An applicant's right to protection and the State's entitlement to protect its citizens against terrorism: a United Kingdom perspective

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Introduction

On 2 October 2000, the Human Rights Act 1998 came into force in the United Kingdom. Prior to that date, the European Convention on Human Rights was, as a treaty, binding on the United Kingdom government but not part of domestic law. An individual who sought a remedy under the Convention had to go to Strasbourg to get it. Under the 1998 Act, the principal provisions of the Convention became part of the law of the United Kingdom. Courts in all parts of the United Kingdom were required to make their decisions in accordance with the Convention, and to recognise Convention rights in cases before them.

On 11 September 2001 occurred a series of events in the United States of America that was not only appalling in itself but which had lasting repercussions. Those events brought the "war against terrorism" to the very front of governmental agendas. As a matter of political necessity, something had to be done: as a matter of practical necessity, governments needed to see what could be done to protect their countries and their citizens from similar outrages.

Clearly, the criminal law can be strengthened. New offences can be created and it has sometimes looked as though the United Kingdom government thought that the creation of new offences in this area was itself something to be proud of. One of the offences newly created in the Anti-terrorism, Crime and Security Act 2001, passed as a direct result of the events of September 11, was the offence 'knowingly causing a nuclear weapon explosion' without lawful authority.[1] It is not absolutely clear that the proscribing of this activity made the world a safer place than it was before. But by creating new offences, a government is seen to be acting, and some of the offences newly created may serve a useful purpose. Of course, merely punishing completed acts is of limited value in protecting the public against terrorism. A terrorist may not care about his own future. He may be content to die during his own act, or to suffer the consequences of it. In order for the criminal law to have a useful role in fighting terrorism, the crimes need to be defined in such a way

[1] Anti-terrorism, Crime and Security Act 2001, s 47

as to enable actions to be taken to prevent terrorist acts occurring. In this context the creation of such offences as failing to communicate immediately to a constable, information that might be of assistance in preventing an act of terrorism[2] as well as the more well-established offences such as conspiracy, may have a part to play.

The criminal law and criminal process, with equality of arms, open evidence and trial by jury for serious offences, is a way of dealing with a terrorist threat which poses few if any human rights difficulties. But the very features of the criminal process that give it its virtues operate also to restrict its value. A person will not be convicted of a crime unless the jury is satisfied beyond reasonable doubt that he committed it. In other words, the jury must be sure. There may be a majority verdict, but the majority required is a large one.[3] The evidence must be given in open court. There are provisions which prevent evidence being published in some cases, but all the evidence deployed against the defendant must be revealed to him. Further, there are provisions requiring the prosecution to disclose to the defendant material which they have discovered that might support his case. Certain material cannot be used at all. In particular, evidence obtained from the covert interception of telephone calls is not generally admissible in evidence in criminal proceedings.[4] These features of criminal process can be defended at various levels, and their effect is that convictions of crime cannot be founded on mere suspicion or on evidence, however convincing, which the defendant does not himself have a chance to deal with, or on evidence obtained in certain ways.

The United Kingdom government has taken the view – also defensible at a number of levels – that for those reasons the criminal law is not itself enough to provide protection from terrorism. As well as doing what it can to ensure that in proper cases there are convictions for criminal offences connected with terrorism, the protection of the public needs powers to enable the authorities to proceed, on the basis of non-disclosable intelligence, leading to suspicion but not proof, and restrain the activities of those who seek to commit terrorist acts.

Thus, a government may perceive a need to devise a procedure by which individuals may be restrained or prevented from committing terrorist acts on the basis of material that would not be sufficient to convict them of a criminal offence, and which in any event for other policy reasons will not be disclosed to them. On the other hand, any such process in a State party to the European Convention on Human Rights will need to be able to be subject to challenge and, if it is to succeed, will need to be able to show that the process itself and any procedure for challenging it are compliant with the Convention.

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[2] Ibid s 117, inserting a new s 38B into the Terrorism Act 2000I

[3] Juries Act 1974 Section 17

[4] Regulation of Investigatory Powers Act 2000, section 17

Process

Is there some means by which intelligence from the security services can be used in judicial proceedings whilst preserving the integrity and secrecy of the intelligence gathering system? At first blush it might seem unlikely that in a post-Human Rights Act Britain it would be possible to establish and maintain a system of proceedings in which information relevant to the decision about an individual was disclosed to the judge in secret and not revealed to the individual. But, fortunately for the government, a model was readily to hand in the form of the Special Immigration Appeals Commission.

One of the reasons why the European Court of Human Rights decided against the United Kingdom in Chahal v UK[5] related to the process by which Chahal's challenge to the decision made against him was treated under national law. The decision had been to deport Chahal on the basis that his deportation was conducive to the public good, and it is clear that the view was taken that he was an active terrorist supporting Sikh separatism. The procedure in such cases raising issues of national security was that the individual was deprived of his ordinary right of appeal to an immigration adjudicator, and his case was transferred to be dealt with by a group of three people who sat in private, heard from the appellant if he wished to give evidence but also took into account information from the government that was not disclosed to the appellant, and gave a decision by way of advice to the Secretary of State. The European Court decided that that process would not stand examination. It referred to the possibility of using instead a system of "special advocates" and drew a comparison with a system that was identified as existing in Canada.

The British Government's reaction was to set up the Special Immigration Appeals Commission[6], which indeed uses a system of special advocates. If an immigration appeal raises issues of national security, it is by certificate of the Secretary of State transferred from the ordinary appellate (Tribunal) process to the Special Immigration Appeals Commission. The commission has a bifurcated process. It conducts its proceedings in open hearings and closed hearings. Open hearings are open to the appellant and his legal representatives; closed hearings are not. But if the Secretary of State proposes to rely on any closed evidence (that is to say, if there are going to be any closed hearings) he is obliged to provide for the appointment of special advocates who will attend the closed hearings on the appellant's behalf. (They also attend the open hearings, in order to be fully appraised of the proceedings.)

The special advocates have security clearance. They may take instructions from the appellant, but only before they have seen the closed material. After

[5] (1997) 23 EHRR 413
[6] Special Immigration Appeals Commission Act 1997

they have seen the closed material, they cannot communicate with the appellants save with the leave of the Commission. It is the special advocate's task to raise in the closed hearings whatever there is to be said on the appellant's behalf. The Commission, which has to be chaired by a High Court Judge and includes other judges and lay members, makes its decision on the basis of all the material disclosed to it, whether in open or closed session. It may give a separate closed judgement relating to the closed sessions and including reasoning which, being based on closed evidence, cannot be disclosed.

The special advocates also have the task of identifying any evidence in respect of which the Secretary of State has no good reason for keeping it confidential. In a closed session they will argue that such evidence should be disclosed to the appellant. If the Tribunal rules in their favour, the Secretary of State has the choice of withdrawing it altogether from the Tribunal or disclosing it. The special advocates thus have the dual task of seeing that as little as possible of the relevant evidence remains closed, and of making representations on the appellant's side in respect of the closed material. The appellant may take part in the open sessions, but he may know rather little of the case against him. If he wins his appeal or if he loses it, he may never fully know the reasons why.

It goes without saying that the special advocates procedure has its critics. A process under which a person may take part in proceedings and have no real appreciation of the case he is meeting, or even how the case is being met on his behalf, is bound to raise some concerns. On the other hand, there are real concerns about maintaining the integrity of intelligence from the security services. If some information is revealed, it may be possible to deduce that a particular channel of information has not been tapped. A person who uses three mobile telephones may be able to draw certain conclusions if evidence from the tapping of only two of them is used against him. If the extent of the security services' knowledge is revealed, it may be clear how that information was obtained. Individual security service personnel may be put at risk. Channels of communication may be permanently disabled.

If it is accepted that there is a need to protect the security services' work whilst being able to act on the information they obtain, it may well be that a special advocates system is, despite its defects, the best that can be devised. Although it has had its critics, they have failed to persuade the higher courts that the Special Immigration Appeals Commission's process is inherently unlawful. Indeed, rather unexpectedly, the European Court of Human Rights recommended the introduction of the special advocate into a broader spectrum of cases in Edwards and Lewis v UK[7]. Similarly, the House of Lords in R v H and C[8] indicated its general approval of the system, with the caveat that the use of special advocates should not become routine in proceedings

[7] (2005) 40 EHRR 24
[8] [2004] UKHL 3

outside the Special Immigration Appeals Commission, although there was a role for them in limited circumstances in other cases.

Detention

Given that a process of judicial decision-making protecting security intelligence was available, the next question for the government must have been whether there was any way in which it could be used in the general fight against terrorism. Human rights jurisprudence (not least Chahal itself) had made it clear that a State party to the European Convention on Human Rights could not expel from its territory an individual who would be at risk of treatment contrary to Article 3 in his own country. Thus Chahal himself was in the end saved from deportation by the fact that if returned to India he would be subject to severe ill-treatment. In the days after 11 September 2001, it appears to have seemed to the British government particularly unfortunate that Britain might thus be compelled, as a state party to the Convention, to harbour international terrorists who could not be removed from the United Kingdom because of the provisions of Article 3 and who had to remain at large in the United Kingdom because they had not been convicted of any criminal offence, and could not be convicted, because of the considerations already set out. The government's response was Part 4 of the Anti-terrorism, Crime and Security Act 2001. Section 21 of that Act enabled the Secretary of State to issue a certificate in respect of a person if he

"reasonably –

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist."

The person could appeal against the issue of a certificate to the Special Immigration Appeals Commission which would, of course, involve the process which I have outlined. Further, the Special Immigration Appeals Commission was required to review certificates on a regular basis. It may be thought that merely providing certificates to suspected international terrorists was unlikely very much to hamper their activities, but the key provision was that of Section 23:

> "**Detention**
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> (1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by—
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> (a) a point of law which wholly or partly relates to an international agreement, or
>
> (b) a practical consideration.
>
> (2) The provisions mentioned in subsection (1) are—

(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and

(b) paragraph 2 of Schedule 3 to that Act (detention pending deportation)."

The effect of those provisions was to permit indefinite detention of foreign nationals who were suspected international terrorists. The detention provisions to which reference is made in s 23(2) are those in the Immigration Act, and apply only to foreign nationals. Detention of foreign nationals to prevent them entering the country or with a view to their removal is permitted by Article 5(1) of the Convention, but it had been long recognised that such detention was only lawful if for the purpose indicated, and ceased to be lawful if the purpose could not be fulfilled.[9] In order to seek to ensure that indefinite detention under s 23 remained lawful so far as Strasbourg is concerned, the British government notified a derogation from Article 5 to the extent necessary, citing the terrorist threat as an emergency threatening the life of the nation.

It will be clear from the foregoing that a person detained under s 23 (a) would necessarily be a foreign national; (b) might be detained indefinitely; but (c) had the right of appeal to the Special Immigration Appeals Commission.

In an early case on s 23, the Special Immigration Appeals Commission decided that the legislation was unlawful as discriminatory. It held that the discrimination between British citizens and non-nationals could not be justified in the context of the aims of the legislation. The Commission considered that it made no sense to detain only non-nationals, when it was clear that British nationals might also be terrorists (as became regrettably clear from later events). It also considered whether detention only of those who could not or would not be deported was a proportionate response, bearing in mind that parts of some foreign countries, notably France, are very close to potential targets within the United Kingdom. The Court of Appeal reversed the Commission's decision, but the House of Lords restored it. The House of Lords too thought that the legislation was defective for the reasons I have identified[10]. It was unlawfully discriminatory, and it was a disproportionate response to the perceived danger.

As a result, the House quashed the statutory instrument giving effect to the Note of Derogation, and declared that the detention provisions of s 23 were incompatible with the Human Rights Act.

Restraint

[9] R v Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 704
[10] A and others v Secretary of State for the Home Department [2004] UKHL 56

The government's response was to introduce a new system, designed to avoid the illegalities of the procedure under the 2001 Act, but apparently modelled to some extent on the very restrictive conditions which the Special Immigration Appeals Commission had imposed on a number of those it had released on bail.

The Prevention of Terrorism Act 2005 makes provisions for control orders. A control order is "an order made against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism"[11] There is a non-exclusive list of potential obligations in s 1(4)(a)-(p). Breach of obligations imposed under a control order is a criminal offence punishable with imprisonment of up to 5 years under s 9. The obligations imposed in a group of cases examined by the Court of Appeal were summarised by it[12] as follows:

> "Each respondent is required to remain within his 'residence' at all times, save for a period of six hours between 10 am and 4 pm. In the case of [one of the respondents] the specified residence is a one-bedroom flat provided by the local authority in which he lived before his detention. In the case of the other five… the specified residences are one-bedroom flats provided [the Home Office]. During the curfew period the respondents are confined in their small flats and are not even allowed into the common parts of the buildings in which these flats are situated. Visitors must be authorised by the Home Office, to which name, address, date of birth and photographic identity must be supplied. The residences are subject to spot searches by the police. During the six hours when they are permitted to leave their residences, the respondents are confined to restricted urban areas, the largest of which is 72 square kilometres. These deliberately do not extend, save in the case of GG, to any area in which they lived before. Each area contains a mosque, a hospital, primary health care facilities, shops and entertainment and sporting facilities. The respondents are prohibited from meeting anyone by pre-arrangement who has not been given the same Home Office clearance as a visitor to the residence."

The judgement of the trial judge[13] contains, in an appendix, the full text of the order, from which it is apparent that numerous other obligations were imposed. The subjects of the control orders were electronically tagged at all times, they were prohibited from access to the internet and to the use of more than one telephone line (no mobile phones allowed), they were entitled to visit only one mosque, to use only one bank account, the transactions on which had to be disclosed, were not entitled to transfer any money or send any documents or goods to a destination outside the United Kingdom, and

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[11] Section 1(1)
[12] SSHD v JJ and others [2006] EWCA Civ 1141[4]
[13] [2006] EWHC 1623 (Admin) (Sullivan J)

were required to notify the Home Office of there possession of any genuine non-UK passport, and to surrender to the Home Office any other passport, identity card or travel document.

The Act draws a clear distinction between a "derogating control order" and a "non-derogating control order". A derogating control order is one the effect of which is incompatible with the individual's rights under Article 5. The procedure for making derogating control orders is different from that for non-derogating control orders: the latter are made by the Secretary of State but require the approval of the court, whereas derogating control orders are made by the court on application by the Secretary of State. There are various other differences, including the threshold conditions before the order can be made, and the duration of orders once made.

"The court" means the High Court in England and Wales or the courts of equivalent jurisdiction in Scotland and Northern Ireland, so that as in the case of the Special Immigration Appeals Commission, there is supervision at that high judicial level. As well as making or allowing the initial control order, the court has jurisdiction in appeals against renewals of order or the imposition of new obligations under them. For these purposes the court may sit with assessors, and may sit in closed session with special advocates.

The control order regime under the 2005 Act differs in important respects from the certification and detention provisions of the 2001 Act. First, control orders may be imposed on British citizens as well as on foreign nationals. Secondly, the control order provisions, unlike those of 2001, are not parasitic on immigration law, and the court dealing with them is the High Court rather than the Special Immigration Appeals Commission. Thirdly, the effect of a non-derogating control order is restriction rather than detention. In a number of other respects, however, it will be apparent that the two systems are similar.

In control order cases there is an appeal on a point of law only from the High Court. A number of those subject to control orders raised issues as to their legality, and the House of Lords gave judgement in a group of cases[14] on 31 October 2007. The House of Lords rejected the claim that the imposition of a control order fell within the criminal limb of Article 6. The Secretary of State had conceded that the proceedings fell within the civil limb of Article 6, and, as Lord Bingham said[15]:

> "the application of the civil limb of Article 6(1) does in my opinion entitle such a person to such a measure of procedural protection as is

[14] SSHD v JJ and others [2007] UKHL 45; SSHD v MB and another [2007] UKHL 46; SSHD v E and another [2007] UKHL 47
[15] SSHD v E at [24]

> commensurate with the gravity of the potential consequences. This… seems to me to reflect the spirit of the Convention."

Further, the House of Lords emphasised the importance of keeping under review the possibility of the prosecution of the individuals in question, as the 2005 Act requires[16]. But there were considerable concerns about other aspects of the cases before the House. By a 3-2 majority in SSHD v JJ, it was held that the conditions imposed under a "purportedly" non-derogating control order did amount to a depravation of liberty within the meaning of Article 5. The trial judge had expressed his conclusion in this way[17]:

> "Drawing these threads together, and bearing in mind the type, duration, effects and manner of implementation of the obligations in these control orders, I am left in no doubt whatsoever that the cumulative effect of the obligations has been to deprive the respondents of their liberty in breach of Article 5 of the Convention. I do not consider that this is a borderline case. The collective impact of the obligations… could not sensibly be described as a mere restriction upon the respondents' liberty of movement. In terms of the length of the curfew period (18 hours), the extent of the obligations, and their intrusive impact on the respondents' ability to lead anything resembling a normal life, whether inside their residences within the curfew period, or for the 6-hour period outside it, these control orders go far beyond the restrictions in those cases where the European Court of Human Rights has concluded that there has been a restriction upon but not a deprivation of liberty."

The conclusion was that the control orders were of no effect, because as the obligations imposed amounted to a restriction on liberty, the order could be made only by the procedure for a derogating control order.

As a result of the decision in SSHD v JJ, there have been a number of subsequent challenges to control orders on the ground that the obligations imposed in the individual case amount to a deprivation of liberty. In the summer of 2010 another made its way beyond the Court of Appeal to the United Kingdom Supreme Court, which has replaced the House of Lords. In the course of giving a judgement with which the other six members of the court sitting agreed, Lord Brown of Eaton-under-Heywood said this[18]:

> "I nevertheless remain of the view that for a control order with a 16-hour curfew (a fortiori one with a 14-hour curfew) to be struck down as involving a deprivation of liberty, the other conditions imposed would

[16] SSHD v E at [21] per Lord Bingham
[17] [2006] EWHC 1623 (Admin) at 73
[18] SSHD v AP [2010] UKSC 24 at [4]. Lord Brown quotes from the judgement of Mitting J in SSHD v AH [2008] EWHC 1018 (Admin).

> have to be unusually destructive of the life the controlee might otherwise have been living… 'Social isolation is a significant factor, especially if it approaches solitary confinement during curfew periods.' Quite how to balance on the one hand the precise length of curfew and on the other hand the degree of social isolation involved in any particular case presents a difficulty: the two are essentially incommensurable."

The Supreme Court went on to give guidance on the interaction of Articles 8 and 5 of the European Convention on Human Rights.

Thus, the basic principle of control orders under the 2005 Act has survived the scrutiny of the House of Lords and the Supreme Court, but both have rightly been concern to ensure that non-derogating control orders do not constitute a breach of Article 5. It is for the Secretary of State in proposing obligations under a control order to ensure that, taken together, they do not amount to a depravation of liberty.

Closed Material

The court's process, with closed sessions and special advocates, has also been the subject of challenge. In SSHD v MB and another, Lord Bingham, after considering the rules of procedure relating to control orders, and authorities from a number of jurisdictions, said this[19]:

> "I do not for my part doubt that the engagement of special advocates in cases such as these can help to enhance the measure of procedural justice available to a controlled person. The assistance which special advocates can give has been acknowledged (for instance, in M v Secretary of State for the Home Department [2004] EWCA Civ 324, para 34), and it is no doubt possible for such advocates on occasion to demonstrate that evidence relied on against a controlled person is tainted, unreliable or self-contradictory. I share the view to which the Strasbourg court inclined in Chahal, above, para 131, repeated in Al-Nashif v Bulgaria (2002) 36 EHRR 655, paragraph 97, that the engagement of special advocates may be a valuable procedure. But, as Lord Woolf observed in R (Roberts) v Parole Board [2005] UK HL 45 (paragraph 60): "The use of an SAA is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him." The reason is obvious. In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of

[19] SSHD v MB at [35]

rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. "Grave disadvantage" is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain. I would respectfully agree with the opinion of Lord Woolf in Roberts, para 83(vii), that the task of the court in any given case is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person (see also R (Hammond) v Secretary of State for the Home Department [2005] UKHL 69".

Lord Bingham's view was that in the cases before the House, where the reasons for making the control orders were wholly contained in closed evidence, so that the person affected had no idea of the case he was to meet, there had been a breach of the right to a fair hearing. The other members of the House of Lords were not able to agree precisely with that analysis, but the cases were sent back to the High Court for redetermination.

There is a summary of the effect of the decision in MB v SSHD in the judgement of Sir Anthony Clarke MR and Waller LJ in SSHD v AF and others[20] which, when the same case was considered by the House of Lords[21] Lord Phillips described[22] as correct. AF came before the House of Lords following further consideration of the same issue by the Grand Chamber of the European Court of Human Rights in[23]. Those were proceedings in relation to the 2001 Act, but in the course of a discussion of the role and function of special advocates, the court said this:

"218 Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

…

220 … even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the

[20] [2008] EWCA Civ 1148
[21] [2009] UKHL 28
[22] at [44]
[23] [2009] ECHR 301

> applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations… Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied."

It followed, as all nine members of the House sitting agreed, that a judge dealing with a control order case 2 would have to be satisfied that sufficient material had been placed in the open to enable the person affected by the control order to have a proper opportunity to meet the allegation against him and in other respects to have a fair trial. Lord Hoffmann, who had been a dissentient in some of the other cases, said this[24]:

> "I agree that the judgement of the European Convention on Human Rights… requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit."

Although the provisions of the 2001 Act relating to the detention of suspected international terrorists have been repealed, the Special Immigration Appeals Commission continues to operate for its original purposes, that is to say to deal with immigration appeals where there is a national security element. In W and others v SSHD[25] the Court of Appeal had to decide whether, following the decision of the House of Lords in AF, appellants before the Special Immigration Appeals Commission were equally entitled to know the "gist" of the case against them. The Court of Appeal drew a distinction between control order cases and other proceedings before the Special Immigration Appeals Commission. Control order cases may engage Article 5, and all the requirements of procedural fairness in the European Convention on Human Rights therefore have application to the proceedings. Issues relating to immigration and nationality, however, are not governed by Article 6 of the Convention[26], and were subject therefore only to principles of domestic law, which did not require the disclosure of even an "irreducible minimum of information" to be provided to the appellant, where disclosure to him would not be in the interests of national security[27].

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[24] at [70]
[25] [2010] EWCA Civ 898
[26] See, most recently, Maaouia v France [2000] 33 EHRR 1037
[27] See also RRB (Algeria) v SSHD [2009] UKHL 10

Torture

The system of special advocates was designed to ensure that the government could put before the Special Immigration Appeals Commission or the court material that it would be contrary to the interests of national security to make public. But not all material upon which the Secretary of State might seek to rely can be taken into account. The particular exception is evidence that has been, or perhaps may have been, obtained by torture.

What is in issue here is not evidence obtained directly by the United Kingdom government's torture of a suspected terrorist. It is not suggested that such a thing happens. But other countries may use torture, and if they do, the information so obtained may be shared with our own government and others in a common aim of anticipating and preventing terrorist activities. Such information may or may not be reliable; if the Secretary of State thinks it is sufficiently reliable, it may form part of the basis upon which he forms a view about the risk posed by an individual.

If he does take action against the individual under the legislative provisions we have been examining, he will have to establish the basis for his suspicion, and the question then arises whether the court can take into account the material derived from torture. In A v SSHD[28] the House of Lords decided unanimously (albeit with some differences on the burden and standard of proof) that such evidence could not be relied upon in legal proceedings. After a wide-ranging discussion Lord Bingham concluded at [52] as follows:

> "The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention. The answer to the central question posed at the outset of this opinion is to be found not in a governmental policy, which may change, but in law."

Lord Nicholls had pointed out that the Secretary of State was entitled to take the material into account in making his own decision but that did not mean he was entitled to use the same process to justify that decision before a court:

> 67. … What should the security services and the police and other executive agencies of this country do if they know or suspect information received by them from overseas is the product of torture?

[28] [2005] UKHL 71

> Should they discard this information as 'tainted', and decline to use it lest its use by them be regarded as condoning the horrific means by which the information was obtained?
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> 68. The intuitive response to these questions is that if use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act in this way. Similarly, if tainted information points a finger of suspicion at a particular individual: depending on the circumstances, this information is a matter the police may properly take into account when considering, for example, whether to make an arrest.
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> 69. In both these instances the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.
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> 70. The next step is to consider whether the position is the same regarding the use of this information in legal proceedings and, if not, why not. In my view the position is not the same. The executive and the judiciary have different functions and different responsibilities.

And the responsibility of a judge includes an obligation not to take account of evidence obtained by torture. However reliable such evidence may be, therefore, it cannot form part of the basis upon which the Special Immigration Appeals Commission or the court upholds the Secretary of State's decision; which means that although the decision may have itself been lawful and justified, if it is challenged it may fall, because the full reasons for it cannot be given.

Concluding Thoughts

The first two principles in the guidelines promulgated on 11 July 2002 by the Committee of Ministers of the Council of Europe in relation to human rights and the fight against terrorism are as follows:

> "**I States' obligation to protect everyone against terrorism**
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> States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully

justifies states' fight against terrorism in accordance with the present guidelines.

II Prohibition of arbitrariness

All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision."

The balance is clearly a difficult one. It may be regarded as clear from the words of Lord Hoffmann quoted above as well as the decision of the Court of Appeal in W and others, that it has not yet been struck in a way that meets the approval of all senior judiciary. Senior judges differ, too, on the extent to which they are prepared to make public comment on these issues. In his Lionel Cohen lecture, given on 23 May 2010 in Jerusalem, Lord Neuberger, the Master of the Rolls, began by saying this:

"Perhaps because of my involvement with one or two cases involving alleged torture or mistreatment of those suspected of involvement with terrorism, I was asked to speak about such topics. It was very tempting – the issues to which torture and terrorism give rise are as fascinating legally and intellectually as they are important politically and morally. But I decided that it would be inappropriate to do so. Judges should be very wary about discussing their recent decisions, and they should rarely, if ever, publicly express, or even appear to express, political views. That is especially true when it comes to highly sensitive topics such as terrorism and torture."

In giving his 2009 Judicial Studies Board Annual Lecture on 'The Universality of Human Rights, Lord Hoffman felt constrained to avoid the area of terrorism and deportation, because there were appeals currently pending – as has so often been the case in the last nine years. On the other hand, Lord Phillips of Worth Matravers, the President of the Supreme Court, in giving the Gresham lecture in London on 8 June 2010, summarised some of the decisions which I have discussed, and concluded with these comments:

"I should add that, in my opinion, the enactment of the Human Rights Act by the previous administration was an outstanding contribution to the upholding of the rule of law in this country and one for which it deserves great credit. Because it requires the Courts to scrutinise not merely executive action but Acts of Parliament to make sure that these respect Human Rights, the Act has given the Supreme Court some of the functions of a Constitutional Court. Drawing the right line between protecting the rights of the individual and respecting the supremacy of Parliament is, I believe, our greatest challenge."

It would be, I think, uncontroversial that that is a challenge. The question deserving consideration is whether there is not a greater one. The decisions I have discussed are precisely described by Lord Phillips' words. The courts examine the words of statutes and the powers of Parliament in order to see whether the legislation is framed in such a manner as to legitimate what is said to be an infringement of the rights of an individual. If the decision is against the government, the response may be different legislation. But, as Parliament speaks through legislation, and as the legislation is question is likely to be construed very strictly because of its effect on individual rights, there may be little opportunity for other factors to b taken into account in this elevated ping-pong.

But there surely is a missing factor. It is the interests of the general public. Those interests are not adequately represented by a government allowed only to defend the drafting of its legislation. The important thing surely is to enable the courts to take into account the interests of individuals other than the claimants. There is precious little in the history of the examination of anti-terrorist legislation by the higher judiciary in the United Kingdom to indicate any real conception of the interests of the many. Can it really be right that it is better for us all to be at risk of being blown up than that the Secretary of State should be allowed to defend a reasonable decision, if part of the basis of his reasoning was material obtained by torture abroad? If so, it is because the courts have elevated the interests of one individual above the interests of everyone else.

Judges decide cases. They decide issues between parties. Where the meaning and ambit of legislation is concerned, they scrutinise the words with care. But when the public interest is concerned, that may be an over-sterile activity. And when the millions outside the courtroom need protection from the activities of the one person in the courtroom, the common-law process may be at its most inadequate. There is simply no formal basis for the interests of non-litigants to be argued.

I should therefore be inclined to suggest that a greater challenge than that described by Lord Phillips is to balance the interests of the one against the interests of the many, within the constraints of the rule of law and the democratic process. The story I have told suggests that that challenge has yet to be recognised, let alone faced.