Terrorist threats, anti-terrorism and the case against the Human Rights Act

Book section

CRITICALLY EXAMINING THE CASE AGAINST THE 1998 HUMAN RIGHTS ACT

Terrorist threats, Anti-Terrorism and the case against the Human Rights Act

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INTRODUCTION

There is surely no field of public discourse that has challenged human rights law more seriously than that of counter-terrorism. Each shares the same roots in liberal democracy but push such polities in radical different directions. Terrorism, 'the weapon of the weak' to use that 'oft-repeated dictum'[1] uses violence against civilian actors as a means of communicating a message to power rather than as a way of scoring a military success over it. This sort of action thrives in open societies because it is in such places that can be found the freedom necessary to the successful execution of its violence: the insecure transport system; the open sporting and cultural venues; the (relative) absence of state surveillance; the tolerance of radical speech.[2] With its indiscriminate reach, its invariable suddenness, its calculated brutality, and its disregard of traditional laws of war, terrorist violence causes terror not only to whose unlucky enough to be subject to it but to those who – witnessing what has happened - fear they might be next. It is this randomness that drives a horror of such violence into the heart of liberal society.[3] Somehow we think that we can by our own careful actions avoid the car accident, or the armed robber, or the burglar, but who can plan against an assault on a movie theatre, or the hotel at which we are staying or the concert to which we have gone? Those whose positions of responsibility mean they are the intended recipients of the message so bloodily communicated - our political leaders; our police chiefs - take particular umbrage at being required by the perpetrators to try to glean the meaning intended by such deliberate carnage. Why should they when the message has been so bloodily delivered? Surely the right response is to crack down hard on those responsible, not listen sympathetically to what they say? And while pursuing past wrongdoers those same leaders feel compelled to prevent further atrocities: there are other stable doors that can be locked even if this one, violent horse has bolted.

Seeming to stand in the way of the robust action so often demanded by terrorist atrocity are the very principles of liberal democratic society that have made such assaults logistically possible, and indeed which some terrorist campaigns seek deliberately to destroy: the 'pluralism, tolerance and broad-mindedness' celebrated as an especial strength of all such societies,[4] and the requirements of fairness, due process and individuated justice that are part and parcel of the liberal perspective on the world. At the core of these principles, the term that has come increasingly to encapsulate them, is the phrase 'human rights'. Human rights are invariably embedded not only in liberal democracy's

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[1] Paul D'Anieri, *International Politics. Power and Purpose in Global Affairs* (3rd edn, Wadsworth, 2013), 280. For two very perceptive studies see Louise Richardson, *What Terrorists Want. Understanding the Enemy; Containing the Threat* (John Murray 2006) and Richard English, *Does Terrorism Work* (Oxford, 2016)..

[2] Paul Wilkinson, *Terrorism versus Democracy: the Liberal State's Response* (3rd edn, Routledge 2011). On free speech aspects see Ian Cram, *Terror and the War on Dissent. Freedom of Expression in the Age of Al*-Qaeda (Springer 2009).

[3] Richard English, *Terrorism: How to Respond* (OUP 2009), esp ch 1.

[4] Echoing here of course the frequently expressed phraseology of the European Court of Human Rights, for an early and influential conceptualisation see *Lingens v Austria* (1986) 8 EHRR 407 at [41].

political discourse but in its local, regional and international law as well. The essence of such rights is captured in their insistence on taking the individual seriously – respect for human dignity is often taken as the basis of our rights culture.[5] This demand does not buckle under utilitarian pressure. Nor does it blink when confronted by the 'enemy within' or 'the enemy without' – human rights are as blind to ethnic and national origin as they are to gender and (in most contemporary forms) sexual orientation. These rights are the clearest manifestation in law of the global dream, that to be 'a citizen of nowhere'[6] is not an insult to be suffered but a badge to be proudly worn, that the world is composed of individual free people rather than various (nationally defined) peoples.

Conceived and then enacted in the last years of the 1990s, the Human Rights Act entered a counter-terrorism arena in which commitments to human rights had already proved controversial. The European Court of Human Rights had caused extreme controversy in 1978 when it had found that the British treatment of selected internees in Northern Ireland had breached the prohibition on inhuman and degrading treatment which is to be found in Article 3 of the European Convention on Human Rights.[7] A decade later the finding that a pre-charge detention period of up to seven days for terrorist suspects breached the right to a judge under Article 5(3) enraged the administration of Mrs Margaret Thatcher and provoked a limited derogation under Article 15 (afterwards upheld by the Strasbourg court).[8] In the years running up to the Human Rights Act two further interventions caused particular uproar. In 1995, the Strasbourg Court ruled (albeit by the narrowest of margins, ten votes to nine) that the UK had breached the Article 2 rights of three acknowledged IRA members whom its Special Air Services had shot dead in Gibraltar, where the three had been planning a major bombing.[9] Then the following year the Court insisted that foreigners suspected of terrorism could not be simply deported if the serious risk was that what awaited them where they were being sent was some serious violation of their rights, such as, in particular, their right not to be tortured or killed, or subjected to inhuman or degrading treatment or punishment.[10] The Home Secretary whose job it was to deal with both these cases was Michael Howard and though there was acceptance in each case it was begrudging and as minimalist as possible. Howard went on to be leader of the Conservative opposition to Tony Blair's New Labour Government during that Administration's second term, and a young political adviser of this time in Government went on to succeed Howard as Tory leader in 1995 – David Cameron.

The terrorist-related arguments mustered against the Human Rights Act have never been phantoms dreamt up by opponents whose hostility has got the better of their reason. They have flowed out of a radically different view of what liberal democracy ought to be allowed to do in its own defence, a view that had, as some of the cases above remind us, already underscored decades of hostility to rights when Northern Ireland related political violence had been the problem and the European

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[5] Chris McCrudden (ed), *Understanding Human Dignity* (OUP 2013).
[6] Theresa May, Speech to the Conservative Party Conference 2016 – full text at http://www.telegraph.co.uk/news/2016/10/05/theresa-mays-conference-speech-in-full/ [accessed 14 November 2016].
[7] *Ireland v United Kingdom* (1978) 2 EHRR 25.
[8] *Brogan v United Kingdom* (1988) 11 EHRR 117; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539.
[9] *McCann v United Kingdom* (1995) 21 EHRR 97.
[10] *Chahal v United Kingdom* (1996) 23 EHRR 413.

Court (rather than any local tribunal) the human-rights-irritant.[11] The commitment to universal human rights has not implausibly seemed to impede the 'struggle' (or in wilder renditions the 'war') against terrorism. Why should not the safety of the state be able to be taken into account when decisions about the removal of dangerous foreigners come to be made? Is not the (lengthy if needs be) detention of suspected terrorists not entirely appropriate in cases where there is evidence of the involvement of such people in terrorist acts even if this cannot be proved in court? Why should the obligations of due process be blind to the fact that the individual in the dock is committed not merely to his or her own freedom but to the destruction of all of ours as well?[12] These sorts of questions were being asked even during passage of the Human Rights Bill and in the immediate aftermath (pre-implementation of the Act in October 2000), and by Labour government ministers as well as opposition spokespersons.[13] But the events of 11 September 2001 gave them a fresh strength, and sense of urgency: must our society surrender before terrorist violence, going down with one hand tied firmly behind its back by human rights ideologues whose perfectionism is threatening to lead to our obliteration? Even without the Al Qaida attacks of that day counter-terrorism could well have been an important component in the critique of human rights that had already begun and was certain to grow. But the actions of Osama Bin Laden and his cohort of suicide-killers have ensured that in the years that have followed it has been the demands of counter-terrorism that have led the attack.[14] The front-line has been fought out over detention and deportation, and it is to each of these turn first before moving to discuss the role of the criminal law in managing the tensions that are revealed in these two arenas of dispute.

DETENTION AND CONTROL

The 1996 decision of *Chahal v United Kingdom*, referred to in passing above,[15] had concerned a Sikh terrorist whose return to India had been successfully resisted. There was no suggestion of his being inclined or likely to engage in political violence within the United Kingdom, nor any complaint about this country's entitlement to expel him. The problem was a practical one that no jurisdiction would take him (or be obliged to take him) other than one to which it could be plausibly shown that he was at risk of having his Article 3 rights violated. In the immediate aftermath of the 11 September 2001 attacks the Secretary of State for the Home Department David Blunkett found himself unable to expel a number of non-British residents against whom there were (to put it at its lowest) concerns about possible involvement with Al Qaida and/or organisations associated with it. At the same time, it was thought impossible to proceed against them under the traditional criminal law: true that law's substance had been greatly expanded so far as terrorism was concerned by the permanent and comprehensive Terrorism Act that had been passed in 2000 (on which more shortly), but even inchoate offences required admissible evidence by way of proof and none could in these cases be guaranteed.

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[11] Aileen McColgan, 'Lessons from the Past: Northern Ireland Terrorism Now and Then, and the Human Rights Act' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal protection of Human Rights: Sceptical Essays* (OUP 2011).

[12] On an attempt to reconcile human rights and terrorism-prevention see Michael Ignatieff, *The Lesser Evil. Political Ethics in an Age of Terror* (Edinburgh University Press 2004).

[13] See the thoughts of the Home Secretary responsible for the Act, Jack Straw, *Aspects of Law Reform. An Insider's Perspective* (CUP 2013), ch 2.

[14] For an early overview of the post 2011 tensions see Conor Gearty, '11 September 2001, counter-terrorism and the Human Rights Act' (2005) 32 (1) *Journal of Law and Society* 18-33.

[15] Text at n 10 above.

Mr Blunkett's decision was to introduce a system of administrative detention for those persons not of British origins who were suspected of being terrorists and whose expulsion was impossible for *Chahal*-based reasons. When the Anti-terrorism Crime and Security 2001 Act received the Royal Assent, seventeen men were certified under section 21 of Part IV of the Act as persons reasonably believed by the Home Secretary to be terrorists whose presence in the United Kingdom constituted a 'risk to national security' as a result of which – given they could not be removed – their (indefinite) detention was thereafter to be legally sanctioned. After early unsuccessful challenges, nine of the detainees found themselves before the Appellate Committee of the House of Lords, then the United Kingdom's most senior judicial body. To the surprise of many, and the indignation of ministers, they scored an unequivocal victory.[16] Because the detention was so obviously in breach of the European Convention's right to liberty under Article 5, with there being next to no prospect of this being merely a preliminary move in deportation proceedings (allowed under Article 5(1)(f)), the Government had felt obliged to derogate from the effect of Article 5, as they were allowed to do under Article 15 so long as the country faced 'a public emergency threatening the life of the nation'. The Lords were on the whole willing to give the authorities the benefit of the doubt on this, not without a few wobbles it is true, but where the majority were clear was that the selective detention without trial of foreign suspects was not 'strictly required by the exigencies of the situation' as is also demanded by Article 15.

Here we see a first practical example of how the human rights idea rears up against those rooted in national security, the global versus the local. It was precisely that aspect of the detention scheme that had made it politically feasible – the limiting of those subject to it to foreigners – that made it suspect under a human rights law that is ever (and from its perspective rightly) on the lookout for discrimination on grounds of nationality.[17] And yet when asked to defend this discriminatory distinction, lawyers for the Home Secretary could not answer honestly along these lines because to do so would be to lose the case: the hierarchy of the laws under scrutiny placed human rights at the top. They therefore had no answer to the sort of unsettling analogies that were on the majority's minds, perhaps best expressed by Lady Hale:

No one has the right to be an international terrorist. But substitute 'black', 'disabled', 'female', 'gay', or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up the group but not the 'white', 'able-bodied', 'male' or 'straight' suspected international terrorists. The answer is clear. [18]

The political reaction to the case was predictable, albeit diluted to some extent by the shock resignation - the day before it was delivered - of Mr Blunkett, brought down by an unrelated, personal matter.[19] To his successor Charles Clarke fell the task of deciding how to respond to the judges. This was important because the form of the relief had been that of a declaration of incompatibility which meant of course that it could have simply been ignored by the authorities,

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[16] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68. For a detailed review of the case see Conor Gearty 'Human rights in an age of counter-terrorism: injurious, irrelevant or indispensable?' (2005) 58 *Current Legal Problems* 58, 25-46.

[17] See in particular the prohibition on discrimination in Article 14.

[18] Above n 16 at para 238.

[19] 'Blunkett Resigns' *Guardian* 15 December 2004: https://www.theguardian.com/uk/2004/dec/15/davidblunkett.immigrationpolicy1 [accessed 15 November 2016].

pleading an overriding necessity to defend the state. To have done this would have been a somewhat awkward manoeuvre from the Party that had after all only a short while before introduced the Human Rights Act, and would have necessitated as well an unattractive disregard of the rational arguments on the issue in favour of suspiciously broad appeals to security (necessary because justifying discrimination against non-nationals simply on that basis was still a political taboo in the mid 2000s). Nor would such robust disregard of human rights have solved anything in the medium term, being nearly certain shortly afterwards to have attracted the censorious oversight of the Strasbourg court.[20]

Accordingly, in the Spring of 2005 the Government introduced a new system of control, eventually encapsulated in the Prevention of Terrorism Act of that year but only after a huge parliamentary struggle, particularly in the Upper House where matters were delayed by resistance from many peers to central features of the new legislative plans.[21] For the purposes of this chapter it is not necessary to go into great detail about the complex system of 'control orders' that replaced the disgraced detention provisions other than to note how central human rights were both to the framing of the original bill and to the debate on detail that followed in Parliament. Key features of the new framework made this clear. The administrative constraints under which subjects of control orders could be placed fell short of detention but could be extremely restrictive nonetheless.[22] Critically however these orders could be applied to British as well as non-British suspects alike. Additional safeguards were required to kick in where the planned restrictions on particular individuals were so severe as to warrant derogation under Article 15 (as opposed to when they did not, in which case oversight was milder).[23]

The new law anticipated – indeed even required - judicial oversight for human rights compatibility, with the executive, seeking by these means to draw the courts into a near co-planning role with regard to what would and would not 'work' under the Convention. This produces our second practical example of the tension that has been produced by the application of human rights law between the political community on the one hand searching for decisive action and the courts on the other, insistent on seeing the individuals before them. The matter arose in the following way. True to the manner in which the Act had been constructed, a series of disputes arose early on the legitimacy of various control orders, with a central initial issue being the extent to which the right to due process was being eroded by the way in which these orders were being made. The leading case is *Secretary of State for the Home Department v AF, AE and AN*.[24] The law lords had already dealt with AF in earlier proceedings, *Secretary of State for the Home Department v MB and AF*.[25] The issue common to all these applications was the degree to which non-derogating control orders needed to have more fairness added to them to be compatible with Article 6. In the first *AF* case Lord Bingham had spoken of the 'core irreducible minimum of procedural protection'[26] that was in his view absent

[20] See the Strasbourg ruling on those issues that remained open after the Belmarsh decision: *A v United Kingdom* (2009) 49 EHRR 29.
[21] See Meg Russell and Maria Sciara, 'Parliament and the House of Lords: A More Representative and Assertive Chamber?' in Michael Rush and Philip Giddings (eds), *The Palgrave Review of British Politics 2005* (Palgrave Macmillan 2006) 122-136, esp at pp 128-129.
[22] See ss 1 – 3.
[23] See s 4.
[24] [2009] UKSC 28, [2010] 2 AC 269.
[25] [2007] UKHL 46, [2008] 1 AC 440.
[26] Ibid [43].

in both cases then before him. But others of the five on the Bench for that first set of proceedings had taken different views about what was required, Lord Hoffman holding that the chosen statutory framework of closed hearings and special advocates was probably consistent the Convention while Lady Hale, Lord Carswell and Lord Brown had been more inclined to root their decisions in the specific facts of the cases before them. The upshot of it all was by no means self-evident: where the government had wanted a general rule their lordships seemed to be offering endless judicial red tape. Hence the second *AF* case, with *AE* and *AN* on this occasion, just two years later and now with nine judges instead of the usual five, and a recent decision in Strasbourg to contend with[27] which had (as it happens) proved Lord Hoffmann's earlier optimism on behalf the scheme unfounded. Their lordships and Lady Hale sought now in a series of carefully crafted speeches to be clear about what the Convention required, and how this could be achieved by reading down the 2005 Act rather than embarking on a new round of declarations of incompatibility. But it looked obstructive to those with security uppermost in their minds and speedy decisions to make in what they saw as a vital national interest.

These two Lords decisions were, however, merely the tip of the iceberg so far as litigation was concerned. At the time of the hearing of *AF, AE and AN* there were 38 persons subject to control orders and apart from the seven who had absconded it did seem as though all the remaining 31 had been shrouded in a fog of litigation: AF's second visit to the Lords represented no less that the eighth substantive hearing of his challenge.[28] Procedure was not the only basis of attack: the rights to privacy and to liberty, and even on occasion to be protected from inhuman and degrading treatment were thrown into the mix by lawyers keen (not unreasonably) to do the very best for their clients. One would not have to have been a right-wing Home Secretary to be frustrated by such legal suffocation, and one would need to have been a saintly holder of that office to have seen that none of these entanglements with human rights were the fault of the judges as opposed to the parliamentary legislation that they were being required to interpret. So why not get the judges to be clearer about what they expect, thereby helping law-makers by offering informal advice on what might pass human rights muster? A reasonable question it might be thought, but one to which the judges took grave exception. Here was a third great tension between the executive and judicial branches, flowing out of the way in which separation of powers is arranged between the three branches of government, as irritating to ministers as it was constitutionally inevitable.

In an early control order case to reach the House of Lords, *Secretary of State for the Home Department v JJ*,[29] the issue had revolved around how severe the imposition of a home curfew needed to be to breach the Convention, in particular Article 5 but with Article 8 playing a role as well. The Respondent Secretary of State looked for specifics (16 hours out of 24? 14 hours?), and in doing so was encouraged by judicial suggestions of a possible precise rule along these lines, from Lord Brown.[30] This necessitated yet another trip back to an enlarged appellate tribunal, this time the

[27] *A v United Kingdom* (n 20).
[28] See the details set out in the case itself [2009] UKSC 28, at [6] – [7] (Lord Phillips).
[29] *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385.
[30] '…[R]ather than leave the Secretary of State guessing as to the precise point at which control orders will be held vulnerable to article 5 challenges, … for my part I would regard the acceptable limit to be 16 hours, leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day. Such a regime, in my opinion, can and should properly be characterised as one which restricts the suspect's liberty of movement rather than actually deprives him of his liberty': ibid [105].

newly established Supreme Court sitting as a bench of seven. In *Secretary of State for the Home Department v AP*[31] the Justices unanimously reiterated that all the circumstances needed to be taken into account, that no bright rule was possible, and – showing an enthusiasm to escape the miasma of litigation into which at this point even the Court itself felt it was at risk of submerging - that henceforth appeal courts would embrace 'the wisdom of generally not interfering with [first instance] decisions in control order cases.'[32] While these various cases were being brought, the senior judges' reluctance to engage in behind the scenes discussions had begun to exasperate the Home Secretary of the day, Mr Charles Clarke, further widening the divide between the executive and the judiciary on matters related to counter-terrorism.[33] Of course the judges could not risk pre-empting hearings on specific cases by having been involved openly or (worse) behind closed doors in deliberations about abstract rules which would then apply to individuals before them. But the indignation of ministers engaged in good faith efforts to resolve the (as they saw it) havoc wreaked by human rights adjudication was also entirely understandable. The issue became moot with the disappearance of the control order scheme (and its replacement by a milder framework of Terrorist Prevention and Investigation Measures (TPIMs)[34]), a casualty of the hostility of the Liberal Democratic part of the new coalition that emerged after the 2010 election. This change of administration also brought to power a Conservative Party by now dedicated to waging war on the Human Rights Act,[35] and it was not long before a particular terrorism-related *casus belli* presented itself.

DEPORTATION

The problem exposed by *Chahal* to which the scheme of administrative detention developed in 2001 by Mr Blunkett had been a part answer did not disappear with the collapse of that legal edifice in the *A* deision in 2004 that we have just discussed.[36] Nor did the control orders or TPIMs solve the problem of dangerous foreigners whose lack of criminal activity in the United Kingdom meant little when compared with their capacity for mischief abroad. Here is our fourth practical tension: why should their personal inviolability be put before the safety of the state? And in particular, one such individual, the Palestinian-Jordanian Abu Qatada (or to give him his original name Omar Othman). Long a thorn in the side of successive governments on account of his high public profile as a radical preacher in north London, Abu Qatada was able successfully to resist efforts to remove him for nearly a decade, relying on a combination of UK and Strasbourg human rights law to avoid his apparently inevitable fate. Especially irksome to ministers was the way in which the safeguards in the Convention scheme appeared constantly to be expanding via new litigation to embrace fresh fears concerning his proposed forced return to Jordan, focusing not only on the risk of his being ill-treated but also on the possible flagrant denial of justice at a trial of him which relied on evidence obtained by torture. Eventually after much toing and froing between Whitehall, the Royal Courts of

[31] [2010] UKSC 24, [2011] 2 AC 1 at [3] (Lord Brown) (with whom Lords Phillips, Saville, Walker and Clarke agreed).

[32] Ibid [20] (Lord Brown).

[33] House of Lords, Select Committee on the Constitution, 6th report Session 2006-7 (11 July 2007) paras 93-97 has the details of the controversy surrounding the issue: http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15104.htm [accessed 15 November 2016]

[34] Terrorism Prevention and Investigations Measures Act 2011.

[35] Conservative Manifesto 2010, *Invitation to join the Government of Britain* p 79.

[36] Text at n 16 above.

Justice and Strasbourg, and even a visit to Jordan by the then Home Secretary herself Mrs Theresa May, Abu Qatada was finally flown out of the United Kingdom in July 2013.[37]

The long-running litigation was as damaging to the public perception of the Human Rights Act as the John Hirst prisoners' voting decision has been to Strasbourg.[38] In both cases the applicant appeared to have been drawn from a 'central casting' parade of villains, with each being as friendly to the media as they were alienating to the audiences who therefore had the chance to see them. The judgments have each been more a saga than a simple case, ensuring there was no protection in the temporary nature of their impact. So with *Hirst* we have had numerous copy-cat actions by other prisoners and frequent efforts by the Council of Europe (through its Committee of Ministers) to secure UK compliance,[39] while Abu Qatada has given us a seemingly endless round of applications for this and that relief as the case slowly inched its way to its 2013 denouement. Even as early as the premiership of Tony Blair, Home Secretary John Reid had been calling for modifications of the Act to allow deportations of foreigners judged undesirable,[40] while in 2006 Blair himself had thrown out the suggestion of a possible veto on court judgments after a decision to block the return to their country of nine Afghan hijackers was described by him as an 'abuse of common sense'.[41] So much had the Abu Qatada case commanded public attention that the success enjoyed by Mrs May in finally having him removed under her watch was frequently mentioned by supporters in the course of her short but successful campaign to succeed David Cameron as Prime Minister.[42] Rarely if ever are the successes enjoyed by the authorities in deporting terrorist suspects put in the balance in the discussion on human rights that inevitably ensues this or that successful resistance to a removal, the successful extradition of Babar Ahmad for example.[43] Still less is any serious regard taken of why these individuals cannot be simply dumped abroad, why a country that says it takes human rights seriously should be so relaxed (as much of the media and indeed ministers seem to be) about torture, flagrant denials of justice and other egregious human rights breaches as long as they happen elsewhere (and even if it has been our actions that have facilitated the abuse).

THE CRIMINAL LAW

Opponents of human rights who got stuck in during the Abu Qatada saga rarely note that without the torture evidence that was to have been used the man was in due course acquitted by Jordan's State Security Court of charges of conspiracy to carry out terrorist acts.[44] In the field of terrorism and human rights, the availability of the criminal law is the great dog that does not bark, the unmentioned option that critics may not even be aware of when they launch their attacks or which

[37] See http://www.bbc.co.uk/news/uk-23213740 [accessed 14 November 2016].
[38] *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849.
[39] For a summary of these activities and a full update of recent developments see House of Commons Library Briefing Paper, *Prisoners' Voting Rights: Developments since May 2015* (CPB 7461, 12 January 2016).
[40] 'John Reid calls for human rights law reform' *Telegraph* 17 September 2007: http://www.telegraph.co.uk/news/uknews/1563347/John-Reid-calls-for-human-rights-law-reform.html [accessed 16 November 2016].
[41] 'Blair to amend human rights law' BBC News 14 May 2006: http://news.bbc.co.uk/1/hi/uk/4770231.stm [accessed 15 November 2016].
[42] See for example this article by Mrs May's supporter and Employment Minister Priti Patel in the *Sun* on 8 July 2016: https://www.thesun.co.uk/news/1410048/theresa-may-has-the-vision-determination-and-experience-to-be-our-next-prime-minister-and-is-the-strongest-candidate-for-the-job/ [accessed 15 November 2016].
[43] *Ahmad v United Kingdom* (2013) 56 EHRR 1.
[44] See http://www.bbc.co.uk/news/world-29340656 [accessed 15 November 2016].

they choose to ignore if they are. Human rights law insists on a proper criminal law system and on adequate enforcement of it – the state's positive obligation to protect rights (including the right to life in Article 2) makes inevitable such a demand. The word 'proper' does a great deal of work here – the European Convention (and therefore the Human Rights Act) insists that the trial of terrorist suspects for this or that specific crime should be fairly conducted – Article 6 goes into great detail about what this entails as a matter of practice. As to the content of that criminal law, the Strasbourg system is relaxed to the point of near-civil-libertarian carelessness – countries can create whatever substantive criminal law they desire so long as the basics of a fair trial are observed.[45] Thus there was no serious objection to the charge against Abu Qatada having been one of 'conspiracy' (rather than any specific action).

The medley of provisions that had been available in 2001 as an alternative to the subsequently disgraced detention power taken in the 2001 Act included (all with a very wide definition of terrorism[46]) those to be found in no fewer than 23 of the 64 sections scattered across the first six parts of the comprehensive Terrorism Act 2000, in force from 19 February 2001. These included: instruction or training in firearms or explosives (at home or abroad), or inviting someone to take part in such training; [47] collecting information 'of a kind likely to be useful to a person committing or preparing an act of terrorism', or merely possessing this kind of information;[48] directing 'at any level, the activities of an organisation which is concerned in the commission of acts of terrorism' (with a punishment of up to life in prison);[49] and even the double thought crime of possessing 'an article in circumstances which give rise to a reasonable suspicion that [the] possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'.[50] The 2000 Act contained an offence of inciting terrorism overseas which allowed the authorities to proceed against residents and punish them as though that which they had incited (murder; offences against the person; criminal damage) had actually occurred, despite the incitement being specifically to commit acts of such terrorism abroad, with it being 'immaterial whether or not the person incited is in the United Kingdom at the time of the incitement.'[51] Later anti-terrorism legislation has added more powers to support these criminal laws – and the ordinary criminal law as well of course it should be remembered - on a regular basis, as we have seen in 2001[52] 2006[53] and 2008.[54]

Why is this criminal model of law enforcement not enough for the proponents of a tough line on terrorism? If it were, there would be no conflict with the Convention except insofar as its enforcement via the exercise of police discretion (on stop and search for example[55]) might attract the critical attention of a Court vigilant to prevent undue invasions of privacy and/or discriminatory action against vulnerable groups. This would be – and has been - irritating to the authorities but

[45] See *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2015] AC 49 where the challenge is as usual to powers rather than the substance of the criminal law itself..
[46] Terrorism Act 2000, s 1.
[47] s 54.
[48] s 58
[49] s 56.
[50] s 57.
[51] s 59(4).
[52] Anti-terrorism, Crime and Security Act 2001
[53] Terrorism Act 2006.
[54] Counter-Terrorism Act 2008.
[55] *Gillan and Quinton v UK* (2010) 50 EHRR 1105. *Beghal v Director of Public Prosecutions* (n 45).

would hardly constitute in itself a basis for the sort of hostility which as we have seen defenders of anti-terrorism law have meted out to human rights. There is a deeper explanation, a fifth and final practical example of the way in which the 1998 Act challenges assumptions about national security that are deeply embedded within the state.

For much of the 20th century the United Kingdom had to deal with an enemy that challenged the integrity of the state's political institutions, both from without and (more relevantly for our purposes) from within. The Soviet Union and its satellite states had sympathetic Communist party members operating lawfully within Britain whose danger was judged to be such that their activities did not have to fall within the criminal sphere before close scrutiny of them could be justified. Over time a grand system of state security grew up, staffed by intelligence services, whose job it was to be vigilant against this external and internal threat and to act decisively when needed in the interests of national security.[56] None of this operated in accordance with any transparent law.[57] Criminal prosecution was the exception rather than the rule.[58] Executive discretion and secrecy ruled. Intelligence was gathered to assist in executive decision-making, not the prosecution of crimes. With the collapse of the Soviet Union in the late 1980s this large-scale institutional framework lost the enemy whose existence had been its rationale. At the same time and under pressure from litigation in the European Court of Human Rights, which had found that to the extent that these security activities invaded rights then their lack of a legal basis took them outside the Convention,[59] legislation placed the UK's various security services on a statutory basis, MI5 in 1989,[60] and MI6 and GCHQ in 1994.[61] In Spring 1992, after a series of mishaps in the policing of terrorism in the UK, primacy in the field of counter-terrorism (then mainly against the Irish Republican Army of course) was handed from the police over to the security services.[62] Since then we have seen a strong momentum towards reconfiguring counter-terrorism along a 'Cold War' rather than a policing model. With their emphasis on executive discretion based on secret intelligence, the detention and control order powers earlier discussed fit this bill very well, as do the wider powers in legislation which allow detention before charge of such long duration that it can easily begin to look like short-term internment.[63]

Coming along in 1998 and fully in 2000, the Human Rights Act has posed a direct challenge to this growing edifice of administrative control. We have already seen how human-rights-based hostility has forced changes to the anti-terrorism powers taken in reaction to the 11 September 2001 attacks. A further example of the same point that came before 11 September is the power of proscription. In

[56] For legal dimensions to this covering much of the 20th century see Keith Ewing and Conor Gearty, *The Struggle for Civil Liberties. Political Freedom and the Rule of Law in Britain, 1914-1945* (OUP 2000) and Keith Ewing and Conor Gearty, *Freedom under Thatcher. Civil Liberties in Modern Britain* (OUP 1990).

[57] Keith Ewing, Joan Mahoney, Andrew Moretta, *Surveillance and the Liberal State* UK Const. L. Blog (16th June 2013): https://ukconstitutionallaw.org/2013/06/16/keith-ewing-joan-mahoney-and-andrew-moretta-surveillance-and-the-liberal-state/ [accessed 16 November 2016].

[58] eg *Chandler v Director of Public Prosecutions* [1964] AC 763.

[59] eg *Malone v United Kingdom* (1984) 7 EHRR 14.

[60] Security Service Act 1989.

[61] Intelligence Services Act 1994.

[62] See the statement by the Home Secretary Kenneth Clarke at House of Commons Parliamentary Debates, 8 May 1992, cc 297-306.

[63] In the Autumn of 2005, the then Prime Minister Tony Blair was defeated in the Commons on his initiative to extend detention before charge to 90 days: 'Blair defeated over terror laws' BBC 9 November 2005: http://news.bbc.co.uk/1/hi/uk_politics/4422086.stm [accessed 16 November 2016].

pre-legislative plans for what became the Terrorism Act 2000 and following earlier statutory precedents[64] the power to ban 'terrorist' organisations had been reposed entirely in the Home Secretary, subject only to what was confidently expected would be the lightest of light touch judicial review. But before the Act took its final shape, decisions in the European Court of Human Rights had made clear that more safeguards would be needed if the power were to survive the guarantee of freedom of association that is to be found in Article 11 of the European Convention and which would soon be part of domestic law.[65] A new tribunal was duly created, to which those facing such bans could take their cases, the Proscribed Organisations Appeals Commission (POAC) and it has proved surprisingly effective.[66]

Here we see a pattern. The security and human rights models have played out a score draw, with neither winning triumphantly but each avoiding defeat. Crimes continue to be prosecuted and security services maintain their secret activities and their intelligence gathering. Where the activities of the latter require action that impacts on rights, it is not directly prevented by human rights law. Rather it is channelled into quasi-judicial realms, places that mimic traditional judicial proceedings without being quite the full deal. Here is the battleground that has thrown the tension between human rights and security into sharp relief: how much should the former yield to the latter, how much 'judicial' should there be and how much be left at the merely 'quasi'? In the sequel to the Belmarsh case in the European Court of Human Rights, *A v United Kingdom*,[67] the Strasbourg judges demanded that those affected by secret proceedings should at least be informed of the gist of the case against them, a ruling that was reluctantly accepted by the Supreme Court.[68] The easiest way to cut through to a human-rights-sensitive solution in these and other cases would be to allow into criminal proceedings evidence against suspects that had been secured via lawfully obtained material from state interception of their communications. Currently prohibited by domestic law, it has been the authorities who have stoutly resisted all change in this area: such stuff belongs to the world of intelligence rather than policing.[69] And where court cases threaten to reveal too much, then better they go into fully secret session or be allowed to collapse than that the State be forced by the eccentric simplicities of the criminal process to reveal its hand.[70]

CONCLUSION

No one case encapsulates the pressure placed on human rights law by the demands of anti-terrorism than that of Moazzam Begg. Held in Guantanamo and before that Bagram jail in Afghanistan for three years and then subjected to close police scrutiny on his return to the United Kingdom, he was charged with serious terrorist offences in 2014, leading to his being remanded without custody in Belmarsh prison for seven months. On the day that the criminal proceedings against him were

[64] In Great Britain starting with the Prevention of Terrorism (Temporary Provisions) Act 1974, s 1. (Northern Ireland had, unsurprisingly, a separate legal code for anti-terrorism.)
[65] See in particular *Socialist Party v Turkey* (1998) 27 EHRR 51.
[66] See now Part Two of the Terrorism Act 2000, and for how the provisions operate, albeit in a case where the proscription was upheld, *R (Lord Carlile of Berriew and Others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] 1 AC 945.
[67] Above n 20.
[68] In *Secretary of State for the Home Department v AF, AE and AN* (n 24).
[69] For a glimpse of the rearguard actions fought to prevent the use of such evidence see the response to the *Report of the Privy Council Review of Intercept as Evidence* Cm 7324 (30 January 2008): Home Office, *Intercept as Evidence. A Report* Cm 7760 (December 2009).
[70] See now Justice and Security Act 2013, Part Two.

scheduled to start however the Crown withdrew the charges and suddenly he was free to go.[71] Begg has never been convicted of any crime and yet his life has been severely affected by the application to him of various administrative powers that have been derived from judgments made on the basis of national security that were never intended to be exposed to public view. The human rights insistence on equality and on individual dignity insists that they should be. The utilitarian demands of security condemns such scrupulousness as reckless and misguided. Stuck with a statutory insistence to respect the former, in the face of strong calls for the latter from both political leaders of all parties and the popular media, the courts do their best to deliver on a legislative mandate in which the legislature appears no longer to believe. If it is fatally diluted by a new Bill of Rights (long in the wings but not yet centre stage[72]) those who believe in equality of respect and individual freedom may look back on the period of the Human Rights Act with nostalgic sadness. If the Act is destroyed, one of the forces that will have greatly weakened it for that kill will have been the counter-terrorist critique.

[71] Richard Norton-Taylor, 'The strange case of Moazzam Begg' *Guardian* 7 Octgober 2014: https://www.theguardian.com/world/defence-and-security-blog/2014/oct/07/moazzam-begg-mi5-syria [accessed 19 November 2016].

[72] *Protecting Human Rights in the UK. The Conservatives' Proposals for Changing Britain's Human Rights Laws* [undated but October 1014]: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf [accessed 19 November 2016].