JUSTICE *Futures* series

THE FUTURE OF COUNTER-TERRORISM AND HUMAN RIGHTS

50 years of defending the rule of law

50th Anniversary
1957–2007

The Future of Counter-terrorism and Human Rights

A JUSTICE *futures* paper

September 2007

This paper is the first of a 'futures' series, designed to celebrate JUSTICE's 50th anniversary, in which staff members and others raise interesting and provocative ideas about the future direction of policy in essay form. It does not necessarily represent JUSTICE policy, but it does draw on JUSTICE's considerable experience as a leading human rights and law reform organisation.

Paper written by Eric Metcalfe emetcalfe@justice.org.uk
Dr Eric Metcalfe is a barrister and JUSTICE's Director of Human Rights Policy

Series editor Sally Ireland

JUSTICE
59 Carter Lane
London
EC4V 5AQ

Tel	**020 7329 5100**
Fax	**020 7329 5055**
E-mail	**admin@justice.org.uk**
Web	**www.justice.org.uk**

JUSTICE – 50 years of defending the rule of law

JUSTICE is an independent law reform and human rights organisation. It works largely through policy-orientated research; interventions in court proceedings; education and training; briefings, lobbying and policy advice. It is the British section of the International Commission of Jurists (ICJ).

JUSTICE relies on its members and supporters for the funds to carry out much of its work. For more information, visit www.justice.org.uk. A donation form is included on the inside back cover of this report.

Introduction

People expect many things from their governments, but none are so perilous for a government to ignore as the demand for security. 'Let the safety of the people be the supreme law',[1] counselled Cicero, and although the maxim is more often recalled as a ringing declaration of constitutional principle, it also serves as shrewd practical advice to anyone holding high public office. For a government that fails in its task to protect its citizens risks being replaced or, worse, overthrown. Even a tyrant, Aristotle advised, should encourage his subjects 'to believe that they owe their safety to the regime' lest they begin to look elsewhere for protection.[2]

The idea of public safety as the imperative principle of government has gone through various iterations over the centuries, but its essential appeal remains the same. Two days into his premiership and faced with the discovery of two undetonated car bombs in central London and a burning SUV being driven into the passenger terminal of Glasgow airport, the new Prime Minister, Gordon Brown, told reporters that 'the first duty of the government is the security and safety of all the British people'.[3]

It is unlikely that the Prime Minister meant anything by this remark other than sensible reassurance offered in the face of troubling events. But the language of public safety as the pre-eminent political value has a compelling quality, and it is leery of competition. Barely a month earlier, Brown's predecessor as Prime Minister described what he saw as the courts' apparent approach of 'putting traditional civil liberties first' in the fight against terrorism as 'misguided', 'wrong' and 'a dangerous misjudgement'.[4] Indeed, at its most extreme, the argument for public safety can easily trump all else. Even today, some point to the bloody civil war that has followed the overthrow of Saddam Hussein and reason that it would be better to live under a stable yet repressive dictatorship – to forgo such basic rights as voting, freedom from torture, due process and free expression – than to endure what Hobbes called the 'war of all against all'.[5]

As grave as the threat of terrorism in the UK is, however, the streets of London are fortunately nowhere as dangerous as those of Baghdad and the solution of jettisoning rights altogether has not been widely proposed as a proportionate response to either the attacks of 9/11, 7/7 or the more recent events of the summer of 2007. A more significant reaction on the part of many, though, has been the claim

[1] 'Salus populi suprema lex esto', De legibus, Bk 3, iii [8].
[2] The Politics, 1315a31.
[3] See eg D Leppard, 'Britain under attack as bombers strike at airport', *Sunday Times*, 1 July 2007.
[4] N Morris, 'Blair accuses courts of putting rights of terrorist suspects first', *The Independent*, 28 May 2007.
[5] De Cive, Ch 1, xiii.

that the threat of terrorism requires a 'balance' to be struck between the ordinary claims of human rights and the extraordinary demands of public safety.[6]

This idea of a balance is usually expressed in one of two ways: first, as a balance between liberty and security (although, on closer inspection, liberty usually turns out to be but one of several values lumped together on the losing side of the equation); and, secondly, as a balance between the right to life, on the one hand, and all other human rights, on the other.[7] This latter version of the balance poses a particular challenge to those who would defend human rights from being overridden by security concerns, because it frames the demands of public safety not as a competing, external value but as the one human right capable of trumping all others. In either version, though, the idea of a balance is typically invoked for the purpose of suggesting that existing laws are skewed too far in favour of liberty and human rights in general, a balance that was perhaps appropriate in times of peace but not in light of the terrorist threat we now know to exist.

To judge by the querulous tone of various official statements since 9/11, this idea of rights and safety out of balance is one the British government has taken to heart. Before the 7/7 bombings, the then Prime Minister, Tony Blair, suggested that 'there is no greater civil liberty than to live free from terrorist attack'.[8] After the bombings, the then Home Secretary, Charles Clarke, maintained that 'the right to be protected from the death and destruction caused by indiscriminate terrorism is at least as important as the right of the terrorist to be protected from torture and ill-treatment'.[9] His successor, John Reid, argued that 'the right to security, to the protection of life and liberty, is and should be the basic right on which all others are based'.[10] And, a month before his resignation, Tony Blair offered the following analysis:[11]

> *We have chosen as a society to put the civil liberties of the suspect, even if a foreign national, first. I happen to believe this is misguided and wrong .... Over the past five or six years we have decided as a country that except in the most limited of ways, the threat to our public safety does not justify changing radically*

---

[6] See eg the government's 2004 consultation paper, *Counter-Terrorism Powers: Reconciling Liberty and Security in an Open Society* (Cmnd 6147: Home Office, February 2004). In the wake of the failed Glasgow attack, one writer ventured that the government should 'suspend ... whatever sections of the Human Rights Act may be required and derogat[e] from the entirety of the European Convention on Human Rights if that cannot be avoided. A balance always has to be struck between security and liberty, but the age of the car bomber means it has to be assessed again', T Hames, 'We must act now to close this terror trail', *The Times*, 2 July 2007.

[7] For a far more extensive critique of the idea of balance in this context, see Waldron, 'Security and Liberty: The Image of Balance', 11 *Journal of Political Philosophy* (June 2003), pp191-210.

[8] 'Blair defends anti-terrorism plans', BBC News website, 24 February 2005.

[9] Speech to the Heritage Foundation, Washington DC, 5 October 2005.

10 'Reid urges human rights shake-up', BBC News website, 12 May 2007. See also eg B Leapman, 'Reid says human rights laws soft on terrorists', Sunday Telegraph, 12 May 2007.

11 See n4 above. See also eg C Brown and N Morris, 'Blair faces torrent of criticism on human rights', The Independent, 24 February 2006: 'We hear an immense amount about [terror suspects'] human rights and their civil liberties. But there are also human rights of the rest of us to live in safety'.

the legal basis on which we confront this extremism. Their right to traditional civil liberties comes first. I believe this is a dangerous misjudgement.

Leaving aside the question of whether the various measures introduced by Mr Blair and his colleagues since 2001 – indefinite detention of foreign terrorist suspects without trial,[12] control orders,[13] or the extension of the maximum period of pre-charge detention of terrorist suspects to 28 days[14] to name but a few – could accurately be described as 'the most limited of ways', there seems little doubt that this political rhetoric has reflected the broader mood of the British public. In the immediate aftermath of 7/7, 70 per cent of those polled agreed with the statement that 'it may sometimes be necessary to restrict the civil liberties of suspected terrorists even though there is not enough usable evidence to charge and convict them', compared with 58 per cent asked the same question five months earlier.[15] A full year after the bombings, another poll showed 69 per cent support for extending pre-charge detention of terror suspects for up to 90 days.[16] At the beginning of 2007, over five years on from 9/11 and over 18 months from 7/7, the annual British Social Attitudes survey found 80 per cent support for the imposition of electronic tagging, travel restrictions and home curfews on those suspected of involvement in terrorism.[17]

Of course, we should be careful about placing too much weight on such figures, for the way in which people answer opinion polls and how they may ultimately decide matters of public policy, having thought through the consequences in a considered way, tend to be different things. Even so, there is an obvious conflict between respect for fundamental rights as one of the axioms of a democratic society, on the one hand, and the apparent belief of a clear majority of people in the UK that it is necessary to curb those rights for the sake of combating terrorism, on the other.

It is also a conflict that is unavoidable. For not only is the government accountable to Parliament and Parliament answerable to the public, but – ever since the UK ratified the European Convention on Human Rights (ECHR) in 1951 but especially since the Human Rights Act 1998 made ECHR rights justiciable in British courts – neither government nor Parliament can avoid taking decisions on counter-terrorism policy without also having regard to human rights. The Blair government, while responsible for the Human Rights Act, ultimately dealt with the conflict between respect for rights and the demands of public safety by seeking to curb the former.

[12] Part 4 Anti-Terrorism, Crime and Security Act 2001.
[13] Prevention of Terrorism Act 2005.
[14] Terrorism Act 2006.
[15] YouGov / *Daily Telegraph* poll of 1854 adults aged 18+ throughout Britain online on 8 July 2005.
[16] YouGov/ *Spectator* poll of 1696 people, 14-15 August 2006: the same poll showed a full 86 per cent of people who believed another major terrorist attack was either 'very likely' or 'fairly likely' in the next 12 months.
[17] J Carvel and L Ward, 'Huge majority say civil liberty curbs a "price worth paying" to fight terror', *The Guardian*, 24 January 2007.

How the Brown government will deal with the same conflict is only beginning to be seen. How it and future governments ought to deal with the conflict is the subject of this paper.

The mistakes of the past

The demands of public safety are nothing new. Governments have always faced threats to the well-being of their citizens, whether from foreign invasion, flood, famine, or the many other species of domestic strife that pose danger to life and limb. Even terrorism – in the sense of violence against civilians for the pursuit of some political objective – is hardly a recent development. Over four centuries have passed since Guy Fawkes attempted to blow up Parliament with gunpowder; the Clerkenwell bombing of 1867, which left 12 dead and over 120 seriously injured, was but one of a series of bomb attacks by Fenian groups in central London between the 1860s and 1880s;[18] and the plot of Conrad's The Secret Agent was based upon an anarchist's failed bomb attack in Greenwich Park in 1894.[19] Taken together with the UK's experience of nearly three decades of terrorism related to the conflict in Northern Ireland,[20] it might reasonably be thought that the legal principles for dealing with such threats would have been established well before the events of 9/11.

In fact, the government's response to 9/11 was the first major test of a new legal and constitutional framework governing counter-terrorism and human rights in the UK, chiefly the Human Rights Act and the Terrorism Act 2000. These were, in turn, both Acts of the new Labour government that had come into power in 1997. As we will see, some of the mistakes of counter-terrorism policy made by the new government were novel, but not all. Some were inherited also. They are also, in virtually every case, mistakes that remain uncorrected.

Although overlapping and interrelated, the main challenges faced by government in the field of counter-terrorism policy can be grouped together under five headings:

Definitional – problems associated with how to define terrorism, and the speciality of legal measures designed to combat it;

[18] See eg the report of the Clerkenwell bombing in *The Times*, 16 December 1867: 'a crime of unexampled atrocity has been committed in the midst of London ... the slaughter of a number of innocent people; the burning and damaging of women and helpless infants, the destruction of poor men's homes and poor men's property'.
[19] National Maritime Museum, 'Propaganda by Deed – the Greenwich Observatory Bomb of 1894', www.nmm.ac.uk.
[20] According to the government's 1998 consultation paper, 'between 1969 and 30 November 1998, 3289 people have died in Northern Ireland as a direct result of Irish terrorism (including the 29 who died as a result of the Omagh bomb on 15 August this year) and between 1972 and the end of November 1998, 121 people have been killed in Britain in incidents of Irish terrorism' (*Legislation Against Terrorism: A Consultation Paper*, Cm 4178, December 1998).

Deportation to torture – issues surrounding attempts to remove foreign nationals suspected of involvement in terrorism, but who face a real risk of torture if returned to their home country;

The gap between suspicion and proof – a long-standing issue has been the apparent difficulty in prosecuting terrorism offences due to a lack of, or unwillingness on the part of government to provide, admissible evidence. The so-called gap between, on the one hand, reasonable suspicion by the government that a person is involved in terrorism and, on the other hand, evidence allowing that person to be charged and prosecuted, has been used to justify the three most contentious measures since 9/11: indefinite detention under Part 4 Anti-Terrorism, Crime and Security Act 2001 (ATCSA); control orders; and the extension of the maximum period of pre-charge detention to 28 days;

The necessity of new measures – problems surrounding the continuing creation of new terrorist offences despite the absence of any evidence to show that they are needed; and

Process – problems surrounding the *way* in which counter-terrorism policy is made, in particular the increasing resort to emergency legislation as a response to terrorist attacks.

As should be apparent, the problems above are not all of the same kind: some are substantive, some structural. Nor are any of the problems unique to the terrorist threat faced from Al Qaeda – in every case, instances of the same problem can be found in counter-terrorism measures well before 9/11. Nonetheless, just as that dramatic turn of events was not the first indication of the threat from Al Qaeda – 224 were killed in attacks on the US embassies in Nairobi and Dar Es Salaam in 1998 and 17 killed in the attack on the USS Cole in 2000 – the UK government's response to 9/11 revealed the faults in UK counter-terrorism policy more clearly than ever before.

Problems of Definition

The definition of 'terrorism' is an insoluble problem, like the definition of 'pornography': it is something that people tend to know when they see it. As one writer has commented, though, the problem for counter-terrorism legislation is that 'we have to know it before we see it'.[21]

Obviously enough, the use of violence directed against innocent civilians for any political purpose seems an unarguable instance of terrorism. Similarly, the use of political violence against democracies governed by the rule of law is a fundamental breach of the social contract: as Rousseau observed, the citizen is bound to obey the laws he helps to make, 'including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them'.[22] If disobedience to the law is one thing, ordinary and criminal, the use of violence to coerce those who disagree is quite another: criminal, still, but extraordinary.

At the other extreme, most people would readily accept that it is legitimate to use force against governments (but only governments, mind) that are not the least bit democratic but rather tyrannical and oppressive: Nazi Germany, Vichy France, and so on. As John Locke argued,[23] and the US Founding Fathers concurred,[24] where government becomes destructive of basic liberties, it is the natural right of the governed to overthrow it. And as the Preamble to the 1948 Universal Declaration of Human Rights stated:

> *it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,*
>
> *...*

The real definitional problems tend to fall between these obvious cases: violence directed against the state in situations where the state exists somewhere in that broad grey area between imperfect democracy and outright dictatorship; violence directed not against human life, but with the potential to nonetheless seriously endanger human well-being – eg disruption to essential services; or those who

[21] See Walter, 'Defining Terrorism in National and International Law' in Walter, Vöneky, Röben, and Schorkopf (eds), Terrorism as a Challenge for National and International Law: Security versus Liberty? (Berlin: Springer-Verlag, 2004) at 25: 'Lawyers need abstract definitions – the famous definition of "pornography" by Justice Potter Stewart of the US Supreme Court being the exception which confirms the rule. The rule [with terrorism] is, unfortunately, that we have to know it, before we see it. Therefore, although we may all agree with the Representative of the United Kingdom to the United Nations that "what looks, smells and kills like terrorism is terrorism", as lawyers we still have to work on an abstract definition of what should legally constitute terrorism'.
[22] Rousseau, The Social Contract, trans GDH Cole (London: Everyman, 1993), pp274-275.
[23] See eg Two Treatises of Civil Government (1690) Bk 2, Ch 19, para 222.
[24] US Declaration of Independence 1776.

espouse violence for some legitimate cause (eg the liberation of North Korea) but where others associated with that cause employ utterly illegitimate methods – eg the suicide bombing of North Korean civilians.

But the vexed question of how to define terrorism begs the prior question of whether a legal definition is actually needed. For it should be obvious that the core of any terrorist activity – murder, attempted murder, conspiracy to cause explosions, etc – is covered by what might otherwise be termed the 'ordinary' criminal law. Beyond this, a legal definition would be strictly necessary only to attach additional penalties to those who commit crimes for terrorist purposes, in the same way that the law already punishes crimes that are racially aggravated, for instance.

Necessity, however, should not be thought the only principle that governs legislation. And although the need for specific terrorism offences is open to question, there is a certainly a strong argument that certain kinds of serious organised crime – including terrorism – are sufficiently complex to warrant an enhanced set of powers for investigation, surveillance, evidence-gathering, and so forth. Accordingly, a statutory definition of terrorism would be an appropriate trigger for these kinds of exceptional powers.

This, at least, was the conclusion of the review of counter-terrorism legislation carried out by Lord Lloyd in 1996 in the wake of the IRA ceasefire.[25] Lloyd recommended that, despite the probable resolution of the conflict in Northern Ireland, the likelihood of future terrorist threats meant that there was a need for permanent counter-terrorism legislation.[26] Nonetheless, he was careful to identify a set of principles that should govern any future legislation, including that 'legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure' and 'additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat' and must 'strike the right balance between the needs of security and the rights and liberties of the individual'.[27]

The actual definition of terrorism arrived at in s1 Terrorism Act 2000,[28] however, proved to be broader than that originally suggested by Lord Lloyd[29] and broader

[25] The inquiry's terms of reference were to 'consider the future need for specific counter-terrorism legislation in the United Kingdom if the cessation of terrorism connected with the affairs of Northern Ireland leads to a lasting peace, taking into account the continuing threat from other kinds of terrorism and the United Kingdom's obligations under international law; and to make recommendations'.
[26] *Inquiry into Legislation Against Terrorism* (Cm 3420, October 1996).
[27] Ibid, para 3.1.
[28] S1 defines 'terrorism' to cover acts involving serious violence against persons, serious damage to property, risk to health or safety of the public, etc, where 'the use or threat is designed to influence the government or to intimidate the public or a section of the public', and 'the use or threat is made for the purpose of advancing a political, religious or ideological cause'.

even than the earlier 1989 statutory definition.[30] Most problematically, it extended the definition of terrorism to cover the 'use or threat' of acts of serious violence against not simply the UK government or any democratic government but *any* government.[31] In other words, the Act draws no distinction between the indiscriminate bombing of civilians on the London Underground, on the one hand, and an assault by the democratic resistance of North Korea on the army barracks in Pyongyang, on the other. Despite the dramatically different morality of the two acts, both would be deemed equally terrorist under the 2000 definition.

This sweeping definition, controversial even in the relatively mild political climate at the time, has since become a major bone of contention during debates on subsequent terrorism legislation. Although the government was careful following 9/11 to constrain the scope of its most exceptional measures – indefinite detention under Part 4 ATCSA and the use of control orders – to only those cases linked to the threat from Al Qaeda,[32] the introduction of ever more terrorist offences of increasing vagueness has meant that the extent of terrorism legislation is now broader than ever before, covering activity which most would deem to be well outside its natural scope.

The nadir was reached with the creation of the offence of 'encouragement to terrorism' under the Terrorism Act 2006,[33] which – at its most ludicrous extreme – criminalises the publication of a statement that 'glorifies the commission or preparation (whether in the past, in the future or generally)' of acts of terrorism.[34] Given that 'terrorism' includes *any* use of violence against *any* government, however despotic, and given that 'glorification' includes reference to *any* act committed in the past, the offence under s1 would apply to anyone commending the example of Washington, De Gaulle, or Mandela to those living under dictatorial regimes.[35]

---

[29] Lord Lloyd proposed a definition then in use by the FBI: 'the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public, in order to promote political, social, or ideological objectives'.

[30] S20 Prevention of Terrorism (Temporary Provisions) 1989 Act defined terrorism as 'the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear', but excluded domestic terrorism (ie non-Irish and non-international).

[31] S1(4)(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'. Other problems include the language of s1(1)(b) – violence intended merely to 'influence' rather than 'intimidate'; the inclusion of acts intended 'seriously to disrupt an electronic system' without obvious harm under s1(2)(e); and the automatic presumption of terrorist intent for acts involving firearms or explosives under s1(3).

[32] See the concession offered by the Attorney General in relation to the scope of Part 4 in the Belmarsh case: *A and others v Secretary of State for the Home Department* [2004] UKHL 56 at para 33.

[33] Under the draft Terrorism Bill released in September 2005, encouragement to terrorism and glorification of terrorism were originally separate draft offences. They were subsequently combined in the bill presented to Parliament, such that the 'glorification' of an act of terrorism became one way in which the offence of encouragement could be committed: see s1(1)(3) Terrorism Act 2006.

[34] S21 Terrorism Act 2006 also broadened the grounds for proscription of groups as terrorist organisations to include any group involved in the 'glorification' of acts of terrorism.

[35] It is, moreover, entirely irrelevant that the maker or the publisher of the statement ever intended that their statement should inspire others – it is simply enough that the publisher was reckless as to the possibility that they may be misunderstood: see s1(2)(b)(ii): 'A person commits an offence if he publishes a statement to which this

Continuing Parliamentary concern at the breadth of the definition led to the government commissioning Lord Carlile in 2006 to conduct a review. The publication of his report[36] in March 2007, however, proved a disappointment, concluding that the 2000 definition was 'broadly fit for purpose' and recommending relatively minor changes only.[37] A legal challenge against the breadth of the statutory definition was similarly dismissed by the Court of Appeal in February 2007.[38] Despite conceding that there was 'no doubt' that non-terrorist activities could fall within the statutory definition,[39] Carlile maintained that it was better to rely on prosecutorial discretion to prevent 'inappropriate prosecution of those struggling against oppressive regimes'.[40]

For someone expressing opposition to an oppressive regime, however, reliance upon the generosity of spirit of police and prosecutors must seem but a poor and doubtful safeguard against the prospect of being arrested and charged with encouragement to terrorism. Indeed, the claim that the defects of overbroad legislation could be cured by the exercise of executive discretion would be a questionable one in most contexts, undermining as it does the cause of legal certainty. In the context of terrorism legislation, seeking to cure legislative excess with executive discretion is to compound error with vice.

Deportation to torture

In many ways, the use of deportation on grounds of national security is the oldest of counter-terrorism measures. Just as it was common in wartime for states to either expel or detain enemy aliens, it became the practice to use deportation against foreign troublemakers. Among the first activities of the newly created Special Branch[41] in 1883 to combat the Fenian bombing campaign was to arrange the deportation of certain suspects to disrupt their activities. And following the

---

section applies ... and ... at the time he publishes it ... he is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences'.

[36] *The Definition of Terrorism* (March 2007).

[37] The two most significant recommendations were changing 'influence' in s1(1)(b) to 'intimidate' and requiring the Attorney General's approval before commencing any prosecutions in respect of extra-territorial matters. In its June 2007 discussion paper, the government also took up another of Lord Carlile's recommendations: the introduction of aggravated sentences for non-terrorist offences committed for a terrorist purpose. Interestingly, in an earlier 2003 report, Lord Carlile had speculated that such a proposal would be unlikely to gain political support: see *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003*, para 115.

[38] *R v F* [2007] EWCA Crim 243. The House of Lords refused leave to appeal and it is expected that the appellant will now complain to the European Court of Human Rights.

[39] *Definition of Terrorism*, n36 above, para 60.

[40] Ibid, para 64. Lord Carlile claimed, surprisingly, that any attempt to narrow the statutory language to exclude those supporting an armed struggle against non-democratic governments would be contrary to the UK government's international obligations.

[41] Or, to use its original title, the Special Irish Branch of the Criminal Investigation Division of the Metropolitan police.

unsuccessful anarchist bombing attempt in Greenwich Park in 1894, a number of foreign anarchists living in London were similarly deported.[42]

This ready resort by governments to deportation as a counter-terrorism measure is easy to understand when one appreciates what little is required of the government in procedural terms, particularly when compared with the most obvious alternative: prosecution. For centuries, criminal proceedings have been attended by numerous safeguards, requiring the police to have reasonable suspicion before a suspect can be arrested, requiring the prosecution to have evidence to support their charges, not to mention all the inherent checks of a criminal trial itself: the presumption of innocence, the right of the accused to know the evidence against him or her, the right to cross-examine witnesses, and so on.

By contrast, a foreign national subject to deportation on grounds of national security traditionally enjoyed little in the way of procedural rights. For a foreign national is, by definition, someone with no right to remain in the UK and the power of the Home Secretary to order the removal of an alien is closely tied with one of the most well established rules of international law: the power of a state to control who enters and remains within its territory.[43] The discretion to do so is, moreover, extremely broad – the Home Secretary need only satisfy himself that the removal of the person in question would be 'conducive to the public good'.[44]

Indeed, before 1973, there was not even a system of statutory appeals against deportation generally and, once one was introduced, deportation on grounds of national security was excluded specifically from its scope. Instead, the Home Secretary allowed those being deported on national security grounds an appeal to a special Home Office advisory panel,[45] known informally as the 'Three Wise Men'. The panel allowed a deportee to make representations and call witnesses on his behalf, but sat mostly in private with no right for the suspect to see, still less challenge, the material supporting the government's case against him.

---

[42] National Maritime Museum, 'Propaganda by Deed – the Greenwich Observatory Bomb of 1894', www.nmm.ac.uk.

[43] See eg Lord Atkinson in the Privy Council decision of *Attorney General for Canada v Cain* [1906] AC 542 at 546: 'One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: *Vattal*, *Law of Nations*, book 1, s 231; book 2, s 125'. See also, eg, Brooke LJ in *A, X and Y v Secretary of State for the Home Department* [2002] EWCA Civ at para 113: 'International law recognises that every state has a right of protection over its nationals abroad, and a duty to receive on its own territory such of its nationals as are not allowed to remain on the territory of other states ... On the other hand no state has an obligation to allow foreigners to remain within its borders and is free to expel them, subject to any constraints imposed by international treaties, if there is another country to which it can send them which is bound to receive them'.

[44] S3(5)(b) Immigration Act 1971: 'A person who is not patrial shall be liable to deportation from the United Kingdom if ... the Secretary of State deems his deportation to be conducive to the public good'. See also *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 per Lord Slynn at para 8: 'There is no definition or limitation of what can be "conducive to the public good" and the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State'.

[45] See statement of the Home Secretary, *Hansard*, HC Debates, 15 June 1971, col 376.

The denuded nature of the appeals process against deportation for foreign nationals suspected of terrorism was laid bare in the 1996 case of *Chahal v The United Kingdom* before the European Court of Human Rights.[46] As it happened, Mr Chahal's complaint that he would be likely to be tortured by the Punjabi authorities if returned to India was but the most well known feature of that noted case. His complaint against the appeal process itself was also equally central to the Court's decision. On both matters, the Court ruled in Mr Chahal's favour, holding first, that the right to freedom from torture under Article 3 ECHR included an absolute right not to be returned to a country where one faced a real risk of being tortured; and secondly, that Mr Chahal's right to an effective remedy had been violated because he lacked any opportunity to challenge the classified material that had formed part of the government's decision to deport him. These two issues: the absolute nature of the prohibition against *refoulement* to torture,[47] even in cases where the individual is alleged to pose a threat to national security; and the use of sensitive intelligence-based material in judicial proceedings, would come to dominate UK counter-terrorism policy in the decade that followed.

The adverse decision in *Chahal* led the new Labour government to establish the Special Immigration Appeals Commission – or 'SIAC' as it would come to be known. When the bill creating SIAC was first introduced in the Commons in 1997, it was praised by members on all sides of the House.[48] One MP predicted that it would lead to 'a process whereby human rights will be placed at the heart of all our immigration and asylum legislation' and that 'the Bill is a sign of things to come'.[49] It is unlikely that anyone could have guessed that, within the space of a few short years, SIAC would become synonymous with several of the most controversial features of UK counter-terrorism policy: indefinite detention without trial, the use of secret evidence and special advocates, the admission of evidence obtained under torture abroad, and the use of diplomatic assurances from countries known for their practice of it.

---

[46] 23 EHRR 413.

[47] The Court rejected the government's argument that its obligation under Art 3 ECHR not to expose Mr Chahal to torture (in this case, by sending him back to India) could be balanced against the risk that Mr Chahal was alleged to pose to national security (due to his involvement in funding separatist activities from the UK) – see *Chahal* judgment, paras 79-80: '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 ... 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 ... The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases .... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration'.

[48] See eg Charles Wardle MP (Con, Bexhill and Battle): 'the Bill is necessary and it will have the support of the whole House', *Hansard*, HC Debates, 30 October 1997, col 1063.

[49] Richard Allan MP, *Hansard*, HC Debates, 26 November 1997, col 1034.

Of course, closed proceedings and special advocates were a feature of SIAC from the very beginning, but the latter were originally meant as a way to make deportation hearings in national security cases *fairer* than the system it replaced: instead of an internal Home Office review, the deportee would have a right of appeal to an independent judicial tribunal that could assess the factual basis for the Home Secretary's decision and, if necessary, overturn it;[50] instead of the classified material being withheld altogether in proceedings from which the deportee was completely excluded, the deportee would be represented by a special advocate who would be able to examine all the secret evidence, make submissions to the court and cross-examine witnesses on his or her behalf.[51]

Although SIAC offered independent judicial scrutiny of the government's case, it was nonetheless scrutiny on the government's own terms – the deportee's entitlement to disclosure of adverse material did not extend to any material which SIAC agreed could not be disclosed for reasons of national security, nor could the deportee's special advocate hope to mount an effective cross-examination of that material when they were prohibited from discussing it with the deportee – a situation Lord Bingham would later describe as 'taking blind shots at a hidden target'.[52]

None of these procedural developments, however, made any difference to the two basic truths of deportation on national security grounds – the very broad discretion of the Home Secretary to order deportation in the first place,[53] and the unarguable fact that many, if not most, of those whom he sought to deport as suspected terrorists came from countries where state-sponsored torture was rife. Accordingly, proceedings for deportation before SIAC assumed an almost Kabuki-like quality, in which the government would nearly always succeed on its arguments concerning national security and almost inevitably lose when it came to the assessment of Article 3 ill-treatment on return.

The government's increasing frustration with the absolute bar against refoulement led it to seek three different ways of addressing the presence of so-called

---

[50] See *Chahal* judgment, n46 above, at para 113: 'any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress'.
[51] See eg s6 Special Immigration Appeals Commission Act 1997.
[52] *Roberts v Parole Board* [2005] UKHL 45 at para 18. See also the dissenting judgment of Lord Bingham in the Torture Evidence case [2005] UKHL 71 at para 59: 'The special advocates have no means or resources to investigate. The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet'.
[53] SIAC itself was bound to respect the government's broader assessments on national security: see the judgment of the House of Lords in *Rehman v Secretary of State* [2001] UKHL 47. In *Rehman*, even on the government's own case, the appellant posed no direct risk to UK national security. Instead, his risk came from his support for armed Islamic groups in India and Kashmir and the subsequent harm to the UK's diplomatic relations with foreign countries. Although SIAC had held that his activities did not constitute a threat to the UK's national security, the House of Lords disagreed. The Home Secretary, the Law Lords ruled, was entitled to have regard to the interests of good diplomatic relations with foreign states as part of the UK's own national security (see eg Lord Slynn at para 17). Despite this victory, the government abandoned deportation proceedings against Mr Rehman shortly afterwards.

'unremovable' foreign terror suspects: (i) indefinitely detaining foreign suspects; (ii) negotiating diplomatic assurances from foreign governments against Article 3 ill-treatment of deportees; and (iii) seeking to re-argue the absolute bar before the European Court of Human Rights.

The first approach was adopted almost immediately following 9/11 with the enactment of the Anti-Terrorism Crime and Security Act 2001, Part 4 of which provided for the indefinite detention of foreign terrorist suspects who could not be deported due to the risk of Article 3 ill-treatment. Whereas the right to liberty under Article 5(1) ECHR normally prohibited the detention of a deportee unless there was a realistic prospect of removal,[54] the government infamously derogated from Article 5 in order to extend the use of immigration detention powers to operate indefinitely against those who could not be removed.[55] SIAC's remit was similarly extended from hearing appeals against deportation on national security grounds to hearing appeals against detention within the so-called 'three walled prison' of Part 4.[56] However, the government's decision to focus exclusively on the threat posed by foreign suspects would prove to be its undoing.[57] By a majority of 8-1, the December 2004 decision of the House of Lords in the Belmarsh case was that indefinite detention under Part 4 breached Article 5.[58] As Lord Bingham put it:[59]

> *the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. The conclusion that [Part 4 is], in Convention terms, disproportionate is in my opinion irresistible.*

The second approach of seeking 'diplomatic assurances' against the ill-treatment of returned suspects was trailed in the government's initial response to the Belmarsh judgment but again much more aggressively by the then Prime Minister, Tony Blair, in his famous 'rules of the game' speech a month after 7/7. In fact, the seeking of

---

[54] See n50 above.
[55] Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644).
[56] So-called because, although the UK could not seek to forcibly return a detainee to a country where he faced a real risk of ill-treatment contrary to Art 3 without breaching its obligations, there was nothing to prevent a detainee from voluntarily returning if he so wished. See eg Lord Goldsmith QC, 59 STAN L REV 1155 (2007).
[57] Indeed, it was on this point that SIAC at first instance in 2002 found Part 4 to have breached Art 14 ECHR as discriminatory on the ground of national origin – see *A, X, Y and others* [2002] HRLR 1274, para 95: 'There are many British nationals already identified – mostly in detention abroad – who fall within the definition of "suspected international terrorists", and it was clear from the submissions made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined'.
[58] *A and others v Secretary of State for the Home Department* [2004] UKHL 56. The Law Lords also found Part 4 incompatible with Art 14, on the basis that it involved discrimination between foreign suspects and UK nationals.
[59] Ibid, para 43.

guarantees from foreign governments against the ill-treatment of returnees was already relatively well established by the time of the *Chahal* judgment – the Court in that case rejecting the promises of the Indian government as insufficient to protect Mr Chahal from harm.[60] The weaknesses of such assurances were also well known:[61] in May 2005, the UN Committee against Torture criticised the Swedish government for returning an asylum seeker, Ahmed Agiza, to Cairo on the basis of 'assurances from the Egyptian authorities with respect to future treatment'.[62] Not surprisingly, the expressions of diplomatic concern by the Swedish authorities were not enough to protect Mr Agiza from being subsequently tortured in a Cairo jail.[63]

None of this dissuaded the UK government, however, from concluding memoranda of understanding with Jordan and Libya and then seeking to deport suspects to those countries. Indeed, despite negotiations with the Algerian government having fallen through, six Algerians were successfully deported in 2006 and 2007. The memorandum with Jordan also passed muster with SIAC, which upheld the Home Secretary's decision to deport Abu Qatada in early 2007. The Libyan memorandum, by contrast, was not enough to satisfy SIAC that those returned to Libya would not face a real risk of torture, notwithstanding the promise of monitoring by the Gadaffi Foundation run by the son of Colonel Gadaffi.

The third means by which the government sought to address the problem of unremovable foreign terror suspects created by the *Chahal* judgment has been the most direct: to seek to overturn *Chahal* itself. In late 2005, the government intervened in the case of *Ramzy v Netherlands* before the European Court of Human Rights,[64] arguing that the minority view of the Court in *Chahal* – ie that national security considerations could be relevant in assessing the risk of ill-treatment to an appellant in the country of return – should be adopted.[65]

---

[60] The Court noted that the UK government had repeatedly received diplomatic assurances from the Indian government against Mr Chahal being mistreated (*Chahal* judgment, n46 above, para 37). However, the assurances failed to assuage the Court's concerns (ibid, para 105): 'Although the Court does not doubt the good faith of the Indian government in providing the assurances ... it would appear that, despite the efforts of that government, the [National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem ... Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety'.

[61] See eg the report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Sweden, April 21-23, 2004 (Council of Europe, CommDH(2004)13, July 8, 2004): 'the weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment'; the comments of the UN Special Rapporteur on Torture, Professor Manfred Nowak, BBC Radio 4, *Today Programme,* 4 March 2005; or Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (May 2005).

[62] *Agiza v Sweden*, Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005), para 4.12

[63] See eg ibid, para 13.4: 'The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons'.

[64] Application No 25424/05.

[65] See *Letter of the UK Government's Agent to the European Court of Human Rights in the matter of Ramzy v The Netherlands, 24 January 2006*: 'The Governments ... do not submit that national security will always or inevitably prevail over concerns about the possibility of ill-treatment. Instead, the submission is that national security should

Each of these measures was shameful in its own way, but none was probably a more direct affront to the absolute prohibition on torture than the defence mounted by the government in *A and others v Secretary of State for the Home Department (No 2)* – the so-called 'Torture Evidence' case.[66] The Home Secretary claimed that he should be allowed in SIAC proceedings to admit evidence obtained by torture that he had received from foreign governments so long as the UK had not been involved in the actual torture. The argument was mercifully and unanimously rejected by the House of Lords in a unanimous 9-0 judgment. As Lord Hoffman noted, '[t]he use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it'.[67]

That the government's frustration with *Chahal* led it increasingly to compromise basic principle would be bad enough. But the renewed emphasis on deportation overlooks significant practical objections as well. The key flaw of using deportation as a counter-terrorism measure was set out by the Newton Committee in 2003:[68]

> *Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.*

Indeed, if the threat posed by Al Qaeda as a foreign terrorist organisation was sufficient to justify the invasion of Afghanistan in late 2001, sending suspected terrorists beyond the jurisdiction of UK authorities seems a strange way to counter such threats. The voluntary departure of 'F', a dual Algerian/French national who was detained indefinitely under Part 4, illustrates this point well, as SIAC noted:[69]

> *On 12th March 2002, the Appellant decided that he could face detention no longer. He went to France the next day. He was escorted by two police officers and was interviewed on arrival by French security officials .... The upshot of the interview was, he says, that he was told he was free to go and would not have any problem in France. He is still in France.*

---

not be ignored. The seriousness of the threat to national security needs to be taken into account as well as factors such as the nature of the treatment feared'.

[66] [2005] UKHL 56.

[67] Ibid, para 82.

[68] *Report of the Privy Counsellors Review of the Anti-Terrorism Crime and Security Act 2001* HC 100, 18 December 2003 (known as 'the Newton Report'), para 195.

[69] Appeal No SC/11/2002 (SIAC, 29 October 2003), para 6.

The rationality of deportation assumes that the removal of the suspect from the UK will sufficiently disrupt the suspect's activities to neutralise the threat. In some cases, this may be correct. It seems increasingly less so, however, especially given the nature of modern telecommunications. If 'F' was indeed planning an attack against the UK, for instance, of sufficient seriousness to warrant his indefinite detention, it seems difficult to see how his being at liberty in France is enough to disrupt that threat.

Of course, the effectiveness of deportation as a counter-terrorism measure is ultimately predicated on the suspect in question being a foreign national, and therefore subject to immigration control.[70] The use of immigration measures, then, does nothing to address the core problem identified by the House of Lords in the Belmarsh judgment and so starkly underlined by the subsequent events of 7/7: the fact that the terrorist threat to the UK comes as much from people who are born here as from abroad.[71] In truth, the absolute prohibition against returning a suspect to a country where he or she faces being tortured is only a difficulty when viewed through the narrow lens of immigration control. The obvious and most enduring solution to the problem of foreign terror suspects is not removal but prosecution.

The gap between suspicion and proof

The most persistent justification for the most exceptional counter-terrorism measures since 9/11 has been the evidential problems in prosecuting suspected terrorists. Indefinite detention without charge in 2001, the introduction of control orders in 2005, and the extension of the maximum period of pre-charge detention to 28 days in 2006 have each been justified by reference to the same core issue – the gap between reasonable suspicion, on the one hand, and admissible evidence capable of supporting criminal charges on the other.

In fact there is not one gap but two. The first is a gap between what *government ministers* have reasonable grounds for suspecting, which may form the basis for their exercise of a wide range of *civil* powers including deportation or the making of a control order, and the kind of evidence required for a criminal prosecution. The

[70] The power of the Home Secretary to deprive an individual of UK nationality, and hence render him liable for deportation on national security grounds, was introduced in 2002 but significantly expanded by s56 Immigration Asylum and Nationality Act 2006. Whereas previously the Secretary of State could only make an order depriving a person of citizenship where he was satisfied that the 'person has done anything seriously prejudicial to the vital interests' of the UK (s40(2) British Nationality Act 1981 as amended by s4 of the 2002 Act), s56 provides that he may order deprivation of citizenship where he is satisfied that 'deprivation is conducive to the public good', ie the same test that he currently applies exercising his powers to exclude or deport non-nationals from the UK.

[71] The Newton Committee in 2003 similarly doubted the government's contention that the threat to the UK came primarily from foreign nationals, see Newton Report, n68 above, para 193: 'The British suicide bombers who attacked Tel Aviv in May 2003, Richard Reid ("the Shoe Bomber"), and recent arrests suggest that the threat from UK citizens is real. Almost 30% of Terrorism Act 2000 suspects in the past year have been British. We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals'.

second is a gap between the reasonable suspicion of the *police* that is the basis for their powers of *arrest*, and the level of evidence required by prosecutors before they will lay criminal charges against a suspect. In both cases, the suspicion that an individual is engaged in terrorism will come not only from police investigations but also on the basis of material provided by the police, the security and intelligence services, MI5, MI6 and GCHQ.

The resort to indefinite detention of foreign suspects following 9/11 is but the most well known example of the gap between suspicion and proof being used to justify exceptional civil measures. Challenged during Parliamentary debate to explain why those suspected of terrorism were not simply charged with terrorist offences instead of being detained,[72] the Home Secretary cited the lack of admissible evidence against those whom the government suspected of involvement in terrorism:[73]

> *If the evidence that would be adduced and presented in a normal court were available, of course we would use it, as we have done in the past .... [However] in some cases the nature of the evidence from the security and intelligence services will be such that it would put at risk the operation of those services and the lives of those who act clandestinely to help them if that evidence were presented in normal open court.*

Lord Rooker, a Home Office Minister, justified the measures to the House of Lords in far blunter terms:[74]

> *If we could prosecute on the basis of the available evidence in open court, we would do so. There are circumstances in which we simply cannot do that because we do not use intercept evidence in our courts.*

Of course, the problem of admissible evidence in terrorism cases is not new, and certainly not unique to the threat posed by Al Qaeda. In submissions to the European Court of Human Rights in the *Brogan* case in 1988, for instance, the UK government

> *drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism.*[75]

---

[72] See eg Robert Marshall-Andrews MP: *Hansard*, HC Debates, 19 November 2001, cols 28-29: 'Does the Home Secretary accept that there is a sea of difference between SIAC being used to deal with issues of deportation—with all the problems that SIAC has as a review body—and its being used to review decisions to incarcerate and imprison, indefinitely, without trial and, indeed, without charge? If evidence exists against the people about whom we have heard, why are they not being charged and tried in this country?'.
[73] *Hansard*, HC Debates, 19 November 2001, cols 28-29.
[74] *Hansard*, HL Debates, 27 November 2001, col 146.
[75] *Brogan v United Kingdom* (1988) 11 EHRR 117, para 56.

Eight years later, Lord Lloyd of Berwick noted in his report that:[76]

> *one of the themes which has persisted throughout [this] Inquiry is the difficulty of obtaining evidence on which to charge and convict terrorists, particularly those who plan and direct terrorist activities without taking part in their actual execution.*

In fact, to describe the problem as being primarily a 'lack' of admissible evidence can often mislead.[77] Certainly, some of the intelligence material relied upon by the government will be inadmissible as evidence in criminal proceedings, either because it falls squarely within one of the established exclusionary rules (eg the rule against hearsay), or because of some other statutory bar, eg the prohibition against using intercepted communications as evidence in s17 Regulation of Investigatory Powers Act 2000. However, some of the material will be evidence that is technically admissible, eg the testimony of an informant or an undercover agent, but which the security and intelligence services are unwilling to allow to be used in criminal proceedings for fear of compromising either their operational techniques, the safety of the source, or both. As the Newton Committee noted in 2003:[78]

> *The inhibiting factor ... seems to be that intelligence on which suspicion of involvement in international terrorism is based (a) would be inadmissible in court; or (b) the authorities would not be prepared to make it available in open court, for fear of compromising their sources or methods.*

Following the Belmarsh judgment in December 2004 and the lifting of the derogation from Article 5 ECHR, Parliament famously rushed through the Prevention of Terrorism Act 2005. This replaced indefinite detention under ATCSA with control orders – a scheme of civil orders that could be made by the Home Secretary against any person he suspected of involvement in terrorism. Instead of outright detention, though, the orders allowed for a range of restrictions to be imposed on suspects, including their place of residence, movement, employment, personal property, association and communication with others.[79] Although the orders already permitted the Home Secretary to impose lengthy curfews on suspects, more

---

[76] Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism, Vol 1* (Cm 3420, October 1996), para 7.1.

[77] See eg 'Under suspicion', *The Economist*, 7 June 2007: 'Some individuals are known by the authorities to be dangerous but cannot be tried for lack of admissible evidence'.

[78] See n68 above, para 207. This was endorsed by the Joint Committee on Human Rights (JCHR), in its July 2004 report (*Review of Counter-Terrorism Powers* (HL 158/HC 713)) criticising the proposed creation of further terrorist offences, noting that it was 'difficult to see how the existence of such an offence would overcome the obstacles to prosecution identified by the Newton Report, in particular the problem that the evidence relied on in relation to a suspected international terrorist is usually intelligence material which is either inadmissible as evidence in a criminal court, or material which the authorities do not wish to disclose for fear of compromising sources or methods' (para 67).

[79] S2 of the 2005 Act governs the making of non-derogating orders. The restrictions which may be imposed are set out under s1(4).

extreme orders allowing full house arrest were available under the Act should the government feel the need to derogate once more from Article 5.[80] Introducing the bill into Parliament, the Home Secretary again referred to the evidential difficulties associated with terrorism cases to justify the use of control orders:[81]

> *I want to make it clear that prosecution is, and will remain, our preferred way forward when dealing with all terrorists. All agencies operate on that basis, and will continue to do so, but all of us need to recognise that it is not always possible to bring charges, given the need to protect highly sensitive sources and techniques.*

The few procedural safeguards available to defendants in control order proceedings compared most unfavourably with those in criminal proceedings. As with proceedings before SIAC, appeals to the High Court against the making of control orders involve the use of classified intelligence material and special advocates, so that – in the most extreme cases – a defendant may end up knowing nothing of the case against him or her. In the case of 'MB', for example, the Court of Appeal stated that it was 'plain that the justifications for the obligations imposed on MB lay in the closed material'.[82] And in the case of 'AF', Mr Justice Ouseley concluded that 'the case made by the Secretary of State for the Home Department against AF is in its essence entirely undisclosed to him'.[83] Similarly, the low standard of proof required of the Home Secretary – to show only 'reasonable grounds for suspecting' that a person is involved in 'terrorism-related activity' – was described by SIAC as 'not a demanding standard for the Secretary of State to meet'.[84]

Although the Home Secretary had been at pains to assure Parliament that control orders would only be applied in cases where there was 'no evidence available that could realistically be used for the prosecution of an individual for an offence relating to terrorism',[85] it became apparent that – in many control order cases – the issue of criminal prosecution has not been kept under serious review. In February 2007, for instance, the High Court quashed a control order for, among other reasons, the Home Secretary's failure to keep the prospects of prosecuting the suspect for terrorism offences under review.[86] In particular, the court found that the Home Secretary had failed to consider whether publicly available court judgments in

---

[80] See s4.
[81] *Hansard*, HC Debates, 26 Jan 2005, col 305. The Lord Chancellor, Lord Falconer, similarly cited 'the evidential problems in proving the link between the individual, his activity and terrorism' in the Lords debates on the Prevention of Terrorism Bill (*Hansard*, HL Debates, 1 March 2005, col 119).
[82] *Secretary of State for the Home Department v MB* [2006] 3 WLR 839, at para 27.
[83] *AF v Secretary of State for the Home Department* [2007] EWHC 651 (Admin) at para 146.
[84] *Ajouaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003), para 71. See also para 48: 'The test is ... whether reasonable grounds for suspicion and belief exist. *The standard of proof is below a balance of probabilities* because of the nature of the risk facing the United Kingdom, and the nature of the evidence which inevitably would be used to detain these Appellants' [emphasis added].
[85] See eg *Government Reply To The Fourth Report From The Home Affairs Committee* Session 2005-06 HC 910, para 29.
[86] *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin).

Belgium could be used as evidence to prosecute the suspect in the UK.[87] It similarly emerged that – in the case of 10 individuals previously detained under Part 4 ATCSA since December 2001 and now subject to control orders – the Crown Prosecution Service (CPS) did not consider the question of prosecution until 19 February 2005. Nor does the CPS appear to have revisited its decisions in those cases at any time subsequently.[88]

The gap between suspicion and proof has also underlined another long-running issue in the UK counter-terrorism debate: the maximum period of pre-charge detention in terrorism cases. Starting with the Prevention of Terrorism (Temporary Provisions) Act 1974, successive British governments throughout the Northern Ireland conflict had sought to extend the maximum period a suspect could be detained by police following arrest without being charged – in the most extreme cases, up to seven days.[89] In submissions before the European Court of Human Rights in 1988, the government sought to justify the increased maximum by reference to practical difficulties with gathering sufficient evidence to support the laying of charges:[90]

> *The [UK] government have argued that in view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was an indispensable part of the effort to combat that threat, as successive parliamentary debates and reviews of the legislation had confirmed .... In particular, they drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism. Time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces.*

As it was, the Court rejected the government's arguments that the extended pre-charge detention was compatible with the right to liberty under Article 5 and, between 1974 and 2000, the government twice derogated from the ECHR on the basis that the situation in Northern Ireland amounted to a 'public emergency threatening the life of the nation'.[91] The need for derogation arose because the

---

[87] Ibid, paras 286-293. This failure was all the more striking, given that the judgments had been in the possession of the Home Office since November 2005 and since the government had already begun to use those same judgments as open evidence against other individuals in proceedings before the Special Immigration Appeals Commission ('SIAC') by September 2006 (see eg, ibid, paras 52 and 124).

[88] Ibid, paras 108 and 111.

[89] The 1974 provisions were re-enacted in various forms in 1976, 1984 and 1989: see s12 Prevention of Terrorism (Temporary Provisions) Act 1984, Art 9 Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 and Art 10 Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984; and s14 of the Prevention of Terrorism (Temporary Provisions) Act 1989.

[90] *Brogan v United Kingdom* (1988) 11 EHRR 117 at para 56.

[91] The first derogation was withdrawn in 1984 on the belief that the 1984 iteration of the measures was compliant with Convention rights. However, following the decision of *Brogan v United Kingdom* (1988) 11 EHRR 117 that the

Court had found that the extended periods of pre-charge detention under earlier provisions had not been subject to any degree of judicial supervision – a necessary requirement of the right of anyone arrested to be brought 'promptly' before a judge.[92]

The government's attempt at a principled solution to settle the long-running issue came in the Terrorism Act 2000. Schedule 8 of the Act sought to introduce a degree of judicial control over detention by requiring judicial authorisation for any detention exceeding 48 hours. It was argued on behalf of the government that this judicial involvement would be sufficient to meet the requirements of Article 5(3) in respect of pre-charge detention up to seven days.[93]

Whether in truth such judicial supervision would prove enough, however, to make the seven-day limit compatible with fundamental rights may never be known. Two years after 9/11, the limit would be extended by Parliament to 14 days,[94] and in 2006 to 28 days.[95] With the announcement of the latest proposals, the Brown government appears willing to extend the maximum limit even further.[96] With a few exceptions,[97] the core of the government's case for extending pre-charge detention ever further seems to be the same as it was before the European Court in *Brogan* – the nature of the terrorist threat, the complexity of terror networks, the large volume of evidence in criminal cases, and the increasing forensic demands, etc. Similarly, difficulties in decrypting heavily encrypted computer data were cited by the government in supporting the 2003 extension of pre-charge detention from seven to 14 days.[98] This did not prevent the government citing the same difficulties in support of extending the limit to 90 days in late 2005.[99] Despite its enthusiastic

---

extended detention of individuals under the 1984 Act breached their right to liberty under Art 5(3) ECHR, the government derogated again. The second derogation was challenged in 1993 in *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539 and the Strasbourg court upheld it as lawful. That derogation remained in force throughout the 1990s and the government hoped that, by passing the Terrorism Act 2000, it would end the need to derogate further.

[92] Art 5(3) ECHR provides that anyone arrested on suspicion of a criminal offence 'shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial'. See *Brogan*, ibid, para 62: 'none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3) [of the Convention]'.

[93] See eg *Hansard*, HC Debates, 15 March 2000, col 474: 'Mr Kevin McNamara (Hull, North): "When will my right hon. Friend inform the Council of Europe that the derogation from the Human Rights Act 1998 no longer needs to apply to Britain?". Mr Straw (The Home Secretary): "We should be able to do that when the Terrorism Bill becomes law".'

[94] Sch 8 Terrorism Act 2000, as amended by s306 Criminal Justice Act 2003.

[95] Sch 8 Terrorism Act 2000, as amended by s23 Terrorism Act 2006.

[96] Prime Minister's House of Commons statement on security, HC Debates, 25 July 2007, col 841.

[97] The more novel arguments raised in 2005 were delays involving the handling of CRBN and other hazardous substances; international nature of terrorism, including the need to use interpreters; and 'delays caused by religious observance' – see Annex A to the government's draft terrorism bill, *Pre-Charge Detention Periods*, 15 September 2005.

[98] See eg *Hansard*, HL Debates, Baroness Scotland of Asthal, 15 October 2003, col 964.

[99] Letter from Anti-Terrorist Branch of the Metropolitan Police, 5 October 2005, printed as an appendix to the Home Affairs Committee, *Terrorism Detention Powers* (HC 910, June 2006): 'Public safety demands earlier intervention, and so the period of evidence gathering that used to take place pre-arrest is often now denied to the investigators. This

support for 90 days, however, the government was unable to point to a single case where a suspect had been held to the then 14-day limit and then released without charge – the kind of example that would at least indicate that the 14-day limit was as problematic as claimed.

The strongest argument against pre-charge detention, however, is less practical than structural: the police may only arrest an individual where they have reasonable suspicion that the person has committed a criminal offence. By way of comparison, 'reasonable suspicion' is also the standard required under the 'threshold test' contained in the Code for Crown Prosecutors, which allows charges to be laid in cases where 'it would not be appropriate to release a suspect on bail after charge, but the evidence to apply the Full Code Test is not yet available'.[100] In other words, given the barely discernible differences between the standard of proof required for arrest and that required for charging an individual under the threshold test, it is impossible to see how any detention period in excess of a few days could be justified. This, at least, is the case in virtually all other western countries, in which the maximum period of pre-charge detention in terrorism cases rarely strays above three days.[101]

Indeed, the fact that the majority of those arrested in the UK on suspicion of terrorism since 9/11 have been released without charge[102] tends to show that what is at issue is not a gap between suspicion and proof but a lack of sound suspicion to begin with. And since 'reasonable suspicion' alone is enough to justify such civil measures as deportation or the application of control orders, the departure from the well established safeguards of the criminal law – the blurring of suspicion and proof – becomes even more disturbing.

However, nowhere are the absurdities of the government's reliance on evidential difficulties as justification for exceptional measures more apparent than in its stubborn refusal to permit intercept evidence – evidence gained from lawful covert interception of a suspect's phone calls, emails, letters, faxes, etc – to be used in court. Indeed, lifting the UK's self-imposed ban on using intercepts was one of the central recommendations of Lord Lloyd's 1996 review of terrorism legislation. Outside the UK, intercept evidence has been used to convict Al Qaeda cells in the

---

means that in some extremely complex cases, evidence gathering effectively begins post-arrest, giving rise to the requirement for a longer period of pre-charge detention to enable that evidence gathering to take place, and for high quality charging decisions to be made.'

[100] Secs 6.2 and 6.3. Sec 6.5 of the Threshold Test allows a Crown Prosecutor to have regard to the evidence available at the time; the likelihood and nature of further evidence being obtained; the reasonableness for believing that evidence will become available; the time it will take to gather that evidence and the steps being taken to do so; the impact the expected evidence will have on the case; and the charges that the evidence will support.

[101] Maximum periods of pre-charge detention in other EU countries include France – 4 days; Germany – 2 days; Spain – 5 days; Greece – 6 days (source: Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: A Survey of Selected Countries* (October 2005). Maximum periods of pre-charge detention in other common law countries include the US – 3 days; Canada – 3 days; New Zealand – 1 day.

[102] See eg 'Half of terror suspects released', BBC News website, 17 July 2007.

United States following 9/11, the Five Godfathers of New York Crime, and war criminals before the International Tribunal for the Former Yugoslavia. It is, moreover, used regularly by prosecutors in Australia, Canada, Israel, New Zealand, South Africa and the United States without incident. Nonetheless, the government had steadfastly refused to allow such evidence to be used, citing concerns by the security and intelligence services that it would compromise methods of interception. If the gap between suspicion and proof is indeed as problematic for terrorism cases as the government claims, it is at least one that seems increasingly self-maintained.

The necessity of new measures

Among the many apparent paradoxes of modern British democracy is that, although the electorate seems to have little faith in politicians, they nonetheless expect a great deal from the laws that they pass. It is perhaps for this reason that legislation on terrorism is fast becoming one of the perennial features of the legislative calendar – since 2000, there have been no less than four Acts dealing with terrorism,[103] and a fifth is now due before the end of 2007. There is apparently little more reassuring to an anxious public than the promise of fresh terrorism measures.

And yet vanishingly few of the measures passed since 9/11 or 7/7 are likely to make any discernible difference to public safety. After all, the original Terrorism Act 2000 was the product of intensive review and debate over three decades of counter-terrorism legislation in the UK.[104] This was followed by the Anti-Terrorism, Crime and Security Act 2001, the Newton Report in 2003, an extended Home Office consultation on counter-terrorism powers and a separate inquiry by the Parliamentary Joint Committee on Human Rights in 2004, capped by the Prevention of Terrorism Act 2005 in the wake of the Belmarsh judgment. The suggestion that there were any conceivable gaps remaining in the counter-terrorism framework after such time would seem difficult to credit. Nonetheless, the Terrorism Act 2006 contained no less than nine new terrorist offences, including encouragement to terrorism,[105] dissemination of terrorist publications,[106] preparation of terrorist acts,[107] and attendance at a place used for terrorist training.[108]

---

[103] The Terrorism Act 2000; the Anti-Terrorism, Crime and Security Act 2001; the Prevention of Terrorism Act 2005; and the Terrorism Act 2006.
[104] See Lloyd report, n23 above.
[105] S1.
[106] S2.
[107] S5. This was the long-mooted proposal of creating an offence of 'acts preparatory to terrorism'. This offence, first suggested by the 1996 review of counter-terrorism legislation conducted by Lord Lloyd of Berwick, had often been mentioned as addressing a possible gap in the existing law. Even here, though, it was difficult to see what the actual gap was. For instance, s57 of the 2000 Act makes it a criminal offence for a person to possess an article in circumstances that give rise to a reasonable suspicion that it is to be used for terrorism. S58 of the same Act makes it an offence to make a record of any kind likely to be useful for terrorism.
[108] S8.

In particular, the government's claim, made in the course of Parliamentary debate on the 2006 Act, that an additional offence of encouraging terrorism was needed to combat 'indirect incitement' is credible only if one wilfully ignores the extensive law against incitement that was already in place: s4 Offences Against the Person Act 1861 (making it a crime to 'encourage, persuade or endeavour to persuade any person to murder any other person'); s8 Accessories and Abettors Act 1861 (prohibiting those who would 'counsel or procure the commission of any indictable offence'); s59 Terrorism Act 2000 (inciting another person to commit an act of terrorism wholly or partly outside the UK), to name but a few of the offences that were available before 9/11 to prosecute persons who incite others to commit acts of terrorism. As the Newton Committee noted as far back as December 2003, 'it has not been represented to us that it has been impossible to prosecute a terrorist suspect because of a lack of available offences'.[109]

This wholesale lack of necessity for new terrorism offences was epitomised in the case of Abu Hamza, the firebrand cleric of Finsbury Park Mosque, notorious for his inflammatory speeches. During debates on the 2006 Act, government MPs suggested that the case of Mr Hamza illustrated the inadequacies of the existing law and the need for broader measures.[110] As it was, Abu Hamza was found guilty in February 2006 on eleven counts, including six charges of soliciting to murder under the 1861 Offences Against The Person Act. Of all the offences he was found guilty of, the newest was an offence under the 2000 Act.[111]

Similarly, of the 19 men jailed for terrorist offences so far in 2007 – including the four failed bombers of 21/7 – all have been convicted under offences created prior to 9/11. Indeed, most of the 19 were convicted of offences under the Explosive Substances Act 1883.

The questionable need for many terrorism measures is not limited to the creation of new offences. The dearth of evidence supporting the government's case for extending pre-charge detention beyond 14 days has already been mentioned. The failings of the control order regime, too, call into doubt the government's justification that the measures were intended for

[109] n68 above para 207.
[110] See eg Michael Connarty (Linlithgow and East Falkirk) (Lab), *Hansard*, HC Debates, 10 Nov 2005, col 516: 'I heard a number of Members refer in the debates in Committee and elsewhere to the Jenny Tonge test or the Cherie Blair test: whether glorification could be inferred from what someone has said. When I discussed that with people whom I regard as serious and intelligent, they laughed. What they wanted was a Mr Hamza test, in which it would be clear whether someone was doing something that could incite or encourage terrorism. We were told that the powers available would not deal with such situations, and they wanted that dealt with before we got into what seemed like silly arguments about what people had said'.
[111] The possession of a so-called 'terrorist encyclopaedia' under s58 of the 2000 Act.

those dangerous individuals whom we cannot prosecute or deport, but whom we cannot allow to go on their way unchecked because of the seriousness of the risk that they pose to everybody else in the country.[112]

Of the 17 control orders currently in force, however, no less than seven recipients have successfully absconded. Home Office Minister, Tony McNulty, stated that he 'did not believe the public was at risk' from the escaped men.[113] Lord Carlile similarly gave his view that the two disappearances 'present little direct risk to public safety in the UK at the present time'.[114]

If, however, the suspects pose little risk to public safety then the government's resort to non-criminal measures seems even more extraordinary: not only do control orders represent a significant departure from the established procedural safeguards of the criminal law, they are an unwarranted and unnecessary departure to boot. The creation of fresh terrorism offences, too, seems to bear little relationship to the logical and coherent development of the criminal law, but rather the government's desire to give the impression of action.

Problems of process

Counter-terrorism policy in the UK is beset by problems of definition and problems of substance: the reliance on immigration measures to tackle a security problem; the adoption of civil measures to avoid the procedural safeguards of criminal prosecutions; or the creation of otiose terrorist offences. But an even deeper challenge lies with the process of policy-making itself, and there is no clearer illustration of this than the fate of the Terrorism Act 2000.

Despite its several flaws, it remains possible to see the 2000 Act as at least a principled attempt to establish a comprehensive legal framework for counter-terrorism policy in the UK, and thereby to avoid the piecemeal, ad hoc creation of new terrorism laws that had been one of the major flaws of Parliament's response to Irish terrorism in the 1970s and 1980s.[115] As it happened, however, the 2000 Act would become but the first of four substantial terrorism Acts that Parliament would pass within the next six years: the 2001 Act in response to 9/11; the 2005 Act in response to the Belmarsh judgment; and the 2006 Act in response to 7/7. In this sense, the 2000 Act was a failure – despite the fact that it continues to provide the

[112] Rt Hon Charles Clarke MP, *Hansard*, HC Debates, 23 February 2005, col 339.
[113] 'Two terror suspects 'on the run'', BBC News website, 17 October 2006.
[114] Lord Carlile, *Report in connection with the Home Secretary's quarterly reports to parliament on control orders* (Home Office, 11 December 2006), para 21.
[115] See eg Walker, The Anti-Terrorism Legislation, OUP, 2002: 'The Terrorism Act 2000 represents a worthwhile attempt to fulfil the role of a modern code against terrorism, though it fails to meet the desired standards in all respects. There are aspects where rights are probably breached, and its mechanisms to ensure democratic accountability and constitutionalism are even more deficient ... But at least that result initially flowed from a solemnly studied and carefully constructed legislative exercise.'

overarching framework for most counter-terrorism powers, Parliament proved unable to resist the temptation to legislate further.

In a time of great crisis, it is often said that what happens to an individual is less important than how he or she reacts. This is also true of institutions. In this sense, the events of 9/11 and 7/7 were not only a challenge for government and for Parliament, but also tests of character which they failed. Of course, it is appropriate, following a major terrorist attack, for the government to review the existing law, to ensure that there are no additional measures that could be sensibly be introduced. But the legislative responses of 2001, 2005, and 2006 were not the product of careful thought but a combination of executive panic and cynical opportunism. Especially egregious was the government's resort to emergency legislation: the 2001 Act passed in little over a month, while the 2005 Act was famously pushed through Parliament in a mere 17 days. In fact, nothing in either Act passed required such urgency. Little would have been lost, and much gained, had Parliament had the proper opportunity to deliberate carefully on the necessity of the proposed measures.

Ironically, the events of 9/11 would also prove a test for the courts and the new legal framework established by the Human Rights Act 1998 (HRA). As is well known, the HRA made it possible for the first time for UK courts to apply rights under the ECHR directly in UK law (rather than – as in the case of Mr Chahal – having to wait until the case reached Strasbourg).[116] In the Belmarsh judgment in December 2004, the majority of Law Lords ruled that, even though the threat from Al Qaeda constituted a 'public emergency threatening the life of the nation', the provisions of Part 4, imposing indefinite detention on foreign terror suspects, were incompatible with the right to liberty under Article 5 ECHR and the right to non-discrimination under Article 14. In the public mind, however, the judgment is best remembered for the statement of Lord Hoffman that:[117]

---

[116] See eg Lord Irvine of Lairg (Lord Chancellor), *Hansard*, HL Debates: 3 November 1997, col 1234: 'I am convinced that incorporation of the European Convention into our domestic law will deliver a modern reconciliation of the inevitable tension between the democratic right of the majority to exercise political power and the democratic need of individuals and minorities to have their human rights secured'.

[117] *A and others v Secretary of State for the Home Department* [2004] UKHL 56, para 97. This passage would subsequently be cited by government ministers as evidence of the courts' lack of realism and the failure of senior members of the judiciary to appreciate the true extent of the terrorist threat. Less well recalled by government, however, was Lord Hoffman's acceptance at para 94 of the 'existence of a threat of serious terrorist outrages', and that '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'. See also Lord Hoffman's postscript in *Rehman v Secretary of State* [2001] UKHL 47 (handed down on 11 October 2001) at para 62: 'I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown ... It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove'.

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 [Part 4]. That is the true measure of what terrorism may achieve.

What has never been widely understood by the public, however, is the very limited nature of the courts' powers under the HRA. In place of such public understanding has sprung the widespread belief – fostered by the ignorance of a hostile press and encouraged by government MPs and cabinet ministers – that judges regularly use the Act to thwart Parliament's intent by overturning key counter-terrorism measures, as they did in the Belmarsh case.[118]

In truth, and contrary to popular belief, the Act gave no power to the Law Lords to overrule Parliament, for a declaration of incompatibility has no legal effect, other than allowing the government to fast-track amending legislation if it so wishes.[119] As the European Court on Human Rights has noted, 'there is no legal obligation on the minister to amend a legislative provision which has been found by a court to be incompatible with the Convention'.[120] The courts' power to issue a declaration of incompatibility is, therefore, ultimately a political device rather than a legal one, at least in the sense that it puts Parliament on notice that the courts consider its legislation contravenes fundamental rights, and affords Parliament the opportunity to think again.

Accordingly, it was open to Parliament, following the Belmarsh case, to ignore the Law Lords' declaration on the basis that indefinite detention under Part 4 was nonetheless necessary for the sake of public safety. Although such an action might harm the UK's standing in the Council of Europe and the EU,[121] that would seem but a small price to pay for a government that sincerely believed that its measures were essential to ensure the safety of the British public. That the government did not take that step suggests that – notwithstanding talk of their overwhelming necessity – the measures were not quite as essential as claimed, at least not important enough to trump the government's desire to avoid embarrassment before the Council of Europe.

[118] See eg T Kavanagh, 'Rip Up the Inhuman Rights Act', *The Sun*, 3 July 2007: 'The British people should not be exposed to the fear of murder outlined by Home Secretary Jacqui Smith because of a shabby Human Rights Act that tolerates intolerance and puts our safety in deadly peril'.
[119] S10 Human Rights Act 1998.
[120] *Burden and Burden v United Kingdom* (Grand Chamber) (no. 13378/05) 12 December 2006, para 39.
[121] See eg R Verkaik, 'Human Rights in the balance', *The Independent*, 4 February 2003, discussing Tony Blair's threat to withdraw from the European Convention on Human Rights.

The way forward

In the nearly six years following 9/11, it has been commonplace to talk of the 'new normal': the idea that the heightened threat of terrorism requires the public to become accustomed to things formerly regarded as exceptional, whether it be concrete barriers in front of public buildings, longer security checks for boarding planes, or the more general idea of a 'rebalancing' of liberty and security. Accompanying this idea of a shift in normalcy is a sense that what is happening (ie deadly terror attacks on civilians) is new and unprecedented. Al Qaeda, we are told, are not the gentleman bombers that the IRA were. And it is indeed true that new technologies – from the internet to more sophisticated types of explosives, etc – make it possible for smaller numbers of people to plot the deaths of many.

Whether in fact the threat from Al Qaeda is qualitively very different from that posed by the IRA – one assumes that the difference matters very little to the families of their victims in either case – it seems clear that behind talk of the 'new normal' is a very old and very familiar set of legislative mistakes: sweeping definitions; rushed legislation; unnecessary and ineffective measures passed in response to a threat of unknown extent. They are all mistakes that government has made in the past and will, indeed, continue to make so long as it heeds the clamour of public safety above all else.

Of course, the demands of public safety come not only from the public themselves but also those bodies charged with protecting it: the police, the security and intelligence services. And it is the weight given to the expertise of these agencies that tends to count for most in the security debate – whether it is the arguments made by police for extending pre-charge detention being debated in Parliament, or the briefings provided by MI5 to the Home Secretary as to whether a given suspect is involved in terrorism. Moreover, it is to this combination of democratic legitimacy and technical expertise that the government firmly maintains the courts should defer when assessing the proportionality of counter-terrorism measures.[122]

There are, however, good reasons to doubt the claims of government and Parliament to what has been termed by the courts as its 'relative institutional competence' in the field of national security.[123] First, as a matter of record, it is possible to point to numerous high-profile failures of intelligence since 9/11: for instance, the belief that Iraq possessed weapons of mass destruction; the belief that

[122] See eg *Rehman v Secretary of State for the Home Department* [2001] UKHL 47 per Lord Hoffman; *A and others v Secretary of State for the Home Department* [2004] UKHL 56 per Lord Bingham at para 29.
[123] See eg *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12 per Lord Bingham at para 17: 'In the result, therefore, the House has before it what appear to be considered and informed evaluations of the terrorist threat on one side and effectively nothing save a measure of scepticism on the other. There is no basis on which the respondents' evidence can be rejected. This is not a question of deference but of what in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, para 29, was called "relative institutional competence"'.

a Brazilian electrician boarding the Tube at Stockwell was a suicide bomber; or the belief that residents of Forest Gate were involved in a terrorism plot. These were all examples of actions taken on the basis of the suspicion of the authorities that it was reasonable to act. When one considers that 'reasonable suspicion' or 'reasonable grounds for suspecting' are the legal tests for the exercise of so many quasi-criminal measures, from control orders to indefinite detention, a strong degree of scepticism is in order.

Nor are the reasons for such high-profile failures of intelligence hard to seek. The so-called 'precautionary principle' suggests that, where the outcome of a given risk is severe or catastrophic, it is prudent to adopt measures to prevent it. As a general basis for policy, the principle is at best of doubtful value, especially where the extent of the risk itself is unknown.[124] Nonetheless, in the context of public bodies, such risk-aversion becomes institutionalised, as the then Prime Minister himself noted in 2005:[125]

> *Bodies set up to guard the public interest have one-way pressures. It is in their interest never to be accused of having missed a problem. So, it is a one-sided bet. They will always err on the side of caution.*

As Feldman has noted, the general institutional caution of public bodies is exacerbated in the context of terrorism. In particular, the severity of the consequences means that the police and security service have a vested interest in acquiring the kinds of powers that will aid them in preventing a terrorist attack:[126]

> *A small likelihood of disastrous consequences tends to provoke a response geared to the scale of the possible consequences rather than to the degree of the likelihood that they will materialise. No public body wants to face the obloquy and legal liabilities that might result from running the risk so bodies become excessively risk averse and defensive in their responses. A high level of risk-aversion tends to lead to the conferral of enlarged powers and increased resources on the public bodies responsible for responding to the risk. If those bodies are also responsible for assessing the risk, they have an institutional interest in playing up the risk as much as possible in order to strengthen their position in the fight for powers and resources. Where terrorism is concerned, the people who assess the risk are those who claim to have a monopoly over the information needed to assess it, and they are also the people who also have the most to gain in terms of*

[124] See eg J Whyte, 'Only a reckless mind could believe in safety first', *The Times,* 27 July 2007: 'the precautionary principle is not really a maxim of good policy. In fact, it is meaningless. It can provide no guidance when making difficult decisions. Those who invoke it in support of their favoured policies do not display their prudence; they reveal groundless biases'.
[125] Speech of Tony Blair to the Institute of Public Policy Research, 26 May 2005, cited in Feldman, 'Human Rights, Terrorism and Risk: The Role of Politicians and Judges' [2006] PL 332 at pp343-344.
[126] Feldman, ibid, p347.

power and resources from any governmental or legislative response: namely the police and the security service.

More generally, the making of counter-terrorism policy should invite a number of questions: first, is public security really the first duty of government, or are there other competing values of equal or even superior value? Secondly, if we allow that public security is at least one among several duties of government, what is it *rational* for the state to do to discharge that duty? Thirdly, of those actions that are rational and effective, what moral and political constraints are there on what states can do to protect the public?

The answer to the first question is clear enough: states have an obligation to protect the lives of their inhabitants,[127] but they also have an obligation to protect the liberty and freedoms of those inhabitants. Even Hobbes – otherwise a firm advocate of allowing 'the defence of the people' to trump all else[128] – conceded that 'the safety of the people' must be understood as requiring 'not the mere preservation of their lives, but generally their benefit and good'.[129] The source of the state's obligation to protect is the same: the right of each individual to lead an autonomous life is the basis for the duty upon states to ensure a framework in which all individuals are free to do so.[130]

The answer to the second question – what is it rational for a state to do to fight terrorism – ought to be equally obvious: the government should seek to adopt only those measures which are, in the first instance, *effective* in fighting terrorism, and not arbitrary or discriminatory in their impact. In other words, seeking to deport suspected terrorists outside the jurisdiction of the UK where they are potentially free to act hardly seems an effective measure. Similarly, proposing fresh terrorism offences when there is no indication that existing offences are inadequate is the kind of otiose gesture that a rational government should strive to avoid. Rationality also means treating like cases alike, so that terrorism should first and foremost be addressed as what it is: a crime.[131] Moreover, any additional terrorism legislation that

---

[127] See eg Art 2(1) ECHR, which directs that 'everyone's right to life shall be protected by law'.
[128] See for example, De Cive, n5 above, the sovereign may do 'anything that seems likely to subvert, by force or by craft, the power of foreigners whom they fear'.
[129] Hobbes, Elements of Law, Bk II, Ch X, 1. See also Leviathan, p175, although the Sovereign's duty is the 'procuration of the safety of the people ... But by Safety here is not meant a bare Preservation but also all other Contentements of life, which every man by lawfull Industry, without danger, or hurt to the Common-wealth, shall acquire to himselfe'.
[130] See eg Joint Committee on Human Rights, *Review of Counter-terrorism Powers*, 18th report of session 2003-2004, 4 August 2004 (HL 158, HC 713), para 7: the opposition between 'security and public safety on the one hand and human rights and the rule of law on the other .... is a false dichotomy'.
[131] See eg Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' [2005] 58 *Current Legal Problems* 25 at p44: 'The alternative that dare not speak its name is so simple as to be unutterable in polite circles: charge or release .... We have a very strong prosecutorial team determined to protect the public within the ordinary law and this had led to numerous arrests and charges under the current law – the ordinary law of murder, criminal damage and offences against the person as well as the special terrorism law'.

is deemed to be necessary must hew as close as possible to the ordinary criminal law.

As to the third and last question – what constraints are there on governmental actions to protect the public – the answer is again well settled: measures must always be considered in the context of fundamental rights, eg they must be strictly necessary, proportionate to an identified threat, the least intrusive means to achieve a legitimate aim, and attended by appropriate safeguards. In substantive terms, this means that 'terrorism' itself must be defined as narrowly as possible to avoid interference with legitimate free expression, for instance; that the absolute prohibition against torture should not be undermined or evaded, whether by diplomatic assurances or the use of torture evidence; that fundamentally unfair measures, such as the use of closed proceedings and secret evidence, should be renounced; and that broad measures such as stop-and-search without reasonable suspicion be as tightly constrained as possible.

In the context of counter-terrorism, respect for fundamental rights also means that the least restrictive measure should always be adopted: lifting the ban on intercept evidence and other measures to enhance criminal prosecutions, for example, rather than seeking to evade the safeguards of criminal proceedings by adopting civil measures with quasi-criminal consequences, eg control orders.

At the constitutional level, rational and proportionate counter-terrorism policy means an end to reliance on emergency legislation and for both Parliament and the courts to reassert their responsibilities as branches of government in their own right. An executive-dominated Parliament and courts which are content to allow quasi-criminal measures to be waved through on a desperately low burden of proof and utterly unfair procedures serve nobody. In particular, Parliament, as the supreme branch of government, must take a much greater responsibility to deliberate carefully and – above all – rationally. It is, of course, right that Parliament should continue to act in the best interests of the nation. But, at the legislative level, having established a just framework for the investigation and prosecution of terror suspects, the most responsible action is utter restraint. So too, the courts must be unafraid to assert principle in the face of public fear and general insecurity. As Waldron notes:[132]

> *our political system needs an institution of a special sort, an institution that comports itself quite differently from the more democratic branches of government, an institution whose members bind themselves to the mast of principle to ensure that individual rights and other constitutional considerations are given their proper due.*

[132] Waldron, 'Temperamental Justice', 54 *New York Review of Books*, 10 May 2007.

However, the will to resist pressure for 'stronger' measures should not be limited to the courts, and the forthcoming counter-terrorism bill represents an important opportunity for Parliament to demonstrate its own restraint. In the last ten years, for example, the maximum period of pre-charge detention has risen from four days in 1997 to seven days in 2000 to 14 days in 2003 to 28 days in 2006. What is now proposed is a fourteenfold increase in the space of a decade. It would, therefore, be a telling moment if the new bill were used not to increase the limit further, but instead to reduce it back to its original pre-9/11 level.

It may, however, be too much to hope for such leadership. Yet if courage is in short supply, it is important to remember that – however serious the threat of terrorism – rights are not something to be balanced, like weights in a scale, or brokered away by government for the sake of greater safety. They are the core principles that a free society must protect even in the face of grave danger, of peril to the life and limbs of its inhabitants. For the public to demand sweeping measures to fight terrorism is not being tough but a sign of panic. And for a government to pile more legislation onto the statute books when it knows full well that there is neither evidence nor need for it, is at best craven and at worst, exploitative. Fear of terrorist attack may rob individuals of their reason, but it should not be allowed to rob a government of its principles, or a nation of its freedoms.

Five good reasons why **you** should ...

support JUSTICE

JUSTICE is independent

Because it is not party political, JUSTICE commands respect throughout the political spectrum. We have representatives from each of the main political parties on our governing body.

JUSTICE is expert

JUSTICE draws on international research and caselaw, and the specialist input of experts to provide the template for public policy.

JUSTICE is influential

JUSTICE enjoys the support of prominent barristers and solicitors, distinguished academics, leading firms and chambers and many individuals and organisations engaged in human rights and law reform.

JUSTICE is effective

Through influential reports and informed dialogue, we continue to play a key role in amending and developing the law, government policy and the practice of public authorities.

JUSTICE is international

As the British section of the International Commission of Jurists (ICJ), we work with colleagues from across the world on areas of common interest and concern.

JUSTICE – 50 years of defending the rule of law

JUSTICE provides lawyers with a strong, impartial and influential voice to defend the rule of law, access to justice and human rights. Its effectiveness has come for 50 years from its independence, both of political party and professional interest, and because its work has a deserved reputation for meticulous research and careful argument

2007 is our 50th anniversary. We have planned an ambitious programme of initiatives for our anniversary year. You can find details of this programme at **www.justice.org.uk/50_anniversary.** As you will see, our aim is very much to set a progressive agenda for the future rather than to rest on our laurels.

But JUSTICE is a small charity, with limited resources. We rely very heavily on the help – both practical and financial – of our supporters. Without that support we simply could not continue our 'routine' work, never mind carry out the forward-thinking analysis that forms the basis of our 50th year programme.

I would like to support JUSTICE's 50th anniversary appeal

Please accept my donation of:

❑ **£10** ❑ **£20** ❑ **£25** ❑ **£50** ❑ **other £_____**

❑ I enclose a cheque payable to JUSTICE

❑ Please charge my VISA / MASTERCARD / MAESTRO (UK) / SOLO card (**please circle**)

Name of cardholder_____

Card Number ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐

Expiry date ☐☐ Valid from ☐☐ Issue number (Maestro UK only) ☐☐ Security code ☐☐☐

Signature _____ Date _____

Name _____

Address* _____

_____ Postcode _____

E-mail_____

* if you are donating via credit or debit card, this should be the card-holder's address

❑ **Gift Aid** allows us to claim an extra 28p for every pound you give. If you would like this donation and all future donations that you make to JUSTICE eligible for Gift Aid, please tick here.

giftaid it

To qualify for Gift Aid, what you pay in income tax or capital gains tax must at least equal the amount that JUSTICE will claim in the tax year. You can cancel this declaration at any time by writing to JUSTICE

❑ Please tick here if you do **not** want to receive information from JUSTICE. JUSTICE will not release your details to any other organisation.

Please return this form (no stamp required) to:

JUSTICE, FREEPOST LON 29163, London EC4B 0ZZ

cthr 9/07

"Fear of terrorist attack may rob individuals of their reason, but it should not be allowed to rob a government of its principles, or a nation of its freedoms".

The six years since 9/11 have given rise to the concept of the 'new normal' – where the threat of terrorism means the public must accept exceptional measures in the name of 'rebalancing' liberty and security.

The Future of Counter-terrorism and Human Rights presents an alternative to the 'new normal', in which respect for human rights is not compromised in the fight against terror. It criticises recent legislative responses to terrorism, and sets out a set of clear principles upon which future counter-terrorism policy should be based.

The Future of Counter-terrorism and Human Rights is the first of a 'futures' series, designed to celebrate JUSTICE's 50th anniversary, in which staff members and others raise interesting and provocative ideas about the future direction of policy in essay form. It does not necessarily represent JUSTICE policy, but it does draw on JUSTICE's considerable experience as a leading human rights and law reform organisation.

JUSTICE is grateful to Network for Social Change for its support of this publication

JUSTICE

JUSTICE is a British-based human rights and law reform organisation dedicated to advancing access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. For more information, visit **www.justice.org.uk**

JUSTICE, 59 Carter Lane, London EC4V 5AQ
Tel 020 7329 5100
Fax 020 7329 5055
E-mail admin@justice.org.uk
Web www.justice.org.uk

JUSTICE Registered charity No 1058580. A company limited by guarantee and registered in England No 3216897. Registered office as above