Clayton Comments

Richard Clayton QC

THE BELMARSH CASE

The House of Lords' decision in ***A v Secretary of State for the Home Department*** is rightly regarded as a constitutional case of the highest importance.[1] The war on terror following the attack on the World Trade Centre on 9/11 created a febrile political backdrop to the case. In April 2004 the Home Secretary, David Blunkett, criticised the Special Immigrations Appeal Commission's decision to release on bail one of the appellants in the case as "extraordinary", adding that others might call it "bonkers".[2] Against that background, a nine judge panel of the House of Lords addressed a number of difficult issues, demonstrating that the Human Rights Act 1998 (HRA) had fundamentally recast basic public law principles. They examined the lawfulness of preventative detention of non-nationals on national security grounds, a subject area where the English courts have traditionally been highly deferential to executive decision making.[3] However, a challenge made under the Human Rights Act 1998 raised new legal possibilities, which went well beyond traditional administrative law principles, demonstrating that Parliament cannot insulate itself altogether from a public law challenge where Convention rights are, themselves, breached. Under the HRA the Courts are entitled to declare that legislation is incompatible with Convention rights, leaving it to Parliament to make the ultimate decision as to remedy the breach by making a remedial order under s 10 of the HRA, as Parliament, in fact, felt obliged to do by repealing the regime that the House of Lords criticised.

The Anti-Terrorism Crime and Security Act 2001

The immediate reaction of the British Government to terrorist destruction of the World Trade Centre on 11 September 2001 was a meeting of the Civil Contingencies Committee, a cabinet committee chaired by the Home Secretary which deals with major crises such as terrorism or natural disasters. After consulting with the two main opposition parties, Parliament was recalled on 14

---

1 [2005] 2 AC 68

2 *G v Secretary of State for the Home Department* (S.C./2/2002, Bail Application S.C.B./10, May 20, 2004)

3 See, eg Simpson 'In the Highest Degree Odious: Wartime Detention without Trial' (OUP, 1992).

September, 2001. The Prime Minister, Tony Blair, then promised Parliament a review of the extradition laws, of the mechanisms of international justice, of the link between terrorism and crime, and of the sources of terrorist finance.[4] When Parliament was again recalled on 4 October 2001, the Prime Minister announced a legislative package addressing a variety of governmental concerns: extradition, the exclusion and removal of terrorist suspects, abuse of asylum and on incitement to racial hatred.[5] On October 15 2001 the Home Secretary told the Commons that, although the wholesale revision of existing anti-terrorism laws was not needed, specific and targeted measures required an emergency Bill. [6] The Prime Minister was eager to emphasise that the response was no "knee-jerk" reaction,[7] and the Home Secretary said that he had thought "long and hard … [and] not rushed into these measures".[8] The Home Secretary then announced he had taken every possible step to get the best legal advice before committing itself to action.[9] He had begun reviewing extradition before 9/11,[10] and the Government decided to wait 10 weeks before introducing its proposals to Parliament, wanting to get things right in terms of meeting the UK's international obligations.[11] The Chancellor of the Exchequer, Gordon Brown, next announced that financial measures against alleged terrorists reflected decisions by G7 finance ministers and central bank governors, as well as UN Security Council Resolutions.[12]

On 19 November 2001, two months after the terrorist attacks on New York, the Bill was put before Parliament. It was widely criticised, and was described as being 'the most draconian legislation Parliament has passed in peacetime in over a century'.[13] Nevertheless, in opening the Second Reading debate, the Home Secretary thanked his advisers, officials and ministerial team for

4 HC Debs, Vol.372, col.606.
5 Ibid., col.675.
6 Ibid., col.923.
7 Ibid., col.635.
8 Ibid., col.928
9 Ibid., col.936
10 Ibid., col.923
11 Ibid., col.928
12 Ibid., cols 940-941
13 A Tomkins (2002) 'Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001' Public Law 205-20

assistance, and indicated that the decision-making process had been informed by the reports of the Joint Lords/Commons Select Committee on Human Rights, and the Home Affairs Committee.[14]

The 2001 Act covered a wide range of areas. Many of its measures were not specifically targeted at terrorism, and the Home Affairs Committee was critical of the swift timetable for such a long bill including non-emergency measures.[15] For example, the 2001 Act rewrote parts of the Terrorism Act 2000 relating to seizure of suspected terrorist assets,[16] gave new powers to Her Majesty's Customs and Excise and Inland Revenue to require the disclosure of information for law enforcement purposes,[17] substituted racially-aggravated with racially or religiously aggravated in some parts of the criminal law,[18] and made it illegal to deal in biological or chemical weapons, or set off a nuclear explosion, or to disclose information which might prejudice the security of any nuclear site or of any nuclear material.[19]

However, the key provisions in the 2001 Act, which the Court had, ultimately, to address in the ***Belmarsh*** case, were contained in Part 4 of the 2001 Act. Part 4 allowed the Home Secretary to certify any non-British citizen whom he suspected to be a terrorist and detain them indefinitely, pending deportation, even when such a deportation would otherwise be prohibited. Part 4 was enacted because of the impact of the European Court of Human Rights (ECtHR) decision in ***Chahal v the United Kingdom*** in 1996.[20] In ***Chahal*** the ECtHR decided that the absolute character of Article 3 of the European Convention of Human Rights (the prohibition of torture and inhuman treatment) meant that the risk of inhuman treatment could not be weighed against the reasons (including the protection of national security) put forward by a State to justify expulsion. Although the Immigration Act 1971 permits deportation of those who are a threat to national security for cases where there is insufficient admissible evidence for prosecution, the ***Chahal*** decision effectively meant that that Article 3 prevented non nations from being deported to another country- if the

14 HC Debs, Vol.375, cols 21-22.
15 http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/351/35102.htm
16 Pt 1 of the Act
17 Pt 2 of the Act
18 Pt 5 of the Act
19 Pts 6 to 8 of the Act
20 (1997) 23 EHRR 413

individual being deported could argue there were substantial grounds for believing that he would be subjected to torture or inhuman treatment on his return.

The British Government's opposition to the ***Chahal*** principle has been unremitting since it lost the case in 1996, but has consistently failed to shift the Strasbourg Court. In the important case of ***Saadi v Italy***[21] in 2009 the Grand Chamber emphasised the absolute character of Article 3, despite the intervention of the UK Government intervened to challenge the decision in ***Chahal***. Although the UK Government argument that ***Chahal*** caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures,[22] the Grand Chamber rejected this submission in robust terms,[23] stressing that:[24]

> As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see ***Chahal v United Kingdom***), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 see ***Indelicato v Italy*** [25] and ***Ramirez Sanchez v France***).[26]

The particular difficulty posed by ***Chahal*** for immigration detention purposes is that the common law power to detain individuals under ***Hardial Singh*** principles are limited to such time, as is reasonable, to enable the deportation process to be carried out.[27] On the face of it, therefore, the decision in ***Chahal*** prevented an individual from being returned to a country where there was a substantial risk of Article 3 treatment had the effect of preventing him from being deported within a reasonable time. As a result, it is not possible under the Immigration Act 1971 to detain alleged terrorists on ***Chahal*** grounds even though they could not be removed from the UK. The Government

21 (2009) 49 EHRR 30
22 Ibid, paras 117–123.
23 Ibid, paras 137–141.
24 Ibid, para 127.
25 Judgment, 18 October 2001 para 30.
26 Judgment, 4 July 2006 paras 115–116 (GC).
27 [1984] 1 WLR 704 approved by the Supreme Court in ***R Lumba) v Secretary of State for the Home Department*** [2012] 1 AC 245.

recognised that continuing to detain an individual in these circumstances went beyond the bounds of the right to liberty under Article 5 of the Convention.

Consequently, the Government decided to utilise the procedure under Article 15 to derogate from the Convention. Article 15 states:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

The Government, therefore, proceeded to opt out of Article 5 altogether- by derogating from the Convention on the ground that there was a 'state of emergency threatening the life of the nation' under Article 15 of the Convention.[28] This meant that the UK gave notice to the Secretary-General of the Council of Europe under Article 15 that, in the Government's view, Part 4 of the 2001 Act constituted a justified derogation from the rights of those detained under Article 5.

Nevertheless, individuals detained under Part 4 were entitled to challenge to the lawfulness of this process by appealing to the Special Immigration Appeals Commission (SIAC). SIAC is chaired by a High Court judge, who sits with two other members who have been vetted by the security services and who have experience of security matters, and has the same status as the High Court (a 'superior court of record'). This resulted in SIAC not being amenable to judicial review by the High Court, although an appeal lies on a point of law to the Court of Appeal (Civil Division) and, with leave, to the House of Lords.

[28] Section 30(1) of the 2001 Act.

But the powers of the SIAC were limited. On an appeal, it could cancel a certificate if it considered that there were no reasonable grounds for believing a detainee to be a suspected international terrorist, or if it considered that, for some other reason, the certificate should not have been issued.[29] On a review, the SIAC could cancel the certificate only if it considered that there were no reasonable grounds for the relevant belief or suspicion.[30] In proceedings before the SIAC, ordinary evidence is heard in the presence of the appellant and his or her legal advisers. 'Closed' evidence from sensitive security sources can be received without disclosure to the appellant or his or her legal team. A 'special advocate' may be appointed to represent the appellant's interests, but must not communicate with the appellant after receiving the closed evidence. In practice, the special advocate procedure makes it difficult if not impossible for the special advocate to take proper instructions from an appellant or to make adequate representations, and this procedure has been strongly criticised.[31]

On 13 November 2001 the derogation order came into force,[32] and was eventually repealed on 8 April 2005.[33] Between those dates the Government claimed that there existed in the United Kingdom a state of public emergency threatening the life of the nation, within the meaning of Article 15(1) of the Convention. The derogation order was renewed by Parliament on 3 March 2003 without a vote, and renewed on 3 March 2004 with a vote.

---

29 Section 25(2)(3) 2001 Act.

30 Section 26(5) 2001 Act.

31 In June 2009 a nine judge panel of the Supreme Court in ***Secretary of State for the Home Department v AF (No 3***) [2010] 2 AC 269 applied the judgment of the Grand Chamber in ***A v United Kingdom***, the Strasbourg sequel to the Belmarsh case, (2009) 49 EHRR 625 (see below) , and held that while it might be appropriate, in the interests of national security in the context of combating terrorism, not to disclose sources of evidence on which the grounds for suspecting a person's involvement in terrorism-related activity were based, a controlee had to be given sufficient information about the allegations against him to enable him to give effective instructions to his special advocate in relation to them. So long as that requirement was satisfied, there could be a fair hearing without the need for detailed disclosure of the sources of evidence on which the allegations were based. However, where the disclosed material consisted of only general assertions and the case against the controlee was based solely or to a decisive extent on undisclosed materials the requirements of a fair trial under Article 6 would not be satisfied.

32 Under the Human Rights Act 1998 (Designated Derogation) Order 2001 SI 2001 No. 3644 and The Human Rights Act 1998 (Amendment No. 2)Order 2001 SI 2001 No. 4032

33 The Human Rights Act 1998 (Amendment) Order 2005 SI 2005 No. 1071.

The Human Rights Act

Before looking at the Belmarsh case itself, it is important to sketch out the implications of the Human Rights Act 1998 (HRA) for the challenge the detainees chose to make.

The standard administrative law principles to which public bodies must comply where a decision is attacked on its merits are not onerous to satisfy. Because of the principle of separation of powers, it is no part of no part of the judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.[34] The standard of irrationality to overcome in a ***Wednesbury*** challenge is not a high one, the decision maker must reach a decision which no reasonable decision maker could make.[35] In contrast, the HRA calls for a very different perspective. The HRA gives effect to rights under the European Convention on Human Rights and is widely recognised a statute of constitutional significance: the Convention is effectively our Bill of Rights by giving effect to Convention rights expressed in positive terms.[36]

More particularly, the HRA provides a legal route for claimants to challenge legislation which is said to breach Convention rights. Under the strong rule of construction created by s 3 of the HRA, legislation must be interpreted so far as possible to give effect to Convention rights. If, however, a s 3 construction is not possible, then a Court is then entitled to make a declaration of incompatibility under s 4- which then allows the Government to use a fast track procedure to remove the incompatibility by laying a draft remedial order before Parliament, by way of delegated legislation under the affirmative resolution procedure. In practice, successive governments have addressed declarations of incompatibility by making remedial orders. The upshot is that under the HRA the detainees were able to mount a full blooded challenge against a decision of the Home Secretary

---

34 ***Chief Constable of The North Wales Police v Evans*** [1982] 1 WLR 1155, per Lord Hailsham 1160.

35 ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** [1948] 1 KB 223

36 See, for example, the dicta in ***Brown v Stott*** [2003] 1 AC 681 of Lord Bingham at p 703 and Lord Steyn at p 708 and those of Lord Woolf CJ in ***R v Offen*** [2001] 1 WLR 253, 275. Similarly, in ***McCartan Turkington Breen v Times Newspapers*** [2001] 2 AC 277, 297 Lord Steyn said that the HRA was a constitutional measure designed to buttress freedom of expression, fulfilling the function of a Bill of Rights in our legal system. In ***R (Laporte) v Chief Constable of Gloucestershire Constabulary*** [2007] 2 AC 105 para 34.Lord Bingham described the HRA in giving effect to Articles 10 and 11 as representing a 'constitutional shift'.

under Part 4 of the 2001 Act when he certified any non-British citizen whom he suspected to be a terrorist, so that he could, in effect, detain them indefinitely.

The *Belmarsh* case

Between 2001 and 2003 sixteen foreign nationals had been detained and held using these powers at Belmarsh. Eight were detained in December 2001, one in February 2002, two in April 2002, one in October 2002, one in November 2002, two in January 2002 and one in October 2003. One further individual was certified but detained under other powers. Of the total detained, two have voluntarily left the United Kingdom. The other fourteen remained in detention as of 18 November 2003.[37]

On 30 July 2002 the Special Immigration Appeals Commission (comprising Collins J (Chairman), Kennedy LJ and Mr Ockelton) (SIAC) upheld a challenge by the detainees.[38] There were two issues for SIAC to decide. First, assuming that the measures breached Article 5, was the derogation from Article 5 lawful? Secondly, did the measures discriminate unjustifiably against the detainees on the ground of their nationality or immigration status?

On the first point, SIAC decided that the UK had been entitled to derogate from the Convention under Article 15. Although no other signatory to the Convention had derogated from any obligation in it because of terrorist activities by or linked to Al Qa'ida, SIAC accepted that each State had to look to its own situation, and that the material disclosed showed that the UK was akin to the United States as an appropriate target for terrorist acts. SIAC, therefore, found that the material before it justified the Government's conclusion that there did exist a public emergency threatening the life of the nation within the terms of Article 15, and the closed material confirmed that view. SIAC drew attention to the fact that the powers in the 2001 Act were focussed on foreign nationals. However, the Attorney-General contended that this was justified, because the evidence showed that foreign nationals constituted "the predominant source of the threat", and SIAC accepted that the elected government's conclusion as to how best to achieve its legitimate aim was entitled to a degree of deference.

---

37 HC Deb, 18 November 2003, c27

38 [2002] HRLR 45

Nevertheless, SIAC went on to decide that the powers of the 2001 Act could only be properly confined to the aliens in the UK if the security threat came almost exclusively from aliens. However, SIAC found that the evidence demonstrated, beyond argument, that the threat was not confined solely to aliens. There were many British nationals already identified—mostly in detention abroad—who fell within the definition of "suspected international terrorists", and it was clear the Government believed many others at liberty in the UK were also suspected international terrorists. SIAC therefore held that the derogation was discriminatory on the grounds of national origin, contrary to Article 14 of the Convention; the upshot was that the detainee's detention breached their Convention rights under the HRA, and SIAC made a declaration of incompatibility under section 4 of the HRA. However, in its judgment SIAC felt constrained to observe that its decision might be of little use to the detainees, should Parliament decide to deal with the discrimination by extending the power of detention to nationals.

On 25 October 2002 the Court of Appeal reversed SIAC's decision.[39] Its importance for present purposes was the highly deferential approach the Court of Appeal took to the issues in the case. Thus, Lord Woolf CJ expressed the view in relation to the complaint that it was discriminatory to treat nations and aliens differently that:[40]

> Whether the Secretary of State was entitled to come to the conclusion that action was only necessary in relation to non-national suspected terrorists, who could not be deported, is an issue on which it is impossible for this court in this case to differ from the Secretary of State. Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference to the Secretary of State because he is better qualified to make an assessment as to what action is called for.

Furthermore, Lord Woolf concluded that the Home Secretary was detaining the claimants no longer than necessary- before they could be deported or until the emergency was resolved, or when they

39 [2004] QB 335

40 Ibid, para 40

cease to be a threat to the safety of the country. Lord Woolf also found that the Home Secretary's conclusion could be objectively justified.[41]

Brooke LJ took a similar approach; and set out principles he derived from Lord Hoffmann's analysis in ***R v Secretary of State for Home Department ex p Rehman***.[42] In ***Rehman*** Lord Hoffman took the view that that the question of whether something is in the interests of national security is not a question of law for the courts to review, but one of judgment and policy for the executive alone, and went on to say that the terrorist attacks in the United States on September 11, 2001 underlined what he called "the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in another country constitutes a threat to national security". Respect should be accorded to the Executive for two reasons: first, because "only the executive has access to special information and expertise in these matters" and, secondly, because such decisions "require a legitimacy which can be conferred only … through the democratic process". As a result, Brooke LJ said:

> (1) When there is an appeal to the Commission it is the Home Secretary, not the Commission, who is the principal decision-maker. (2) It must be remembered that the Home Secretary has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission cannot match. (3) Because what is at issue is an evaluation of risk, an appellate body traditionally allows a considerable margin to the original decision-maker. It should not ordinarily interfere with a case in which the Home Secretary's view is one which could reasonably be entertained. (4) Even though a very different approach may be needed when determining whether an appellant's Article 3 rights are likely to be infringed, this deferential approach is certainly required in relation to the question whether a deportation is in the interests of national security. (5) Although the Commission has the express power to reverse the exercise of a discretion, they should exercise restraint by reason of a common-sense recognition of the nature of the issue and of the differences in the decision-making processes and responsibilities of the Home Secretary and the Commission. (6) The events of 11 September are a reminder that in matters of

41 Ibid, para 52.
42 [2003] 1 AC 153 at paras 57-58 and 62.

> national security the cost of failure can be high. Decisions by ministers on such questions, with serious potential rights for the community, therefore require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.

The detainees then appealed to the House of Lords, which eventually assembled a special nine judge panel (rather than the usual five) to hear the case on account of its constitutional importance.

The sensitivity of the appeal to the House of Lords was obvious from the outset, and in September 2004 the Treasury Solicitors (on behalf of the Government) wrote to the Senior Law Lord, Lord Bingham, suggesting that Lord Steyn should be recused from hearing the appeal since (they alleged) he had expressed a view on the central issue in the appeal in his lecture, "Guantanamo Bay: the Black Legal Hole".[43] Lord Goldsmith QC, the Attorney General continues to maintain that the Government was right to maintain the challenge in the light of the ***Pinochet*** case,[44] whereas Lord Steyn is quite adamant that it was inappropriate for the Government to make the application to recuse him.[45]

The issues before the House of Lords

The issues that were argued out before the House of Lords can be summarised as follows:

(1) whether the derogation from Article 5 made under Article 15 was lawful;

(2) whether there was a 'public emergency threatening the life of the nation';

(3) whether the measures were 'strictly required by the exigencies of the situation'

---

43 ICLQ 53 [2004] 1 where Lord Steyn said '"In my view the suspension of Article 5 of the European convention on human rights - which prevents arbitrary detention - so that people can be locked up without trial when there is no evidence on which they could be prosecuted is not in present circumstances justified.'

44 ***R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet*** [2000] 1 AC 119

45 Alan Paterson ***Final Judgment The last Law Lords and the Supreme Court*** (Hart Publishing, 2013) at 302.

(4) whether Part 4 of the 2001 Act was compatible with the prohibition of discrimination in Article 14.

Whether the derogation from Article 5 made under Article 15 was lawful

The Attorney General conceded on behalf of the Government, that the detention violated the right to liberty under Article 5, unless the right was interpreted restrictively in the light of a valid derogation and all the Law Lords accepted that this concession was rightly made.[46] The Attorney General also conceded, and all the Law Lords (except Lord Scott) accepted that the validity of the derogation order made under s 14 of the HRA depended whether it could be shown that the Government met the substance of Article 15(1) of the Convention.

Section 14 (as amended by the derogation orders made by the Government stated that:

> In this Act "designated derogation" means … any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

However, Lord Scott was probably correct to doubt that the Government's concession was rightly made.[47] He pointed out that Article 15 does not form part of domestic law in the UK, because it is not a "Convention right" listed in s 1 and Sch 15 of the HRA. He, therefore questioned why the enactment of s 14 would have been thought necessary, and took the view that a derogation order had no legal effect, merely shows that measures had been deliberately rather than inadvertently enacted in a form that was inconsistent with a Convention right.

---

[46] However, the A-G made the concession solely for the purposes of that litigation only, keeping open the possibility of arguing before the ECtHR, if necessary, that the 2001 Act was compatible with Article 5, even without reference to a derogation.

[47] Lord Scott was rightly distinguishing between Convention rights taking effect as (i) statutory rights under the HRA and as (ii) international rights under the Convention, a distinction which Lord Nicholls later emphasised in ***In re McKerr*** [2004] 1 WLR 807, para 25 and which played a prominent role in ***In re G (Adoption: Unmarried Couple)*** [2009] 1 AC 38 in the reasoning of Lord Hoffmann at para 33 and of Baroness Hale at para 117. But see Professor Feldman's case comment where he argues the contrary: ECL Review 2005, 531-552.

The House of Lords then went on to consider Article 15(1) which required the Government to establish the following:

(1) the existence of a public emergency threatening the life of the nation;

(2) the measures being strictly required by the exigencies of the situation; and

(3) the measures being consistent with the UK's other international obligations.

Whether there was a 'public emergency threatening the life of the nation'

The majority decided that, in the light of the ECtHR case law and the nature of the large scale terrorist attacks which had occurred, the lack of any specific threat of an immediate attack did not invalidate the assessment that there was a risk of terrorist attack at some unspecified time. They took the view that, since such an assessment was pre-eminently political in character and had be made by the executive and Parliament, great weight was to be accorded by the courts to their judgment. They, therefore, held that SIAC had examined full evidence, was not shown to have misdirected itself and had reached a view open to it. SIAC's conclusion was, accordingly, unimpeachable.

However, Lord Hoffman memorably dissented in an opinion which strongly contrasts with the views he expressed in ***Rehman***, where he added a post script in the following terms:[48]

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community

[48] Above, para 62.

> through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

By contrast, in the Belmarsh case Lord Hoffmann took a different approach:

> 95 …. the question is whether such a threat is a threat to the life of the nation. The Attorney General's submissions and the judgment of the Special Immigration Appeals Commission treated a threat of serious physical damage and loss of life as necessarily involving a threat to the life of the nation. But in my opinion this shows a misunderstanding of what is meant by "threatening the life of the nation". Of course the Government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: "Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours"
>
> 96 This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.
>
> 97 For these reasons I think that the Special Immigration Appeals Commission made an error of law ….

However, Lord Hoffman's immediately went on to reach a conclusion which was, equally, striking:

> Others of your Lordships who are also in favour of allowing the appeal would do so, not because there is no emergency threatening the life of the nation, but on the ground that a power of detention confined to foreigners is irrational and discriminatory. I would prefer not to express a view on this point. I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. 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. It is for Parliament to decide whether to give the terrorists such a victory.

Whether the measures were 'strictly required by the exigencies of the situation'

The eight law lords who considered this question held that the burden was on the Secretary of State to convince the courts that the measures were strictly required. However, their approaches differed in other respects. Lord Bingham, with whom Lord Carswell agreed, equated strict necessity with proportionality.[49] Lord Walker, by contrast, said that irrationality and disproportionality were separate grounds of challenge from 'strictly required', although there was 'a considerable degree of overlap'.[50] The views expressed by the others were less clear.

Lord Bingham in his leading opinion applied a structured proportionality test, as it was then understood.[51] He asked (i) whether there was a legislative objective sufficiently important to justify limiting a fundamental right, (ii) whether the measures were rationally designed to meet the legislative objective, and (iii) whether the means used were no more intrusive on rights than

---

49 Above, para 30 and 240.

50 Ibid, para 195.

51 In ***Huang v Secretary of State for the Home Department*** [2007] 2 AC 1 at para 19 Lord Bingham added the fourth requirement to the earlier three he analysed in this case, that the Court must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage.

necessary to achieve the legitimate objective. He pointed out that the detainees' argument contained seven propositions.[52]

He, first observed that Part 4 of the 2001 Act was designed to remove the problems posed by ***Chahal*** in relation to deporting and detaining foreign terrorists in the immigration system. Secondly, the public emergency said to justify the derogation was the Al-Qaeda threat. Thirdly, that threat did not result solely from the activities of foreign nationals subject to UK immigration control. SIAC had found this as fact, and its finding could not be contradicted in view of the public statements the Government made. Fourthly, sections 21-23 of the 2001 Act were not rationally related to the Al-Qaeda threat, because (i) the regime did not cover UK nationals who represented an Al-Qaeda threat, (ii) it allowed supposedly dangerous foreigners to go abroad freely (the 'prison with three walls'), and (iii) the measures were not expressed to be limited to Al-Qaeda. Although the Government contested this proposition, Lord Bingham found this was the correct positon in point of fact. Furthermore, in relation to (iii) the Government had offered an undertaking that the powers would be used only against those suspected international terrorists who were suspected of having links with Al-Qaeda, but Lord Bingham held that the courts must not allow the protection of fundamental rights to be dependent on concessions, undertakings or implications in legislation.[53] Fifthly, the Government had not shown why measures being used to contain the Al-Qaeda threat from suspected UK nationals could not have been used equally well against foreign nationals. Sixthly, Lord Bingham held that the right to liberty is fundamental, and any restriction of it must attract strict scrutiny by the judges.

The Attorney General responded to this strict scrutiny submission by asserting the orthodox position that the executive was entitled to a wide discretionary area of judgment in national security matters, and argued that there was a danger of judicial supremacy over democratic decision-makers if the judges applied a standard of strict scrutiny to such decision. Lord Bingham emphatically rejected this approach- in dicta which firmly anchor the Human Rights Act in its constitutional setting:

52 Above, para 31.
53 Ibid, para 33.

the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ….. that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it "The courts are charged by Parliament with delineating the boundaries of a rights-based democracy" ("Judicial Deference: servility, civility or institutional capacity?").[54] See also Clayton, "Judicial deference and 'democratic dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998".[55]

54 [2003] PL 592, 597

55 [2004] PL 33.

This approach led Lord Bingham, finally, to conclude that in the light of such strict scrutiny, neither the Derogation Order nor sections 21 and 23 of the 2001 Act could be justified since that Part 4 of the Act could not withstand scrutiny under Article 15(1) of the Convention.

Lord Nicholls agreed that under the HRA Parliament had imposed responsibility on the courts to make these assessments. The right of aliens to liberty is just as important as that of UK nationals. Wholly exceptional circumstances would be required to justify the indefinite detention of either.[56] Lord Walker, on the other hand, dissented. Lord Hope agreed that the right to liberty is fundamental, and said that in cases affecting liberty the margin of discretion or discretionary area of judgment is narrower than in relation to other rights.[57] Lord Scott said that section 23 of the 2001 Act derogated from rights in a very extreme way. As the Secretary of State had not shown that less extreme measures would not have sufficed, the measures taken had not be shown to be strictly required.[58] Lord Rodger took the view that the words 'strictly required' forced the judges to compare the treatment of foreign nationals with that of UK nationals.[59] He thought that the Court of Appeal had been wrong to consider that the SIAC had decided that the measures were strictly required. Baroness Hale, agreed with Lords Bingham, Nicholls, Hope, Scott and Rodger;[60] she said that there was no sense in locking someone up then allowing him to go voluntarily to a foreign country where he was almost immediately released, as had happened to one of the detainees. In her view, this showed that it had not been necessary to lock up either foreign nationals or UK nationals for security reasons.[61]

Whether Part 4 of the 2001 Act was compatible with Article 14

The UK could have derogated from prohibition against discrimination under Article 14 of the Convention, but had chosen not done so when derogating from the Convention. The House of Lords, therefore, had to consider whether detention under the 2001 Act was compatible with Article 14,

56 Ibid, paras 81, 84.
57 Ibid, para 106-108.
58 Ibid, para 155
59 Ibid, para 168
60 Ibid, para 219
61 Ibid, paras 230-231.

bearing in mind that, as Lord Bingham said, treating like cases alike is a basic principle of democratic constitutions and is also a general axiom of rational behaviour.[62]

The Law Lords expressed different views concerning whether the detainees had been subject to different treatment on an illegitimate ground under Article 14 which states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Lord Bingham held that both nationality and immigration status fall within the words 'or other status' under Article 14. Weighty reasons would be needed to justify treating people differently on the ground of their nationality.[63] Lord Hope, Lord Scott and Baroness Hale all rejected the Attorney General's argument that the relevant comparators for foreign nationals who were suspected international terrorists were foreign nationals who were not suspected international terrorists, who were equally liable to be detained pending removal.

The House of Lords also decided that the difference of treatment was justified as having a rational and objective justification, that it had a legitimate state aim and was proportionate. Lord Bingham accepted that the aim was to prevent international terrorism. The justifiability of differential treatment caused by the measures had to be assessed in the light of that aim.[64] Different treatment on the basis of nationality or immigration status may be justified in the context of controlling immigration, but not where the aim is related to security, since the threat to security did not depend on a person's nationality or immigration status.[65] Lords Hope, Scott and Rodger took similar views.[66] Lord Bingham also rejected the argument that imprisoning UK nationals as well as foreign nationals would have been worse than just imprisoning foreign nationals. Any discriminatory measure affects one group more than another, but cannot be justified on the ground that it would have been worse

62 Ibid, para 46 quoting Lord Hoffmann in ***Matadeen v Pointu*** [1999] 1 AC 98, at p. 109.
63 ***Gaygusuz v. Austria*** (1996) 23 EHRR 364
64 ***Belgian Linguistic Case (No. 2)*** (1968) 1 EHRR 252, para 10.
65 Above, para 54
66 Ibid, paras 138, 158 and 190 respectively.

to impose the measure on everybody.[67] On the other hand, Baroness Hale, instead of upholding a proportionality complaint, decided that the difference of treatment did not serve a legitimate aim: because it could not be said to be rationally related to the aim (of combating terrorism). A democracy values everyone equally, and it would not be right to lock up only gay, black, disabled or female suspected international terrorists; no more can it be right to lock up only foreign ones.[68]

The House of Lords' decision

The House of Lords made a declaration of incompatibility under s 4 of the HRA that s 23 of the Anti-terrorism, Crime and Security Act 2001 and was incompatible with Articles 5 and 14 of the Convention on Human Rights. However, the memory of one of the Counsel in the case, Alex Bailin, was that "personally, I will never forget the atmosphere in the Lords' Chamber when judgment was handed down in the Belmarsh case. The judgment had not been circulated in draft in advance and it did feel something like a legal penalty shoot-out. The nine-judge Court had not given the slightest indication of its view during the hearing and there was no doubting that Lord Bingham fully appreciated the significance of the moment when he cautiously gave the first summary of his Opinion."[69] My own recollection is at the time I spoke to a number of the lawyers involved the case- during the period between the conclusion of the argument in October 2004 and the decision announced on 16 December 2004. None of those lawyers predicted that the House of Lords would overturn the Court of Appeal's judgment. The factor which excited most comment from those to whom I spoke was the advocacy of David Pannick QC, who intervened in the appeal on behalf of Liberty. I was told that David Pannick's submissions had an immediate and powerful impact on the nine Law Lords hearing the appeal, so much so that he seized the opportunity to reply by making oral submissions- in response to the Government's arguments made by the A-G, Lord Goldsmith QC, an opportunity not generally afforded to an intervenor in an appeal.

67 Ibid, para 68.
68 Ibid, paras 236-238.
69 http://ukscblog.com/lord-bingham-a-tribute/

Despite the House of Lord's decision, the detainees remained in detention, except for two who chose to leave the United Kingdom and another, who had been released on bail on conditions amounting to house arrest. None of the detainees were entitled, under domestic law, to compensation in respect of their detention and they therefore, lodged an application to the ECtHR on January 21, 2005.

The response to the House of Lords' decision

The House of Lords' decision created a major problem for Charles Clarke on his first day as Home Secretary, following David Blunkett's resignation on 15 December 2004 amidst allegations that he helped fast-track the renewal of a work permit for his ex-lover's nanny.[70] When he made his statement on the Belmarsh judgment on 20 December 2014 Mr Clarke said 'I was not particularly surprised at the Law Lords' judgment. In fact, it would be a surprise if there were not deep controversy about the ethical, philosophical and moral issues that are involved. These are difficult questions, and it is not surprising that people will come to difficult and complicated judgments on them … Mr Tony Baldry (Banbury) (Con): Does not the Home Secretary accept that the Law Lords did not make what he described as an ethical, moral or philosophical judgment, but a legal judgment?[71]

Mr Clarke, nevertheless, decided that the detainees would remain in Belmarsh Prison until the Government made its considered response. But he also decided to invite Lord Bingham to have a general discussion about the problems of terrorism, which Lord Bingham declined, presumably because of his personal belief in the separation of powers.[72]

It is worth pointing out that a study of the media's response to the HRA shows that their response to the Belmarsh case was, in fact, rather balanced.[73] The Daily Mail as a right leaning tabloid and a self-

---

70 Clarity about the circumstances and events leading up to and surrounding Mr Blunkett's departure emerged in the phone hacking trial of 2013/14. On 24 June 2014 Andy Coulson, former editor of the News of the World was found guilty of a charge of conspiracy to intercept voicemails (phone-hacking). Blunkett's evidence proved central to the verdict.

71 Hansard HC Vol 428, cola 1915 and 1919 (December 20, 2004)

72 Lord Phillips 'Introductory Tribute: Lord Bingham of Cornhill' at xlix in ***Tom Bingham and the Transformation of the Law: a Liber Amicorium*** ed Adenas and Fairgreive (OUP, 2009)

73 Lieve Gries ***Mediating Human Rights Media, Culture and Human Rights Law*** (Routledge, 2015) pp 30-32.

declared critic of the HRA took a much more nuanced view. However, Lord Rees-Mogg, the peer and veteran journalist harshly criticised the House of Lords, accusing them of using the HRA to establish their supremacy over Parliament. The left wing MP, George Galloway, said 'I saw "friends of David Blunkett are complaining that he has faced "trial by media". That's better than the trial he gave to those entombed at Belmarsh'.

The Belmarsh case provoked other strong expressions of opinion. Shami Chakrabarti, the Director of Liberty, argued that, by "acting as judge, jury and jailer, the Government has flouted the very values it claims to defend. It must now act honourably and charge or release all those currently held".[74] On the other hand, the Foreign Secretary, Jack Straw, said that the Law Lords were simply wrong to imply that 'this is a decision to detain these people on the whim of the Home Secretary'.[75] Lord Steyn, on the other hand, thought that Lord Bingham's judgment in the Belmarsh case, had contained the "most eloquent and magisterial rebuke" to an attorney general since Lord Denning quoted the words of Thomas Fuller: "Be you ever so high, the law is above you."[76]

The Government response to the House of Lords' decision

The Government immediately accepted the House of Lords' decision and announced it would legislate to meet a deadline. The Government did not want to ask Parliament to continue the Part 4 powers for a further year from March 2005 following the House of Lord's decision, and, therefore proposed the Prevention of Terrorism Act 2005, which received Royal Assent on 11 March 2005 and came into operation on 14 March 2005. On 16 March 2005 the Government informed the Secretary General of the Council of Europe that it was withdrawing its derogation from Article 5, and on 3 April 2005 the Lord Chancellor made the Human Rights Act 1998 (Amendment) Order 2005,[77] repealing the designated derogation that had been inserted into Schedule 3 to the Human Rights Act 1998 by a derogation order which the House of Lords had held to be unlawful.

74 http://www.telegraph.co.uk/news/1479156/Terror-suspects-win-Lords-appeal-against-detention.html
75 http://www.theguardian.com/uk/2004/dec/17/terrorism.immigrationpolicy
76 http://www.theguardian.com/uk/2005/jun/11/terrorism.uksecurity
77 SI 1071 of 2005

The Prevention of Terrorism Act 2005 repealed Part 4 of the 2001 Act and replaced it with a temporary measure: the main provisions of the 2005 Act only lasted 12 months unless renewed by an order requiring to be laid in draft before and approved by each House. Instead of a detention regime, the 2005 Act established 'control orders', which were of course also subject to controversy and considered in a number of further House of Lords' decisions. Control orders were executive preventative orders which subjected suspected terrorists to house curfew, relocation, and prohibitions or restraints on the use of electronic communications and financial services.

The 2005 Act was piloted through both Houses of Parliament in 17 days. The Clerk of the Parliaments described it as "a prime example of emergency legislation".[78] Of particular notoriety was the "prolonged ping-pong", involving a "36-hour sitting of both Houses to reconcile differences of view … where each House considered the bill on five occasions following Third Reading in the Lords".[79] The First Parliamentary Counsel, Sir Stephen Laws, suggested that the Bill was the toughest piece of legislative drafting that he had worked on during the course of his career.[80] The timetabling also adversely affected the Joint Committee on Human Rights from undertaking effective parliamentary scrutiny. It did succeed in producing two reports on the legislation,[81] but its second report said that "the rapid progress of the Bill through Parliament has made it impossible for us to scrutinise the Bill comprehensively for human rights compatibility in time to inform debate in Parliament."[82]

---

78 House of Lords Constitution Committee, Fast-track Legislation: Constitutional Implications and Safeguards (2008–09) (2009), HL 116-II, p.159.

79 House of Lords Constitution Committee, Fast-track Legislation: Constitutional Implications and Safeguards (2008–09) (2009), HL 116-I, para.82.

80 Civil Service World, Interview: Stephen Laws, February 14, 2012. See further BBC Radio 4, The Work of the Parliamentary Draftsmen, December 10, 2008. The National Archives, http://webarchive.nationalarchives.gov.uk/+/http://www.cabinetoffice.gov.uk/media/210692/draftsmanscontract1.pdf [Accessed January 26, 2014].

81 Joint Committee on Human Rights, Prevention of Terrorism Bill: Preliminary Report (2004–05) (London: TSO, 2005), HL 61 and Joint Committee on Human Rights, Prevention of Terrorism Bill (2004–05) (London: TSO, 2005), HL 68.

82 Joint Committee on Human Rights, Prevention of Terrorism Bill (2004–05) (2005), HL 68, para.1.

The Strasbourg decision

Since a declaration of incompatibility under the HRA was not binding on the parties, the applicants lodge an application with the ECtHR. On 19 October 2009 the Grand Chamber gave its decision.[83] Many of the issues decided by the House of Lord were re-litigated and the Grand Chamber held that the derogating measures had been disproportionate in that they discriminated unjustifiably between nationals and non-nationals with the result that there was a breach of the right to liberty under Article 5(1). The Grand Chamber made numerous holding on other issues, which were not canvassed before the House of Lords including, in particular, finding that the detention in some cases based on closed material breached the right under Article 5(4) to take proceedings by which the lawfulness of detention shall be decided speedily by a court.

The implications of the House of Lords decision

When interviewed Lord Bingham he selected the Belmarsh case as the most important he had decided in his career. He said, with characteristic understatement, that "It was the first serious challenge under the Human Rights Act, and one felt the stakes were quite high."[84] Keith Ewing describes the decision as being 'one of the most important public law decisions since ***Entick v Carrington***'[85] David Feldman has claimed that the Belmarsh case is 'perhaps the most powerful judicial defence of liberties' since the 1770s and it 'will long remain a benchmark in public law'.[86] Arden LJ states that it is a 'landmark decision' that should be seen as a 'powerful statement by the highest courts of the land of what it means to live in society where the executive is subject to the rule of law'.[87] The Incorporated Council of Law Reporting includes the Belmarsh case as one of its

83 (2009) 49 EHRR 29

84 http://ukscblog.com/lord-bingham-a-tribute/

85 Ewing 'Bonfire of Liberties: New Labour Human Rights and the Rule of Law' (OUP, 2010) at 237

86 Feldman 'Proportionality and Discrimination in Anti-Terrorist legislation' (2005) 64 CLJ 271 at 273.

87 Arden 'Human Rights in the Age of Terrorism (2005) 121 LQR 604 at 622 and 625.

five public law cases[88] in its 15 top decisions celebrated in its 150th anniversary edition of the Law Reports (1865-2015).[89]

The House of Lords' ruling, inevitably, has its critics. Finnis has argued that the House of Lords failed to grasp a fundamental aspect of liberty, that while a community may expect some of its members to abuse their liberty and to cause harm to others, the community need not accept the same risk from non-members.[90] Tomkins has suggested that the result in the House of Lords was unsurprising.[91] He points out that the House of Lords decision did not secure the release of the detainees, most of whom remain incarcerated. It triggered a Government response which may have represented an increase, not decreased, the scope and scale of the state's repressive counter-terrorist measures. Furthermore, despite the House of Lord's decision, the remainder of the Anti-terrorism, Crime and Security Act 2001 remained intact. He also argues that the Belmarsh case did not foreshadow a beacon of light on national security issues.[92]

However, the Belmarsh judgment deserves to be viewed as standing on its own merits. It is a towering decision, from at least four perspectives. First, the House of Lords reached an arresting conclusion in a most unpromising terrain, reviewing administrative detention of aliens, where traditionally the Courts have taken a very deferential approach. Secondly, the political climate in which the decision was made was intense and problematic, as the application to recuse Lord Steyn indicated. Thirdly, the structured proportionality analysis undertaken by Lord Bingham stands almost alone among HRA cases in terms of its analytical rigour.[93] Finally, and, not least, the Lord

---

88 The other four public law cases celebrated are ***Liversidge v Anderson*** [1942] AC 206; ***Associated Provincial Picture Houses v Wednesbury***; ***Anisminic v Foreign Compensation Commission*** [1969] 2 AC 147 and ***Pepper v Hart*** [1993] 2 AC 593.

89 Incorporated Council of Law Reporting for England and Wales (2015)

90 FInnis 'Nationality, Alienage and the Constitutional Principle' (20070 123 LQR 417; and see, the recent lecture of Finnis 'Judicial Power: Past, Present and Future' 21 Oct 2015. |

91 See eg Adam Tomkins "Case Comment: Readings of ***A v Secretary of State for the Home Department***" P.L. [2005] 259;

92 Tomkins 'National Security and the role of the Court: a changed landscape? (2010) LQR 543.

93 The approach taken by the courts to proportionality under the HRA was usefully analysed by a paper published by the Ministry of Justice in September 2007 which also looked at human rights cases at the Court of Human Rights and in Germany, France and Spain. The paper pointed out that proportionality (as it is most rigorously applied) requires the well-known four stage analysis discussed; and distinguished proportionality as a legal concept from the concept of balancing, a broad

Bingham clearly and unequivocally spelt out the rationale for the HRA's constitutional character: under the HRA the courts are charged by Parliament with delineating the boundaries of a rights-based democracy.

Published in "Landmark Cases in Public Law" ed Satvinder Juss and Maurice Sunkin (Bloomsbury, June 2017)

brush approach which does not operate from a presumption that public interest goals must be restricted by rights or that rights take precedence over public interest goals which are not suitable and necessary to their purpose. The paper concluded the various jurisdictions it examined varied considerably in the level of scrutiny it applied to Government assertions through the proportionality lens. In Germany and Spain proportionality almost always involved the rigorous four stage inquiry. The picture was less consistent at the ECtHR, France and the House of Lords, In the England the courts are more prone to adopt the broad brush balancing approach. Even where proportionality is applied, the English courts appear to be more forgiving of government assertions than in other countries except France: see Gould Lazerus and Swiney 'Public Protection, Proportionality, and the Search for Balance' Ministry of Justice Research Series 10/07, September 2007.