

Terror detainees win Lords appeal, but what now?



In December 2004, the House of Lords made a landmark decision on internment when it ruled that the government's policy of indefinite detention of foreign nationals without trial was a violation of their human rights and, therefore, unlawful. **Shami Chakrabarti**, director of Liberty, and **Joanne Sawyer**, legal officer at Liberty and senior lecturer in human rights at the University of Kingston, discuss the House of Lords' decision, its significance and what will happen next.

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.¹

Facts

The landmark decision of the House of Lords on internment, and its ongoing effects, has seldom been far from the news since it was handed down at the end of 2004 (*A and others v Secretary of State for the Home Department* [2004] UKHL 56, 16 December 2004).² A committee of nine Law Lords heard appeals by nine detainees on the legality of their detention, under the government's derogation from the protections of article 5 (the right to liberty) of the European Convention on Human Rights ('the convention') by Anti-terrorism, Crime and Security Act (ATCSA) 2001 Part IV. By eight votes to one, the government's policy of indefinite detention of foreign nationals without trial was declared to violate the detainees' human rights and was, therefore, unlawful. The Lords quashed the Human Rights Act 1998 (Designated Derogation) Order 2001 SI No 3644, which had allowed the UK to opt out of article 5 of the convention and declared ATCSA Part IV to be incompatible with articles 5 and 14 of the convention.

Liberty and others have been gravely concerned by the measures in Part IV since they were rushed through parliament in the wake of the events of 11 September 2001, with very little substantive debate or opposition. It is worth noting that no other Council of Europe state (including Spain, which has suffered an Al-Qaeda attack) has resorted to internment, but they have instead relied on existing or strengthened criminal law. During

the bill stage, we contended that the UK had failed to meet the test for lawfully opting out of the convention (article 15 covers the circumstances in which a state can lawfully derogate from the convention). In addition, we believed that the measures constituted bad and counter-productive anti-terror policy; a view which has sadly been borne out by evidence of an increasing mistrust by, and alienation of, the Muslim population of the UK.³ Furthermore, not only is the practice of executive detention 'the antithesis of the right to liberty and security of person',⁴ it is also seriously damaging to the mental health of all those who have been detained.⁵

Over the years since ATCSA was passed, and as civil and political society has become aware of 'Britain's own Guantanamo Bay' at Belmarsh Prison and elsewhere, the voices calling for the repeal of Part IV have reached a crescendo.⁶ Those seriously concerned by the issue include faith leaders,⁷ parliamentarians⁸ and international bodies such as the UN Committee on the Elimination of Racial Discrimination (see box), the Committee of Ministers of the Council of Europe,⁹ the Council of Europe Commissioner for Human Rights (see box), the European Commission against Racism and Intolerance (see box) and the UN Committee against Torture.¹⁰

The Judicial Committee of the House of Lords, to a large extent, agreed with and reflected those concerns, holding that detention of foreign nationals without trial was not 'strictly required by the exigencies of the situation' (article 15), most importantly because the measure was not proportionate if UK nationals said to pose the same threat were not caught, and where foreign nationals were permitted to leave.¹¹ Lord Hoffmann reasoned that there was not a public emergency threatening the life of the nation, underlining the crucial importance of maintaining fundamental values even in difficult times (see box).

The significance of the House of Lords' decision

The message of the House of Lords' judgment goes beyond the narrow confines of the legality of internment, and deals with the broadest of constitutional issues. First, it reminds us of the state's responsibility to preserve and protect human rights and democratic freedoms. Second, it demonstrates the House of Lords' evolution from the highest appeal court in the UK to a truly constitutional court (references being made in the judgment to the Magna Carta, democratic history and constitutional traditions). Third, the Lords reasserted the central role of the rule of law in democracies, underlining that democracy is more than majority rule and that the judiciary has a vital role to play in ensuring fairness, equality and protection against arbitrariness within a democratic state (see Lord Bingham's quote opposite). This is reflected in the intricate constitutional balance achieved by the Human Rights Act (HRA) 1998, itself enacted by this government, between the legislature, executive and judiciary. Fourth, and crucially for this case, the judgment is peppered with reminders that human rights apply to everyone, whether or not they are British citizens, and that the state is obliged to act fairly and proportionately to all those within its territory.¹²

What happens next?

As the judiciary may not, under the HRA, strike down primary legislation, the House of Lords' judgment did not lead to the immediate release of all those detained. Those affected by the ruling remain in detention. The next step is for the government to consider how it wishes to respond. The Home Secretary, Charles Clarke, has stated that he will consider the judgment carefully and return to parliament with his view.

The government's response to the judgment represents the clearest test to date of its commitment to preserving and promoting the scheme of its own HRA and of rule of law values more generally. It will also be a test for civil and political society to push ahead with the work that the House of Lords and others have started. Lawyers and judges are sometimes criticised for monopolising human rights. Now the ball is firmly back in parliament's court to ensure that the spirit and principles of the House of Lords' judgment, informed as it was by parliamentarians, international bodies and civil society, is followed through. In our view, the government's response must:

- Set out a clear and prompt timetable for the charge or release of those detained

under ATCSA Part IV and for the repeal of the offending legislation;

■ Ensure that any new anti-terror legislation is founded on a real and explained practical need rather than a political imperative for legislation;

■ Be achieved without need for derogation from, or violation of, human rights standards;

■ Reflect the particular importance of the presumption of innocence and equal treatment principles in the anti-terror response of any democratic nation;

■ Understand that a respect for human rights standards is not symptomatic of being 'soft' on terrorism or careless about national security; and

■ Accord appropriate respect to the role assigned to the Law Lords by those who passed the HRA and to the judicial branch of our constitutional arrangements more generally.

We strongly believe that the government cannot ignore this judgment, nor can it simply amend Part IV – it must repeal the entire legislation and think again. As both the Home Office (see discussion paper, *Counter-terrorism powers: reconciling security and liberty in an open society* (Cm 6147, February 2004, para 36) and Lord Rodger,¹³ among others, have accepted, attempting to cure the discrimination simply by extending detention to British nationals would in itself be draconian and disproportionate.

We are concerned by the Home Secretary's suggestion (*Times* 19 January 2005) that the detainees be deported to their countries of origin, even though the government's stated reason for their detention is that they cannot be deported for fear of torture or death. We know from the experience of other countries, such as Sweden, that diplomatic assurances alone are an inadequate safeguard against torture.¹⁴

Should the government's response be too slow or inadequate, there is always the option of Strasbourg, and a potentially more damning judgment which, historically, the UK has never ignored. The House of Lords may also revisit these questions if it decides to hear an appeal on whether evidence obtained by torture can be relied on to justify the detention of these men (see *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123).

But we hope it will not come to that. Liberty will be urging the government to resolve this issue quickly, and charge or release those detained. The duty of parliamentarians is to scrutinise rigorously any new legislation that the government proposes. The House of Lords has confirmed that internment is legally wrong. But this is no longer a debate merely for lawyers and judges and it is not just down to par-

■ Council of Europe Commissioner for Human Rights, Opinion 1/2002 (28 August 2002, para 40):

In so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals.

■ The Committee for the Elimination of Racial Discrimination reported on the UK on 10 December 2003 (CERD/C/63/CO/11, para 17):

The committee is deeply concerned about provisions of the [ATCSA] which provide for the indefinite detention without charge or trial, pending deportation, of non-nationals of the United Kingdom who are suspected of terrorism-related activities. While acknowledging the state party's national security concerns, the committee recommends that the state party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, the committee draws the state party's attention to its statement of 8 March 2002 in which it underlines the obligation of states to 'ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin'.

■ The European Commission against Racism and Intolerance, 8 June 2004, General Policy Recommendation No 8, without passing judgment on the ATCSA expressly, recommended to Council of Europe member states:

... to review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or groups of persons, notably on grounds of 'race', colour, language, religion, nationality or national or ethnic origin, and to abrogate any such discriminatory legislation.

■ Lord Bingham:

... the function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney-General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. (para 42)

■ Lord Hoffmann:

... Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom ... (para 95)

... such a power [detention without trial] in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory. (para 97)

liament. Clearly, parliament will have the final say on what new legislation is enacted, but members of the public also have an important role to play in ensuring that their democratically elected representatives understand, respect, and present their views. The House of Lords, the Joint Committee on Human Rights, the Newton Committee, faith leaders and many other members of civil society have spoken. The landscape is moving to an acceptance that internment is not only legally but also morally wrong. The government must reflect this in the action that it takes.

■ More details of Liberty's ongoing campaign against internment can be found at: www.liberty-human-rights.org.uk.

- 1 The Honourable President A Barak of the Supreme Court of Israel in *Public Committee Against Torture in Israel v The State of Israel* HJC 5100/94.
- 2 Liberty intervened in this case before the Special Immigration Appeals Commission, the Court of Appeal and the House of Lords. The text of Liberty's intervention can be found at: www.liberty-human-rights.org.uk/issues/internment-intervention.pdf.
- 3 Liberty, *The impact of anti-terrorism powers on the British Muslim population* (2004), available at: www.liberty-human-rights.org.uk/resources/policy-papers/2004/anti-terror-impact-brit-muslim.PDF.
- 4 Baroness Hale, para 222.
- 5 Royal College of Psychiatrists, *The psychiatric problems of detainees under the 2001 Anti-terrorism, Crime and Security Act*, 13 October 2004.
- 6 The authors acknowledge the differences

between the two regimes, but ultimately both are a version of indefinite detention without charge or trial.

- 7 Letter to *Guardian*, 13 December 2003, jointly signed by prominent members of the Christian, Jewish and Muslim faiths, and others.
- 8 Most notably the Joint Committee on Human Rights, Second Report of Session 2001-2002 (paras 38-39), Fifth Report of Session 2002-2003 (24 February 2003, HL 59, HC 462, para 32), Sixth Report of Session 2003-2004 (23 February 2004, HL 38, HC 381, para 35), Eighteenth Report of Session 2003-2004 (21 July 2004, HL 158, HC 713, paras 42-44) and the Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 review: report*, HC 100 (December 2003) ('the Newton Committee').
- 9 The Committee of Ministers of the Council of Europe, 11 July 2002.
- 10 UN Committee against Torture, *Consideration of Fourth UK Periodic Report*, Thirty-third session, 25 November 2004, CAT/C/CR/33/3.
- 11 The government refers to this as the three-walled prison, in that all those certified may leave the UK if they can find a country that is willing to take them. For example, one man certified by the Home Secretary under ATCSA Part IV went to France, where he was met by French officials and subsequently released.
- 12 See, for example, Baroness Hale at paras 229, 234, 237 ('*democracy values each person equally*') and 238.
- 13 Para 188.
- 14 Human Rights Watch (2004), '*Empty promises: diplomatic assurances no safeguard against torture*', see: www.hrw.org/reports/2004/un0404/ and <http://hrw.org/english/docs/2004/05/27/sweden8621.htm>.