SINGAPORE ACADEMY OF LAW ANNUAL LECTURE 2006: "TERRORISM AND HUMAN RIGHTS"

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1 Singapore was the first member of the Commonwealth in which I was instructed to appear after taking silk in 1978. I cannot tell you what a wonderful experience it was to leave a dreary English winter and be welcomed to a country that combined state-of-the-art modern architecture and luxuriant tropical vegetation, and where everything, and everyone, seemed to work. On the second occasion that I came here I did not make the mistake of leaving my wife behind and she has never forgotten the wonder of her first visit. And so I did not need to be asked twice to come here, with Christylle, to give the 13th of the Academy's annual lectures. The invitation was all the more welcome because I was aware of the prestige that attaches to these lectures, and of the distinction of the lecturers who have gone before me.

2 And as a new Chief Justice of England and Wales, it has been a particular pleasure to renew my acquaintance with your new Chief Justice, whom I had greatly enjoyed meeting in Kuala Lumpur, when he was Attorney-General, and to meet today the other members of the Bench of the Supreme Court and their law clerks.

3 Two years ago there was, here in Singapore, a major international research symposium attended by leading legal academics from around the world. They had come together to examine and compare anti-terrorism laws and policies in many of the major jurisdictions, including the UK. Victor V Ramraj and Michael Hor of your National University of Singapore made major contributions and subsequently joined Kent Roach of the University of Toronto in editing the papers that had been delivered into a valuable work, *Global Anti-Terrorism Law and Policy*,[1] with a postscript bringing the subject up to date, as at the middle of last year.

1 Cambridge University Press, 2005.

4 In this lecture I propose to concentrate on the complex history of the legislation and judicial reaction to that legislation in my own jurisdiction – 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 US Supreme Court. The US and the UK 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 US the constraint is their Constitution. In the UK the constraint is the European Convention on Human Rights. While I shall concentrate on the UK I shall be looking at developments that we have been following with great interest on the far side of the Atlantic.

I. The United Kingdom

5 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.

6 As an ex-colonial power, the UK 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 terrorist acts.

7 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.

8 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.

9 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*, 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 occasional use of arbitrary authority".[2]

10 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.

11 The most famous, or notorious, decision was that in *Liversidge v Anderson*,[3] 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".[4]

12 As we shall see, it is no longer so easy for the legislature of the UK 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 War. 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 Human Rights Convention").[5]

13 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.[6] This Convention

2 A V (Albert Venn) Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th Ed, 1951) at p 411.
3 [1942] AC 206.
4 *Id* at 207.
5 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), Eur TS No 5, 312 UNTS 221, 1953 UKTS No 71 (entered into force 3 September 1953), available on the website of the Council of Europe at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (accessed 7 December 2006).
6 UN Convention Relating to the Status of Refugees (29 July 1951), 189 UNTS 150, 1954 UKTS No 39 (Cmd 9171) (entered into force 22 April 1954), available on the

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.

14 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 though he posed a threat to the security of the country in which he had sought refuge.

15 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*[7] the Strasbourg Court held that Art 3 would be infringed if a person was extradited to a country where there were substantial grounds for believing that he would 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 the individual's fundamental rights".[8]

16 The UK has always contended that this balance was not observed in the sequel to *Soering*, namely the case of *Chahal v United Kingdom*.[9] In that case the UK 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.

17 He resisted deportation on the ground that he feared that he would be tortured if he were returned to India. The UK 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

website of the UN High Commissioner for Refugees at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (accessed 7 December 2006).

7 (1989) 11 EHRR 439 ("*Soering*").

8 *Id* at para 89.

9 (1997) 23 EHRR 413 ("*Chahal*").

to treatment contrary to Article 3 if removed to another State"[10] it was unlawful to remove him. The activities of that individual, however undesirable or dangerous, could not be a material consideration.

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

19 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 Art 3, there is no right to detain a suspected terrorist 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.

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

21 The Secretary of State had ordered that Chahal should be deported on the ground that his continued presence in the UK 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 Secretary of State and could not be 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.

22 At the time of the decision in *Chahal* the UK had not made the Human Rights Convention part of its domestic law. It always respected, however, the judgments of the Strasbourg Court. The decision in *Chahal* raised two problems.

10 *Id* at para 80.

23 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 inhumane 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 Art 5(4) to challenge his detention according to a fair procedure?

24 The Government's response was to adopt a procedure that the Strasbourg Court itself had commended in *Chahal* – a procedure that the court believed, perhaps not wholly accurately, existed in Canada. In 1997, Parliament passed a statute[11] creating a Special Immigration Appeals Commission, or SIAC. This consists of three judges, of whom the President is a member of the High Court.

25 Where applicants for admission to the UK are refused permission to enter or ordered to be deported on the grounds that this is conducive to the public good and, in particular, to the interests of national security, a right of appeal is granted to SIAC. Pursuant to the statute, procedural rules have been made designed to ensure that proceedings before SIAC do not lead to the 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 that advocate has seen the closed material, he is no longer permitted to communicate with the applicant.

26 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.

27 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 into one domestic

11 Special Immigration Appeals Commission Act 1997 (c 68) (UK).

law and they proceeded to do so. They passed the Human Rights Act 1998,[12] which came into force on 2 October 2000.

28 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 the Human Rights Convention. 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.

29 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. The senior judiciary and I have to work closely with Ministers in relation to many aspects of the administration of justice and I believe that Ministers appreciate that judges are doing their best to apply the law and that they do not decide cases according to personal predilections.

30 I said that, after *Chahal*,[13] the Government shelved the question of what to do about aliens whom they didn't 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 inhumane 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 Art 5(1) of the Convention in respect of:

12 1998 c 43 (UK).
13 *Supra* n 9.

> 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.[14]

31 Relying on this derogation, Parliament then passed the Anti-Terrorism, Crime and Security Act 2001.[15] 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 UK was a risk to national security and suspected that this person was a terrorist. Under s 23 of the Act the issue of such a certificate rendered the alien in question subject to detention and deportation. And, if it was not possible to deport him because of the risk of torture and so on, then he could be detained indefinitely in the UK without trial, pending ultimate deportation. The Act gave the 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.

32 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 Art 14 of the Human Rights 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 Art 14.

33 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*[16] is one of the most dramatic to have been given in my time in the law.

14 Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001 No 3644) (UK).

15 2001 c 24 (UK).

16 [2005] 2 AC 68 ("*A v Secretary of State*").

34 Exceptionally, nine law lords sat to hear the appeal. Their speeches run to over a hundred 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)*)[17] where the issue was whether low-level IRA terrorist activity in Ireland justified derogation from Art 5 of the Human Rights Convention). The Strasbourg Court gave the following definition of "public emergency affecting the life of the nation":[18]

> [A]n 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.

35 Lord Hoffmann, in a lone, and Churchillian dissent, applied a more fundamental test, which gave the words a more literal meaning. He said:[19]

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

He added:[20]

> 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 Art 5.

36 The second issue was whether the terms of the Derogation Order and of s 23 of the Act satisfied the requirement that they should infringe

17 (1979–80) 1 EHRR 15.
18 *Id* at para 28.
19 *A v Secretary of State*, *supra* n 16 at para 96.
20 *Id* at para 97.

Convention rights to no greater extent than was "strictly required by the exigencies of the situation".

37 Seven members of the House concluded that they did not. Three factors weighed particularly in their reasoning. The first was the importance that the UK 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.

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

39 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 s 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 ("the 2005 Act").[21] 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 2005 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.

40 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

21 2005 c 2 (UK).

considers it necessary to impose the order in order to prevent him from continuing to be so involved.

41 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.

42 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.

43 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 Art 5.

44 He also questioned whether the provisions for review by the court satisfied the requirements of a fair trial under Art 6. He commented:[22]

> [T]he 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 of the order. … 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.

22 *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to the United Kingdom 4th–12th November 2004*, CommDH(2005)6 (Office of the Commissioner for Human Rights, Council of Europe, 2005), paras 21–22. The report is available from the website of the Council of Europe at <http://www.coe.int>, or from <http://www.statewatch.org/news/2005/jun/coe-uk-report.pdf> (both accessed 7 December 2006).

> 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. …

45 A month after the Commissioner's visit, on 7 July 2005, 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.

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

47 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 of the order 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 Human Rights 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.

48 The case against MB depended very largely on closed material. His appeal came before Sullivan J.[23] He accepted the argument that the 2005 Act did not provide for a fair trial and declared it incompatible with the Human Rights 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.[24] 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

23 *Re MB* [2006] HRLR 29; (2006) 150 SJLB 539, QBD (Admin).

24 *Secretary of State for the Home Department v MB* [2006] 3 WLR 839, CA.

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.

49 The Strasbourg Court had itself indicated approval of the use of closed material coupled with a special advocate in *Chahal*.[25] 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.

50 A little more than a week later we heard a second appeal from a decision of Sullivan J on control orders that was adverse to the Secretary of State.[26] This case 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.

51 The remaining six hours each day was a period of only relative freedom, in that each could not go outside a 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.

52 Sullivan J held that these obligations, when taken as a whole, amounted not merely to restrictions on movement but to deprivation of liberty, contrary to Art 5 of the Human Rights Convention. 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.

25 *Supra* n 9.

26 *Secretary of State for the Home Department v JJ* (2006) 103(28) LSG 27, QBD (Admin).

53 This time we rejected the Secretary of State's appeal.[27] We agreed with Sullivan J 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 impose new control orders, reducing the period of house arrest from 18 hours to 14 hours a day, albeit he stated that this was less than the security services advised to be necessary. It may well be that the Home Secretary will petition the House of Lords for permission to appeal against our judgment. At the same time, the controlled persons are, I understand, making a fresh challenge against the new control orders. Continuous litigation of this kind, and the uncertainty that it creates, is manifestly unsatisfactory.

54 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?

55 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.[28] 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 embargo cannot be justified.

56 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?

57 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

27 *Secretary of State for the Home Department v JJ* [2006] 3 WLR 866, CA.
28 2000 c 23 (UK).

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 House of Lords' famous decision in *A v Secretary of State*.[29] You will remember that in that case, 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.

58 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.

59 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 UK authorities were party. That was not the case, however.

60 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 and evidence obtained by torture was not admissible.

61 But what was of particular interest in relation to the decision of the House of Lords was a critical issue as to the 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

29 *Supra* n 16.

might well not even be aware of what evidence was being held against him as the result of the use of closed material.

62 A minority of three, but a powerful minority as they were Lord Bingham of Cornhill, Lord Nicholls of Birkenhead and Lord Hoffmann, held that if there were grounds to suspect that evidence might have been obtained by torture, SIAC should reject the evidence unless satisfied that this was not the case. The majority, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood held that SIAC should admit the evidence unless satisfied, on a balance of probabilities, that it had been obtained by torture.

63 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 7 July 2005.

64 Here I propose to leave the jurisprudence of the UK. 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 US?

II. The United States

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

66 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".[30] A few weeks later the USA PATRIOT Act[31]

30 Authorization for Use of Military Force (18 September 2001), SJ Resolution 23; subsequently Public Law No 107-40; 50 USC (US) § 1541; 115 Stat 224, available from the website of the US Government Printing Office at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107.pdf> (accessed 7 December 2006).

significantly reduced the safeguards on the use by the intelligence services of covert surveillance.

67 More dramatic were the steps taken by the President in the exercise of executive authority. The administration promulgated a Military Order[32] 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 US Naval Base at Guantanamo Bay in Cuba.

68 The attraction of this location was that it was believed to be outside the jurisdiction of the US courts so that an application for *habeas corpus* by a non-national would not lie.

69 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.

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

31 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act 2001 (26 October 2001), Public Law No 107-56; 18 USC (US) § 1 note; 115 Stat 272, available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf> (accessed 7 December 2006).

32 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order 222 (13 November 2001), 66 Fed Reg 57,833, available from the website of The White House at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (accessed 7 December 2006).

71 We heard the case at the time when the District Court of Columbia had ruled that the US courts had no jurisdiction over aliens detained at Guantanamo. After reviewing both English and United States authority, we commented:[33]

> [W]e 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 the courts of England take pending review by the appellate courts in the United States, to a 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 review in any court or independent forum.

72 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 US. As his evidence was that he was already in negotiations about the position of British detainees, we made no order against him.

73 Our judgment was subsequently referred to in a Brandeis brief, which was placed before the US Supreme Court in *Rasul v Bush*,[34] 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 US 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 US. The merits of the detainees' claims for wrongful detention remain to be determined.

33 In *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] UKHRR 76 at paras 64 and 66.

34 542 US 466 (2004).

74 A second important decision of the US Supreme Court in this area, *Hamdi v Rumsfeld*,[35] related to a US citizen, Mr Hamdi, who had been declared an "illegal enemy combatant" by the US government and detained without trial, initially at Guantanamo and subsequently at military prisons on the US mainland. His father filed a *habeas corpus* petition.

75 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.

76 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".[36] On 29 June 2006, the US Supreme Court gave its decision in the important case of *Hamdan v Rumsfeld*.[37] 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.

77 The military commission, both in structure and procedure, violated the provisions of both the Uniform Code of Military Justice[38] and Art 3 of the third Geneva Convention.[39]

35 542 US 507 (2004).

36 US Department of Defense, "Defense Department Background Briefing on the Combatant Status Review Tribunal" (7 July 2004), available from the Department's website at <http://www.defenselink.mil/transcripts/2004/tr20040707-0981.html> (accessed 7 December 2006).

37 126 S Ct 2749 (2006).

38 10 USC § 801 *et seq*, available from the website of the US Government Printing Office at <http://www.access.gpo.gov/uscode/title10/subtitlea_partii_chapter47_.html> (accessed 7 December 2006).

39 Geneva Convention (III) Relative to the Treatment of Prisoners of War (12 August 1949), 75 UNTS 135; [1955] 6 UST 3316; TIAS No 3364 (entered into force 21 October 1950), available from the website of the UN High Commissioner for Human Rights at <http://www.ohchr.org/english/law/prisonerwar.htm> (accessed 7 December 2006). The text of the Convention is also set out in the Third Schedule to the Geneva Conventions Act (Cap 117, 1985 Rev Ed) (S'pore).

78 These challenges to executive action in the US 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 terrorist 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 US Constitution.

79 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.

80 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 I have to apply when dealing with terrorism include the Human Rights Act.

81 In the UK 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.

82 The desirability of preventing terrorists from blowing up innocent citizens is one that we can all appreciate. While I was writing this speech we 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 UK to the US. But security operations such as these deal with the product of terrorism, not the cause.

83 Terrorism is spawned by ideology and the ultimate battle is one of ideology. John Reid, our 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.

84 At a lecture given at the Irish Council for Civil Liberties (ICCL) 30th Anniversary Celebrations earlier this year, Shami Chakrabarti, the Director of the human rights group Liberty, observed:[40]

> 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 …

And:[41]

> If our values are truly fundamental and enduring, they have to be relevant whatever the level of threat.

85 I share these sentiments, coming from two very different quarters.

86 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 UK millions of immigrants from all corners of the globe, many of them refugees from countries where human rights are 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.

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40 Available on the ICCL website at <http://www.iccl.ie/DB_Data/publications/Shami_speech.pdf> (accessed 7 December 2006) at p 5.

41 *Id* at p 4.