

**TERRORISM AND GLOBAL SECURITY:
THREATS TO THE INDEPENDENCE OF THE JUDICIARY IN A
CHANGING WORLD**

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The whole theme of this Conference is ‘judicial challenges in a changing world’. There are so many ways in which the world changed forever on 11 September 2001. We in the United Kingdom – as in many countries of the world - had been used to living with terrorism for many years before that. But Irish terrorism was rather different from al Qaeda terrorism. The Irish did not use suicide bombers. They did not try to kill people on the same massive scale. They gave warnings (although not always effectively) of their impending atrocities. They had defined political objectives which they sought to achieve through recognisably paramilitary command structures. To track them down our security services were usually working alone or with colleagues in Western Europe. I am not saying that Irish terrorism was or is acceptable. But we eventually learned that compromising the rule of law was not the way to defeat it. The new terrorism has led governments the world over to introduce new challenges to the rule of law. The question is – have those new challenges also brought challenges to the independence of the judiciary?

The judiciary face in two directions. The sanctions which the state imposes to protect itself and its people from those who have done, or plan to do, them harm are imposed by the courts. But the courts are also there to protect individuals against the arbitrary and unjustified imposition of those sanctions. That is why it is so important that the judiciary are independent of the Government and the executive. But the Government's attempts to protect us all from the new forms of terrorism have made it more difficult for the judiciary to perform our traditional protective role. Does this also mean that the independence of the judiciary is also under threat? Let us consider four examples from recent British history.

The four examples

(i) The expansion of executive detention

We tend to take it for granted that people can only be deprived of their liberty by the order of a court. Article 5 of the European Convention on Human Rights not only lays down a limited list of the grounds upon which a person may be deprived of his liberty but also requires that a detained person be able speedily to challenge the lawfulness of his detention before an independent court or tribunal.¹ Executive detention of

¹ Article 9(4) of the International Covenant on Civil and Political Rights is to the same effect; but the rights contained in the European Convention are made rights enforceable in UK domestic law by the Human Rights Act 1998.

foreigners pending deportation is allowed under article 5(1)(f) but this cannot persist indefinitely if there is no real possibility of deportation – either because there is nowhere which will have him or because the only place which would have him is a place where he would face a real risk of torture.² So our Government's immediate response to 9/11 was to derogate from the Convention in order to be able to detain indefinitely foreigners who were suspected of involvement in terrorism but could not be deported.³

The House of Lords eventually held, in the first *Belmarsh* case,⁴ that they could not do this. It did not fall within the power of derogation under article 15 of the Convention because it was discriminatory and irrational. Foreigners can of course be treated differently by the immigration laws. But they cannot be subjected to additional penalties or denied a fair trial just because they are foreigners. Singling out foreigners was irrational because it was well known that there were home grown terrorists too but the Government was not prepared to take similar action against them. So we declared the derogation invalid and the legislation incompatible with

² *Chahal v United Kingdom* (1996) 23 EHRR 413.

³ Derogations are permitted by article 15 in times of war or other public emergency threatening the life of the nation but only insofar as they are 'strictly required by the exigencies of the situation' and not in breach of our other obligations under international law.

⁴ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

the Convention rights. The European Court of Human Rights in Strasbourg later agreed with us.⁵

To its credit the Government has not since tried to introduce executive detention for everyone suspected of terrorism. But it has extended the period for which people can be detained during investigations without being charged with any criminal offence to 28 days and has tried to persuade Parliament to extend it even further.

These are undoubtedly attempts to encroach upon the role of the courts in deciding whether or not there is a good case – on the facts as well as on the law - for locking a person up and if so for how long he should be locked up. Instead, the executive decides that it wants to detain someone, not because of what he can be proved to have done, but because of what it is suspected that he has done or may do, and the judiciary is merely asked to review whether the executive has good grounds for its suspicions. Should the judiciary really be asked to lend its countenance to executive decision-making in this way? Or is it better that we are involved, even in this subsidiary capacity, rather than not at all?

⁵ *A and others v United Kingdom* (2009) 49 EHRR 29.

(ii) The use of torture

It goes without saying that our authorities are not allowed to use torture – or inhuman or degrading treatment – to obtain confessions or extract information. This is contrary to the UN Convention on Torture and also incompatible with article 3 of the European Convention on Human Rights. When – deplorably – they forget this, it is one of the roles of the courts and the judiciary to hold them to account. This we have been trying to do, for example by inquiring into the use of torture in British detention centres in Iraq⁶ and into possible British complicity in the use of torture to interrogate British citizens or residents abroad, sometimes in the face of Government attempts to keep relevant information secret on grounds of national security.⁷

But one of the features of the new terrorism is that tracking it down means, as the former head of our Security Service has put it, ‘dealing with countries that have very different standards of human rights from our own, with intelligence and police services that may, in their way be extremely primitive . . .’⁸ What then can be done with the information they supply?

⁶ *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

⁷ Unsuccessfully in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

⁸ Sir Richard Dearlove, *What price is too high? The response to terrorism and its consequences for civil liberties*, Ashurst Seminar, London 1 November 2005.

Once again, in the second *Belmarsh* case,⁹ the House of Lords made it clear that our courts could never make use of evidence which had been obtained by the use of torture. By a majority of three to two, however, they decided that the person wishing to challenge the admissibility of the evidence had to prove that it had been obtained by torture. As Lord Bingham, one of the dissenters, put it,¹⁰

‘This is a test which in the real world can never be satisfied. The foreign torturer does not boast of his trade. The security services . . . do not wish to imperil their relations with regimes where torture is practised . . . The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet.’

In reality, therefore, although the case was hailed as a great victory for the rule of law, the Government won the day. But are there compromises with the traditional notions of a fair trial which can be justified for the greater good? And do the judiciary compromise their independence by going along with these?

⁹ *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221.

¹⁰ At para 59.

(iii) Modifying the standards of a fair trial

The Government's response to the first *Belmarsh* decision was to persuade Parliament to legislate to replace executive detention with 'control orders' – not going so far as to deprive the suspected terrorist of his liberty but simply restricting it by placing him under a form of house arrest. As with executive detention, there is judicial review, but the process provides for there to be closed as well as open material. The judge sees all the material which the Home Secretary uses to make the decision. But the material cannot be disclosed to the controllee if it is 'contrary to the public interest' to do so. In such cases, a special security cleared advocate is appointed for the controllee. He can take instructions from his client up until the time when he sees the closed material but not afterwards except with leave of the court (which is rarely given). He can test the material by cross-examination and argument. He can try to persuade the court that there is no need to keep it secret. But if he fails, the controllee may not know more than the bare outlines of the case against him.¹¹

¹¹ The Court of Appeal has just held that this procedure cannot be adopted in ordinary civil proceedings unless there is statutory provision or the consent of all parties: *Al-Rawi v Security Service* [2010] EWCA Civ 482.

The first time this came before us, in *Secretary of State for the Home Department v MB and AF*,¹² the Law Lords held, by a majority, that if the controllee could not have a fair hearing without disclosure then the Home Secretary would have to choose between disclosing the material and withdrawing the case. (We had to turn the language of the statute on its head to do this, but that is another story.) We were, however, optimistic that in most cases, with strenuous efforts all round, a fair trial would be possible.

This turned out to be over-optimistic. When the case of *AF* came back to us,¹³ we were told that in reality the scope for contesting the Home Secretary's objections to disclosure was very limited. The principles adopted in the lower courts had been extremely cautious, allowing the Home Secretary to refuse to disclose simply because there were national security concerns about the type and source of the material in general. It was not their practice to conduct a balancing exercise between the harm to the public interest from disclosure and the harm to the interests of justice from non-disclosure in the particular case.

It is good, therefore, that we have insisted that these orders cannot be confirmed if the Home Secretary is not prepared to give enough

¹² [2007] UKHL 46, [2008] AC 440.

¹³ [2009] UKHL 26, [2009] 3 WLR 74.

disclosure for there to be a fair trial. But it is worrying that the courts have so far adopted such a restricted view of their powers to challenge the Home Secretary's claims to secrecy. We would all much prefer these cases to be dealt with by way of prosecution in the criminal courts, rather than by way of executive control on the grounds of mere suspicion rather than proof. We may even have to modify our criminal trial procedures somewhat to do this. But if so the courts rather than the Government should be in charge of striking the necessary balance between the competing interests. We do this in other cases where public interest immunity is claimed for government information but where immunity is claimed in the interests of national security the courts will ordinarily (but not invariably) defer to the executive's view.¹⁴

Once again, therefore, is this an example of the Government recruiting the judiciary to lend some respectability to fundamentally unfair procedures? Or have the judiciary at least this time got it right by putting the burden on the Government to disclose or withdraw? Can it be right to allow less fair procedures for imposing preventive measures on the ground of reasonable suspicion than it is for imposing punishment for proven wrong-doing if the result is the same – a long time behind bars or

¹⁴ *Conway v Rimmer* [1968] AC 910; see *R (Mohamed) v Secretary of State for Foreign Affairs* [2010] EWCA Civ 65 for a recent example and review of the approach to disclosure in cases involving national security.

confined to the home? How far can the judiciary lend itself to modifications of the traditional notion of a fair trial in order to prosecute terrorists to conviction?

(iv) Vetting the judges?

A final aspect of this is that the judges hearing special immigration and control order cases have been specially vetted by the security services so that they are deemed safe to see the classified material which others, including the individuals affected, are not allowed to see. This does not, as far as I know, mean that they have been specially selected by the Government. The assignment of judges is the business of the Head of the Judiciary and the Head of our Judiciary is no longer a member of the Government.¹⁵ Some of these judges are very far from Government-minded: a very high ranking civil servant in the Home Office once complained to me that they always seemed to get the notoriously independent-minded Mr Justice X on particularly sensitive cases where they would have preferred someone more compliant.

But is the implication that not all judges are to be trusted with top secret material? And if so, should we be more worried about the implication or

¹⁵ Before the Constitutional Reform Act 2005, the Head of Judiciary in England and Wales and Northern Ireland was the Lord Chancellor, who was also the Speaker of the House of Lords and a senior member of the Government. The Lord Chief Justice is now Head of the Judiciary and the Lord Chancellor is head of the Ministry of Justice.

about the consequence? And would it be more worrying still if there were evidence of the Government actively trying to bring these cases before the judges from whom they hoped for the most favourable responses? That is, I suspect, the greatest threat to the independence of the judiciary to emerge from these problems so far.

Conclusion

I have not been trying to draw conclusions – merely to raise questions for us to consider. They illustrate some of the difficulties involved in national judicial systems trying to combat nationally a threat which operates globally. Among the many striking quotations about the rule of law now carved into the walls of the library of the new Supreme Court of the United Kingdom are these words of Martin Luther King: ‘injustice anywhere is a threat to justice everywhere’.