Clayton Comments

Richard Clayton QC

LORD BINGHAM AND THE HUMAN RIGHTS ACT 1998: THE SEARCH FOR DEMOCRATIC LEGITIMACY DURING THE "WAR ON TERROR"

RICHARD Clayton QC
Hugh Tomlinson QC

Introduction

In March 1993, Lord Bingham added his voice to those calling for the incorporation of the European Convention on Human Rights into domestic law. He concluded his Denning Lecture on what he described as a "downbeat note":

> It would be naive to suppose that incorporation of the Convention would usher in a new Jerusalem. As on the morrow of a general election, however glamorous the promises of the campaign, the world will not at once feel very different. But the change would over time stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice. It would restore our country to its former place as an international standard-bearer of liberty and justice. It would help to reinvigorate the faith, which our eighteenth and nineteenth century forbears would not for an instant have doubted, that these were fields in which Britain was the world's teacher, not its pupil. And it would enable the judges more effectively to honour their ancient and sacred undertaking to do right to all manner of people after the laws and usages of their realm, without fear or favour, affection or ill will.[1]

This characteristic combination of caution, history and vision gives an important insight into the approach taken by Lord Bingham to human rights issues over the last decade and a half of his judicial career.

Lord Bingham was by no means the only senior judicial figure to support incorporation. One of the most noticeable features of the Bill of Rights debate during this period was that senior British judges explicitly participated in the process. Lord Scarman had been a powerful advocate of a bill of rights in the 1970s.[2] In the 1990s Lord Browne-Wilkinson suggested a bill of rights should be formulated as a rule of construction[3] and Lord Woolf favoured a form of incorporation which did not threaten parliamentary sovereignty.[4] By the mid 1990s the momentum in favour of a Bill of Rights had

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1 T Bingham, "The European Convention on Human Rights: Time to Incorporate" in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000), p.140

2 Sir Leslie Scarman, *English Law - The New Dimension* (Stevens, 1974).

3 Lord Browne-Wilkinson 'The Infiltration of a Bill of Rights' [1992] PL 397; See also Lord Browne-Wilkinson, 'The Impact on Judicial Reasoning' in B Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (Clarendon Press, 1998).

4 Lord Woolf 'Droit Public - English Style' [1995] PL 57.

become irresistible[5] and in September 1993 the Labour Party published *A New Agenda for Change: Labour's Proposals for Constitutional Reform* arguing for a Human Rights Bill which would incorporate the European Convention. Such a bill was introduced within 5 months of the Labour Government being elected in 1997 and the Human Rights Act ("HRA") was given royal assent on 9 November1998.

The HRA did not come into force until 2 October 2000. On 6 June of that year Lord Bingham became the Senior Law Lord. In his eight years in post the HRA has become central to the work of the Judicial Committee. Lord Bingham has presided in nearly 200 cases in which the HRA has been considered by the House, often giving the leading speech and only on rare occasions finding himself in the minority.[6]

These decisions of the House of Lords in HRA cases have ranged over the whole area of English private and public law and even a brief survey of Lord Bingham's contributions to the development of this case law is beyond the scope of this paper. We want to deal with one specific area, that of the political legitimacy of the HRA itself.

The political background is well known. Over those eight years, the HRA has often been the subject of acute political controversy. The Government's initial enthusiasm for its enactment cooled appreciably with the terrorist attacks in New York and London; as the Prime Minister, Tony Blair put it in 2005 "the rules of the game are changing".[7] Mr Blair himself challenged the value of the Convention and the HRA: focusing attention on the problems involved in deporting terrorists under criticising the Article 3 regardless of the danger they face in their home countries.[8] Despite the

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5 For the background to the debate, see eg A Lester, *A Bill of Rights for England* (Charter 88, 1991); F Mount, *The Recovery of the Constitution* (Charter 88, 1992); A Lester, *The Crisis Facing Human Rights in Europe; Does the British Government Really Care?* (Charter 88, 1993); F Klug, *Reinventing the Community: The Rights and Responsibilities Debate* (Charter 88, 1996); Liberty *A People's Charter - Liberty's Bill of Rights* (1993); (and see also, F Klug and J Wadham, 'The "democratic entrenchment" of a Bill of Rights: Liberty's Proposals' [1993] PL 579); The Institute for Public Policy Research *A British Bill of Rights* (1993)

6 On most of those occasions, he has favoured a more expansive approach to the HRA: see *R (Roberts) v Parole Board* [2005] 2 AC 738 (dissenting on the issue as to whether the appointment of a special advocate satisfied Art 5(4) fairness requirements); *Qazi v LB Harrow* [2004] 1 AC 983 and *Kay v Lambeth* [2006] 2 AC 465 (dissenting on the issue of whether Art 8 could be taken into account in possession actions) *YL v Birmingham City Council* [2008] AC 95 (favouring a broader concept of "functional public authority" under s.6 of the HRA) but see *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153 (Lord Bingham dissenting on the issue as to whether the HRA applied to persons in the custody of British troops in Iraq). It is also noteworthy that the first HRA case to reach the House of Lords, *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 was a successful appeal against a decision of a Divisional Court presided over by Lord Bingham CJ.

7 PM's Press Conference 5 August 2005 www.pm.gov.uk/output/Page 8041.asp

8 BBC News, 17 May 2006

2006 attempt by the Department of Constitutional Affairs to rehabilitate the HRA[9] many in the Labour Government have remained deeply sceptical about its benefits. Similar attitudes are common in the Conservative opposition which is now committed to replacing the HRA which is said to have "undermined the Government's ability to deal with crime and terrorism" with a British Bill of Rights, the nature and content of which are, as yet, undefined.

In this troubled political climate steering a course which maintains the values of the Convention but avoids the charge of excessive judicial activism was not straightforward. In a series of important decisions, Lord Bingham piloted the way in this difficult exercise in navigation. Central to his approach, we suggest, has been an attempt to establish the democratic legitimacy of the HRA whilst, at the same time, giving practical effect to its values in the most important areas where they are under threat.

In this paper we will concentrate on two topics: first, the way in which the House of Lords has dealt with Strasbourg case law as a means of emphasising democratic legitimacy and secondly, its approach to the vital but politically controversial subject of terrorism. In both areas Lord Bingham has taken the lead and has, in general, carried his colleagues with him. We will argue that that the cautious conservatism of the approach in the first area has assisted the House of Lords in taking a more forthright approach in the second.

The HRA and the Strasbourg case law

The most fundamental way in which the House of Lords has sought to preserve the democratic legitimacy of the HRA is in its approach to Strasbourg case law. If, the argument goes, the judges are simply applying the Convention case law then they are implementing the will of parliament as found in the HRA and are not forging new rights without democratic accountability. This approach, developed by Lord Bingham, has found wide acceptance among his colleagues. It is, however, not without difficulties.

The starting point for consideration of this issue is section 2(1) of the HRA which requires a court to "take account" of any relevant Strasbourg judgments or decisions. The approach under the HRA is therefore very different from section 3(1) of the European Communities Act 1972.[10] In the first instance the House of Lords took a literal approach to section 2. In *R (Alconbury Developments Ltd)*

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[9] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf

[10] Section 3(1) of the European Community Act states "For the purpose of all legal proceedings any question as to the effect of any of the Treaties or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be treated for determination as such in accordance with the principles laid down by and by any relevant decision [of the European Court of Justice or any court attached thereto])."

v Environment Secretary Lord Slynn said that in the absence of some special circumstances the court should follow any clear and constant jurisprudence of the European Court of Human Rights.[11]

However, in *R (Ullah) v Secretary of State for the Home Department*,[12] in a case which established the potentially radical point that a person resisting removal from the United Kingdom might, in exceptional circumstances, rely on "qualified Convention rights" to challenge the decision to remove him, Lord Bingham took a rather different approach to the effect of Strasbourg cases, stating that:

> "a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law ... It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".

Lord Bingham explained the rationale for this approach in *R (SB) v Denbigh High School*:[13] saying that the purpose of the HRA was not to enlarge the rights or remedies of those in the UK whose Convention rights have been violated; but to enable Convention rights and remedies to be asserted and enforced by the domestic courts- and not only by recourse to Strasbourg, focusing on the principle of 'bringing rights back home'.[14] The approach has been approved and followed in a number of subsequent cases.[15]

The principle that the English courts should focus on Strasbourg case law has important ramifications in relation to the issue of democratic legitimacy. It places strict limits on "judicial activism". Thus, for example, it enabled the House of Lords in *R (Countryside Alliance) v Attorney-*

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11 [2003] 2 AC 295 para 26; see also *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, para 18.

12 [2004] 2 AC 323 para 20.

13 [2007] 1 AC 100, para 29

14 A principle he held to be firmly established by *Aston Cantlow v Wallbank* [2004] 1 AC 546, paras 6-7, 44 ; *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, paras 18-19; and *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, paras 25, 33, 34, 88 and 92

15 See, eg *R (S) v Chief Constable of South Yorkshire Police* [2004] 1 WLR 2196 para 27 (Lord Steyn); *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, para 34; *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] 2 WLR 781 , para 37; *R (Al-Skeini) v Ministry of Defence* [2008] 1 AC 153, para 106 (Lord Brown);

General[16] to say that, whatever their individual views, the Strasbourg case law did not permit the claims of those who engaged in fox-hunting to be brought within the scope of Article 8. Although the House also dealt, somewhat unconvincingly, with the "justification" issue in the alternative, the *Ullah* principle helped to divert a potentially explosive political conflict with the House of Commons.

Nevertheless, despite its political attractions, the *Ullah* principle is not without its difficulties. On the clear words of section 2(1) it plainly does not mean that English courts must *only* look at Strasbourg,[17] still less does it oblige the English courts to apply those cases strictly as precedent,[18] unlike the position under European Community law. The White Paper issued prior to the enactment of the HRA provides some support for asserting that the purpose of enacting the HRA was to bring rights home,[19] and certainly does not seek to define the Government's objectives in such a specific or restrictive way. Furthermore, when the HRA was being enacted, clear statements[20] were made by the Home Secretary in the House of Commons[21] and by the Lord Chancellor in the House of Lords[22] that the courts must be free to develop human rights jurisprudence and to move out in new directions.

It seems unfortunate for the English courts to have sought democratic legitimacy by means a self-denying ordinance which has the effect of severely restricting their ability to be "an international standard-bearer of liberty and justice" as envisaged by Lord Bingham in 1993.[23]

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16 [2008] 1 AC 719.

17 Thus, Laws LJ expressed the view in *Begum v Tower Hamlets London Borough Council* [2002] 1 WLR 2491 para 17 that 'the courts task under the HRA … is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence, as the HRA enjoins us to do.'; and see to similar effect, his remarks in *R (Pro-life Alliance) v BBC* [2004] 1 AC 185 para 33.

18 Cf *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 18 per Lord Bingham "the case law of the Strasbourg court is not strictly binding"; and see *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] 2 WLR 781 paras 44 to 45 (Lord Scott drawing attention to the possibility of the domestic courts and the Court of Human Rights reaching conflicting interpretations of the Convention, and see also Lord Bingham's response at para 37).

19 See *Rights Brought Home: The Human Rights Bill* Cm 3782 para 1.18.

20 *In re G (Adoption: Unmarried Couple* [2008] 3 WLR 76 para 119 per Baroness Hale

21 Hansard (HC Debates), 16 February 1998, col 768

22 Hansard (HL Debates), 18 November 1997, cols 514-515

23 See, p.000 above.

A number of commentators have drawn attention to the difficulties deriving from the *Ullah* doctrine.[24] These have been acknowledged by Baroness Hale in her 2008 "Justice" Lecture.[25] The legal and practical difficulties inherent to the doctrine have troubled the House of Lords in subsequent cases.[26] In *R (Animal Defenders International) v Secretary of State for Culture*[27] the claimant was prevented from placing an advertisement about the threat to the survival of primates on the ground that this would breach the ban on political advertising contained in section 321(2) of the Communications Act 2003. The claimant alleged that Article 10 had been breached, relying strongly on a decision of the Court of Human Rights, *VgT Verein v Switzerland*.[28] In fact, when the 2003 Act was been passed, the Secretary of State felt unable to make a statement of compatibility under section 19(1)(a) of the HRA; instead, she made a statement under section 19(1)(b) that, although unable to make a statement under section 19(1)(a), the Government wished the House of Commons to proceed with the Bill. The Government's position was that it believed and had been advised that the ban on political advertising in what became sections 319 and 321 was compatible with Article 10, but because of the Court's decision in *VgT* it could not be sure.[29] Nevertheless, in *Animal Defenders* the House of Lords declined to follow *VgT* and held that the ban did not violate Article 10; and their treatment of the *Ullah* principle in *Animal Defenders* was not entirely persuasive.

The principle that the English courts must apply the Convention strictly in line with Strasbourg case law is not the approach of other signatories to the Convention such as France or Germany.[30] Furthermore, the focus on Strasbourg case law could distract the English courts from benefiting the views expressed in cases from other jurisdictions when wrestling with universal human rights problems - unlike the South African Constitutional Court which has shaped its decisions by reference to the wisdom to be derived from all jurisdictions. Finally and most importantly, the concentration on Strasbourg decisions has prevented the English courts from developing indigenous human rights jurisprudence.

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24 See eg J Lewis 'The European Ceiling on Human Rights' [2007] PL 720; R Masterman 'Aspiration or foundation? The status of Strasbourg jurisprudence and "Convention rights" in domestic law' in H Fenwick, G Phillipson and R Masterman *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007).

25 Baroness Hale, "Law Lords at the Margin: Who defines Convention rights?" 15 October 2008.

26 See also *In re G (Adoption: Unmarried Couple)* n.20 above.

27 [2008] 2 WLR 781.

28 (2001) 34 EHRR 159.

29 Ibid, para 13.

30 See eg Orucu (ed) *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, 2003)

There are a number of factors to be borne in mind in identifying the proper perspective approach to be applied to Strasbourg cases.[31] The Court of Human Rights does not develop its principles and reasoning in the more discursive analytical style of the common law tradition. In fact, Convention principles are often extended- even if the reasoning for doing so is sometimes exiguous.[32] A number of the Strasbourg cases do not, on analysis, withstand close scrutiny; and the nature and style of the reasoning in many Strasbourg decisions gives rise to acute difficulties of interpretation.[33]

All these arguments suggest that the price to be paid for "democratic legitimacy" by the adoption of the *Ullah* principle may be too high. Although, during the first eight turbulent years of the HRA, the course steered by Lord Bingham has been a wise one, we suggest that the time may shortly come when a change of direction is required, with English judges having the confidence to move to a new phase in the development of a domestic rights jurisprudence.

Terrorism and Democracy

Nevertheless, the *Ullah* principle – with its acknowledgment of strict limits on judicial activism - has served an important purpose in the early years of the HRA. When faced with the accusation of unaccountable judicial activism, the Judges have had the ready answer that they are simply doing the will of the elected Parliament, following Strasbourg and "bringing rights home".

As already mentioned, the most fundamental challenge to the HRA has come from politicians demanding vigorous judicial prosecution of the war on terror. The Home Secretary, Mr Charles Clarke, famously complained that the Law Lords had refused to meet him to discuss "issues of principle" arising in terrorism cases.[34] In a magazine interview he said

> "I have been frustrated at the inability to have general conversations of principle with the law lords . . . because of their sense of propriety. I do find that frustrating. I have never met any of them. I think there is a view that it's not appropriate to meet in terms of their integrity. I'm not sure I agree . . . and I regret that. I think

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31 See eg R Masterman 'Aspiration or foundation? The status of Strasbourg jurisprudence and "Convention rights" in domestic law' in H Fenwick, G Phillipson and R Masterman *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007).

32 For example, the principle from *Z v Finland* (1997) 25 EHRR 371 para 103 that Art 8 interferences with confidential medical information must be subject to important limitations and accompanied by effective and adequate safeguards against abuse has been applied in the rather different contexts of the broadcast of a CCTV film showing the claimant's suicide attempt (*Peck v United Kingdom* (2003) 36 EHRR 719, para 78) and to the release of telephone taps into the public domain concerning the well known Italian politician (*Craxi v Italy (No 2)* (2003) Judgment of 17 July 2003, para 74) - although the Court has not provide detailed reasoning for that extension.

33 See eg *N v Secretary of State for the Home Department* [2005] 2 AC 296.

34 Report of the Select Committee of the House of Lords *"Relations between the executive, the judiciary and Parliament"* Evide, p.26

> some dialogue between the senior judiciary and the executive would be beneficial, and finding a channel is quite important."[35]

This complaint has was roundly dismissed by Lord Bingham who in a 2005 Lecture said that ministers did not always understand the reality of the independence of the judiciary. He warned that judges were "bound to take no notice" of a prime minister who ordered them "to do something" that was inconsistent with the rule of law. He said that "The ultimate treason for any judge is to uphold as lawful that which is unlawful".[36] More recently, Lord Bingham rejected Mr Blair's assertion that as a result of terrorism, "the rules of the game have changed".[37]

The conflict between the perceived demands of the "war on terror" and the HRA arose in perhaps its sharpest form in the seminal Belmarsh case, *A v the Secretary of State for the Home Department*.[38] A panel of nine Law Lords was convened to examine the proportionality of the control order regime for terrorist suspects under section 23 of the Anti-Terrorism Crime and Security Act 2001. Lord Bingham delivered the leading speech. He rejected the Government's argument that the court should not conduct a proportionality review because this was a matter for the democratic institutions and not the courts. In rejecting this distinction he said

> "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. ... The [HRA] 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'" [39]

He went on to hold, with the support of seven of his colleagues, that the detention of suspected terrorists which was confined to detaining non nationals was a disproportionate response, not strictly required by the exigencies of the situation for derogating from the Convention under Article 15 and was also discriminatory in breach of Article 14 of the Convention. The approach of the House of Lords in the Belmarsh case make it a decision of the first magnitude, bearing comparison

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35 Interview, *New Statesman*, 26 September 2005.

36 Speech to Law Society, 14 September 2005.

37 Interview, BBC Law in Action, 15 July 2007.

38 [2005] 2 AC 68

39 Ibid, para 42

with *Anisminic*,[40] *Ridge v Baldwin*[41] and *Conway v Rimmer*.[42]

The case against the Belmarsh detainees returned to the House of Lords in *A v Secretary of State for the Home Department (No 2)*[43] where the complaint was that the Secretary of State sought the ability to rely on evidence of a third party obtained through his torture in a foreign state. This time the issue was considered by a seven member Judicial Committee. Led by Lord Bingham the House unanimously held that evidence obtained by torture could not be relied on in any circumstances. Lord Bingham observed:[44]

> "It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer".

It should be noted, however, that Lord Bingham found himself in a minority on the crucial practical issue of the burden of proof in cases where it was alleged that evidence had been obtained by torture. In contrast to the majority of his colleagues, he took the view that evidence should be excluded if there was a real risk that evidence may have been obtained by torture.[45]

The first Belmarsh decision led to a recasting of the control order regime for those suspected of terrorist activities. In due course, this came before the House of Lords again in a series of linked cases. In *Secretary of State v JJ*,[46] the House of Lords addressed the question as to whether the obligations imposed by the non-derogating control orders considered cumulatively infringed Article 5. The terms of the control orders confined the individual to a one-bedroom flat for 18 hours every day, required visitors to be approved in advance, and prevented the individual from leaving a defined urban area. The majority, led by Lord Bingham, held that the control orders constituted a deprivation of liberty for the purposes of Article 5. Consistent with the Strasbourg case law,[47] the

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40 [1969] 2 AC 147

41 [1964] AC 40

42 [1968] AC 910

43 [2006] 2 AC 221.

44 Ibid, para 51.

45 Ibid, para 56 (Lord Nicholls and Lord Hoffmann agreed with Lord Bingham), the majority were of the view that the burden was on the party challenging the evidence to show that, on a balance of probabilities, it was obtained by torture.

46 [2008] 1 AC 385.

47 See *Guzzardi v Italy* (1981) 3 EHRR 333.

Court considered the cumulative effect of the control order obligations on the individual's Article 5 right to liberty.

In *Secretary of State for the Home Department v MB*[48] an application for a control order was made without notice to MB and was supported by an open and a closed statement. The open statement asserted that MB was an Islamic extremist who was involved in terrorist-related activities but no details were given of those assertions and it was clear that the justification for making the order lay in the closed material. The Court of Appeal had held that the "special advocate" procedure provided sufficient protection for the Article 6 rights of the controlee.[49] In the House of Lords, only Lord Hoffmann agreed with this approach. The majority were of the view that, although the right to a fair trial required that a person be informed of the case against him and be permitted to respond to it, the right was not absolute and might be limited in the interests of national security; but that only such measures restricting the individual's rights as were strictly necessary were permissible. Any difficulties MB suffered in making his case were to be sufficiently counterbalanced by the procedures employed by the judicial authorities; and the court's task was to ascertain whether, looking at the process as a whole, a procedure had been used which involved significant injustice to the controlled person. The House of Lords accepted that the statutory provisions by which material might be withheld from the controlled person might be mitigated by procedural means, including the appointment of special advocates; but took the view that since there could be cases where the core, irreducible minimum of procedural protection would not be met, the Prevention of Terrorism Act and CPR Pt 76 had to be read down under section 3 of the Human Rights Act 1998 so as to take effect only where it was consistent with fairness for them to do so.

Three of the four Lord Law Lords making up the majority[50] favoured remitting the case to the first instance court for reconsideration. However, Lord Bingham was of the view that the concept of fairness "imports a core, irreducible minimum of procedural protection" involving disclosure to the controlee of the thrust of the case against him.[51]

In these cases the House of Lords has resolutely refused to bow to political pressure and or criticism and has upheld the Convention rights of unpopular terrorist suspects. The democratic legitimacy identified by Lord Bingham in the first Belmarsh case has both explicitly and implicitly buttressed the approach which has been taken.

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48 [2008] 1 AC 440.

49 [2007] QB 415.

50 Baroness Hale, Lord Carswell and Lord Brown.

51 Ibid, paras 41 and 43; the issue continues to divide judicial opinion with a majority of the Court of Appeal rejecting the approach of Lord Bingham and overturning the views of first instance judges on the issue, *Secretary of State for the Home Department* v *AF, AM and AN* [2008] EWCA Civ 1148. The case is due to be reconsidered by the House of Lords.

Conclusion

When the HRA came into effect, Lord Bingham observed that its implementation "has assumed something of the character of a religious event: an event eagerly-sought and long-awaited but arousing feelings of apprehension as well as expectation, the uncertainty that accompanies any new and testing experience."[52] Over the past eight years he has sought to temper the fervour of the zealots whilst reinvigorating domestic traditions of rights based jurisprudence. The maintenance of the democratic legitimacy of the HRA has been a key feature in this approach.

After eight years, the HRA has become an established feature of the legal landscape. It has penetrated every aspect of private and public law. If the New Jerusalem remains unbuilt, the modest foundations of a domestic Bill of Rights are still intact. English law has absorbed "rights discourse" without cataclysmic upheaval. Although some sacred jurisprudential cows have been culled[53] many common law principles appear reassuringly familiar. The "war on terror" has been met head on and the HRA has survived the encounter.

The success in preserving and maintaining Convention values during such a turbulent period reflects careful stewardship of Lord Bingham. His cautious conservation of democratic legitimacy through the *Ullah* principle has provided vital support for the HRA over this period. The consistent approach in his opinions has been to graft long established common law principles onto the firmer constitutional bedrock created by the Convention, developing a creative and delicate synthesis of domestic legal principles and Convention rights, a perspective Lord Bingham described in January 2000 as "recognising the important values which infuse the Act, but also recognising the strengths of our own native tradition, idiosyncratic though some of them doubtless are". [54] As a result of the enactment of the HRA, rights jurisprudence has taken firm root in the legal landscape. Lord Bingham's contribution to that process has been vital and irreplaceable.

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52 Lord Bingham "Foreword", in R Clayton and H Tomlinson *The Law of Human Rights* (OUP, 2000)

53 The metaphor is Lord Slynn's, see *R v Lambert* [2002] 2 AC 545, para 6.

54 Lord Bingham "Foreword", in R Clayton and H Tomlinson *The Law of Human Rights* (n.52 above).