishing precisely what is the rule the court has to apply but with the second tier questions that arise in any legal system simply because rules are rarely perfectly clear or complete in themselves. For example, under certain rights guaranteed by the Convention, an English court may have to assess the compatibility of a measure by reference to what is "necessary in a democratic society".[2] Those words "necessary in a democratic society" have a dynamic content that requires them to be constantly updated. Thus the court that has to apply those terms at any particular point in time is likely to have to make a value judgment as to what

[1] *Osman v United Kingdom* [1999] Crim LR 82.

[2] See eg *European Convention on Human Rights*, Arts 8 (right to respect for private and family life), 10 (freedom of expression).

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they should entail. It is those value judgments that I seek to compare and contrast. What this comparison shows is that here is considerable common ground in the common law world. This in itself is a potential source of strength for decision-making in this sphere.

THE CONVENTION AND THE HUMAN RIGHTS ACT 1998

It may be helpful at this point to summarise the position in English law regarding the Convention and the United Kingdom's *Human Rights Act 1998*. It is well known that the United Kingdom has neither a codified constitution nor its own indigenous Bill of Rights. The domestic courts of the United Kingdom are, however, empowered to give protection to the rights guaranteed by the Convention. This was drafted after the experiences of the Second World War and British lawyers played an important role in its drafting.

The Convention is an international treaty to which the states who are members of the Council of Europe are parties. There are at present 46 such states from stretching from Ireland in the West to Russia in the East. The principal rights are the rights to life, freedom from torture, liberty, fair trial, freedom to manifest one's religion and freedom of expression.[3] There is a provision that enables a member state to derogate from the right to liberty and certain other rights if there is a "war or other public emergency threatening the life of the nation".[4]

The United Kingdom courts could not enforce the rights guaranteed by the Convention without domestic legislation implementing the Convention. In the case of England and Wales, this was the *Human Rights Act 1998*, which was commenced on 2 October 2000. In essence, it provides is as follows. By s 2, the courts "must take into account" of Strasbourg jurisprudence when deciding questions in connection with Convention rights. Section 3 is then directed to the interpretation of legislation. It requires an English court so far as possible to interpret legislation (whenever enacted) so that it is in conformity with Convention rights. But this does not empower the court to rewrite legislation or interpret it in a manner which is inconsistent with a fundamental feature of the legislation.[5] Nor does it empower the court to strike down primary legislation, ie legislation enacted by Parliament as opposed to secondary legislation made under powers conferred by Parliament. If the court cannot interpret primary legislation so that it conforms to the Convention, it can (if it is one of the higher courts) make a declaration of incompatibility (s 4). There are two consequences of this. First, in the case before it, the court must apply the legislation as it stands (and it will not be able to give effect to the Convention). Second, the government may use a streamlined procedure to introduce an amendment to make the legislation conform to the Convention (s 10). In this way, parliamentary sovereignty is preserved.

Section 6 of the *Human Rights Act 1998* provides that it is unlawful for public authorities to act in a manner that is incompatible with Convention rights. So, if a Department of State wishes to exercise a discretionary power, it must do so in conformity with the Convention. The Act does not define "public authority". However s 6 states that the court is a public authority. It too has a duty not to act incompatibly with Convention. However, parliamentary sovereignty is preserved because the new duty does not apply to an act if the public authority could not have acted differently because of primary legislation (s 6(2)(a)).

Section 19 is also important because it provides that, when a government bill is introduced into Parliament, the relevant government minister must make a statement as to whether the bill complies with the Convention. This makes it difficult in practice for the government to introduce legislation that does not comply with the Convention.

The Convention provides in Art 6 for the establishment of the Strasbourg court to ensure the observance of the Convention. It thus has the power to give authoritative rulings on the interpretation of the Convention.

[3] *European Convention on Human Rights*, Arts 2, 3, 5, 6, 9, 10.

[4] *European Convention on Human Rights*, Art 15.

[5] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

With that digression, I now return to the main theme of this lecture. The roadmap that I will be taking through those cases is from deportation to detention, then to torture, control orders[6] and special trial procedures.

DEPORTATION: CHAHAL AND MOHAMED

I will deal with these first two cases briefly. They are important because they establish a principle that has influenced the development of the law in this field. The first is the decision of the Strasbourg court in *Chahal v United Kingdom* (1997) 23 EHRR 413. In this case the British government wished to deport a Mr Chahal to India on the grounds that his continued presence in the United Kingdom was not conducive to the public good, including the fight against terrorism. Mr Chahal was a well-known Sikh separatist. He, however, claimed that on his return he would suffer inhuman and degrading treatment, contrary to Art 3 of the *European Convention on Human Rights*, at the hands of the Indian police. The British government contended that, although generally a deportation which resulted in the a violation of the deportee's rights under Art 3 on his return would normally violate the Convention, this did not apply where the activities of the deportee were considered to be damaging to national security or, alternatively, this damage was certainly a matter the court could take into account in deciding what course to take. The Strasbourg court rejected these arguments and stressed the importance of Art 3. It held that the activities of the individual in question could not excuse a violation of Art 3. The effect of this decision is that, in the absence of satisfactory assurances from the receiving state, even a dangerous terrorist could not be deported. This principle is often referred to as the *Soering* principle.[7]

The Constitutional Court of South Africa came to a similar conclusion in *Mohamed v President of South Africa* 2001 (3) SA 837. I would like to summarise this case because it helps to demonstrate the near universality[8] of the philosophical position taken in the *Chahal case*. The *Mohamed case* also concerned an alleged terrorist, in this case a Tanzanian who was alleged to have conspired to bring about the bombing of the United States embassies in Dar-es-Salaam and Nairobi in 1998. These were particularly serious acts of terrorism. Over 220 people were killed in these incidents and over 4,500 persons were injured. Mr Mohamed moved to South Africa and applied for asylum under an assumed name. In the meantime a grand jury in New York had concluded that the attacks were the work of Al-Qaeda. Mr Mohamed was spirited out of South Africa and put on trial in New York for an offence which, upon conviction, could lead to the death penalty. It was held that this was a violation of Mr Mohamed's constitutional rights. The South African Constitution protects the right to life. The court referred to a number of cases, including *Chahal*, and held that it was a breach of Mr Mohamed's constitutional rights for the South African authorities to hand him over to the American authorities without obtaining an assurance that the death penalty would not be exacted.

It is the *Soering* principle which led the British government to introduce legislation for the executive detention of foreign terrorist suspects. In the next part of this lecture, I will examine a major decision on that legislation.

DETENTION: THE A CASE, THE GILLAN CASE AND GUANTANAMO BAY

After 9/11, Parliament passed the *Anti-terrorism, Crime and Security Act 2001* (UK) (the 2001 Act). This was a substantial piece of legislation. The most controversial part of the 2001 Act, however, was Pt 4 under which the Home Secretary was given authority to issue against an alien a certificate of the Home Secretary's reasonable belief that the individual's presence in the United Kingdom constitutes a threat to national security and that the person was accordingly a suspected terrorist. Such a person

[6] Control orders are discussed below. They constitute orders which restrict the movements of a terrorist suspect but do not involve full-time detention.

[7] After the decision in *Soering v United Kingdom* [1989] 11 EHRR 439, where this principle was first applied. In the *Soering case*, however, it was not alleged that the deportee was a terrorist.

[8] The Supreme Court of Canada has, however, left open the question whether in exceptional circumstances an individual might be deported to a receiving state where he might be tortured or subject to inhuman or degrading treatment: *Suresh v Canada* [2002] 1 SCR 3.

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might then be detained and deported. However, if the *Soering* principle applied, so that the alien could not be deported without risk of torture or death in the country to which he was to be returned, the 2001 Act enabled the Secretary of State to detain him indefinitely. Significantly, the alien did not have to be brought to trial in that period. This made it necessary for the United Kingdom government to enter a derogation under Art 15 of the Convention. The United Kingdom was the only signatory to the Convention to do this. The derogation was from Art 5(1)(f), which permits detention with a view to deportation but not indefinite detention if deportation is not possible.

The 2001 Act conferred rights of appeal in lieu of the right to apply for habeas corpus. The Secretary of State's certificate was subject to an appeal to the Special Immigration Appeals Commission (SIAC). This tribunal has three members at least one of whom must be a judge who holds or has held high judicial office and at least one of whom must be an immigration judge. It sits without a jury.

SIAC had power to cancel the certificate if it considered that it should not have been issued. The issue then for SIAC was whether there were reasonable grounds for the Home Secretary's belief or suspicion, and SIAC had to reach an objective judgment on this question against all the circumstances in which the judgment was to be made. SIAC also had jurisdiction to determine whether the derogation satisfied the conditions of Art 15 of the Convention. There was an "open" element in the proceedings before SIAC, which considered the information that the Home Secretary is prepared to disclose to the detainee. There was also a "closed" element to these proceedings, in which SIAC examined material that the Home Secretary was not prepared to make public. In this part of the process a special advocate represented the detainee. Once a special advocate has received the closed material he may no longer communicate with the detainee or his legal representatives. The detainee could further appeal, but on a point of law only, to the Court of Appeal. If he was unsuccessful in the Court of Appeal he could appeal again, with permission, to the House of Lords.

SIAC had to review the certificate at regular intervals. SIAC could grant bail, where appropriate, subject to conditions. If a detainee agreed to leave the United Kingdom, his detention came to an end. The 2001 Act provides for a derogation from Convention rights under Art 15 of the Convention to be challenged before SIAC.

I have now set the scene for the decision of the House of Lords in the *A v Secretary of State for the Home Department* [2005] 2 AC 68 (sometimes called the *Belmarsh case* after the prison where the detainees were held). This is a landmark decision for many reasons. It is also an unusual decision in that it is a decision of nine members of the House, which normally sits in constitutions of five.[9] By its decision, the House of Lords, in exercise of its powers conferred by the *Human Rights Act 1998*, quashed the *Human Rights (Designated Derogation) Order 2001*, and made a declaration that s 23 of the *Anti-terrorism Crime and Security Act 2001* (providing for detention without trial) was incompatible with Arts 5 and 14[10] of the Convention. In so doing, the House of Lords restored the order of SIAC, which had been set aside by the Court of Appeal. It must be one of the first times that the courts of the United Kingdom have dealt such a body blow to legislation enacted by Parliament to confer powers on the Executive to meet a threat to national security. The decision shows the measure of the change made by the *Human Rights Act 1998*.

The decision is a lengthy one. It extends to some 100 pages. The lead judgment is that of Lord Bingham, but each of the other members of the House, other than Lord Carswell, also provides reasons for their decision. It is impossible to do justice to all the reasoning and learning in any summary of them. I have given a lecture devoted to this case, now published in the *Law Quarterly Review*,[11] in which more detailed comments can be found.

It was of course accepted by the government that provisions of Pt 4 of the 2001 Act were incompatible with Art 5 of the Convention as the government had entered a derogation pursuant to

[9] According to *The Economist* (18 December 2004), this is only the second time that it has sat with a constitution of nine since the Second World War.

[10] This prohibits discrimination, on any ground, in the enjoyment of Convention rights.

[11] Arden M, "Human Rights in the Age of Terrorism" (2005) 121 LQR 604.

Art 15 of the Convention. I will now read the relevant part of that article:

> 15 (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that the measures are not inconsistent with its other obligations under international law.

The threshold question in the *A case* was whether a state of emergency had arisen entitling the United Kingdom to derogate from the articles specified above. The House of Lords (by a majority of 8:1,[12] but Lord Scott of Foscote dubitante[13]) rejected the appellants' arguments on this point. In essence, the question had been one for SIAC. SIAC had heard evidence that had not been disclosed to the House of Lords and there was no misdirection by SIAC and therefore no error of law. In one of its earliest decisions on this issue, the Strasbourg court had accepted that Ireland could derogate from the Convention even though it was not shown that a widespread loss of life or an attack on the territorial integrity of the state was involved.

Moreover, the House was prepared to attach great weight to the judgment of the Secretary of State and Parliament to the issue whether there was a public emergency threatening the life of the nation. In the words of Lord Bingham (at [29]):

> It is perhaps preferable to approach [the question of the deference owed by the courts to the political authorities] as one of demarcation of functions or what Liberty in its written case called "relative institutional competence". The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum.

Lord Nicholls was more emphatic than Lord Bingham in his rejection of the appellants' arguments on the validity of the derogation. He held that (at [79]):

> All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.

Both Lord Scott and Lord Hoffmann made reference to the shortcomings of intelligence in relation to Iraq and weapons of mass destruction. They took the view that, even though courts are not able to second-guess intelligence, they are able to have a substantial amount of scepticism about it.

On the derogation issue, the lone dissenting voice was that of Lord Hoffmann. He held that, although he was prepared to accept that there was credible evidence that terrorist outrages were planned against the United Kingdom, there was no emergency threatening the life of the nation for the purposes of Art 15. He wrote (at [96]):

> Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

He further held (at [97]):

> 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.

There has been considerable protest from politicians over this passage. In my article in the *Law Quarterly Review*, I respectfully expressed doubts as to whether this was an expression of a legal judgment as opposed to one of political science. A journalist in the *Observer* newspaper recently wrote that "The slyness of the sentiment infuriated [many politicians and civil servants]" and that

[12] The dissenting judgment was that of Lord Walker, who usefully summarises his views in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [209].

[13] *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [154].

Lord Hoffmann had "allowed no room for argument about the balance between liberty and security".[14] I am not convinced that this is a fair criticism since there was no balancing exercise of that kind to be performed in the *A case*. I would say that Lord Hoffmann's observations have to be understood as those of a person who was brought up in South Africa at the time of the apartheid when the regime used anti-terrorist legislation as a means of stifling opposition. That is, however, again with great respect, a very different situation from that in which the United Kingdom finds itself.

The second issue in the *A case* was whether the provisions of the 2001 Act relating to detention violated Convention rights only "to the extent strictly required by the exigencies of the situation" for the purposes of Art 15. Here the argument focused on the fact that the powers of detention related only to foreign nationals who could not be deported. It could not be said that foreign nationals were the only threat; if they were a threat, they could under the 2001 Act go abroad and carry on their activities from abroad. They could be detained even if the threat which they presented was not as members of Al-Qaeda but of some other organisation altogether which had not been responsible for the state of emergency justifying the derogation. The House of Lords (by a majority of 7-1, Lord Hoffmann not expressing a view on this or the next issue) accepted these arguments: in a word, s 23 was irrational. The fact that the detention could be reviewed by SIAC did not overcome these points. As Lord Scott put it, the Secretary of State

> should at least … have to show that monitoring arrangements or movement restrictions less severe that incarceration in prison would not suffice.[15]

Lord Scott's reference to movement restrictions was taken up by the government after its defeat in the *A case* when the government introduced a bill to enable control orders to be imposed on suspected terrorists. I will explain what the courts have said about that in due course.

In the *A case*, the House of Lords also held (and this was the third issue) that the powers of preventive detention discriminated unjustifiably between non-UK nationals and UK nationals, who could not be detained on suspicion.

What is the significance of the decision of the House of Lords in the *A case*? It is a landmark decision in a favour of liberty and freedom of the individual. It will be cited in the English courts for many years to come. It is also likely to be cited in courts in other countries. The analysis of the legal issues is also very important. On the question whether there was a "public emergency threatening the life of the nation" for the purposes of Art 15 of the Convention, the view of the majority was deferential to that of Parliament largely because the question of the scale of the terrorist threat was one of political judgment in which the courts had a more limited role to play. It should be noted that the appeal was limited to the question was whether SIAC had made an error of law; there was no rehearing of the evidence. The question was not whether the individuals who were being detained[16] presented a threat of the seriousness required by Art 15; their position fell to be examined on the second question before the House. As noted above, Lord Hoffmann dissented. The passages from his speech already quoted have been much criticised. It is, however, possible to point to regimes where legislation about terrorism has been used to maintain a particular regime in power. Lord Hoffmann's observations would have been very relevant if there had been a finding that the government intended to use the powers of detaining individuals for ulterior purposes or if the House had concluded that the government's assessment of the situation was wholly unreasonable. But that was not this case.

The view of the majority on the first question contrasts sharply with its view on the question whether the provisions for detention were "strictly required by the exigencies of the situation" as required by Art 15 of the Convention. Here the House rejected the government's argument. The House was on firmer and more familiar ground on this aspect of the case and the question of proportionality. It could conclude that the power of detention did not prevent any person who was content to return to his own country from doing so and carrying on terrorist activities from there. (To prevent a person

[14] Cohen N, "Save us from the Crackpots who see Zionist Conspiracies in Everything", *The Observer* (13 August 2006).

[15] These criticisms of Pt 4 would make it difficult for the government to seek to meet human rights considerations simply by extending Pt 4 to United Kingdom nationals.

[16] There were 16 individuals in all who were detained.

acting in this way, it would have been necessary to bring criminal proceedings against him and obtain a conviction and a sentence of imprisonment.) Nor did the power of detention prevent United Kingdom nationals from carrying on terrorist activities because they could not be detained under this power.

My view is that the importance of the decision is its bottom line. The House rejected the idea of detention of alien terrorists without trial, notwithstanding the pressure of arguments as to national security. The deprivation of liberty by indefinite detention without trial is such an extreme measure that very special circumstances are needed to justify it. The decision is a powerful statement of the value to be placed on the Convention right to liberty.

I now turn to another case decided in 2006 by the House of Lords, namely *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 WLR 537; [2006] UKHL 12. This decision also arises out of powers conferred by anti-terrorist legislation. The contrast which it provides with the *A case* is what makes it interesting in the context of the present discussion. It shows that the deprivation of freedom does not simply mean placing an individual under lock and key or under a control order. There is a range of different ways in which liberty can be affected by anti-terrorist legislation. The facts of the case also show that the liberty in question may be that of an ordinary citizen and not that of a suspected terrorist. I was a party to the decision of the Court of Appeal in this case.

The facts were simple. The appellants were stopped and searched on their way to watch a peaceful demonstration outside an arm fair under powers contained in the *Terrorism Act 2000* (UK). That Act provides that a chief police constable or an assistant police officer can, if he is satisfied that it is expedient to do so for the prevention of acts of terrorism, issue an authorisation to police officers to stop and search persons without having to have any suspicion of their having committed any offence. The authorisation has to be confirmed by the Home Secretary, but it is not made public. The power of search may only be used for the purpose of searching for articles of a kind that could be used in connection with terrorism. The principal issue before the Court of Appeal was whether the detention involved in a search of this kind was a restriction on liberty that violated the right to liberty in Art 5 of the Convention. If it was it did not fall within the exceptions to Art 5. The Court of Appeal held that there had been no violation of Art 5 in these circumstances. The House of Lords upheld this decision. The *Gillan case* thus recognises the need to have some restrictions on liberty in order to ensure effective policing. By contrast with the *A case*, the invasions of liberty were minor. This shows that the more serious the invasion of a person's right to liberty the stricter will be the scrutiny by the courts.

Another question raised by the *Gillan case* is the difficult question of racial profiling for security purposes. Would it be unlawful discrimination to select a person for search by reference to a profile which included his race or ethnic origin, for example on the basis that, or which included the fact that, he was an Asian or a Muslim? Certainly many Muslims have expressed the view that the police when exercising anti-terrorist legislation unfairly target them. Discrimination on the grounds of race, colour, ethnic origin or nationality is made unlawful by the *Race Discrimination Act 1976* (UK) (the 1976 Act).

In the *Gillan case*, it was argued that the statutory power of search was unlawful in that there were insufficient safeguards to prevent it from being abused or exercised arbitrarily. The appellants submitted that the power would fail this test because, although there was a code of practice for the police that advised the police that the powers should not be used in a way that discriminated against minority groups, there was nothing to prevent persons being selected for search on the ground of their ethnic or racial origin. Therefore, on the appellants' submission, the police could only lawfully stop everyone, or (say) every fifth person because there would be no discrimination in that event. Neither Lord Bingham nor Lord Walker dealt with the point, which did not arise on the facts.

The other members of the House, Lord Hope, Lord Scott and Lord Brown, dealt with the point obiter and rejected it. In short they indicated that in principle racial profiling for security purposes did not constitute unlawful race discrimination provided that race was only one ingredient in the objectively justifiable selection of a person for searching.

In particular, Lord Brown observed that that result would make random searches impractical or futile. He noted that there was value in an intuitive stop. He also held that it was not unlawful

discrimination to take a person's ethnic background into account in deciding whether to exercise these powers, provided that the reason for stopping the person was a reason connected with the perceived terrorist threat and not on grounds of racial discrimination and that the power was used sensitively. On the contrary it would not be lawful to use the power against persons who were perceived to present no terrorist threat. Lord Brown distinguished an earlier case (the *Roma Rights case*)[17] in which the House held that it was unlawful to treat asylum applications by a particular ethnic group, the Roma, routinely with more suspicion. In that case, the Roma applicants had been treated stereotypically rather than as individuals. In the case of the search of an Asian or Muslim, those characteristics were, so long as Al-Qaeda were perceived as a terrorist threat, part of a profile of a person who might have connections with a terrorist organisation.

The speech of Lord Hope is also of great interest. Lord Hope considered the issue in two stages. First, he posed the question: how in practice is discriminatory use to be prevented given the nature of terrorist threats it is designed for? Second, he asked: how did the fact that it is likely to be difficult to detect whether the use of the power was discriminatory square with the principle of legal certainty? As to the first question, the nature of the terrorist threat was bound to pay a large part in the selection process. Discrimination on racial grounds is unlawful even if the assumptions on which it is based turn out to be justified.[18] Therefore, the police could not rely on person's Asian origin alone. There had to be something more than this. This was likely to be the case. As to the second question, Lord Hope said that in view of the fact that the legal framework and code of practice were published there was sufficient compliance with the requirement for accessibility even if the authorisations themselves were not published. Lord Scott agreed with Lord Brown.[19]

As the question of racial profiling only arose obiter, the House did not consider in detail what the limits of legitimate lawful discrimination would be or whether any safeguards were required to meet possible abuse or racial profiling for other purposes. Lord Hope's speech suggests that some caution is necessary[20] though passages in Lord Brown's speech[21] can be read as suggesting that ethnic origin could be a dominant reason for deciding to search a particular individual. No defence of justification would be available because that defence only arises under the 1976 Act if the discrimination is indirect, rather than (as here) direct.

Racial profiling by the police as a basis for exercising their counter-terrorist powers is clearly capable of leading to the inappropriate exercise of those powers, such as the exercise of those powers on the sole or predominant basis of stereotypical assumptions about a person's race and ethnic origins. The assumption that a terrorist would be a Muslim from an Arab country would be such an assumption as it is now well known that recent terrorist incidents connected with Al-Qaeda have involved persons of different nationality or racial origin. Furthermore, not all terrorists are Muslims. The identification of persons on the basis of assumptions of this kind is also open to operational objection for the same reason: it will not be adequate to catch all persons who are in fact terrorists. Moreover the profile of terrorists has changed over time.[22]

In all the circumstances, it would seem more prudent to concentrate on other approaches to fighting terrorism generally, such as better intelligence, more effective security measures, and investigation, or, in relation to the exercise of the powers of search, on the behaviour of persons against whom the powers should be exercised, rather than their racial or ethnic origin.

Over the years there have been worrying allegations of improper racial profiling by the police in other fields such as drugs and traffic offences. In the particular context of terrorism, racial profiling is

[17] *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)* [2005] 2 AC 1.

[18] *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12 at [44]; [2006] 2 WLR 537.

[19] Lord Scott also added that even if the search required some degree of stereotyping this was validated by ss 41-42 of the *Race Relations Act 1976* (UK), as amended.

[20] *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12 at [47]; [2006] 2 WLR 537.

[21] *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12 at [92]; [2006] 2 WLR 537.

[22] For instance, it now includes women and teenagers.

productive of mistrust by Muslims in the fairness of the police and thus may lead to a lack of co-operation from that part of the community with respect to the provision of information about potential terrorists. In those circumstances, there must be a case for more detailed guidance for the police than at present,[23] and also a case for having a legislative framework. This would enable a central record to be kept of the exercise of counter-terrorist powers on grounds that include racial profiling, and for monitoring their use. Inappropriate racial profiling is likely[24] to involve unlawful racial discrimination. In addition, it can lead to damage to the individual concerned and to harm to community. For all these reasons, it must be taken most seriously.

Guantanamo Bay

No discussion of detention in the context of terrorism would be complete without some reference to the position of the detainees held at Guantanamo Bay. The history of this matter is well known. Following 9/11, the United States and its allies took military action against Al-Qaeda installations and the Taliban regime in Afghanistan. In the course of this exercise, the United States took a number of suspected terrorists prisoner. Some of them were transferred to the United States naval base at Guantanamo Bay, Cuba. This is not part of the sovereign territory of the United States, but is leased to it by Cuba. Relatives of the Guantanamo Bay detainees have sought to establish in the American courts that the detainees are entitled to be tried in American courts. According to the media, there are some 480 prisoners in Guantanamo Bay who have been held there without trial for more than four years.

On 28 June 2004, the United States Supreme Court handed down its historic decisions in a number of cases concerning detainees held at Guantanamo Bay. In one of these, *Rasul v Bush* 124 S Ct 2686 (2004), the Supreme Court held by a majority that in order to challenge their detention the detainee, who was not an American citizen, did not have to be present in a federal district of the United States. It was sufficient that the United States had complete jurisdiction and control over the Guantanamo Bay base. The detainees were not therefore in a "legal black hole" as it has been described.[25] A detainee who was an American citizen was entitled to have his status determined by an American court wherever he was apprehended.[26]

It is of course very welcome that the United States Supreme Court has held that the detainees in Guantanamo Bay have the right to have their status judicially determined. A decision to the contrary would certainly have been at variance with the principles of habeas corpus as established in England.[27] The jurisdiction to grant habeas corpus is not territorial only and thus it would not be an answer to an application for relief by way of habeas corpus that the United Kingdom authorities holding a person in custody did not have sovereignty over the place where he was held. Furthermore, as a matter of principle, there must be a right for a detainee to assert in an appropriate tribunal or court of law: "You have got the wrong person" and to have a court determine whether the detention is lawful. Even in wartime, or in times when national security is threatened, the Executive can make mistakes.

The United States Supreme Court did not, however, decide in *Rasul v Bush* whether a military tribunal was an appropriate tribunal to determine the status of a detainee at Guantanamo Bay, or what a detainee must show in order to obtain his release. The Supreme Court handed down a further decision in June this year in the case of *Hamdan v Rumsfeld* 126 S Ct 2749 (2006). In this case Hamdan, who was detained at Guantanamo Bay, challenged the United States government's decision to try him for criminal conspiracy before a specially convened military commission. The Supreme

[23] The current guidance is set out in *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12; [2006] 2 WLR 537.

[24] Subject to the views of Lord Scott above.

[25] See Lord Steyn, "Guantanamo Bay: The Legal Black Hole" (2004) 52 ICLQ 1; see *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* (2003) UKHRR 76.

[26] *Hamdi v Rumsfeld* 542 US 507 (2004).

[27] See *Ex parte Mwenya* [1960] 1 QB 241.

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Court there held (by a majority) that the President of the United States had no power to cause a detainee to be tried by a military tribunal other than under the laws of war. Moreover if the detainee was detained during a conflict, he was entitled to the protection of the Geneva Conventions whether or not he was supported by a state signatory to the Convention. The majority further held that the Geneva Conventions required Hamdan to be tried before ordinary military courts, not, as was proposed, by military commissions that had different rules of procedure and evidence for which no special need had been shown.

The *Hamdan* decision is a welcome decision. As a result of this decision, the United States administration has accepted that it should apply the Geneva Conventions to all the Guantanamo Bay detainees. This is a step forward as the United States administration has not previously accepted that all the detainees there were entitled to be treated as prisoners of war. Furthermore, it has had to introduce new legislation about the military commissions used to try detainees at Guantanamo Bay. Under this new legislation,[28] the principles of law and rules of evidence used in courts martial will in general apply, and the detainees will be legally represented if they so wish. Moreover, the new legislation prohibits the use before military commissions of evidence obtained by torture. An enemy combatant has a right of appeal to a further military tribunal and from there he can appeal on a point of law to the federal courts. However, the new legislation appears to provide for the removal of the right of any alien enemy combatant to apply for habeas corpus in the ordinary courts. In addition, the new legislation provides that enemy combatants may not rely on the Geneva Conventions in any civil proceedings brought in the United States courts against the United States or its agents. Moreover, the new legislation states that in some circumstances the President of the United States has authority to interpret the meaning of the Geneva Conventions and their application to the United States. Some of the provisions of this legislation may well be challenged before the United States Supreme Court in due course. Opponents of this legislation have pointed out that any departure from international law in relation to the treatment of detainees at Guantanamo Bay undermines the moral case for military action against terrorists and may put at risk the lives of American soldiers and those of its allies.

The European Union and others continue to press for the closure of Guantanamo Bay. It appears that the United States administration does not consider that this can be done until the detainees can be brought to justice either in the United States or in their home countries. The British government refused to give any assurances to the United States government that it would bring criminal charges against the British subjects held at Guantanamo Bay before their release.[29] In all the circumstances there would appear to be no likelihood that Guantanamo Bay will be closed in the near future and so the legal battles over Guantanamo Bay may continue.

The history of detention at Guantanamo Bay is remarkable for many things. It is remarkable that Guantanamo Bay was ever established just outside the territorial jurisdiction of the United States courts. It is also remarkable how long the issues relating to detainees have taken to reach the United States Supreme Court. English courts treat matters concerning the liberty of a person as urgent and often give them priority over other cases. It is also remarkable that the detainees were not treated as prisoners of war for the purposes of the Geneva Conventions.

The fate of the detainees at Guantanamo Bay is a cause of considerable concern across the world for the message it sends about the justice in the United States. The Attorney-General for England and Wales, Lord Goldsmith, has recently referred to the position as "unacceptable" and as "a symbol to many – right or wrong – of injustice".[30] If the detainees are indeed terrorists who have committed crimes, it should be possible for the American authorities to adduce sufficient evidence to determine

[28] *Military Commissions Act 2006* (US), s 3930. This Act was passed in September 2006 after this lecture was given in Sydney, and thus the written text of the lecture has been amended to reflect this fact.

[29] It has been said that David Hicks, the Australian citizen held there, has also not committed any offence under Australian law.

[30] Lord Goldsmith, Attorney-General for England and Wales, Speech to a conference on International Homeland Security & Resilience (Royal United Services Institute, London, 10 May 2006). In his Magna Carta lecture given in Sydney on 13 September 2006, the Lord Chancellor, Lord Falconer, referred to the action of the United States in seeking to put terrorist suspects beyond the reach of the law in Guantanamo Bay as a "shocking affront to the principles of democracy".

their status and to bring criminal charges against them. If they are not persons whom the American authorities are entitled to detain, they should be released as soon as possible.

TORTURE: PUBLIC COMMITTEE AND A V SSHD (NO 2)

Under this heading I wish to compare two cases dealing with torture. The use of torture is the subject of an absolute ban under the Convention and international law. I want to explain why this is so. Evidence obtained by torture is often unreliable but in addition it is contrary to the laws of civilised nations to allow torture. Torture involves an attack on the integrity of an individual who is defenceless at that point in time and who at that moment poses no threat. It is liable to lead to yet more inhumanity of man to man. The common law of England has always prohibited it.

In a well-known case, *Public Committee against Torture in Israel v State of Israel* (sometimes called "the ticking bomb case"),[31] the Israeli Supreme Court of Israel held that it was not open to the General Security Service (GSS) of Israel (the Israeli secret services) to use torture, which in that case involved shaking a suspect or holding him in a painful position for a lengthy period, or to depriving him of sleep. The Israeli Supreme Court said that torture was one of the methods that it was not open to a democracy to use in the fight against terrorism. That court left open the "ticking bomb" paradigm where a person (who might be a child, or a person not responsible for creating the danger) has information about a bomb which is ticking and will kill many innocent people. In such a situation, the Israeli Supreme Court ruled that the GSS might have a defence of necessity if it used unlawful coercive interrogation methods. However, the situation which the Israeli Supreme Court left open has never, so far as I am aware, had to be considered by a court. It is, I suggest, likely to be a very remote case and the use of force even in that situation would probably be illegal under international law. The Israeli Supreme Court further held that it was for the Knesset to decide whether special legislation was required with regard to interrogation methods of the GSS, subject to the provisions of the Basic Law: Human Dignity and Liberty.

In the course of his judgment, President Barak uttered the words that are often quoted:

> We conclude this judgment by revisiting the harsh reality in which Israel finds itself … We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are always open to it. Sometimes democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

Under the Convention, torture is absolutely prohibited in any circumstance, as is inhuman or degrading treatment or punishment, so that the issue that arose in the Israeli case could not arise in the United Kingdom. However in recent years, some people (not, I think, in Europe) have put forward the idea that torture might be made lawful if it was conducted under a judicial warrant in times of emergency. One of the proponents of this idea is Professor Alan Derschowitz, a leading American lawyer. Such a system would require fine judgments to be made as to the seriousness of the emergency and the measure of force. More importantly, it would be the beginning of a slippery slope. Once torture is used it would become difficult to control. In fact the *Detainee Treatment Act 2005* (US) of the United States now provides that no individual in the custody, or under the control, of the United States government can be subjected to cruel, inhuman or degrading treatment.[32] This prohibition can, however, under the *Detainee Treatment Act 2005* be repealed by later legislation but the amending legislation must specifically refer to the *Detainee Treatment Act 2005*.

Not all states observe the ban on torture. There has been considerable concern throughout the world at the interrogation techniques authorised by the United States government and reputed to be

[31] *Public Committee against Torture in Israel v State of Israel*, Applications HC 5100/94, HC 4054/95, HC 6536/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99.

[32] Cruel, inhuman or degrading treatment is defined as such treatment as defined in certain amendments to the United States *Constitution*, as defined in the United States' reservations, declarations and understandings in relation to the Torture Convention.

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used by a number of other governments. The use of torture by other countries is important to the United Kingdom because many countries now share intelligence and there is accordingly a possibility that the Executive in the United Kingdom is making decisions, for example, as to whether a person should be subjected to a control order, on the basis of evidence obtained by a foreign state as a result of the use of coercion against other persons in its control. Thus the context in which torture has been the subject of litigation in England is entirely different from that in which it arose in Israel.

In the next case I wish to mention, *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575, the question arose whether, when determining the legality of a certificate given by the Secretary of State that a person was a suspected terrorist and could therefore be detained, SIAC could rely on evidence which the appellant suspected had been obtained from overseas governments who had obtained it by torture of other persons.

The House held that, while the Executive would not act unlawfully if in its decision-making it took account of evidence provided by foreign states which was liable to have been obtained by them by the use of torture, evidence obtained by torture was inadmissible in a court of law. Lord Bingham pointed out that the common law had regarded torture and its fruits with abhorrence for over 500 years (at [51]). In addition, Art 15 of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (Torture Convention), although not expressly implemented in English law, prohibited the use of evidence obtained by torture in legal proceedings. The House of Lords accepted that two strong reasons for the prohibition on the use of evidence obtained by torture to be found in Art 15 of the Torture Convention were that evidence obtained by torture was likely to be unreliable and that such a prohibition served to discourage its use.[33] In addition, the House held that the admission of evidence obtained by torture was inconsistent with integrity of the proceedings.[34]

However, different views were expressed about what the suspect had to demonstrate before the evidence was rendered in admissible. The majority held that the appropriate test of whether the evidence should be admitted and taken into account was for SIAC to ask itself whether it was established, by means of such diligent inquiries into the sources as it was practical to carry out, and on a balance of probabilities, that the information relied on by the Secretary of State had been obtained by torture. The majority held that that was the approach that Art 15 of the Torture Convention[35] took and that that approach was the best guide to what was practical. If it were established, by that appropriate test, that the information was obtained under torture, that information had to be left out of account in the overall assessment of the question whether the Home Secretary had reasonable grounds for a belief or suspicion of the kind necessary for the purposes of issuing a certificate which could lead to restrictions on the liberty of a suspected terrorist.

The minority took a different view. They considered that once the suspect adduced plausible grounds for believing that the evidence had been, or may have been, obtained by torture, the evidence had to be left out of account unless it was established that there was no real risk that it was obtained by torture. The minority took the view that it would in practice be very difficult to show that evidence met the test laid down by the majority.

Neither case discusses the level at which a coercive interrogation technique would constitute torture. Under the Convention, such questions are unlikely to arise since both torture and inhuman and degrading treatment are prohibited. Press reports would suggest that a narrower view has at least in the past been taken in the United States[36] of what constitutes torture from that under the Convention and

[33] *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575 at [39] (Lord Bingham).

[34] *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575 at [39] (Lord Bingham), [91] (Lord Hoffmann).

[35] *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art 15 provides: "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."

[36] See eg Editorial, "The Vote on Mr Gonzales", *Washington Post* (16 January 2005): "Mr Gonzales made a second bad judgment about the Geneva Conventions: that their restrictions on interrogations were 'obsolete'. Quite apart from the question

one day it may be necessary for some definition to be found. What is noticeable in the cases referred to here is the similarity of approach between the Supreme Court of Israel and the House of Lords in their outright rejection of torture.

CONTROL ORDERS: MB AND JJ

As I have explained, the United Kingdom government lost the *A case* on executive detention. It was far from clear what the government would do next. Under the *Human Rights Act 1998* (UK), Parliament was not bound to amend the legislation. However, since the decision in the *A case*, Parliament has in fact repealed the legislation held to be incompatible with the Convention and enacted a new law providing for control orders to be made restricting the freedom of terrorist suspects.[37]

When the *Prevention of Terrorism Act 2005* (UK) was being debated in Parliament, concern was expressed about judges becoming involved in what was really an executive activity: this could affect their independence and breach the principle of the separation of powers. For this and other reasons, control orders are very controversial. There is still no requirement in law to charge a person subject to a control order or to bring him to trial. In June 2005, Alvaro Gil-Robles, the Human Rights Commissioner for the Council of Europe, criticised the *Prevention of Terrorism Act* on the basis that control orders were intended to "substitute the ordinary criminal justice system with a system run by the executive". Moreover he recommended that control orders should only be made for an aggregate period of 12 months, after which the suspect would be released unless charged with a criminal offence. So far as I am aware, the government did not accept these criticisms. Indeed the primary usefulness of such orders must surely be to place restrictions on an individual before he commits an offence with which he can be charged in order to prevent the commission of acts connected with terrorism.

The scheme relating to control orders in the *Prevention of Terrorism Act* may be summarised as follows:

(a) The function of a control order is to impose obligations on individuals suspected of being involved in terrorism related activities. The obligations are designed to restrict or prevent further involvement by individuals in such activities. The intention is that each order is tailored to the particular risk posed by the individual concerned. Obligations that may be imposed include prohibitions on the possession or use of certain items, restrictions on movement to or within certain areas, restrictions on communications or associations and requirements of place of abode.

(b) If a control order does not derogate from the rights guaranteed by the Convention, particularly the right to liberty, it is called a "non-derogating control order". (As to the circumstances in which a control order derogates from the right to liberty in the Convention, there has been some recent case law in the Court of Appeal in England to which I will refer below). The court's permission is required for the Secretary of State to make a non-derogating control order. However, if the matter is urgent, the Secretary of State can make an order without seeking permission of the court but he must apply to the court for confirmation immediately. Before he makes a non-derogating

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of POW status for detainees, this determination invalidated the Army's doctrine for questioning enemy prisoners, which is based on the Geneva Conventions and had proved its worth over decades. Mr Gonzales ignored the many professional experts, ranging from the Army's own legal corps to Secretary of State Colin L Powell, who told him that existing interrogation practices were effective and that setting them aside would open the way to abuses and invite retaliation against Americans. Instead, during meetings in his office from which these professionals were excluded, he supported the use of such methods as 'waterboarding', which causes an excruciating sensation of drowning. Though initially approved for use by the CIA against al Qaeda, illegal techniques such as these quickly were picked up by military interrogators at Guantanamo and later in Afghanistan and Iraq. Several official investigations have confirmed that in the absence of a clear doctrine – the standing one having been declared 'obsolete' – US personnel across the world felt empowered to use methods that most lawyers, and almost all the democratic world, regard as torture. Mr Gonzales stated for the record at his hearing that he opposes torture. Yet he made no effort to separate himself from legal judgments that narrowed torture's definition so much as to authorize such methods as waterboarding for use by the CIA abroad. Despite the revision of a Justice Department memo on torture, he and the administration he represents continue to regard those practices as legal and continue to condone slightly milder abuse, such as prolonged sensory deprivation and the use of dogs, for Guantanamo." In 2006, however, the Pentagon issued a new army manual that would prohibit waterboarding.

[37] *Prevention of Terrorism Act 2005* (UK).

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control order, the Secretary of State must have reasonable grounds for suspecting that the individual has been involved in a terrorism-related activity and he must consider that it is necessary for purposes connected with protecting members of the public from the risk of terrorism to make a control order imposing obligations on that individual. A non-derogating control order may last for twelve months but is renewable. A derogating control order may last for six months only but it is also renewable.

(c) When considering whether to grant permission for a non-derogating control order, or when considering whether to confirm a non-derogating control order made by the Secretary of State, the court may hold a hearing without notice to the person on whom the order is to be imposed, and it must consider whether the Secretary of State's decision was "obviously flawed". If it finds that it was obviously flawed, the order cannot be made or must be quashed. If it finds that it was not obviously flawed, the court must refer the control order for a full hearing on notice to the other party. At this hearing the court will apply the judicial review test to the control order in order to decide if it should continue in force.

(d) The 2005 Act also enables control orders to be made that derogate from the Convention. These can only be made by the court on the application of the Secretary of State. Again, there will be a preliminary hearing, which may be without notice, and if the court decides there is a prima facie case for the order to be imposed, the court will make the order and give directions for a full hearing on notice to the other party to be held.

(e) The court must confirm a derogating control order at that hearing if:
   (i) it decides on the balance of probabilities that the controlled person is or has been involved in terrorism-related activity;
   (ii) it considers the obligations imposed as part of the control order are necessary for purposes connected with protecting members of the public from the risk of terrorism;
   (iii) it appears to the court that the risk arises out of or is associated with a public emergency in respect of which there is a designated derogation from the whole or a part of Art 5 of the Convention;
   (iv) the obligations imposed by the control order are in a list of derogating obligations set out in the derogation order.

(f) At the hearing of any proceedings for the making or confirmation of a control order, or permission to make a control order, the court may hear evidence in open and closed sessions. If the session is closed, the subject of the proposed control order and his legal representative are excluded but a special advocate who represents the interests of the individual concerned will be appointed. The special advocate cannot communicate with the subject of the proposed control order after he has been served with the closed material.

There have been two recent decisions of the Court of Appeal, presided over by Lord Phillips, Lord Chief Justice of England and Wales, concerning control orders. The two cases provide an interesting contrast with each other and indeed with the case of *Gillan* (the case considered above about the detention of the two observers who were stopped on their way to a peaceful demonstration). In the first case, *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, the subject was prevented by the order made by the Secretary State from a number of specified activities, including a restriction on leaving the United Kingdom. The object of the order was to prevent the subject from going to Iraq to fight against the coalition forces. The judge (Sullivan J) held that the procedure for judicial review made the non-derogating control order system incompatible with Art 6[38] of the Convention. The Court of Appeal disagreed. The court had to decide whether the decision of the Secretary of State was flawed on the basis of the material presented at the time of the court's adjudication, rather than just at the time of the Secretary of State's decision as the judge below had held, and this gave the court a more substantial role. Moreover, the court had to consider whether the suspect's Convention rights were violated. Furthermore, the standard of review open to the court in

[38] This provides for the rights of fair trial and access to a independent court or tribunal for the determination of civil rights and obligations.

determining whether the decision of the Secretary of State was flawed did not (as the judge had held) fall short of the standard of review required to meet the requirements of Art 6 of the Convention.

However, the Court of Appeal accepted that the Secretary of State was better placed than the court to determine the measures necessary to protect the public from the activities of a terrorist suspect and that accordingly a degree of deference was required to be paid to the decision of the Secretary of State. But the court still had to give intense scrutiny to the each of the restrictions to be imposed by the control order. The Court of Appeal likened this exercise to fixing the conditions for bail. Since Art 6 of the Convention was concerned only with fair procedure and not with the content of rights or obligations, the judge hearing the application did not, as the judge in the instant case had thought, have to be satisfied as to the facts on which the suspicion was based but only as to whether the Secretary of State had reasonable grounds for his suspicion.

The Court of Appeal (not without some misgivings) held that the court hearing the application could examine "closed material", ie material that would not be shown to the subject of the order or made public in court, and decide whether it should be shown to the subject, without violating the subject's rights to a fair trial. For this purpose the special advocate procedure could be used. The Court of Appeal noted that in the *Chahal case*, the Strasbourg court, drawing on the experience of the Canadian courts, had recognised that the use of confidential material may be unavoidable where national security is at stake.

In the second case, *Secretary of State for the Home Department v JJ* [2006] EWCA Civ 1141, the Court of Appeal had to consider more extensive forms of control order. In this case, each of the subjects of the control orders had to live in his own one-bedroom flat (not their own home) for 18 hours a day and in the remaining hours they could only visit specific areas. The flats were subject to spot searches. The Court of Appeal agreed with the judge (Sullivan J) that the restrictions imposed by the order were so extensive that they violated Art 5 of the Convention and, as there was no derogation order in place, the orders had to be quashed. This therefore is a case where the deprivation of liberty was not transient, as it had been in the *Gillan case*. It obviously raises the question at what precise point a control order amounts to a deprivation of liberty for the purposes of the Convention in any particular case, and that question may have to be worked out in later cases.

SPECIAL TRIAL PROCEDURES

My last group of cases illustrate the way in which courts have sought to fashion procedures that address the special problems affecting the trial of suspected terrorists and yet preserve sufficient freedom to ensure that justice is still done. They illustrate the variety of different ways in which Parliament may seek to change the trial process and the judgments which the courts have to make as to whether the essential requirement of fairness to the defendant is met or whether the balance is swung too far in favour of the those who prosecute or investigate terrorism.

In the first case, *Kartar Singh v State of Punjab* (1994) 3 SCC 569, the Supreme Court of India had to consider a comprehensive constitutional challenge to the then anti-terrorist legislation in India. The court found that most of the legislation satisfied the *Constitution* of India. It reached this conclusion by reading in safeguards to protect against abuse. It read into the offence of abetting a terrorist act a requirement for mens rea. In relation to a provision in the legislation rendering suspect's confessions to a police officer admissible, the Supreme Court gave guidelines, including a guideline that the maker of the confession should be taken without delay before the Chief Judicial Magistrate who would record the statement and order a medical examination if there was any question of torture. The Supreme Court also laid down guidelines for the periodic review of cases registered under the legislation and also of the prevailing situation in the areas notified as the ones affected by terrorist activities. The Supreme Court also laid down guidelines on when a witness whose life was in danger could remain anonymous. Substitute safeguards were put in place to make up for the fact that the defendant would not be able to cross-examine the witness, such as the appointment of a special advocate to address the court on the weight to be attached to the evidence and the administration of written questions.

I need not remind this audience of the detailed facts of *R v Lodhi* [2006] NSWSC 571. It concerned a criminal trial in New South Wales of an alleged terrorist. A question was raised as to the

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constitutionality of a statutory provision requiring the Attorney-General to be given the right to object if information was to be disclosed in a criminal trial that related to national security. The application would be dealt with in the absence of the defendant or his representatives. One of the questions considered was whether the legislation exceeded the powers of the Commonwealth Parliament on the ground that it authorised judicial power to be exercise in a manner inconsistent with the essential character of a court or with the nature of judicial power. The judge rejected this challenge, holding that the powers related to pre-trial disclosure rather than to the calling of evidence in the course of a trial. The judge would moreover have power to stay the proceedings if there was a substantial adverse impact on the fairness of the proceedings.[39] The court sought to strike the balance between the position of the state and the accused by making this reservation.

Finally I would briefly refer to the decision of the Supreme Court of Canada in *Re Art 83.28 of the Canadian Criminal Code* [2004] 2 SCR 248; 2004 SCC 42. This concerned an application by the Crown to examine under oath an unco-operative witness during the trial of two persons charged with the explosion on board an Air India jet in 1985. The Crown wanted to examine the witness in private in the absence of the accused. The examination would be under oath and in private, and the witness would not be entitled to decline to answer. A judge other than the trial judge made the order for the examination. Counsel for the accused only then became aware of what was afoot and he challenged the order on constitutional grounds. In the end, the order was varied so that counsel for the accused could attend but on terms that he would leave if information was elicited which did not relate to the trial. Moreover no information acquired during the examination was to be given to the accused.[40] The case went to the Supreme Court of Canada. Applying a presumption of constitutionality and a purposive approach the majority held that it was implicit in the statutory power that counsel for the accused should be able to participate in the examination of the witness. The Supreme Court also held that the witness would be able to rely on the privilege against self-incrimination in extradition or deportation proceedings as well as criminal proceedings if it was sought to use his evidence against him.

The defendants in the criminal trial sought to challenge the new powers on the grounds that they infringed judicial independence. The Supreme Court by a majority rejected this challenge and the further argument that the judge was co-opted into performing an executive function. The judge's role was the traditional role of ensuring that the investigation was conducted fairly. The purpose of the investigation was to investigate a terrorist offence. There was a presumption that such proceedings would be held in public but in the instant case the hearing would be in private and the information would not be published until after the criminal trials had concluded. Judicial independence was preserved because the judge would be empowered to ensure that the questioning was fair and relevant. This then was another case where the court's decision mitigated the apparent adverse impact of the legislation on the rights of the accused.

DRAWING THE THREADS TOGETHER

I said in my introduction that I had two purposes. The first purpose was to provide information about some of the major developments in the jurisprudence in this field. I hope that I have fulfilled that purpose. My second purpose was to use those cases to draw some conclusions together about lessons for the future. It is to that second purpose that I now turn. I will do this under four headings: the terrorist threat, legislative and executive action, the role of the courts and some closing thoughts.

The terrorist threat

The terrorist threat is undoubtedly serious and nothing I have said should be taken a underestimating the threat. Terrorism is a feature of modern society. Effective police action or military action within the law can reduce it but it is not likely to be completely eradicated unless terrorist groups themselves

[39] It is understood that there has been no appeal from this decision.

[40] It does not appear that consideration was given to the use of a special advocate.

decide to abandon their armed struggle. Governments have a duty to protect the public and they will inevitably seek ways to qualify the normal rules of criminal procedure, immigration and other laws to protect the public.

Legislative and executive action

Since 9/11, there has been intense legislative activity in the United Kingdom. In addition to the *Prevention of Terrorism Act 2005* to which I have already referred, Parliament has passed the *Terrorism Act 2006* (UK). Section 1 of this Act makes it an offence intentionally or recklessly to publish a statement likely to be understood by those to whom it is directed as encouraging terrorism. Such statements include statements which glorify the commission or preparation of acts of terrorism and which constitute statements from which persons to whom they are addressed could reasonably be expected to infer that what is being glorified is being glorified as conduct which should be emulated by them in existing circumstances. Section 5 of this Act also makes it an offence for a person, with the intention of committing acts of terrorism or assisting another to commit such acts, to engage in conduct in preparation for giving effect to his intention. These provisions are cast in wide terms and were hotly debated in their passage through Parliament. I note that in its recent Review of Sedition Laws,[41] the Australian Law Reform Commission took the view that it was undesirable to introduce an offence of glorifying terrorism. It expressed the view that the offence would represent "an unwarranted incursion into freedom of expression and the constitutionally protected freedom of political discourse". It noted that the Convention would be a crucial safeguard against an overly broad interpretation of the offence but that that safeguard would of course be absent in Australia.[42] However, I note that the *Criminal Code* of Australia includes an offence of urging inter-group violence.

The 2006 Act also permits the detention of terrorist suspects for up to 28 days before they are charged. The original proposal by the government was for three-month period of detention but this was rejected by Parliament. It has been reported in the press that as a result of the alleged plot by terrorists to blow up several transatlantic airliners which was made public in August 2006 the government would again ask Parliament to approve a pre-charge detention period of 90 days.

In addition, the new *Racial and Religious Hatred Act 2006* (UK) creates offences involving stirring up hatred against persons on religious grounds, and confers new powers of arrest in relation to both racial and religious hatred. The new offences can be committed by words or behaviour or the publication or distribution of written material. There is a provision that states that the new offences are not to restrict discussion or criticism of religions or religious beliefs or practices.

So the British Parliament has been busy creating new powers for the Executive and new offences for the citizen. Powers to detain or make control orders are potentially particularly troubling. There is a risk that powers of detention or to make control orders that are based on a subjective assessment of intelligence may turn out to be wrong so that innocent people suffer. Judges must always bear in mind the possibility that innocent people have become caught up in the activities which give rise to suspicion. Likewise, if criminal offences are defined too broadly, innocent people may also be wrongly convicted of offences in circumstances for which those offences were not intended.

We saw in the *Gillan case* that in the fight against terrorism Parliament had given the police new powers of search that were more extensive than would generally be thought acceptable. This is not untypical of anti-terrorist measures. Where legislation is passed giving the Executive new and

[41] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws*, Report No 104 (2006). My attention has been drawn to the decision of the High Court of Australia in *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37. In this case, the High Court of Australia by a majority upheld legislation for the mandatory (administrative) detention of an illegal immigrant pending his removal from the jurisdiction, even though he was a stateless person and no country had been found to accept him. His detention was therefore indefinite. There was no suggestion that he was a terrorist suspect. It may be that the decision would have been different if the illegal immigrant had been able to invoke a bill of rights or some unwritten constitutional norm. As to the latter, see generally, McLachlin CJ, *The Judicial Conscience* (Osgoode Hall Law School, 2006) (published in the conference proceedings of the Raoul Wallenberg International Human Rights Symposium 2006); see also the decision of the Court of First Instance of the European Communities in the *Yusuf and Al Barakaat International Foundation v Council and Commission* OJ C 44 (2002) (*Yusuf case*) (case T 306/01), now on appeal to the European Court of Justice.

[42] ALRC, n 41 at 6.24.

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extensive powers, it is important that the same legislation makes the government accountable for the exercise of those powers given to it. This will serve to prevent any temptation to act in an unconstitutional fashion as happened when the Watergate affair in the United States took place. There are healthy signs, however, that the British Parliament is developing legislative techniques to make the Executive more accountable for the way it uses new anti-terrorist statutory powers. Sometimes sunset clauses are included so that the government has to come back and ask for an extension of its anti-terrorist powers. In other cases, there may be a provision for independent reviews at regular intervals of the way in the new powers are being used. I would interpose that the reports of independent review bodies can be of great use to the courts. In the *A case*, the House of Lords placed great emphasis on a Privy Counsellor review of the relevant provisions of the 2001 Act. As an alternative, the use of the new powers could be made subject to more continuous review by a separate agency. That agency could monitor the use across different government departments of measures introduced for reasons of national security to meet the terrorist threat.

Where it is said that the ordinary liberties of the individual have to be restricted in some way, the legislation should contain as many safeguards as practicable for the individual. For example, it can be argued that a person should never be at risk of losing his liberty on the basis of evidence that he has not seen. But, if Parliament considers that the court or tribunal should have access to sensitive information that cannot be shown to the defendant, then safeguards must be provided. For instance, the court should be able to see that information and the court should be able to appoint a special advocate who can make submissions on this material for the assistance of the court. The decision of the Supreme Court of India in the *Kartar Singh case* goes one stage further: it is an example of the courts taking the initiative to ensure that these safeguards are provided.

The general approach should not, however, be to create new criminal offences or processes save where the existing criminal law cannot be used. The same standards and procedures should apply in terrorist cases as in other cases. That should be the starting point and there should only be a departure from it if a good reason to the contrary is made out. Using the ordinary criminal process is the best way of ensuring that rights and freedoms are not whittled away.

The above points about legislative techniques for ensuring accountability and the creation of new anti-terrorist offences are really points for policymakers and legislators. I turn below to the role of the courts but before I do, it is necessary to say a few words about the relations between judges and politicians. I can of course only speak for the United Kingdom. Only recently, following the delivery of the decisions on control orders to which I have referred, the Prime Minister, Tony Blair, was reported as having said that the judges were frustrating the government's efforts to protect the United Kingdom from terrorist threats by repeatedly striking down anti-terrorist laws on the grounds that they infringed the suspects' human rights.[43] In the recent crisis over the invasion of Lebanon by Israel, Tony Blair also referred to an arc of extremism and to the need for a "renaissance" in the way the United Kingdom deals with terrorists. Politicians have often expressed their anger at decisions in the courts which have in some way prevented executive action or which have resulted in laws that were passed by Parliament being declared incompatible with human rights. They point out that judges do not have any responsibility if as a result of legal action they cannot stop a terrorist plot.

Much of the tension has arisen from the exercise of the powers conferred by the *Human Rights Act 1998*, and there have been suggestions by the government and by the leader of the opposition to amend the *Human Rights Act 1998* in some not very clearly identified way. As yet, there has been no legislative measure brought forward for that purpose and it is difficult to see what Parliament could do because, even if the *Human Rights Act 1998* were repealed, individuals would still have the right to go to the Strasbourg court and obtain relief against the government there. If the Strasbourg court ruled that particular legislation breached the Convention, the United Kingdom would be under a treaty obligation to remedy that violation for the future by taking steps to repeal the legislation. I therefore leave aside the possibility of any amendment of the *Human Rights Act 1998*, and return to the relationship between judges and politicians.

[43] Jones G, "Judges 'Frustrate Fight Against Terror'", *Daily Telegraph* (4 August 2006).

Judges cannot become involved in a public debate with politicians about why they have decided certain cases in a certain way. Still less can they do so in private discussions with politicians. If ministers do not like the courts' decisions, they should not seek to undermine the administration of justice by criticising the judiciary, still less by attacking their decisions on a personal level. The role of making decisions on legal issues is constitutionally that of the judges. Ministers should appeal a decision to a higher court or so far as they can bring about a change in the law.

The role of the courts

So I now turn to the role of the courts. Their duty is to decide cases. As Lord Bingham said in the *A case* in the passage which I quoted, when the issue is a legal issue it is the duty of the court to decide that issue. The traditional role of the courts is to be the guardians of individual rights and liberty. The terrorist threat has enhanced that role. With increasing emphasis in public life on transparency, there is today another role, and that is the role of explaining decisions clearly and educating people as to their rights and duties. The courts' willingness to do this will help improve the transparency of judicial decision-making. The most important place for the voice of the judges to be heard is in general in their judgments.

There are some other points worth noting here. The brief survey of cases across the common law world that I have undertaken in this lecture demonstrates as it seems to me the remarkable adaptability of the common law to deal with the challenges of terrorism and to find new solutions. I spoke earlier in this lecture of the expansion joint in the Sydney Harbour Bridge. If that room for expansion were not there, the bridge would have fallen down long ago. Of course a great deal of skill and scientific calculation went into creating that expansion joint. The amount of expansion needed to make the bridge stand up will depend on a number of variables. We have need of creative and bold judges who are able to apply the same level of skill to the law to make it meet modern circumstances. Yet, at the same time, it is important to be absolutely clear what the expansion joint is for. It is not for expedient short-term solutions. The bottom line for the courts in meeting the challenge of terrorism is the preservation of a plural society and democratic way of life, subject to the rule of law, and the essence of our individual freedoms. That involves the retention of the courts' vital role as the guardians of individual rights.

In fact, these values happen to be the values that underlie the Convention. The advantage of a statement of rights is that it enables people more easily to identify fundamental values. The years since 9/11 have also brought home in the United Kingdom the point that one of the other advantages of statement of rights is that it enables some control to be exercised over excessive intrusions by the other branches of government into individual rights and freedoms. It is quite possible that but for the *Human Rights Act 1998* there would today be many people being held in detention in the United Kingdom as terrorist suspects. Yet of course those detentions did not prevent the London bombing since the persons responsible for those events were not aliens who could be detained under the 2001 Act but Britons. Nor would 18-hour control orders necessarily have prevented them.

You will notice that in that statement of the bottom line I made no reference to the maxim that he who comes to equity should come with clean hands. I know that New South Wales is a stronghold of equity, and long may it remain so. But this particular maxim cannot I think be deployed in the field of human rights. Politicians may want to say that those who break the rules of society should not be entitled to its benefits and that bills of rights are not suicide pacts. But those two propositions are not the same. Of course human and constitutional rights should not be pushed too far and that is why for instance we have seen the courts adopting the special advocate technique for dealing with the disclosure of evidence that cannot be shown to the suspect without risking national security. Where, however, national security and the fundamental values to which I have referred are not genuinely and seriously compromised, everyone should have equal rights in a court of law. That is the principled approach and the approach that will reduce so far as we can the risk that innocent people will suffer miscarriages of justice. Likewise, it was the view of the Strasbourg court that everyone should have equal rights in the first case discussed above, namely *Chahal v United Kingdom*.

This brief journey around the common law world also demonstrates something else and that is the value of international discourse between judges. There is at the end of the day an extraordinary

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similarity of thought between the different jurisdictions involved in the various cases to which I have referred, even if they use different techniques. The international discourse between judges at the highest levels transcends national boundaries and not subject to political control. Professor Anne-Marie Slaughter, author of *A New World Order*,[44] may be right that this international judicial discourse will one day lead the way to a new world order based on the rule of law. A body of global constitutional and human rights law is being created. There is an extraordinary congruence of thinking. Looking at the challenge of terrorism across the common law world is like watching the wind make ripples in a field of grass. Some stalks are more blown than others but at least they are all blown in the same direction.

Some concluding thoughts

Despite the scale of the threat from terrorism, we must keep the threat in perspective. More people are killed in natural disasters than terrorist incidents. Security measures intrude upon the ordinary liberties of citizens (see eg the *Gillan case*, above). The question that society has to ask itself is whether the incomplete security which counter-terrorist measures provide for the protection of its members justifies their effect on the liberty of the individual members. It would not be much fun living in a society in which the police could search our homes at any time of day and without showing any grounds for suspicion.

Some intrusion of personal liberty is of course acceptable, such as searches at airports and the entrance to buildings. But major intrusions into the right to liberty may well be a different matter. The truth is that some risk from terrorism is bound to remain, however intrusive the counter-terrorist measures are. No measures will make us absolutely secure from terrorism. It would seem pointless so to restrict individual liberties in the hope of making people more secure if the result is to destroy the essential characteristics of a free or democratic society, or indeed to cause disharmony between the groups who feel that they are wrongly made the targets of the new powers. There is no point in being more secure if you are also less safe. So an appropriate balance has to be struck between liberty and national security. It is worth noting that, even if the House of Lords in the *A case* had accepted the validity of the detention provisions of the 2001 Act, it would not have prevented the London bombings which were carried out not by aliens with no right to remain the United Kingdom but by terrorists who were British citizens.

An analogy has recently been drawn between the war on terrorism and the Cold War. There are many differences of course between the Cold War and the war on terror. Nonetheless, it is worth remembering that during the Cold War there were many moments when things could have gone badly wrong, such as during the Korean War and the Cuban crisis. There were also those who thought that there should be a stronger military response against the communist threat. It all turned out the right way in the end. After a long wait, the Cold War came to an end partly because the authoritarian regimes failed to deliver economic success and also social and political justice. In the end it was democracy and freedom that triumphed. So we too should remain quietly confident. If we hold on to the fundamental values of a plural, democratic society, subject to the rule of law, and all that that involves, there is surely a good chance that terrorism too will be defeated and that freedom will survive. There is moreover no better way of ensuring that that happens.

[44] Slaughter A, *A New World Order* (Princeton, 2004).