Human Rights and Terrorism

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When Labour swept into power a little over a decade ago with the promise of a new and progressive agenda, including incorporation of the European Convention of Human Rights (ECHR) into domestic law, it appeared to be the dawn of a new era for human rights in this country. The era that transpired, however, was the very opposite of what we had been led to expect and this is nowhere better illustrated than in the failings of the Government's anti-terrorism measures.

The pattern over the past decade has been all too clear: amidst much tough posturing and rhetoric, a new piece of terrorism legislation is unveiled. A minister dutifully applies a rubber stamp marked "human rights compatible" to the Bill. Where necessary, strong-arm tactics and misleading statements (usually assurances as to its exceptionality or various "safeguards") are employed to drive it onto the statute books. Some time later, after many individuals have been adversely affected, a court concludes that, even on the most generous view, the legislation is anything but compliant with our minimum human rights obligations and is forced to strike it down or re-write it. The minister declares him or herself "disappointed" with the decision. When the Government has lost all possible avenues of appeal, the cycle starts all over again with a new piece of legislation.

Non-Criminal Measures

The pattern was set with the Anti-Terrorism Crime and Security Act 2001 (ATCSA 2001), which introduced the system by which resident foreigners suspected of terrorism could be interned without trial if they could not be deported, for example, if they might be subject to torture or the death penalty in their native country. Several individuals were interned, mainly in HMP Belmarsh, under these powers; they were free to leave, but only if they left the country. It was of course a hopelessly flawed approach and the House of Lords duly said as much (*A (No.1) v. Secretary of State for the Home Department* [2005] 3 All ER 169). The heart of the judgment was that it was discriminatory, and therefore, contrary to art.14, ECHR, for the system to be applied to foreign nationals only. The House of Lords was scathing in its criticism of the legislation. Most memorably perhaps Lord Hoffman said in his speech:

"The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these."

The Government's response was to repeal the offending provisions of the ATCSA 2001 and, after a long-stand off with the Upper House, passed the Prevention of Terrorism Act 2005 (PTA 2005), which ignored every criticism in the *A (No.1)* judgment, save for the discrimination point. The PTA 2005 introduced a system of control orders, which permitted the detention or control – again indefinitely and without trial – of both foreign nationals *and* British citizens on the basis of "closed material" (evidence which is withheld from the controlled person). Both the Court of Appeal and the House of Lords (*Secretary of State for the Home Department v. MB* (2008) 1 All ER 657) felt compelled to "read down" (in other words, re-write) the legislation in a number of different respects, including requiring withdrawal or disclosure of the closed material, in order to reach the *minimum* standards of fairness required by art.6, ECHR. In a separate judgment (*JJ & Ors v. Secretary of State for the Home Department* (2008) 1 All ER 613) the House of Lords also decided that the Home Secretary had breached a number of individuals' art.5 rights by imposing such restrictive control orders upon them as to deprive them of their liberty.

Perhaps the Government's lowest point came in the case of *A (No.2) v. Secretary of State for the Home Department* (2006) 1 All ER 575, where the Home Secretary advanced the quite extraordinary proposition that a court should not be prevented from relying on evidence which had, or might have, been procured by torture inflicted by officials of a foreign state without the complicity of British authorities. The House of Lords unanimously rejected that proposition. In his judgment, Lord Hoffman reiterated the principle which had in this country been obvious to every court and government (bar this one, it seems) for the last 300 years:

> "The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it."

Not to be deterred, the Government decided that it would deal with the "inconvenience" of being unable to prosecute, detain or deport persons who might be subject to torture or the death penalty in their native country by signing with some of these offending countries a "memorandum of understanding" to the effect that any person returned to them by Britain would be properly treated. Deportation notices were then issued to a number of individuals. Yet again, the appellate courts had to be called upon. The Court of Appeal (*AS & DD v. Secretary of State for the Home Department* [2008] EWCA Civ. 289) ruled that there was a real risk that the memorandum of understanding might not be honoured; accordingly, there was a real risk that the affected persons might suffer treatment contrary to art.3, ECHR and the deportations were blocked.

Finally, in an effort to side-step the usual parliamentary scrutiny, measures to freeze the assets of suspected terrorists were introduced by secondary legislation in the Terrorism (United Nations Measures) Order 2006 and the Al-Qaida

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and Taliban (United Nations Measures) Order 2006. However, Collins J (*A, K, M, Q & G v. HM Treasury* [2008] EWHC 869 (Admin)) was on hand to stem the injustice. Describing the orders as "Draconian" and the chances of overturning an asset freezing notice as "infinitesimal", he quashed both orders on the grounds that they did not confer an effective right to be heard or a fair hearing upon the affected person.

Criminal Law

In the sphere of crime, because of the heightened art.6, ECHR protections for persons "charged with a criminal offence", it has been much harder to erode vital human rights safeguards. That hasn't stopped the Government from making a determined assault upon many established principles of criminal law.

Through the Terrorism Acts 2000 and 2006 (TA 2000 and 2006) and the ATCSA 2001, we have seen the creation of some 40 new terrorism offences. We now have the following sorts of criminal offences, most of them punishable by lengthy terms of imprisonment: intentionally or *recklessly* encouraging terrorism (s.1, TA 2006); conduct *preparatory* to the commission of a terrorist act (s.5, TA 2006); collecting, making or possessing a record of information *likely to be useful* in committing or preparing an act of terrorism (s.58, TA 2000); *failing to disclose information* knowing or believing it might be of material assistance in a terrorism investigation (s.,38B TA 2000); and even wearing or displaying clothing in such a way as to *arouse suspicion* of membership of a proscribed terrorist organization (s.13, TA 2000).

Ten years ago, criminalizing this sort of conduct would have been unthinkable: any encouragement had to be intentional; action had to go beyond mere preparation for it to amount to an attempt; and for anything other than the most minor offences, a failure to act and strict liability were considered as insufficiently blameworthy properly to attract criminal sanction. One of the dangers of creating so many criminal offences in so short a space of time was exemplified in *R. v. Zafar & Ors* (2008) 2 WLR 1013 where the Court of Appeal had to step in when five young men with nothing more than jihadi propaganda material on their computers were convicted of possession of an article for a terrorist purpose contrary to s.57, TA 2000. The Lord Chief Justice criticized the wide and imprecise way in which the offence was drafted and was forced to read down the offence to give it a more restricted meaning compliant with the Human Rights Act 1998 (HRA 1998); the convictions were quashed.

Quite apart from the proliferation of terrorism offences, the TA 2000 also sought to alter the usual position that a defendant bears no more than an evidential burden in relation to his defence by placing a *legal burden* on him in relation to a number of the statutory defences. Once more, the issue went to the House of Lords (*Attorney-General's Ref (No.4 of 2002)* [2005] 1 AC 264) and once more the legislation was read down in order to restore a fair position; the evidential burden was re-imposed. Lord Bingham offering this magnificently serene assessment of the position:

> "I would accept that … where the defendant has raised an evidential issue … the prosecutor may well be unable to disprove the facts specified in [the offence]. But if so, that will be because he cannot point to any conduct of the defendant which has contributed to the furtherance of terrorism. It is not offensive that a defendant should be acquitted in such circumstances."

The latest in this long line of civil liberties battles is being fought over the provision in the Counter-Terrorism Bill (CTB) to extend the limit on pre-charge detention in terrorism investigations. This government had already increased terrorism detention from 48 hours to seven days in 2000, to 14 days in 2003, to 28 days in 2006 (a request for 90 days having been defeated) and now, in 2008, it wants 42 days. There is in our view simply no basis for the suggestion that terrorism investigations have become increasingly complex and at such a rate that a decade ago a charging decision could be made in two days but now up to 42 days is needed. Moreover, should it ever make its way onto the statute books, we expect the courts to find that the provision violates art.5, ECHR. Also contained in the CTB is the provision for drawing adverse inferences from silence during post-charge questioning. Suffice it to say that we have grave doubts as to whether these provisions will be found to comply with art.6, ECHR.

Summary

The stated purpose of the HRA 1998 was to "bring rights home". It is a depressing irony that the very Government that introduced this Act has the most appalling human rights record, particularly in its anti-terrorism laws. As we have set out in this piece, Judges (doubtless appreciative of the truth that human rights are constitutionally entrenched largely because of the danger posed to them by governments which in times of perceived crisis are liable to violate them) have thus far had the wisdom and courage to deliver difficult judgments in order to stand up for fairness and the rule of law.

We seem to be living through an age of near parliamentary lawlessness but in its haste to infringe fundamental rights and undermine sections of society, the Government would do well to heed Sir Thomas More's rebuke to Will Roper in "A Man for All Seasons". After Roper declares that he would be prepared to "cut down every law in England" to get after the Devil, More retorts:

> "This country's planted thick with laws from coast to coast: man's laws, not God's, and if you cut them down do you really think you could stand upright in the winds that would blow then? I'd give the Devil benefit of law for my own safety's sake."

Human rights are nothing less than vital to the long-term benefit and advancement of the whole of society. When they are cavalierly cut down in order to get at a few, we are all of us made the less safe. It is imperative that the Government reverse the trend and restore human rights to their rightful place as the cornerstone of our legal system before lasting harm is done to civil liberties, community cohesion and any number of lives.