Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)

HOUSE OF LORDS

SESSION 2004-05
[2004] UKHL 56
on appeal from: [2002] EWCA Civ 1502

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)

X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)

ON

THURSDAY 16 DECEMBER 2004

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LORD BINGHAM OF CORNHILL

My Lords,

1. The nine appellants before the House challenge a decision of the Court of Appeal (Lord Woolf CJ, Brooke and Chadwick LJJ) made on 25 October 2002 ([2002] EWCA Civ 1502, [2004] QB 335). The Court of Appeal allowed the Home Secretary's appeal against the decision of the Special Immigration Appeals Commission (Collins J, Kennedy LJ and Mr Ockelton) dated 30 July 2002 and dismissed the appellants' cross-appeals against that decision: [2002] HRLR 1274.

2. Eight of the appellants were certified by the Home Secretary under section 21 of the Anti-terrorism, Crime and Security Act 2001 on 17 or 18 December 2001 and were detained under section 23 of that Act on 19 December 2001. The ninth was certified on 5 February 2002 and detained on 8 February 2002. Two of the eight December detainees exercised their right to leave the United Kingdom: one went to Morocco on 22 December 2001, the other (a French as well as an Algerian citizen) went to France on 13 March 2002. One of the December detainees was transferred to Broadmoor Hospital on grounds of mental illness in July 2002. Another was released on bail, on strict conditions, in April 2004. The Home Secretary revoked his certification of another in September 2004, and he has been released without conditions.

3. The appellants share certain common characteristics which are central to their appeals. All are foreign (non-UK) nationals. None has been the subject of any criminal charge. In none of their cases is a criminal trial in prospect. All challenge the lawfulness of their detention. More specifically, they all contend that such detention was inconsistent with obligations binding on the United Kingdom under the European Convention on Human Rights, given domestic effect by the Human Rights Act 1998; that the United Kingdom was not legally entitled to derogate from those obligations; that, if it was, its derogation was nonetheless inconsistent with the European Convention and so ineffectual to justify the detention; and that the statutory provisions under which they have been detained are incompatible with the Convention. The duty of the House, and the only duty of the House in its judicial capacity, is to decide whether the appellants' legal challenge is soundly based.

4. …

   The background

5. In July 2000 Parliament enacted the Terrorism Act 2000. This was a substantial measure, with 131 sections and 16 Schedules, intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism. Relevantly for present purposes, that Act defined "terrorism" in section 1, which reads:

   > "1 Terrorism: interpretation
   >
   > (1) In this Act 'terrorism' means the use or threat of action where -
   >
   > > (a) the action falls within subsection (2),
   > >
   > > (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
   > >
   > > (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it -

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section -

(a) 'action' includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

6. On 11 September 2001 terrorists launched concerted attacks in New York, Washington DC and Pennsylvania. The main facts surrounding those attacks are too well known to call for recapitulation here. It is enough to record that they were atrocities on an unprecedented scale, causing many deaths and destroying property of immense value. They were intended to disable the governmental and commercial power of the United States. The attacks were the product of detailed planning. They were committed by terrorists fired by ideological hatred of the United States and willing to sacrifice their own lives in order to injure the leading nation of the western world. The mounting of such attacks against such targets in such a country inevitably caused acute concerns about their own security in other western countries, particularly those which, like the United Kingdom, were particularly prominent in their support for the United States and its military response to Al-Qaeda, the organisation quickly identified as responsible for the attacks. Before and after 11 September Usama bin Laden, the moving spirit of Al-Qaeda, made threats specifically directed against the United Kingdom and its people.

7. Her Majesty's Government reacted to the events of 11 September in two ways directly relevant to these appeals. First, it introduced (and Parliament, subject to amendment, very swiftly enacted) what became Part 4 of the Anti-terrorism, Crime and Security Act 2001. Secondly, it made the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644) ("the Derogation

Order"). Before summarising the effect of these measures it is important to understand their underlying legal rationale.

8. First, it was provided by para 2(2) of Schedule 3 to the Immigration Act 1971 that the Secretary of State might detain a non-British national pending the making of a deportation order against him. Para 2(3) of the same schedule authorised the Secretary of State to detain a person against whom a deportation order had been made "pending his removal or departure from the United Kingdom". In *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 it was held, in a decision which has never been questioned (and which was followed by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97), that such detention was permissible only for such time as was reasonably necessary for the process of deportation to be carried out. Thus there was no warrant for the long-term or indefinite detention of a non-UK national whom the Home Secretary wished to remove. This ruling was wholly consistent with the obligations undertaken by the United Kingdom in the European Convention on Human Rights, the core articles of which were given domestic effect by the Human Rights Act 1998. Among these articles is article 5(1) which guarantees the fundamental human right of personal freedom: "Everyone has the right to liberty and security of person". This must be read in the context of article 1, by which contracting states undertake to secure the Convention rights and freedoms to "everyone within their jurisdiction". But the right of personal freedom, fundamental though it is, cannot be absolute and article 5(1) of the Convention goes on to prescribe certain exceptions. One exception is crucial to these appeals:

   > "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   >
   >> (f) the lawful arrest or detention of ….. a person against whom action is being taken with a view to deportation ….."

   Thus there is, again, no warrant for the long-term or indefinite detention of a non-UK national whom the Home Secretary wishes to remove. Such a person may be detained only during the process of deportation. Otherwise, the Convention is breached and the Convention rights of the detainee are violated.

9. Secondly, reference must be made to the important decision of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413. Mr Chahal was an Indian citizen who had been granted indefinite leave to remain in this country but whose activities as a Sikh separatist brought him to the notice of the authorities both in India and here. The Home Secretary of the day decided that he should be deported from this country because his continued presence here was not conducive to the public good for reasons of a political nature, namely the international fight against terrorism. He resisted deportation on the ground (among others) that, if returned to India, he faced a real risk of death, or of torture in custody contrary to article 3 of the European Convention which provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Before the European Court the United Kingdom contended that the effect of article 3 should be qualified in a case where a state sought to deport a non-national on grounds of national security. This was an argument which the Court, affirming a unanimous decision of the Commission, rejected. It said, in paras 79-80 of its judgment:

   > "79. Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or

> degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.
>
> 80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees."

The Court went on to consider whether Mr Chahal's detention, which had lasted for a number of years, had exceeded the period permissible under article 5(1)(f). On this question the Court, differing from the unanimous decision of the Commission, held that it had not. But it reasserted (para 113) that "any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress". In a case like Mr Chahal's, where deportation proceedings are precluded by article 3, article 5(1)(f) would not sanction detention because the non-national would not be "a person against whom action is being taken with a view to deportation". A person who commits a serious crime under the criminal law of this country may of course, whether a national or a non-national, be charged, tried and, if convicted, imprisoned. But a non-national who faces the prospect of torture or inhuman treatment if returned to his own country, and who cannot be deported to any third country and is not charged with any crime, may not under article 5(1)(f) of the Convention and Schedule 3 to the Immigration Act 1971 be detained here even if judged to be a threat to national security.

10. The European Convention gives member states a limited right to derogate from some articles of the Convention (including article 5, although not article 3). The governing provision is article 15, which so far as relevant provides:

> "*Derogation in time of emergency*
>
> 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."

A member state availing itself of the right of derogation must inform the Secretary General of the Council of Europe of the measures it has taken and the reasons for them. It must also tell the Secretary General when the measures have ceased to operate and the provisions of the Convention are again being fully executed. Article 15 of the Convention is not one of the articles expressly incorporated by the 1998 Act, but section 14 of that Act makes provision for prospective derogations by the United Kingdom to be designated for the purposes of the Act in an order made by the Secretary of State. It was in exercise of his power under that section that the Home Secretary, on 11 November 2001, made the Derogation Order, which came into force two days later, although relating to what was at that stage a proposed derogation.

The Derogation Order

11. The derogation related to article 5(1), in reality article 5(1)(f), of the Convention. The proposed notification by the United Kingdom was set out in a schedule to the Order. The first section of this, entitled "Public emergency in the United Kingdom", referred to the attacks of 11 September and to United Nations Security Council resolutions recognising those attacks as a threat to international peace and security and requiring all states to take measures to prevent the commission of terrorist attacks, "including by denying safe haven to those who finance, plan, support or commit terrorist attacks". It was stated in the Schedule:

> "There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom."

The next section summarised the effect of what was to become the 2001 Act. A brief account was then given of the power to detain under the Immigration Act 1971 and reference was made to the decision in *Hardial Singh*. In a section entitled "Article 5(1)(f) of the Convention" the effect of the Court's decision in *Chahal* was summarised. In the next section it was recognised that the extended power in the new legislation to detain a person against whom no action was being taken with a view to deportation might be inconsistent with article 5(1)(f). Hence the need for derogation. Formal notice of derogation was given to the Secretary General on 18 December 2001. Corresponding steps were taken to derogate from article 9 of the International Covenant on Civil and Political Rights 1966, which is similar in effect to article 5, although not (like article 5) incorporated into domestic law.

The 2001 Act

…

Public emergency

16. The appellants repeated before the House a contention rejected by both SIAC and the Court of Appeal, that there neither was nor is a "public emergency threatening the life of the nation" within the meaning of article 15(1). Thus, they contended, the threshold test for reliance on article 15 has not been satisfied.

17. The European Court considered the meaning of this provision in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, a case concerned with very low-level IRA terrorist activity in Ireland and Northern Ireland between 1954 and 1957. The Irish Government derogated from article 5 in July 1957 in order to permit detention without charge or trial and the applicant was detained between July and December 1957. He could have obtained his release by undertaking to observe the law and refrain from activities contrary to the Offences against the State (Amendment) Act 1940, but instead challenged the lawfulness of the Irish derogation. He failed. In para 22 of its judgment the Court held that it was for it to determine whether the conditions laid down in article 15 for the exercise of the exceptional right of derogation had been made out. In paras 28-29 it ruled:

> "28. In the general context of Article 15 of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is

> sufficiently clear; they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed. Having thus established the natural and customary meaning of this conception, the Court must determine whether the facts and circumstances which led the Irish Government to make their Proclamation of 5 July 1957 come within this conception. The Court, after an examination, finds this to be the case; the existence at the time of a 'public emergency threatening the life of the nation' was reasonably deduced by the Irish Government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.
>
> 29. Despite the gravity of the situation, the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally, but the homicidal ambush on the night of 3 to 4 July 1957 in the territory of Northern Ireland near the border had brought to light, just before 12 July - a date, which, for historical reasons, is particularly critical for the preservation of public peace and order - the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland."

18. In the *Greek Case* (1969) 12 YB 1 the Government of Greece failed to persuade the Commission that there had been a public emergency threatening the life of the nation such as would justify derogation. In para 153 of its opinion the Commission described the features of such an emergency:

> "153. Such a public emergency may then be seen to have, in particular, the following characteristics:
>
> (1) It must be actual or imminent.
>
> (2) Its effects must involve the whole nation.
>
> (3) The continuance of the organised life of the community must be threatened.
>
> (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate."

In *Ireland v United Kingdom* (1978) 2 EHRR 25 the parties were agreed, as were the Commission and the Court, that the article 15 test was satisfied. This was unsurprising, since the IRA had for a number of years represented (para 212) "a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants". The article 15 test was accordingly not discussed, but the Court made valuable observations about its role where the application of the article is challenged:

> "(a) *The role of the Court*

> 207. The limits on the Court's powers of review are particularly apparent where Article 15 is concerned.
>
> It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.
>
> Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Art. 19), is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision."

The Court repeated this account of its role in *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, adding (para 43) that

> "in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."

The Court again accepted that there had been a qualifying emergency when the applicants, following a derogation in December 1988, were detained for periods of six days and four days respectively in January 1989. In *Aksoy v Turkey* (1996) 23 EHRR 553 the Court had little difficulty in accepting, and the applicant did not contest, that a qualifying public emergency existed. This was, again, an unsurprising conclusion in the context of Kurdish separatist terrorism which had claimed almost 8000 lives. The applicant in *Marshall v United Kingdom* (10 July 2001, Appn No 41571/98) relied on the improved security situation in Northern Ireland to challenge the continuing validity of the United Kingdom's 1988 derogation. Referring to its previous case law, the Court rejected the application as inadmissible, while acknowledging (pp 11-12) that it must

> "address with special vigilance the fact that almost nine years separate the prolonged administrative detention of the applicants Brannigan and McBride from that of the applicant in the case before it."

19. Article 4(1) of the ICCPR is expressed in terms very similar to those of article 15(1), and has led to the promulgation of "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) 7 HRQ 3. In paras 39-40, under the heading "Public Emergency which Threatens the Life of the Nation", it is said:

> "39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

> (a) affects the whole of the population and either the whole or part of the territory of the State, and
>
> (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.

> 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4."

20. The appellants did not seek to play down the catastrophic nature of what had taken place on 11 September 2001 nor the threat posed to western democracies by international terrorism. But they argued that there had been no public emergency threatening the life of the British nation, for three main reasons: if the emergency was not (as in all the decided cases) actual, it must be shown to be imminent, which could not be shown here; the emergency must be of a temporary nature, which again could not be shown here; and the practice of other states, none of which had derogated from the European Convention, strongly suggested that there was no public emergency calling for derogation. All these points call for some explanation.

21. The requirement of imminence is not expressed in article 15 of the European Convention or article 4 of the ICCPR but it has, as already noted, been treated by the European Court as a necessary condition of a valid derogation. It is a view shared by the distinguished academic authors of the Siracusa Principles, who in 1985 formulated the rule (applying to the ICCPR):

> "54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger."

In submitting that the test of imminence was not met, the appellants pointed to ministerial statements in October 2001 and March 2002: "There is no immediate intelligence pointing to a specific threat to the United Kingdom, but we remain alert, domestically as well as internationally;" and "[I]t would be wrong to say that we have evidence of a particular threat."

22. The requirement of temporariness is again not expressed in article 15 or article 4 unless it be inherent in the meaning of "emergency." But the UN Human Rights Committee on 24 July 2001, in General Comment No 29 on article 4 of the ICCPR, observed in para 2 that:

> "Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature."

This view was also taken by the parliamentary Joint Committee on Human Rights, which in its Eighteenth Report of the Session 2003-2004 (HL paper 158, HC 713, 21 July 2004), in para 4, observed:

> "Derogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary. According to the Government and the Security Service, the UK now faces a near-permanent emergency."

It is indeed true that official spokesmen have declined to suggest when, if ever, the present situation might change.

23. No state other than the United Kingdom has derogated from article 5. In Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe resolved (para 9) that:

> "In their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights."

It also called on all member states (para 12) to:

> "refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the rights and liberties guaranteed under its Article 5 (right to liberty and security)."

In its General Comment No 29 on article 4 of the ICCPR, the UN Human Rights Committee on 24 July 2001 observed (in para 3):

> "On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation, in situations not covered by article 4."

In Opinion 1/2002 of the Council of Europe Commissioner for Human Rights (Comm DH (2002) 7, 28 August 2002), Mr Alvaro Gil-Robles observed, in para 33:

> "Whilst acknowledging the obligation of governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11th 2001 cannot, on their own, be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the present circumstances. Detailed information pointing to a real and imminent danger to public safety in the United Kingdom will, therefore, have to be shown."

The Committee of Privy Counsellors established pursuant to section 122 of the 2001 Act under the chairmanship of Lord Newton of Braintree, which reported on 18 December 2003 (*Anti-terrorism, Crime and Security Act 2001 Review:* Report, HC 100) attached significance to this point:

> "189. *The UK is the only country to have found it necessary to derogate from the European Convention on Human Rights*. We found this puzzling, as it seems clear that other countries face considerable threats from terrorists within their borders."

It noted that France, Italy and Germany had all been threatened, as well as the UK.

24. The appellants submitted that detailed information pointing to a real and imminent danger to public safety in the United Kingdom had not been shown. In making this submission they were able to rely on a series of reports by the Joint Committee on Human Rights. In its Second Report of the Session 2001-2002 (HL paper 37, HC 372), made on 14 November 2001 when the 2001 Act was a Bill before Parliament, the Joint Committee stated (in para 30):

> "Having considered the Home Secretary's evidence carefully, we recognise that there may be evidence of the existence of a public emergency threatening the life of the nation, although none was shown by him to this Committee."

It repeated these doubts in para 4 of its Fifth Report of the Session 2001-2002 (3 December 2001). In para 20 of its Fifth Report of the Session 2002-2003 (HL paper 59, HC 462, 24 February 2003), following the decisions of SIAC and the Court of Appeal, the Joint Committee noted that SIAC had had sight of closed as well as open material but suggested that each House might wish to seek further information from the Government on the public emergency issue. In its report of 23 February 2004 (Sixth Report of the Session 2003-2004, HL Paper 38, HC 381), the Joint Committee stated, in para 34:

> "Insufficient evidence has been presented to Parliament to make it possible for us to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation."

It adhered to this opinion in paras 15-19 of its Eighteenth Report of the Session 2003-2004 (HL Paper 158, HC 713), drawing attention (para 82) to the fact that the UK was the only country out of 45 countries in the Council of Europe which had found it necessary to derogate from article 5. The appellants relied on these doubts when contrasting the British derogation with the conduct of other Council of Europe member states which had not derogated, including even Spain which had actually experienced catastrophic violence inflicted by Al-Qaeda.

25. The Attorney General, representing the Home Secretary, answered these points. He submitted that an emergency could properly be regarded as imminent if an atrocity was credibly threatened by a body such as Al-Qaeda which had demonstrated its capacity and will to carry out such a threat, where the atrocity might be committed without warning at any time. The Government, responsible as it was and is for the safety of the British people, need not wait for disaster to strike before taking necessary steps to prevent it striking. As to the requirement that the emergency be temporary, the Attorney General did not suggest that an emergency could ever become the normal state of affairs, but he did resist the imposition of any artificial temporal limit to an emergency of the present kind, and pointed out that the emergency which had been held to justify derogation in Northern Ireland in 1988 had been accepted as continuing for a considerable number of years (see *Marshall v United Kingdom* (10 July 2001, Appn No 41571/98) para 18 above). Little help, it was suggested, could be gained by looking at the practice of other states. It was for each national government, as the guardian of its own people's safety, to make its own judgment on the basis of the facts known to it. Insofar as any difference of practice as between the United Kingdom and other Council of Europe members called for justification, it could be found in this country's prominent role as an enemy of Al-Qaeda and an ally of the United States. The Attorney General also made two more fundamental submissions. First, he submitted that there was no error of law in SIAC's approach to this issue and accordingly, since an appeal against its decision lay only on a point of law, there was no ground upon which any appellate court was entitled to disturb its conclusion. Secondly, he submitted that the judgment on this question was pre-eminently one within the discretionary area of judgment reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament.

26. The appellants have in my opinion raised an important and difficult question, as the continuing anxiety of the Joint Committee on Human Rights, the observations of the Commissioner for Human Rights and the warnings of the UN Human Rights Committee make clear. In the result, however, not without misgiving (fortified by reading the opinion of my noble and learned friend Lord Hoffmann), I would resolve this issue against the appellants, for three main reasons.

27. First, it is not shown that SIAC or the Court of Appeal misdirected themselves on this issue. SIAC considered a body of closed material, that is, secret material of a sensitive nature not shown to the parties. The Court of Appeal was not asked to read this material. The Attorney

General expressly declined to ask the House to read it. From this I infer that while the closed material no doubt substantiates and strengthens the evidence in the public domain, it does not alter its essential character and effect. But this is in my view beside the point. It is not shown that SIAC misdirected itself in law on this issue, and the view which it accepted was one it could reach on the open evidence in the case.

28. My second reason is a legal one. The European Court decisions in *Ireland v United Kingdom* (1978) 2 EHRR 25; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539; *Aksoy v Turkey* (1996) 23 EHRR 553 and *Marshall v United Kingdom* (10 July 2001, Appn. No. 41571/98) seem to me to be, with respect, clearly right. In each case the member state had actually experienced widespread loss of life caused by an armed body dedicated to destroying the territorial integrity of the state. To hold that the article 15 test was not satisfied in such circumstances, if a response beyond that provided by the ordinary course of law was required, would have been perverse. But these features were not, on the facts found, very clearly present in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15. That was a relatively early decision of the European Court, but it has never to my knowledge been disavowed and the House is required by section 2(1) of the 1998 Act to take it into account. The decision may perhaps be explained as showing the breadth of the margin of appreciation accorded by the Court to national authorities. It may even have been influenced by the generous opportunity for release given to Mr Lawless and those in his position. If, however, it was open to the Irish Government in *Lawless* to conclude that there was a public emergency threatening the life of the Irish nation, the British Government could scarcely be faulted for reaching that conclusion in the much more dangerous situation which arose after 11 September.

29. Thirdly, I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety. As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called "relative institutional competence". The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, para 62, per Lord Hoffmann. The appellants recognised this by acknowledging that the Home Secretary's decision on the present question was less readily open to challenge than his decision (as they argued) on some other questions. This reflects the unintrusive approach of the European Court to such a question. I conclude that the appellants have shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question.

Proportionality

30. Article 15 requires that any measures taken by a member state in derogation of its obligations under the Convention should not go beyond what is "strictly required by the exigencies of the situation." …

…

43. The appellants' proportionality challenge to the Order and section 23 is, in my opinion, sound, for all the reasons they gave and also for those given by the European Commissioner for Human Rights and the Newton Committee. The Attorney General could give no persuasive answer.

…

Discrimination

45. As part of their proportionality argument, the appellants attacked section 23 as discriminatory. They contended that, being discriminatory, the section could not be "strictly required" within the meaning of article 15 and so was disproportionate. The courts below found it convenient to address this discrimination issue separately, and I shall do the same.

...

67. The Court of Appeal differed from SIAC on the discrimination issue: [2004] QB 335. Lord Woolf CJ referred (para 45) to a tension between article 15 and article 14 of the European Convention. He held (para 49) that it would be "surprising indeed" if article 14 prevented the Secretary of State from restricting his power to detain to a smaller rather than a larger group. He held (para 56) that there was objective and reasonable justification for the differential treatment of the appellants. Brooke LJ (paras 102, 132) also found good objective reasons for the Secretary of State's differentiation, although he also relied (paras 112-132) on rules of public international law. Chadwick LJ found (para 152) that since the Secretary of State had reached his judgment on what the exigencies of the situation required, his decision had to stand, and that "The decision to confine the measures to be taken to the detention of those who are subject to deportation, but who cannot (for the time being) be removed, is not a decision to discriminate against that class on the grounds of nationality" (para 153).

68. I must respectfully differ from this analysis. Article 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 remains in full force. Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of article 14. It was also a violation of article 26 of the ICCPR and so inconsistent with the United Kingdom's other obligations under international law within the meaning of article 15 of the European Convention.

…

71. Having regard to the conclusions I have already reached, I think it unnecessary to address detailed arguments based on alleged breaches of articles 3 and 6 of the European Convention. I express no opinion on those questions, nor on a question relating to the admissibility of evidence obtained by torture which was not argued before SIAC or the Court of Appeal in the part of these proceedings which is now the subject of appeal.

72. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry and Baroness Hale of Richmond, and on all questions of substance I agree with them.

73. I would allow the appeals. There will be a quashing order in respect of the Human Rights Act 1998 (Designated Derogation) Order 2001. There will also be a declaration under section 4 of the Human Rights Act 1998 that section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status. The Secretary of State must pay the appellants' costs in the House and below.

…

LORD HOFFMANN My Lords,

86. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill and I gratefully adopt his statement of the background to this case and the issues which it raises. This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.

87. At present, the power cannot be exercised against citizens of this country. First, it applies only to foreigners whom the Home Secretary would otherwise be able to deport. But the power to deport foreigners is extremely wide. Secondly, it requires that the Home Secretary should reasonably suspect the foreigners of a variety of activities or attitudes in connection with terrorism, including supporting a group influenced from abroad whom the Home Secretary suspects of being concerned in terrorism. If the finger of suspicion has pointed and the suspect is detained, his detention must be reviewed by the Special Immigration Appeals Commission. They can decide that there were no reasonable grounds for the Home Secretary's suspicion. But the suspect is not entitled to be told the grounds upon which he has been suspected. So he may not find it easy to explain that the suspicion is groundless. In any case, suspicion of being a supporter is one thing and proof of wrongdoing is another. Someone who has never committed any offence and has no intention of doing anything wrong may be reasonably suspected of being a supporter on the basis of some heated remarks overheard in a pub. The question in this case is whether the United Kingdom should be a country in which the police can come to such a person's house and take him away to be detained indefinitely without trial.

88. The technical issue in this appeal is whether such a power can be justified on the ground that there exists a "war or other public emergency threatening the life of the nation" within the meaning of article 15 of the European Convention on Human Rights. But I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants

of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law.

89. The exceptional power to derogate from those rights also reflected British constitutional history. There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the government. It happened during the Napoleonic Wars and during both World Wars in the twentieth century. These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised. But the necessity of draconian powers in moments of national crisis is recognised in our constitutional history. Article 15 of the Convention, when it speaks of "war or other public emergency threatening the life of the nation", accurately states the conditions in which such legislation has previously been thought necessary.

90. Until the Human Rights Act 1998, the question of whether the threat to the nation was sufficient to justify suspension of habeas corpus or the introduction of powers of detention could not have been the subject of judicial decision. There could be no basis for questioning an Act of Parliament by court proceedings. Under the 1998 Act, the courts still cannot say that an Act of Parliament is invalid. But they can declare that it is incompatible with the human rights of persons in this country. Parliament may then choose whether to maintain the law or not. The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with our constitutional traditions.

91. What is meant by "threatening the life of the nation"? The "nation" is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the "life" of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity.

92. This, I think, is the idea which the European Court of Human Rights was attempting to convey when it said (in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15) that it must be a "threat to the organised life of the community of which the State is composed", although I find this a rather dessicated description. Nor do I find the European cases particularly helpful. All that can be taken from them is that the Strasbourg court allows a wide "margin of appreciation" to the national authorities in deciding "both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it": *Ireland v United Kingdom* (1978) 2 EHRR 25, at para 207. What this means is that we, as a United Kingdom court, have to decide the matter for ourselves.

93. Perhaps it is wise for the Strasbourg court to distance itself from these matters. The institutions of some countries are less firmly based than those of others. Their communities are not equally united in their loyalty to their values and system of government. I think that it was reasonable to

say that terrorism in Northern Ireland threatened the life of that part of the nation and the territorial integrity of the United Kingdom as a whole. In a community riven by sectarian passions, such a campaign of violence threatened the fabric of organised society. The question is whether the threat of terrorism from Muslim extremists similarly threatens the life of the British nation.

94. The Home Secretary has adduced evidence, both open and secret, to show the existence of a threat of serious terrorist outrages. The Attorney General did not invite us to examine the secret evidence, but despite the widespread scepticism which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction, I am willing to accept that credible evidence of such plots exist. The events of 11 September 2001 in New York and Washington and 11 March 2003 in Madrid make it entirely likely that the threat of similar atrocities in the United Kingdom is a real one.

95. But 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 and that the appeal ought to be allowed. 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.

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