JUDICIARY OF ENGLAND AND WALES

THE RT. HON. THE LORD PHILLIPS, LORD CHIEF JUSTICE OF ENGLAND AND WALES

TERRORISM & HUMAN RIGHTS

UNIVERSITY OF HERTFORDSHIRE LAW LECTURE,
(ORIGINALLY DELIVERED TO THE SINGAPORE ACADEMY OF LAW, AUGUST 2006)

THURSDAY, 19TH OCTOBER 2006

It is a pleasure to be here this evening on my first visit to the University of Hertfordshire and indeed to Hatfield. My predecessor was I understand one of the first to give a lecture for the School of Law in this magnificent auditorium, when he delivered a lecture on the Constitutional Reforms in February last year, to bring the series of James Kingham memorial lectures to a close.

In this lecture I propose to concentrate on a rather different subject, the complex history of the legislation and judicial reaction to that legislation in the United Kingdom – a story in which I have inevitably played a part – and there have been quite a few developments in that story over the past year.

These, however, pale into insignificance when compared to the importance of recent decisions of the Supreme Court of the United States.

The United States and the United Kingdom have seen themselves as partners in the fight against global terrorism, but partners who have differed in relation to the legal constraints on the methods used in that fight. In the United States the constraint is their Constitution. In the United Kingdom the constraint is the European Convention on Human Rights. While I shall concentrate on the United Kingdom I shall be looking at developments that we have been following with great interest on the far side of the Atlantic.

Terrorism is not readily defined, and whether activities amount to terrorism can depend upon your point of view. One man's terrorist can be another man's freedom fighter.

As an ex-colonial power, the United Kingdom has been responsible for detaining without trial as terrorist suspects in India, in Kenya, in Cyprus, by way of example, men who have gone on to be their country's leaders. There are still around the world minorities, striving for independence, who resort to measures that are condemned by the regimes in power as terrorism.

But we are today facing a new kind of terrorism. Terrorism inspired by an ideology that treats as enemies those whose way of life is espoused by the vast majority in the democracies against whom the terrorism is aimed; terrorism whose motivation is not a desire for independence, but simply ideological hatred. And the ideology is so strong that some at least of those who share it are prepared to destroy themselves in order the more effectively to destroy others. The suicide bomber is a new phenomenon and one against whom the theory that punishment deters crime is manifestly inapplicable.

In a time of national emergency the reaction of those running a country, or making a country's laws, is to detain without trial those suspected of being at risk of committing subversive activities.

Such a course tends to be acceptable to the vast majority of the inhabitants of the country in question, who are not at risk of being locked up. Dicey, in his great work Introduction to the

Study of the Law of the Constitution (8th ed. p 271) remarked 'under the complex conditions of modern life no government can in times of disorder, or of war, keep the peace at home, or perform its duties towards foreign powers, without occasionally using arbitrary authority'. This reaction was reflected by the approach of the majority of the House of Lords to the interpretation of regulations introduced under wartime legislation in both the First and the Second World Wars which permitted detention without trial.

The most famous, or notorious decision was that in Liversedge v Anderson (1942) 2 AC 206, where the House, in the face of a notable dissent by Lord Atkin, held that the Home Secretary was not required to give any reason for locking up a citizen pursuant to a regulation which gave him the power to do so if he had 'reasonable cause to believe' him 'to be ...of hostile associations ...and that by reason thereof it was necessary to exercise control over him'.

As we shall see, it is no longer so easy for the legislature of the United Kingdom to confer such powers on the Secretary of State. The difficulty lies in the incorporation in our domestic law of the European Convention on Human Rights and the expansionist approach to the interpretation of that Convention of the European Court at Strasbourg. At the end of the Second World War two Conventions were concluded, largely by way of reaction to that event. The first dealt with the manner in which a State should treat those within its boundaries. This was the 1950 European Convention on Human Rights.

The second placed restrictions on the circumstances in which a State could deport aliens who had sought refuge within its boundaries.

This was the 1951 United Nations Refugee Convention. This convention required signatories to grant asylum to those who had fled persecution in their own countries. There was, however, an exception to this obligation. If an asylum seeker posed a threat to the security of the country in which he was seeking asylum, that country was entitled to deport him even if he faced the risk of persecution in his own country.

Although most of the signatories of the Human Rights Convention were also signatories to the Refugee Convention, the Strasbourg Court has held that the former Convention precluded repatriation of someone if he faced a serious risk of torture or inhumane or degrading treatment in his own country, even if he posed a threat to the security of the country in which he had sought refuge.

Article 3 of the Human Rights Convention places an absolute bar on subjecting someone to torture or inhuman or degrading treatment. In Soering v United Kingdom (1989) 11 EHRR 439 the Strasbourg Court held that Article 3 will be infringed if a person is extradited to a country where there are substantial grounds for believing that he will suffer such treatment. In that case, however, the Court stressed that inherent in the Convention was the search for a 'fair balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights'.

The United Kingdom has always contended that this balance was not observed in the sequel to Soering, namely the case of Chahal v United Kingdom (1996) 23 EHRR 413. In that case the United Kingdom sought to deport to India Mr Chahal, a Sikh separatist, who had been refused asylum, on the ground that his presence was not conducive to the public good for reasons of national security.

He resisted deportation on the ground that he feared that he would be tortured if he were returned to India. The United Kingdom Government argued before the Strasbourg Court that the Secretary of State was entitled to balance Chahal's interest as a refugee against the risk he posed to national security if not deported. The Strasbourg Court rejected this argument. It held that 'whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State' it was unlawful to remove him. The activities of that individual, however undesirable or dangerous, could not be a material consideration.

This decision has far-reaching implications and, in a case that is presently before the Strasbourg Court, the United Kingdom has intervened in an attempt to get the Court to have second thoughts about Chahal. Let me explain the implications of that decision.

Article 5 of the Human Rights Convention provides that no one shall be deprived of his liberty, save in certain specified circumstances, the most material being lawful detention after conviction by a competent court. Another is lawful detention of a person against whom action is being taken with a view to extradition or deportation. Where, however, deportation is not possible because of the impact of Article 3, there is no right to detain a terrorist suspect without trial. Executive detention is not an option. Thus it follows from the decision in Chahal that the Convention prevents you from sending the alien who is a threat to your national security back to his own country, but does not permit you to detain him, if he insists on remaining in your country against your will.

The Strasbourg Court in Chahal struck a further blow to the United Kingdom's ability to take executive action in the interests of national security.

The Secretary of State had ordered that Chahal should be deported on the ground that his continued presence in the United Kingdom was not conducive to the public good for reasons of national security. When Chahal challenged that order by judicial review, the English court held that issues of national security were for the Security of State and could not be the subjected to review by the court. The Strasbourg Court held that this was not good enough. Article 5(4) provides that anyone deprived of his liberty is entitled to challenge the lawfulness of his detention before a court. Chahal had not been able to make an effective challenge because he was not aware of the reasons why the Secretary of State had concluded that he posed a risk to national security. Article 5(4) had been infringed.

At the time of the decision in Chahal the United Kingdom had not made the Human Rights Convention part of our domestic law. It always, respected, however, the judgments of the Strasbourg court. Chahal raised two problems.

The first was what to do with aliens who were a security risk but who could not be deported because they risked being subjected to torture or to inhuman or degrading treatment in their own countries. There was no obvious answer to this problem and, for the time being the government shelved it. The other problem was more immediate. When the government wanted to deport an alien on grounds of national security it would often not be willing to disclose to the alien the information that gave rise to the security risk. How could it cater for the alien's right under Article 5(4) to challenge his detention according to a fair procedure?

The government's response was to adopt a procedure that the Strasbourg Court had itself commended in Chahal – a procedure that the Court believed, perhaps not wholly accurately, existed in Canada. In 1997 it passed a Statute creating a Special Immigration Appeals Commission, or SIAC. This consists of three judges, of whom the President is a member of the High Court.

Where applicants for admission to the United Kingdom are refused permission to enter or ordered to be deported on the grounds that this is conducive to the public good and, in particular, in the interests of national security, a right of appeal is granted to SIAC. Pursuant to the Act, procedural rules have been made designed to ensure that proceedings before SIAC do not lead to disclosure of material where this would be damaging to the national interest. Closed hearings take place in the absence of the applicant at which SIAC considers closed material. The applicant is represented by a special advocate but, once he has seen the closed material, he is no longer permitted to communicate with the applicant.

As I shall explain, SIAC has since been given other statutory roles in circumstances where the Secretary of State wishes to rely on material, disclosure of which would imperil security operations.

The creation of SIAC took place at the time of a change of administration under which, in 1997, 'New Labour' replaced the old Conservatives. The Labour Party had made it part of their manifesto that they would incorporate the Human Rights Convention and they proceeded to do so. They passed the Human Rights Act 1998, which came into force on 2 October 2000.

The Act is a typical British compromise. It preserves the supremacy of Parliament. In construing any Act of Parliament the court has a statutory duty to do so, if this is possible, in a way which renders the Act compatible with Convention rights. If this cannot be achieved the Court can make a declaration that it is not compatible with the convention, but at the

same time giving effect to the Act's provisions. Parliament has a fast track procedure for amending legislation held by the court to be incompatible with the Convention if it chooses to do so.

As we shall see, the Human Rights Act has enabled terrorist suspects to challenge anti-terrorism legislation on human rights grounds and they have not hesitated to do so.

The task of the judiciary is, of course, to rule objectively as to whether or not legislation complies with the Convention. In performing that task we have upheld some challenges to legislation passed by Parliament. Ministers have, on occasion, tended to react to adverse judgments in a manner that has enabled the media to paint a picture of strife between Ministers and the judiciary. The judges are accused of defeating the will of Parliament. Let me make it plain that as far as the present situation is concerned, this is a false picture. I and the senior judiciary have to work closely with Ministers in relation to some aspects of the administration of justice and I believe that Ministers appreciate that judges are doing their best to apply the law and do not decide cases according to personal predilections.

I said that, after Chahal, the Government shelved the question of what to do about aliens whom they did not wish to have in this country because they were a threat to national security, but whom they could not expel because they would be at risk of torture or inhuman or degrading treatment in their own countries. After 9/11 the Government hastened to address this problem. Article 15 of the Human Rights Convention entitles a signatory to derogate from some of its obligations 'to the extent strictly required by the exigencies of the situation...in time of war or other public emergency threatening the life of the nation'. On 11 November 2001 an Order was made derogating from Article 5(1) of the Convention in respect of:

> 'foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom'.

Relying on this derogation, Parliament then passed the Anti-Terrorism, Crime and Security Act 2001. Part 4 of that Act was particularly controversial. This permitted the Home Secretary to issue a certificate in respect of an alien if he reasonably believed that this person's presence in the United Kingdom was a risk to national security and suspected that this person was a terrorist. Under section 23 of the Act the issue of such a certificate rendered the alien in question subject to detention and deportation. If it was not possible to deport him because of the risk of torture or inhuman or degrading treatment in his own country, then he could be detained indefinitely in the UK without trial, pending ultimate deportation. The Act gave an alien so detained the right to appeal to SIAC against the derogation and against certification by the Secretary of State. Such appeal was subject to the SIAC procedure of closed material and special advocates.

The Secretary of State issued certificates in relation to a number of aliens that he was unable to deport and these men were detained in Belmarsh prison. They exercised their right to appeal to SIAC. They alleged that the derogation was unlawful in that there was no 'public emergency threatening the life of the nation'. They further alleged that the measure was discriminatory and thus contrary to Article 14 of the Convention in that it only applied to foreign suspected terrorists and not to British nationals. SIAC upheld the appeal on the ground that the order was discriminatory and contrary to Article 14.

The Secretary of State appealed to the Court of Appeal, which allowed the appeal, holding that the discrimination was justified because the detainees had no right to be in this country and, furthermore, were free to leave if they wished to. This reasoning did not withstand a further appeal to the House of Lords. The judgment of the House in A v Secretary of State for the Home Department [2004] UKHL 56 is one of the most dramatic to have been given in my time in the law.

Exceptionally nine Law Lords sat to hear the appeal. Their speeches run to over 100 pages. The first issue was whether there was indeed a 'public emergency threatening the life of the nation' that justified the making of the derogation order. Eight out of the nine Law Lords

reached the conclusion that there was. They attached weight to the fact that the Secretary of State and Parliament had so concluded and that SIAC, which had considered closed material, had confirmed this view. Particularly important was the nature of the test to be applied. In the leading speech Lord Bingham cited a decision of the Strasbourg Court (Lawless v Ireland (No 3) (1961) 1 EHRR 15 where the issue was whether low level IRA terrorist activity in Ireland justified derogation from Article 5. The Strasbourg Court gave this definition of 'public emergency affecting the life of the nation':

> 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.

Lord Hoffmann, in a lone, and Churchillian dissent, applied a more fundamental test, which gave the words a more literal meaning. He said:

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

He added:

> "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"

This statement was received with enthusiasm by the liberal groups but not by Ministers, who considered that it violated the rule that a judge should not descend into politics. The fact remains that no other signatory to the Human Rights Convention had found it necessary to derogate from Article 5.

The second issue was whether the terms of the Derogation Order and of section 23 of the Act satisfied the requirement that they should infringe Convention rights to no greater extent than was 'strictly required by the exigencies of the situation'.

Seven members of the House concluded that they did not. Three factors weighed particularly in their reasoning. The first was the importance that the United Kingdom has attached, since at least Magna Carta, to the liberty of the subject. The second was that the measures attached only to foreign nationals. There were, however, plenty of terrorist suspects of British nationality. How could it be necessary to detain the foreign suspects without trial if it was not necessary to lock up the British suspects. Finally, the measures permitted those detained to opt to leave the country. If they were so dangerous, this did not seem logical, for they would be free to continue their terrorist activities overseas.

Accordingly the House of Lords quashed the derogation order and declared that section 23 of the 2001 Act was incompatible with the Convention.

This dealt a severe blow to the government's anti-terrorism strategy. The Government could, in theory, have disregarded the decision of the House of Lords and left section 23 of the Act in force, but it has always respected judicial decisions on incompatibility. It did so on this occasion. It repealed the offending legislation and passed a new Act – the Prevention of Terrorism Act 2005. This empowers the Secretary of State, in specified circumstances, to place restrictions on terrorist suspects by making them subject to control orders. These orders can impose a wide variety of obligations such as curfew, electronic tagging, restrictions on association and on electronic communication, duty to report to the police station and so on. The Act makes provision for two types of control order.

The first imposes obligations which fall short of depriving the suspect of his liberty. These are likely to interfere with other human rights, such as the right to privacy and to respect for family life, but these are rights with which the Convention permits interference where specified circumstances, such as national security, justify this.

Such control orders are known as 'non-derogating' control orders, because they do not derogate from Convention rights. The Secretary of State can impose such an order where he reasonably suspects someone of having been involved in terrorism-related activity and considers it necessary to impose the order in order to prevent him from continuing to be so involved.

The other type of control order is a 'derogating control order'. This is one that imposes restrictions that do amount to deprivation of liberty. Before such a control order can be made, the Government has to make a derogation order.

Having done so, it then has to apply to the court to make the control order. More than suspicion is required. The court has to be satisfied that the individual against whom the order is made has been involved in terrorism and that the order is necessary by way of response.

The 2005 Act makes detailed provision for access to a court in order to challenge the making of a control order. Appeal is to a single judge, with a further right of appeal to the Court of Appeal. The regime of closed material and the special advocate is adopted. The Act provides that the principles of judicial review are to apply and that any human rights challenge is to be made in accordance with these statutory provisions.

In June 2005 the European Commissioner for Human Rights visited London. He questioned whether the new legislation was compatible with Convention obligations.

He suggested that the restrictions that could be imposed by non-derogating control orders might well amount to deprivation of liberty contrary to Article 5.

He also questioned whether the provisions for review by the court satisfied the requirements of a fair trial under Article 6. He commented:

> "The proceedings fall some way short of guaranteeing the equality of arms, in so far as they include in camera hearings, the use of secret evidence and special advocates unable subsequently to discuss proceedings with the suspect...Quite apart from the obvious flouting of the presumption of innocence, the review proceedings described can only be considered to be fair, independent and impartial with some difficulty. Substituting 'obligation' for 'penalty' and 'controlled person' for 'suspect' only thinly disguises the fact that control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive".

A month after the Commissioner's visit, on 7 July last year, we experienced in London a synchronised series of explosions on public transport, inflicting heavy loss of life and personal injuries. The suicide bombers responsible were all British subjects.

This, I suspect, persuaded most people in the United Kingdom that special measures to deal with terrorists were a necessity. Challenges of the new regime of control orders were, however, not slow in coming.

A non-derogating control order was made against a man referred to as MB. This was on the grounds that the Secretary of State reasonably suspected him of having been involved in terrorism-related activities and that the control order was necessary to prevent him from travelling from England to Iraq to fight with the insurgents there.

Because of this limited objective, the obligations that it imposed were relatively modest, including the surrender by MB of his passport and an embargo on foreign travel. He sought a declaration that the 2005 Act was incompatible with the Convention because it did not provide for a procedure for challenging the imposition of the order that was fair. One complaint was of the use of closed material and a special advocate.

The case against MB depended very largely on closed material. His appeal came before Mr Justice Sullivan. He accepted the argument that the Act did not provide for a fair trial and declared it incompatible with the Convention for this reason. The Secretary of State appealed. Because of the importance of the case, I presided over the appeal, sitting with the next two most senior judges, the Master of the Rolls and the President of the Queen's Bench Division. We allowed the appeal.

We held that the judge had wrongly concluded that the court's only role was the limited role of considering whether the Secretary of State's original decision had been flawed. We held that the court could and should consider whether the control order was justified on the basis of the evidence at the date of the hearing before us. What caused us most concern was the use of closed material, which meant that MB was not informed of the nature of the case against him. We decided, however, that where precautions against terrorism are concerned, the Secretary of State must be permitted, where the needs of security so demand, to avoid disclosing secret material.

The Strasbourg Court had itself indicated approval of the use of closed material coupled with a special advocate in Chahal. The safeguards put in place by the 2005 Act were the best conceivable in the circumstances. We refused permission to appeal to the House of Lords, but I understand that MB has petitioned their Lordships for leave to appeal and it may well be that our judgment will not be the final chapter in the consideration of the use of closed material.

A little more than a week later we heard a second appeal from a decision of Mr Justice Sullivan on control orders that was adverse to the Secretary of State. This concerned what purported to be non-derogating control orders against five Iraqi nationals and a sixth man whose identity was in doubt, but who was either Iraqi or Iranian. All were terrorist suspects and the orders made against them were draconian. Each was required to remain in a very small flat, in the case of five of the six, not in an area of his choosing, for 18 hours out of every 24.

The remaining six hours each day was a period of only relative freedom, in that each could not go outside a relatively modest geographical area, nor arrange to meet anyone who had not obtained clearance from the Home Office. Visitors to the flats also had to be vetted by the Home Office, and the flats were subject to random searches by the police. Each subject was restricted to a single land telephone line – the inference being that this would be monitored.

Mr Justice Sullivan held that these obligations, when taken as a whole, amounted not merely to restrictions on movement but to deprivation of liberty, contrary to Article 5. As such they could only have been imposed as derogating control orders after a derogation order had been made. In the event the orders were void, and he quashed them. The effect of his judgment was, however, stayed, pending appeal to us by the Secretary of State.

This time we rejected the Secretary of State's appeal. We agreed with Mr Justice Sullivan that the restrictions imposed by the control orders were so severe as to amount to deprivation of liberty. We refused permission to appeal. The Home Secretary's reaction was to make new control orders, reducing the period of house arrest from 18 hours to 14 hours a day, albeit that he stated that this was less than the security services advised to be necessary. The Home Secretary has petitioned the House of Lords for permission to appeal against our judgment.

At the same time, the controlled persons are able to make a fresh challenge against the new control orders. Continuous litigation of this kind, and the uncertainty that it creates, is manifestly unsatisfactory.

Is there an alternative solution to the imposition of restrictions on liberty based on mere suspicion and on evidence that the suspect is not permitted to see?

Those who oppose the current regime argue that detention cannot be justified unless it can be proved that the detainee has been indulging in terrorist activity and that, if this can be proved, the terrorist should be prosecuted with due process of law. One of the problems with this solution is that evidence against terrorists so often consists of the product of covert surveillance which the security services are not prepared to disclose. Provision for telephone intercepts, themselves an infringement of the Convention right to privacy, is made by the Regulation of Investigatory Powers Act 2000.

This Act imposes a statutory prohibition on the use of such evidence in court. This accords with the wishes of the security services. There are many who believe that this blanket embargo cannot be justified.

Debate about the justification for resorting to exceptional measures to deal with terrorism often focuses on the extreme case of the use of torture. What if a bomb has been placed that is likely to take countless lives and a terrorist has been caught who knows the location of the bomb.

In such a situation cannot torture be justified in order to induce the terrorist to disclose where the bomb is hidden? The classic answer is that the law can never justify the use of torture, but in a situation such as that the executive might be forgiven for acting in a manner that was unlawful. A more difficult question is whether there are circumstances in which evidence obtained by torture can be admissible in a court of law.

This question arose in the second round of litigation that had led to the Lords' famous decision in A. You will remember that in the case of A, the ground for detention was that the Secretary of State had certified that an alien was reasonably suspected of being a terrorist and reasonably believed to be a threat to national security. On appeal SIAC had to quash the certificate if SIAC considered that there were no reasonable grounds for such suspicion or such belief. The issue was whether in reaching its decision SIAC could have regard to information which had been, or might have been, obtained by the use of torture. SIAC ruled that it could have regard to such evidence. By a majority of two to one the Court of Appeal upheld this ruling.

Their reasoning was as follows. The Secretary of State could not shut his eyes to information which had been obtained by the use of torture. To do so would be contrary to his responsibility for national security. SIAC could not ignore such evidence either, unless its acceptance would amount to an abuse of process.

There would be an abuse of process if the evidence received was the only evidence against a suspect and that evidence had been obtained by the use of torture to which the United Kingdom authorities were party. That was not the case, however.

On appeal to the House of Lords sitting seven strong the decision of the Court of Appeal was unanimously reversed. The House held that the Court of Appeal had been wrong to equate the position of SIAC with that of the Secretary of State. The issue for SIAC was whether SIAC had reasonable grounds for belief, not whether the Secretary of State had had such grounds, and SIAC had to reach its decision on admissible evidence. Evidence obtained by torture was not admissible.

But what was of particular interest in relation to the decision of the House of Lords was a critical issue as to burden of proof. Was the burden on the detainee to establish that evidence had been obtained by torture in order to get it excluded, or was SIAC bound to exclude evidence unless satisfied that it had not been obtained by torture?

This question had to be considered having regard to the fact that the detainee might well not even be aware of what evidence was being held against him as the result of the use of closed material.

A minority of three, but a powerful minority as they were Lord Bingham, Lord Nicholls and Lord Hoffman, held that if there were grounds to suspect that evidence might have been obtain by torture, SIAC should reject the evidence unless satisfied that this was not the case.

The majority, Lords Hope, Rodger, Carswell and Brown held that SIAC should admit the evidence unless satisfied, on balance of probability, that it had been obtained by torture.

You will appreciate that this was a significant victory for the security services, for when information is received from third parties, hard evidence that it was obtained by the use of torture is unlikely to be forthcoming. It is perhaps mischievous to wonder whether the voting in the House of Lords might have been at all affected by the terrorist atrocities of the 7th July.

Here I propose to leave the jurisprudence of the United Kingdom. In summary I would comment that the Human Rights Act has unquestionably circumscribed both the legislative and the executive action that would otherwise have been the response to the outbreak of global terrorism that we have seen over the last decade. How about the position in the United States?

The United States

In the United States the protection of the individual from executive action lies in the Constitution. That protection has been tested since the events of 9/11.

Within days of the attacks that took place on that day, Congress passed a joint resolution authorising the President to 'use all necessary and appropriate force' against those responsible for 9/11 'in order to prevent any future acts of international terrorism against the United States by such...persons'.

A few weeks later the Patriot Act significantly reduced the safeguards on the use by the intelligence services of covert surveillance.

More dramatic were the steps taken by the President in the exercise of executive authority. The administration promulgated a Military Order which claimed authority to detain without

time limit any non-citizen whom the President had 'reason to believe' was a member of Al Qaeda, was involved in international terrorism or was involved in harbouring terrorists. The same Order authorised trials of non-citizens by military commissions. Several hundred persons were removed from Afghanistan, where they had been captured, to detention at the United States Naval Base at Guantanamo Bay in Cuba.

The attraction of this location was that it was believed to be outside the jurisdiction of the United States courts so that an application for habeas corpus by a non-national would not lie. At first this stratagem proved successful. The District Court of Columbia ruled that it had no jurisdiction over aliens detained at Guantanamo. These aliens included a number of British subjects, one of whom was a Mr Abbasi. He, through relatives, instigated judicial review proceedings in the English court. He sought a mandatory order that the Foreign Secretary should intervene on his behalf. The Foreign Secretary objected that the case was not justiciable as it called for a review of his conduct of foreign affairs and this fell outside the jurisdiction of the court. He also contended that the English court would not investigate the legitimacy of the actions of a foreign sovereign state. These submissions were accepted by the judge of first instance, who refused Mr Abbasi permission to seek judicial review. In the Court of Appeal we overruled him and we heard Mr Abbasi's application ourselves.

We held that, where human rights were engaged, the English court could investigate the actions of a foreign sovereign state. It necessarily has to do so in asylum cases.

We heard the case at the time when the District Court of Columbia had ruled that the United States courts had no jurisdiction over aliens detained at Guantanamo. After reviewing both English and United States authority, we commented ([2002] EWCA Civ 1598 at paragraph 64):

"we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles, recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black hole'...What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.

It is important to record that the position may change when the appellate courts in the United States consider the matter.

The question for us is what attitude should he courts of England take pending review by the appellate courts of he United States to the detention of a British citizen the legality of which rests (so the decisions of the United States courts so far suggest) solely on the dictate of the United States Government and, unlike that of United States citizens, is said to be immune from judicial review"

We decided that the court could do no more than require our Secretary of State to give consideration to Mr Abbasi's predicament. We could not dictate to him how he should conduct foreign relations with the United States. As his evidence was that he was already in negotiations about the position of British detainees, we made no order against him.

Our judgment was subsequently referred to in a Brandeis brief, which was placed before the United States Supreme Court in Rasul v Bush (2004) 542 US 466, but I would not be so bold as to claim that this had any influence on the decision of that court.

By a majority of six to three the Supreme Court held that foreign nationals held at Guantanamo Bay could use the US court system to challenge their detention. This decision struck an important blow for the rule of law in the United States. The merits of the detainees' claims for wrongful detention remain to be determined.

A second important decision of the Supreme Court in this area, Hamdi v Rumsfeld (2004) 542 US 507 related to a US citizen, Mr Hamdi, who had been declared an 'illegal enemy combatant' by the United States Government and detained without trial, initially at Guantanamo and subsequently at military prisons on the United States mainland. His father filed a habeas corpus petition.

The Supreme Court held by an 8-1 majority that Hamdi could not be held indefinitely at a US military prison without the assistance of a lawyer and without an opportunity to contest the allegations against him before a neutral arbiter.

The Pentagon announced that it was establishing a Combatant Status Review Tribunal where detainees could challenge their enemy combatant status. They would, however, only have the assistance of a personal representative assigned by the Government, not a lawyer, and they would have to overcome a 'rebuttable presumption in favour of the Government's evidence.
On June 29 of this year the Supreme Court gave its decision in the important case of Hamdan v Rumsfeld. Hamdan, a Yemeni national detained at Guantanamo, challenged the jurisdiction of the military commission before whom he was due to be tried for conspiracy "to commit... offences triable by military commission". The Supreme Court upheld this challenge, holding that there was no basis for ousting the jurisdiction of the Federal Courts. The military commission, both in structure and procedure, violated the provisions of both the Uniform Code of Military Justice and Article 3 of the third Geneva Convention.
These challenges to executive action in the United States have related solely to attempts to oust the jurisdiction of the courts. Thanks to the Supreme Court those attempts have failed. The substantive measures that have given rise to jurisdictional challenge purport to apply to terrorists suspects the right to detention that exists in relation to enemy combatants in time of war. Wars come to an end, but the end of what has been called the war on terrorism is not in sight. We have yet to see whether, and in what circumstances, indefinite detention of terrorist suspects is compatible with the United States Constitution.
Very recently a District Judge has ruled unlawful, as contrary to the Constitution, electronic surveillance carried out by the executive without the authority of the court. Her decision is, I understand to be challenged on appeal. I shall follow the outcome of that appeal with interest.
So far this lecture has been concerned with an historical survey of what the press like to picture as strife between the judge and the executive in relation to dealing with terrorism. In England and Wales there is no such strife. Policy is for the executive, but their policy must respect the rule of law. It is not for the judge to attempt to influence policy. The judge's job is simply to apply the laws that are made by a democratically elected Parliament. I propose, however, to conclude this lecture by explaining why I am content that the laws which I have to apply when dealing with terrorism include the Human Rights Act.
In the United Kingdom the executive and the legislature have sought to deal with the threat of terrorism by imposing restraints on the freedom of those the executive suspects, but cannot prove, are involved in terrorism.
The Government recognises, however, that the extent to which it is free to do so is circumscribed by the Human Rights Convention and that Parliament has determined that it should be the duty of the courts to rule on whether or not legislation is compatible with the Convention and to strike down secondary legislation or executive action that infringes the Convention. I believe that this is a satisfactory state of affairs.
The desirability of preventing terrorists from blowing up innocent citizens is one that we can all appreciate. We recently had a dramatic demonstration of the apparent success of the Security Services in doing this with the arrest of 24 young men alleged to have been plotting to blow up ten airliners bound from the United Kingdom to the United States. But security operations such as these deal with the product of terrorism, not the cause.
Terrorism is spawned by ideology and the ultimate battle is one of ideology. John Reid, the Home Secretary, in a recent speech, said that we were living through what was "at heart an ideological struggle"; a struggle between democracies and "the core values of a free society" on the one hand and "those who would want to create a society which would deny all the basic individual rights we now take for granted" on the other.
At a lecture given at the London School of Economics earlier this year, Shami Chakrabarti, the Director of the human rights group Liberty, observed "the philosophy of post [Second World] war democrats is that of fundamental rights, freedoms and the rule of law. This is the legacy of Eleanor Roosevelt and ...of Winston Churchill"... "If our values are truly fundamental and enduring, they have to be relevant whatever the level of threat".
I share these sentiments, coming from two very different quarters.
Respect for human rights must, I suggest, be a key weapon in the ideological battle. Since the Second World War we in Britain have welcomed to the United Kingdom millions of

immigrants from all corners of the globe, many of them refugees from countries where human rights were not respected. It is essential that they, and their children and grandchildren, should be confident that their adopted country treats them without discrimination and with due respect for their human rights. If they feel that they are not being fairly treated, their consequent resentment will inevitably result in the growth of those who, actively or passively, are prepared to support the terrorists who are bent on destroying the fabric of our society. The Human Rights Act is not merely their safeguard, it is a vital part of the foundation of our fight against terrorism.

Ends
