

# *The detention of foreign nationals: three cheers for the House of Lords*

*Darren Sylvester raises three cheers in respect of their Lordships' judgments in A and others v. Secretary of State for the Home Department & X and another v. Secretary of State for the Home Department [2004] UKHL 56, 16<sup>th</sup> December 2004.*

## **Introduction**

It was my first article for this Newsletter that I questioned the legitimacy of the government's decision to derogate from Article 5 of the European Convention on Human Rights (ECHR) when the Anti-Terrorism, Crime and Security Bill (as it then was) was progressing through Parliament<sup>1</sup>. In the penultimate sentence of that article I wrote:

*"Until challenges arise questioning either the exercise of power under the Act or the lawfulness of the derogation under Article 15 it seems, for now at least, that the government's decision to derogate from Article 5 of the ECHR is legitimate".*

On 16<sup>th</sup> December 2004 nine law lords gave judgment, eight of whom agreed<sup>2</sup> that s.23 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001) is incompatible with Articles 5 and 14 of the ECHR insofar as it is disproportionate, permitting detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status.

Article 5(1) of the ECHR provides that everyone has the right to liberty and security of the person, and that no one could be deprived of his liberty save in accordance with a procedure prescribed by law and in certain circumstances. The government, via the Human Rights Act 1998 (Designated Derogation) Order<sup>3</sup>, purported to derogate from Article 5(1)(f) under the power contained in Article 15. In short, this allows derogations "*in time of war or other public emergency threatening the life of the nation*".

## **Synopsis of facts**

The basic facts of the case were that nine appellants had been certified by the then Home Secretary, David Blunkett, as suspected international terrorists<sup>4</sup> and were detained under s.23 ATCSA 2001. All the appellants were foreign nationals; none had been the subject of any criminal charge, neither was there a prospect of a criminal trial commencing. The ATCSA 2001 gave

---

<sup>1</sup> See "The Anti-Terrorism, Crime and Security Bill – is derogating from Article 5 of the ECHR legitimate and necessary?", The Weekly Law Reports Student Newsletter, 10<sup>th</sup> Edition, January 2002, page 15 et seq.

<sup>2</sup> Lord Walker of Gestingthorpe dissenting

<sup>3</sup> 2001, S.I. 2001/3644, effective 13<sup>th</sup> November 2001

<sup>4</sup> Under s.21 of the Anti-Terrorism, Crime & Security Act 2001

jurisdiction to the Special Immigration Appeals Commission (SIAC) for appeals pertaining to the derogation. The appellants lodged appeals at SIAC on the bases that the ATCSA 2001 and the Designated Derogation Order 2001 were discriminatory, as they only permitted suspected terrorists who were non-nationals to be detained. The appeals were successful, however, the Secretary of State successfully appealed to the Court of Appeal. The detainees sought leave to appeal to the House of Lords on the point of whether the ATCSA 2001 was in breach of the ECHR.

## Public emergency

Lord Bingham of Cornhill delivered the leading judgment in the House of Lords. His Lordship accepted the argument advanced on behalf of the government that there was a public emergency threatening the life of the nation which permitted the derogation under Article 15 of the ECHR. In arriving at this decision, His Lordship's reasoned and comprehensive analysis draws parallels between the decision in *Lawless v. Ireland*<sup>5</sup> and the period after 11<sup>th</sup> September 2001.

In contrast, Lord Hoffman's perspicuous judgment shows another school of thought on the public emergency argument. In dealing with this aspect, His Lordship's starting point is that the case "*calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention*"<sup>6</sup>. He continued by elucidating on the phrase "*threatening the life of the nation*" expressing, amongst other things, that "*the life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations*"<sup>7</sup>.

Whilst accepting that the threat from terrorism in the UK - given the events in New York on September 11<sup>th</sup> 2001 and Madrid on 11<sup>th</sup> March 2004 - is a real one, Lord Hoffman articulates that a threat of serious physical damage and loss of life does not automatically equate to a threat to the life of the nation as he argues "*Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community*"<sup>8</sup>.

## Proportionality & discrimination

Article 15 required that measures taken by a member state, by way of derogation, should not exceed what was "*strictly required by the exigencies of the situation*". The rationale behind the proportionality doctrine is to ensure that member states, when formulating decisions on a state of emergency (including the precise nature and scope of the derogations needed to address the emergency) do not engage a sledgehammer to crack a nut.

Lord Bingham found that s.23 ATCSA and the Designated Derogation Order 2001 did not comply with Article 15's proportionality requirement. In

---

<sup>5</sup> (No.3) (1961) 1 EHRR 15

<sup>6</sup> Para 86 of the judgment

<sup>7</sup> Para 91 of the judgment

<sup>8</sup> Para 96 of the judgment

particular, the appellants complained that the choice of an immigration measure to address a security problem had the inevitable result of failing to do just that. Moreover, the government failed to properly address any potential threat posed by terror suspects who are UK nationals, since they do not fall within the legislation requirements, and are at large. Foreign nationals, on the other hand, were allowed to leave the UK with impunity to pursue activities in another country; foreign nationals who could not leave the UK for another country<sup>9</sup> suffered the severe penalty of indefinite detention even though such persons may pose no threat or harbour no hostile intention to the UK at all.

Lord Bingham also gave judgment upon the fact that s.23 ATCSA was discriminatory, thereby being in breach of Article 14 of the ECHR. The contentions raised were that as s.23 was discriminatory, it could not have been “strictly required” within the proper construction of Article 15 and as a consequence was disproportionate. The appellants further contended that s.23 was discriminatory as its reach only extended to non-UK nationals. Interestingly, Lords Nicholls, Hope, Scott, Rodgers, Carswell and Baroness Hale of Richmond concurred with Lord Bingham.

### **Limitations of the judgment**

It seems that the Secretary of State was unsuccessful in the House of Lords as seven of their Lordships allowed the appellants appeal not because there is no emergency threatening the life of the nation; but on the ground that a power of detention confined only to foreign terror suspects is irrational and discriminatory.

On the 26<sup>th</sup> January 2005 the Home Secretary, Charles Clarke, in addressing the discriminatory and proportionality parts of the judgment, announced that the detention of foreign terror suspects without trial is to be replaced by a form of “house arrest”. For suspects who could not be deported, the use of new “control orders” would become operational. Such control orders would include no outside access, curfews and electronic tagging, however, the proposal of intercept evidence has been rejected, but is likely to be reviewed again before any changes in the law are presented to Parliament.

The Home Secretary’s pronouncements made clear the new powers could be used against all suspected terrorists, irrespective of whether they were UK or foreign nationals thought to be involved in domestic or international terrorism. Charles Clarke has stated that the twelve detainees, currently being held at Belmarsh and Woodhill jails, would not be released until the new laws are in place.

---

<sup>9</sup> Due to Article 2 and/or Article 3 reasons

## **An effective substitution?**

It is argued that keeping terror suspects under house arrest is simply a substitution for detention without charge or trial in Belmarsh to detention without charge or trial at home.

Should these proposals, as they stand, be passed through both Houses of Parliament, then it is my view that the future will see greater legal challenges on the horizon. Were the current detainees desirous of a remedy, they would have to take the matter to the European Court of Human Rights in Strasbourg. If this occurred, the European Court is highly likely to agree with the House of Lords' decision that Convention rights were clearly breached. In the event this matter reached the European Court, it would be interesting to see whether the approach adopted is from a higher threshold – maybe looking at breaches of Article 6 ECHR as the House of Lords did not consider such a point.

## **General significance**

Had there been more judgments analogous to Lord Hoffman's analysis, especially where he expresses no view on the majority decision that s.23 ATCSA 2001 is irrational and discriminatory to avoid giving the impression that all that was necessary was to extend the power to United Kingdom citizens as well<sup>10</sup> – then it is entirely reasonable to assume that the Home Secretary would have arrived at a different set of proposals in responding to the decision.

This aspect notwithstanding, one would not expect anything less of their Lordships' taking serious responsibility for protecting the human rights fabric of society. The judiciary's role must continue in this regard; as only then will Parliament have a working gauge to measure the future effectiveness of decisions involving, and potentially affecting, human rights.

The House of Lords has once again brought restored confidence, certainty and clarity to an area of law of general public importance vis-à-vis the safeguarding of traditional laws and political values in society. Doubtless many will have been elated with the decision; and perhaps a few commenced celebratory remarks with the words "hip, hip ... .."!

**Darren Sylvester, barrister**

---

<sup>10</sup> Para 97 of the judgment