

TERRORISM AND THE LAW IN THE UNITED KINGDOM#

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I INTRODUCTION

The initial problem is that of definition. In the *Terrorism Act 2000* (UK), the definition of terrorism ‘is complicated but essentially it provides that terrorism is the use, or threat, of action which is violent, damaging or disrupting and is intended to influence the government or intimidate the public and is for the purpose of advancing a political, religious or ideological cause’.¹ The vagueness of this definition has given rise to considerable misgivings, especially as it has been carried over into further legislation – the *Anti-terrorism, Crime and Security Act 2001* (UK) which was an extensive response to the events of 11 September 2001.

Anxiety has also been expressed about the vague contours of the statutory definition, particularly because the line between terrorism, as it is popularly understood, and activities associated with public demonstrations and public protest has been blurred. In theory it is possible to extend the statutory definition of terrorism to encompass the actions of those involved in industrial disputes, political processions, religious demonstrations, animal rights protests, and a variety of other public meetings in circumstances where the ordinary criminal law has hitherto sufficed. For the time being, however, we have to rely on the good sense of the police and security services, prosecutors, judges and jurors to maintain a sense of proportion when acts of terrorism are alleged. The difficulty of defining terrorism has long been recognised. The Diplock Commission of 1972, for instance, commented that although ‘what distinguishes terrorist activities from other crimes involving acts or threats of violence is the motive that lies behind them, motive does not provide a criterion for defining the kinds of crime with which we need to deal’.² The Commission added that terrorist

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1 Defence Committee, *The Threat from Terrorism*, House of Commons Paper No 348-1, Session 2001–02 (2001) [5]. See also Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activity in Northern Ireland*, Cmnd 5185 (1972). Here it was suggested that ‘terrorist acts’ could be taken ‘to be the use or threat of violence to achieve political ends’: at [3].

2 Diplock, above n 1, [5].

organisations ‘inevitably attract into their ranks ordinary criminals whose motivation for particular acts may be private gain or personal revenge’.³

The first reference to terrorism as such apparently dates from 1798, and the Defence Committee of the House of Commons has said that ‘modern terrorism’ began to emerge in the later 18th century.⁴ In retrospect, bombings in the later 19th century certainly came within the perceived meaning of terrorism. The Defence Committee noted that between 1880 and 1887 ‘terrorists from Irish-American organisations based in the United States carried out a series of bombings in London and also attacked Glasgow and Liverpool’.⁵ The activities of other groups, outside the Irish context, also aroused alarm and sometimes exaggerated fears. In the later 19th century, anarchists stimulated alarm and fear. One American writer observed that the ‘common conception of the anarchist as a ragged, unwashed, long-haired, wild-eyed fiend, armed with smoking revolver and bomb – to say nothing of the dagger he sometimes carried between his teeth – dates from this period’.⁶ In a British study it was noted that anarchists became ‘the apostles of total destruction in the more gullible sections of the popular imagination’⁷ with suggestions of starting epidemics of cholera or yellow fever⁸ and of schemes ‘to drop lice on the rich in the stalls from the galleries of theatres’⁹ or ‘to catapult small incendiary bombs from the top deck of a bus into the upper storeys of the rich mansions of the West End’.¹⁰

Today, in the face of terrorism at home and abroad, the use of stereotypes is more difficult, and the public has become familiar with more sophisticated methods and types of terrorism. The McDonald Commission, reporting in Canada in 1981, stressed that ‘political fanaticism is not on the wane, and modern technology increases the power of a few to threaten the many’.¹¹ Today, outside the tragedies of the Middle East, we have read of a wide variety of terrorist groups such as Abu Sayyaf in the Philippines,¹² the 17 November group in Greece,¹³ the Revolutionary Armed Forces of Colombia (FARC),¹⁴ the Basque separatist group (ETA) in Spain, and most visibly Al Qaeda, which in the words of the Defence Committee of the House of Commons, ‘had its origins in the Mujahedden campaign to expel the Soviet regime from Afghanistan – to purge

3 Ibid.

4 Defence Committee, above n 1, [15].

5 Ibid.

6 Henry David, *The History of the Haymarket Affair* (first published 1936, 1963 ed) 436. This book is a study of the labour riot in the Haymarket in Chicago on 4 May 1886.

7 John Quail, *The Slow Burning Fuse: The Lost History of the British Anarchists* (1978) 169.

8 Ibid 169–70.

9 Ibid 175.

10 Ibid.

11 Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police (the McDonald Commission), *Freedom and Security under the Law, Second Report* (1981) vol 1, 40.

12 See, eg, ‘Philippines Terror Leader Killed in Sea Ambush’, *The Times* (London), 22 June 2002, 18.

13 See, eg, ‘Terrorist Victims Attack Greece’, *The Times* (London), 7 June 2002, 24; ‘Envoy’s Widow Inspired Others to Help Police’, *The Times* (London), 19 July 2002, 16.

14 See, eg, ‘Republicans Caught in Crossfire’, *The Times* (London), 25 April 2002, 4; ‘US Congress Links IRA Men to Colombian Rebels’, *The Times* (London), 25 April 2002, 4.

the Muslim nation of communist rule⁷ and later turned against the United States as a reaction to the Gulf War of 1991.¹⁵

Within the United Kingdom, three decades of problems associated with Northern Ireland have led to an ongoing familiarity with terrorism, generating a remarkable literature of official and other publications. Between 1969 and 30 November 1998, 3289 people died in Northern Ireland ‘as a direct result of Irish terrorism ... and between 1972 and the end of November 1998, 121 people [were] killed in Britain in incidents of Irish terrorism’.¹⁶ Temporary powers first introduced in the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK), which followed the Birmingham pub bombings in which 21 people died, were modified and continued over many years until it was finally decided to adopt permanent legislation – directed at domestic and international terrorism – in 2000. The international dimension was brutally demonstrated in the explosion on board Pan Am Flight 103 over Lockerbie in December 1988, resulting in 270 deaths. The Irish dimension was equally demonstrated in the Omagh bombing of 15 August 1998 which killed 29 people. The festering legacy of three decades of violence is reflected in the prolonged investigation of the events of Bloody Sunday (30 January 1972) by a Tribunal of Inquiry consisting of Lord Saville of the House of Lords in the chair and of a Canadian judge and an Australian judge.¹⁷

The aim behind the *Terrorism Act 2000* (UK) was to put the legislative responses of 1974 on a permanent basis, suitably modified and adjusted so as

to create legislation which is both effective and proportionate to the threat which the United Kingdom faces from all forms of terrorism – Irish, international and domestic – which is sufficiently flexible to respond to a changing threat, which ensures that individual rights are protected and which fulfils the United Kingdom’s international commitments.¹⁸

The complexities are such that the Act consists of 131 sections and 16 schedules, with provisions on matters including the proscription of terrorist organisations, terrorist finance, arrest and detention, stop and search, powers of entry, cordoned areas, uniforms, and inciting terrorism overseas.¹⁹ An illustration

15 Defence Committee, above n 1, [18]–[32]. The attacks of 11 September 2001, so strongly linked to Osama bin Laden and al Qaeda, had precedents in the 1990s, including the 1993 attack on the World Trade Center and on US embassies in Nairobi and Dar-es-Salaam.

16 United Kingdom, *Legislation Against Terrorism: A Consultation Paper*, Cm 4178 (1998) [2.2].

17 The Tribunal of Inquiry was originally set up in early 1998 and consisted of Lord Saville of Newdigate, Sir Edward Somers (a retired judge of the Court of Appeal of New Zealand) and William L Hoyt (a former Chief Justice of the Supreme Court of New Brunswick). Sir Edward Somers later retired from the Tribunal on grounds of ill-health and was replaced by Justice John Toohey, formerly of the High Court of Australia. A major reason for setting up the Saville Inquiry was the continuing dissatisfaction with the Report of the original Tribunal, consisting solely of Lord Chief Justice Widgery, which reported in April 1972 on the events of Bloody Sunday which resulted in 13 civilian deaths. See Lord Widgery, *Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry that day*, House of Lords Paper No 101, House of Commons Paper No 220 (1972).

18 *Legislation Against Terrorism*, above n 16, [8].

19 See generally Clive Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (2002), especially ch 1 on ‘Background and Introductory Issues’; J J Rowe, ‘The Terrorism Act’ [2001] *Criminal Law Review* 527.

of the extended scope of the legislation is the area of proscription, previously related to Northern Ireland alone, which now covers other domestic and international groups.²⁰

It seemed that the legislation of 2000 had provided at least a cautious, standing core of provisions, emerging from earlier legislative experiments and intensive review by a series of committees and within Parliament itself.

Then came September 11 and, rightly or wrongly, Parliament was rushed into enacting the *Anti-terrorism, Crime and Security Act 2001* (UK) ('*Anti-terrorism Act*'). Consisting of 129 sections and 8 schedules, this measure – superimposed on the *Terrorism Act 2000* (UK) – seeks to cut off terrorist funding, ease the sharing of anti-terrorist information among government agencies and departments, streamline relevant immigration procedures, ensure the security of the nuclear and aviation industries, improve the security of dangerous substances, and extend police powers.²¹ A number of the provisions are 'not particularly controversial'.²² These would include provisions to reinforce security in the nuclear industry, an area which was given some prominence by the Royal Commission on Environmental Pollution as early as 1976.²³ Much more controversial was an attempt, subsequently dropped in order to ease early passage of the legislation, to introduce an offence of incitement to religious hatred akin to incitement to racial hatred. Section 23 of the *Anti-terrorism Act* is also especially sensitive, providing for the detention without trial of some suspected international terrorists (not British citizens, it should be noted) secured through formal derogation from art 5(1) of the *European Convention on Human Rights* ('*ECHR*'),²⁴ which is concerned with the right to liberty and security. At the second reading of the *Anti-terrorism, Crime and Security Bill 2001* (UK), the Home Secretary declared in the House of Commons that the proposed measures would allow us 'to take rational, reasonable and proportionate steps to deal with an internal threat and an external, organised terrorist group',²⁵ but a few days earlier the Home Affairs Committee of the House of Commons had expressed a number of deep-rooted concerns.²⁶ Wider concerns about terrorism and anti-terrorism were brought out in the Annual Report on Human Rights of the Foreign

20 See *The Times*, 20 July 2002, 7 for an example of convictions relating to a proscribed group overseas.

21 See generally Walker, above n 19; Adam Tomkins, 'Legislating against Terror: The Anti-Terrorism, Crime and Security Act 2001' [2002] *Public Law* 205; Helen Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65 *Modern Law Review* 724.

22 Tomkins, above n 21, 206.

23 Royal Commission on Environmental Pollution, *Nuclear Power and the Environment*, Cmnd 6618 (1976), ch VII. See also Roger Parker, *Report on the Windscale Inquiry* (1978), which devoted a chapter to 'Terrorism and Civil Liberties' 22.

24 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

25 United Kingdom, *Parliamentary Debates*, House of Commons, 19 November 2001, vol 374, columns 25–6 (David Blunkett, Home Secretary).

26 Select Committee on Home Affairs, *The Anti-Terrorism, Crime and Security Bill 2001*, House of Commons Paper No 351, Session 2001–02 (2001).

Affairs Committee of the House of Commons²⁷ and in a debate in the House of Lords on poverty and terrorism.²⁸

There are undoubtedly important constitutional issues raised by international and domestic terrorism. Recognition of these issues is not new²⁹ but the range and complexity of the problems have been enhanced in the wake of 11 September. There are, as indicated, issues of human rights; the relationship between the executive and the legislature is under strain in efforts to combat terrorism; the apparatus of state security and international cooperation in matters of security require reassessment and vigilance; and the challenges to the courts of law are acute as judges seek an acceptable balance when they arbitrate on responses to terrorism and threats to national security.

II TERRORISM AND HUMAN RIGHTS

In the United Kingdom the enactment and bringing into operation of the *Human Rights Act 1998* (UK) are directly relevant to a study of terrorism. The experience of World Wars I and II offers a reminder of the problems of reconciling the protection of national security with the protection of personal freedom. In an influential work, Brian Simpson has examined in depth the issues raised by detention without trial during the World War II.³⁰ It is significant that detention without trial has also been highly controversial in more recent times, during the troubles in Northern Ireland and through the provisions of the *Anti-terrorism Act*. Following the experience in Northern Ireland, and in the light of options raised in the consultation paper of 1998,³¹ there are special provisions in the *Terrorism Act 2000* (UK) for limited powers of detention in police investigations but it is the Act of 2001 which gives rise to wider problems of detention without trial.

Non-British citizens are, by virtue of Part 4 of the *Anti-terrorism Act*, subject to indefinite detention without trial, conditional on certification by the Home Secretary that the detention is based on reasonable suspicion of terrorism and reasonable belief in a risk to national security. There are provisions of, and legal decisions relating to, the *ECHR* which prevent the Home Secretary from solving the problem in some instances by deportation rather than detention. In order to clear the issue of detention without trial, the Government formally derogated from art 5(1) of the *ECHR*. Detainees may appeal to the Special Immigration

27 *Annual Report for 2001*, House of Commons, Paper No 589, Session 2001–02 (2002).

28 United Kingdom, *Parliamentary Debates*, House of Lords, 27 February 2002, vol 631, column 1479 ff (Lord Dahrendorf).

29 See, eg, Conor Gearty and John A Kimbell, *Terrorism and the Rule of Law* (1994); H P Lee, *Emergency Powers* (1984); International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1993); Laurence Lustgarten and Ian Leigh, *In from the Cold: National Security and Parliamentary Democracy* (1994).

30 A W Brian Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (revised ed, 1994).

31 United Kingdom, *Legislation against Terrorism: A Consultation Paper*, Cm 4178 (1998) ch 8. See *Terrorism Act 2000* (UK) s 41; Walker, above n 19, 123 ff.

Appeals Commission ('SIAC'), a novel appellate institution provided for by statute.³² In July 2002, an appeal was taken to SIAC by a number of people detained. It was ruled that the power to detain was incompatible with arts 5 and 14 of the *ECHR* 'in so far as it permits detention of suspected international terrorists in a way that discriminates against them on the ground of nationality'.³³ Article 14 provides broadly against many forms of discrimination, and there had been no derogation from its application.

In October 2002 the Court of Appeal ruled against SIAC on the issue of discrimination.³⁴ Lord Chief Justice Woolf recognised the importance of not discriminating, adding that the 'danger of unjustified discrimination is acute at times when national security is threatened'.³⁵ He also referred to 'the critical issue as to whether the *ECHR* permits the United Kingdom to detain only those who are non-nationals who are suspected of being international terrorists'.³⁶ The Lord Chief Justice was prepared to allow the appeal, taking into account the deference allowed to the executive on matters of national security and the regular review of detention required by the *Anti-terrorism Act*, recognising that the Home Secretary's actions were proportionate to what is necessary, and recognising also that the difference in treatment between nationals and non-nationals had 'an objective and reasonable justification'.³⁷ His colleagues agreed in separate judgements. There were other issues in the case, but the central argument on discrimination favoured by SIAC was rejected by the Court of Appeal.³⁸ The case is a reminder of the complexity of seeking to balance the demands of national security and the freedom of individuals.

III THE EXECUTIVE AND THE LEGISLATURE

In the United Kingdom the executive is extremely powerful in the legislature, through an effective denial of the separation of powers. The executive may play a role in the initiation of legislation and affect the degree of accountability in the course of debates, questions, committee proceedings and other traditional mechanisms of scrutiny. Nothing demonstrates the power of the executive more vividly than the area of national security, especially in time of war or in response to a major terrorist outrage. The fears of the people are matched by the fears of the legislators. In the BBC Reith Lectures on radio in 2002, Onora O'Neill said that terrorism 'spreads fear. As the etymology of the word tells us, terrorists aim at terror, at fear, at intimidation'.³⁹ She added that the fears which followed 11

32 *Special Immigration Appeals Commission Act 1997* (UK). The nature and composition of SIAC are well described by Helen Fenwick, above n 21, 739–43.

33 The decision was on 30 July 2002. On this occasion SIAC consisted of Justice Collins (in the chair), Lord Justice Kennedy, and Mark Ockelton.

34 *A v Secretary of State for the Home Department* [2003] 1 All ER 816.

35 *Ibid*, [9].

36 *Ibid* [37].

37 *Ibid* [54].

38 *Ibid* [45]–[56].

39 Onora O'Neill, *A Question of Trust* (2002), 25–6.

September ‘made the daily placing of trust in others and in the normal functioning of public institutions harder’.⁴⁰

The speed with which the *Anti-terrorism Act* was enacted is a powerful illustration of the effect of fear and resentment in the legislative process itself. As early as 1908, with reference to a rushed legislative response to bombings in the 1880s, Lord Loreburn said:

I always dislike legislation passed in undue hurry. I remember when the Explosives Act was passed twenty or twenty-five years ago, it was passed in one day under the strong feeling that prevailed at that time against the prevalence of dynamiting in the country. I do not think that the Bill was a bit better because it was passed in a hurry.⁴¹

Yet threats, real or apparent, to national security led in subsequent years to some astonishing examples of speed which were often unnecessary. The notorious *Official Secrets Act 1911* (UK) was bounced through the House of Commons because of the alleged imminence of war with Germany,⁴² and amending and strengthening legislation of 1920 was justified on grounds of national security and threats of espionage, though not without some protest: Sir Donald Maclean saw the Bill as ‘another attempt to clamp the powers of war on the liberties of the subject in peace’⁴³ and another member of Parliament observed that the Bill ‘has been introduced in an atmosphere which is possibly appropriate – barricades in Downing Street, secret police scattered about this very building, the galleries cleared, everyone apparently in a panic in fear of the people’.⁴⁴

Much more recently the first *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK) followed immediately on the Birmingham pub bombings; and the *Criminal Justice (Terrorism and Conspiracy) Act 1998* (UK) followed immediately on the Omagh bombings, with Parliament understandably wishing to be seen to do something.⁴⁵ The passage of the Anti-terrorism, Crime and Security Bill 2001 (UK) was only the latest example of legislative action at the behest of the executive. Moreover, armed intervention – in Afghanistan or possibly in Iraq – would seem to be dictated by the executive without legislation at all and without any guarantee of full consultation with Parliament. Various committees of the House of Commons can do something to redress the balance, but the overwhelming authority of the executive is difficult to resist. It is legitimate to question whether Parliament and especially the elected House of

40 Ibid.

41 United Kingdom, *Parliamentary Debates*, House of Lords, 23 June 1908, 4th Series, vol CXC, column 1478 (Lord Loreburn, Lord Chancellor).

42 See David Williams, ‘Official Secrecy in the Courts’ in P R Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (1978) 154, 160.

43 United Kingdom, *Parliamentary Debates*, House of Commons, 2 December 1920, 5th Series, vol 135, column 1546 (Sir Donald Maclean).

44 United Kingdom, *Parliamentary Debates*, House of Commons, 2 December 1920, 5th Series, vol 135, column 1566 (Lieut-Commander J M Kenworthy).

45 See Stephen Bailey, David Harris and David Ormerod in Stephen Bailey, David Harris and Brian Jones, *Civil Liberties, Cases and Materials* (5th ed, 2001) 574.

Commons should, as a matter of constitutional propriety, accept the imbalance in the respective roles of the executive and the legislature.⁴⁶

IV THE APPARATUS OF STATE SECURITY

The apparatus of state security raises many issues including international cooperation and problems of accountability. The *Terrorism Act 2000* (UK) puts on a permanent basis the central provisions of the various *Prevention of Terrorism (Temporary Provisions) Acts*⁴⁷ and, on a site-specific basis, the *Northern Ireland (Emergency Provisions) Acts*,⁴⁸ with police powers overtly extended. The *Anti-Terrorism Act* also provides ‘wholly gratuitous further extensions of regular police powers’.⁴⁹ Anti-terrorist activities would clearly involve the special branch of each police force. In fact, the Special Branch of the Metropolitan Police originated in 1883 as a response to bombings in London.⁵⁰ Police action of any kind raises varied and confusing challenges of accountability,⁵¹ and these can only be enhanced in the context of national security.

Also central to the battles against terrorism are the security and intelligence services: the Security Service (‘MI5’), the Secret Intelligence Service (‘MI6’), and the Government Communications Headquarters (‘GCHQ’). These three all existed on a non-statutory basis until the *Security Service Act 1989* (UK) and the *Intelligence Services Act 1994* (UK), both of which have their own schemes of accountability designed ultimately to ensure that they have the confidence of Parliament and the public.⁵² To add to such confidence there is an official publication on the Security Service, which gives considerable attention to terrorism emanating from Northern Ireland or originating overseas, emphasising that in both instances the Security Service ‘works closely with UK law enforcement agencies and with overseas security and intelligence services to disrupt terrorist activity’.⁵³ In her memoirs, Dame Stella Rimington, former Director-General of MI5, writes of the sensitivity of international security

46 See, eg, ‘MP Seeks Vote Before Troops go into Iraq’, *The Times* (London), 18 July 2002, 15.

47 *Northern Ireland (Emergency Provisions) Act 1991* (UK); *Northern Ireland (Emergency Provisions) Act 1991 (C 24)* (UK); *Northern Ireland (Emergency Provisions) Act 1996* (UK); *Northern Ireland (Emergency Provisions) Act 1998* (UK).

48 *Prevention Of Terrorism (Additional Powers) Act 1996* (UK); *Prevention Of Terrorism (Temporary Provisions) Act 1989* (UK); *Prevention Of Terrorism (Temporary Provisions) Act 1989 (C 4)* (UK).

49 Tomkins, above n 21, 218.

50 See Home Affairs Committee, Special Branch, *Fourth Report*, House of Commons Paper No 71, Session 1984–85 (1985); Bernard Porter, *The Origins of the Vigilant State: The London Metropolitan Police Special Branch Before the First World War* (1987).

51 See David Williams, ‘Police Accountability: Four Cases and a Statute’ in David Butler, Vernon Bogdanor and Robert Summers (eds), *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall* (1999) ch 14.

52 See Stella Rimington, ‘Security and Democracy – Is there a Conflict?’ (Richard Dimpleby Lecture, BBC Educational Developments, 12 June 1994).

53 *The Security Service* (3rd ed, 1998) 15.

contacts in the period of the Cold War.⁵⁴ That sensitivity doubtless applies in the new field of terrorism after 11 September.

There is the allied question of the extent to which reliance should be given to intelligence material in such contexts as the ‘detention without trial’ challenge.⁵⁵ Lord Justice Brooke in that case indicated that the intelligence community faced difficulties relating to differences in language, differences in culture, and ‘often very subtle differences in political or religious ideology’.⁵⁶ However, he added that

it seems to me inevitable that the judiciary must be willing, as SIAC was, to put an appropriate degree of trust in the willingness and capacity of ministers and Parliament, who are publicly accountable for their decisions, to satisfy themselves about the integrity and professionalism of the Security Service.⁵⁷

An overarching role in national security is necessarily assumed by the Prime Minister, the Home Secretary and other relevant ministers, though, as we have seen, there are questions of the adequacy of political accountability when demands for secrecy are made in the name of national security.

V THE ROLE OF THE COURTS OF LAW

The role of the courts in the context of domestic and international terrorism is both complex and controversial. A sobering initial comment is that the courts have often displayed considerable deference to the executive in conditions of war, or in the prelude to and aftermath of war, and hence they have been able to do little to compensate for the democratic deficit caused by a weakened parliamentary response at legislative and executive level.⁵⁸ The problem is arguably compounded with the backdrop of terrorism, especially because there can be a ‘drift’ – in other words, an indefinite emergency without the formal declarations which mark the beginning and the end of war. Concessions to the executive could have implications for many years. There is already ample evidence of deference in the face of terrorism, as seen in the ‘detention without trial’ case.⁵⁹ The Court of Appeal in that case referred to the decision of the House of Lords in *Secretary of State for the Home Department v Rehman*⁶⁰ (‘*Rehman Case*’) which was decided on 11 October 2001 after hearings in May. The Home Secretary had ordered the deportation of a Pakistani citizen in the interests of national security even though the Security Service had concluded that, although he was linked to Islamic terrorist organisations abroad, he was unlikely to commit acts of violence against the United Kingdom. Overruling a decision by SIAC allowing an appeal against deportation, the Court of Appeal

54 Stella Rimington, *Open Secret* (2001) 206 ff.

55 *A v Secretary of State for the Home Department* [2003] 1 All ER 816.

56 *Ibid* [86].

57 *Ibid* [87].

58 See, eg, *R v Halliday, Ex parte Zadig* [1917] AC 260; *Liversidge v Anderson* [1942] AC 206 (House of Lords).

59 *A v Secretary of State for the Home Department* [2003] 1 All ER 816.

60 [2002] 1 All ER 122.

and the House of Lords explicitly accepted the need for a collective approach to international terrorism. Lord Slynn, for instance, said that the ‘means open to terrorists both in attacking another state and attacking international or global activity by the community of nations ... may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens’.⁶¹ Lord Steyn, while not denying the competence of the courts in matters of national security, saw it as ‘self-evidently right’ that great weight should be given to the views of the executive.⁶²

The combination of globalism and traditional deference produces a strong version of judicial restraint. In another ruling of the House of Lords, *Re Al-Fawwaz*,⁶³ Lord Hutton spoke of ‘the modern world of international terrorism and crime’⁶⁴ and Lord Millett referred to ‘today’s global village.’⁶⁵ The United States had sought extradition of two people on the grounds that they were parties to a terrorist conspiracy, hatched outside the United States, to murder United States citizens elsewhere in the world. The House of Lords was disinclined to narrow the scope of extradition by requiring the relevant alleged crime to have been committed within the territory of the requesting state. Yet it is significant that Lord Scott of Foscote, after referring to President Bush’s intention to establish military tribunals to try non-citizens accused of terrorism, indicated that he expected the charges in this case to be laid before the District Court for the Southern District of New York where they originated.⁶⁶ This caveat, which was noted by Lord Rodger of Earlsferry, is not part of the decision itself but it could be interpreted as an important expression of unease in the current climate of globalism and deference.

Not everything goes the way which the executive or prosecuting authorities might wish. In June 2002, the Administrative Court of the Queen’s Bench Division quashed the Home Secretary’s decision to extradite an alleged Algerian terrorist wanted in France.⁶⁷ In August 2002, a Muslim convert was cleared by a jury of trying to recruit Islamic terrorists contrary to the *Terrorism Act 2000* (UK).⁶⁸ SIAC, as we have seen, has also handed down decisions, albeit later overruled, contrary to the Home Secretary’s rulings on deportation and detention without trial. There is certainly potential for strong public arguments on the factual basis for extradition and in defence to criminal charges.

Wide consideration of issues of national security arose in a decision of the Court of Appeal in November 2002.⁶⁹ The mother of a British national, who had

61 Ibid 130.

62 Ibid 135. See also the uncompromising views of Lord Hoffmann who invoked the separation of powers to underline the special capability of the executive to determine limits to national security: at 142.

63 [2002] 1 All ER 545.

64 Ibid 562.

65 Ibid 575.

66 Ibid 579.

67 ‘Blunkett Failed to Address Bomb Case Issues’, *The Times* (London), 28 June 2002, 14.

68 ‘Muslim Cleared of Attempting to Recruit Terrorists’, *The Times* (London), 10 August 2002, 2.

69 *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598 (Lord Phillips MR, Waller LJ and Carnwath LJ).

been captured in Afghanistan and detained in Guantanamo Bay, Cuba, sought judicial review on her son's behalf to compel the Foreign Office to make representations on his behalf to the United States government, or to take other appropriate action. It was claimed that her son had been held captive for eight months without access to a court or tribunal, or even to a lawyer. In March 2002, Mr Justice Richards had refused permission to seek judicial review, but in July the Court of Appeal granted permission, and the substantive hearing took place in September 2002. It transpired that officials of the Foreign and Commonwealth Office and members of the security services had visited the applicant and other British detainees at Guantanamo Bay on three occasions in 2002.

The Court of Appeal ultimately found no basis for judicial intervention, but it expressed considerable concern about the American law relevant to Guantanamo Bay which is by no means settled and the Court of Appeal took the opportunity to quote Lord Atkin's famous remark that 'amid the clash of arms, the laws are not silent'.⁷⁰ It was clear, however, 'that there can be no direct remedy in this court'⁷¹ and 'that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State'.⁷² The Court of Appeal also denied that the *ECHR* and the *Human Rights Act 1998* (UK) offer any support for the contention that the Foreign Office owed the applicant a duty to exercise diplomacy on his behalf. There were important propositions, however, about justiciability and judicial review and, although no remedy was secured in the case, there is potential for judicial action in different circumstances.

Irrespective of the outcome, the case is important because of the publicity which the Court of Appeal has given to the facts, to international law, to the scope of judicial review, and to the anxiety expressed about some judicial rulings in the United States.

VI CONCLUSIONS

'Liberal democracies', declared the McDonald Commission in Canada in 1981, 'face a unique challenge in maintaining the security of the state. Put very simply, that challenge is to secure democracy against both its internal and external enemies, without destroying democracy in the process'.⁷³ What emerges, even from this tentative investigation of the constitutional implications of anti-terrorism, is that the courts do have a significant democratic role to play in offering a forum for the public scrutiny of particular events or individual grievances. The transparency offered by the courts should not be underestimated.

In the *Rehman Case* Lord Hoffmann declared that decisions about threats to national security

70 Ibid [60]; *Liversidge v Anderson* [1942] AC 206, 245 (House of Lords).

71 *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598, [67].

72 Ibid [69].

73 Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police, above n 11, [16].

require 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.⁷⁴

As we have seen, however, the response to terrorism, especially international terrorism, raises numerous issues of effective political accountability. Judicial intervention can also raise a number of difficulties, and the courts have to act with caution and a sensible measure of deference. This does not mean an abdication of judicial responsibility. Amid the claims of globalism, executive responsibility, secrecy in matters of security, and the need to combat terrorism, it is also important that the courts should continue in appropriate cases to ensure that individuals can have their day in court.

74 *Rehman Case* [2002] 1 All ER 122.