***Secretary of State for the Home Department* v. *Rehman* (AP)**

HOUSE OF LORDS
Lord Slynn of Hadley Lord Steyn Lord Hoffmann Lord Cyde Lord Hutton
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(RESPONDENT)
v.
REHMAN (AP)
(APPELLANT)

ON 11 OCTOBER 2001
[2001] UKHL 47

LORD SLYNN

My Lords,

1. Mr Rehman, the appellant, is a Pakistani national, born in June 1971 in Pakistan. He was educated and subsequently, after obtaining a master's degree in Islamic studies, taught at Jamid Salfiah in Islamabad until January 1993. On 17 January 1993 he was given an entry clearance to enable him to work as a minister of religion with the Jamait Ahle-e-Hadith in Oldham. His father is such a minister in Halifax and both his parents are British citizens. He arrived here on 9 February 1993 and was subsequently given leave to stay until 9 February 1997 to allow him to complete four years as a minister. He married and has two children born in the United Kingdom. In October 1997 he was given leave to stay until 7 January 1998 to enable him to take his family to Pakistan from which he returned on 4 December 1997. He applied for indefinite leave to remain in the United Kingdom but that was refused on 9 December 1998. In his letter of refusal the Secretary of State said:

> "the Secretary of State is satisfied, on the basis of the information he has received from confidential sources, that you are involved with an Islamic terrorist organisation Markaz Dawa Al Irshad (MDI). He is satisfied that in the light of your association with the MDI it is undesirable to permit you to remain and that your continued presence in this country represents a danger to national security. In these circumstances, the Secretary of State has decided to refuse your application for indefinite leave to remain in accordance with paragraph 322(5) of the Immigration Rules (HC395).
> "By virtue of section 2(1)(b) of the Special Immigration Appeals Commission Act 1997 you are entitled to appeal against the Secretary of State's decision as he has personally certified that [sic] your departure from the United Kingdom to be conducive to the public good in the interests of national security".

The Secretary of State added that his deportation from the United Kingdom would be conducive to the public good "in the interests of national security because of your association with Islamic terrorist groups". Mr Rehman was told that he was entitled to appeal, which he did, to the Special Immigration Appeals Commission by virtue of section 2(1)(c) of the Special Immigration Appeals Commission Act 1997. The Special Immigration Appeals Commission (Procedure) Rules 1998 (SI 1998 No 1881) allowed the Secretary of State to make both an open statement and a closed statement, only the former being disclosed to Mr Rehman. The Secretary of State in his open statement said:

> "The Security Service assesses that while Ur Rehman and his United Kingdom-based followers are unlikely to carry out any acts of violence in this country, his activities directly support terrorism in the Indian subcontinent and are likely to continue unless he is deported. Ur Rehman has also been partly responsible for an increase in the number of Muslims in the United Kingdom who have undergone some form of militant training, including indoctrination into extremist beliefs and at least some basic weapons training. The Security Service is concerned that the presence of returned jihad trainees in the United Kingdom may encourage the radicalisation of the British Muslim community. His activities in the United Kingdom are intended to further the cause of a terrorist organisation abroad. For this reason, the Secretary of State considers both that Ur Rehman poses a threat to national security and that he should be deported from the United Kingdom on [the] grounds that his presence here is not conducive to the public good for reasons of national security".

2. The appeal was heard both in open and in closed sessions. The Commission in its decision of 20 August 1999 held:

> "That the expression 'national security' should be construed narrowly, rather than in the wider sense contended for by the Secretary of State and identified in the passages from Mr Sales' written submissions cited above. We recognise that there is no statutory definition of the term or legal authority directly on the point. However, we derive assistance from the passages in the authorities cited to us by Mr Kadri, namely *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, 410A-C, per Lord Diplock and *R* v *Secretary of State for Home Affairs Ex p Hosenball* [1977] 1 WLR 766, 778D-H, 783F-H, per Lord Denning MR, and note the doubts expressed by Staughton LJ in *R v Secretary of State for the Home Department, Ex p Chahal* [1995] 1 WLR at 531. Moreover, whilst we recognise the terms of the Security Service Act 1989 are in no way decisive in the issue, we have derived assistance from the general approach contended for by Mr Nicholas Blake QC [special advocate before the Commission]. We have found the passage cited by him from Professor Grahl-Madsen's book [*The Status of Refugees in International Law* (1966)] to be particularly helpful. In the circumstances, and for the purposes of this case, we adopt the position that a person may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals. National security extends also to situations where United Kingdom citizens are targeted, wherever they may be. This is

the definition of national security which should be applied to the issues of fact raised by this appeal".

3. They then considered the allegations of fact and they said:

> "we have asked ourselves whether the Secretary of State has satisfied us to a high civil balance of probabilities that the deportation of this appellant, a lawful resident of the United Kingdom, is made out on public good grounds because he has engaged in conduct that endangers the national security of the United Kingdom and, unless deported, is likely to continue to do so. In answering this question we have to consider the material, open, closed, and restricted, the oral evidence of witnesses called by the respondent, and the evidence of the appellant produced before us. We are satisfied that this material and evidence enables us properly to reach a decision in this appeal (Rule 3 of the 1998 Rules).

4. The Commission declined to set out in detail their analysis of the "open" "restricted" and "closed" evidence on the basis that this would be capable of creating a serious injustice and they confined themselves to stating their conclusions, namely:

> "1. Recruitment. We are not satisfied that the appellant has been shown to have recruited British Muslims to undergo militant training as alleged.
> 2. We are not satisfied that the appellant has been shown to have engaged in fund-raising for the LT [*Lashkar Tayyaba*] as alleged.
> 3. We are not satisfied that the appellant has been shown to have knowingly sponsored individuals for militant training camps as alleged.
> 4. We are not satisfied that the evidence demonstrates the existence in the United Kingdom of returnees, originally recruited by the appellant, who during the course of that training overseas have been indoctrinated with extremist beliefs or given weapons training, and who as a result allow them to create a threat to the United Kingdom's national security in the future"

5. They added:

> "We have reached all these conclusions while recognising that it is not disputed that the appellant has provided sponsorship, information and advice to persons going to Pakistani for the forms of training which may have included militant or extremist training. Whether the appellant knew of the militant content of such training has not, in our opinion, been satisfactorily established to the required standard by the evidence. Nor have we overlooked the appellant's statement that he sympathised with the aims of LT in so far as that organisation confronted what he regarded as illegal violence in Kashmir. But, in our opinion, these sentiments do not justify the conclusion contended for by the respondent. It follows, from these conclusions of fact, that the respondent has not established that the appellant was, is, and is likely to be a threat to national security. In our view, that would be the case whether the wider or narrower definition of that term, as identified above, is taken as the test. Accordingly we consider that the respondent's decisions in question were not in accordance with the law or the Immigration Rules (paragraph 364 of HC 395) and thus we allow these appeals".

6. The Secretary of State appealed. The Court of Appeal [2000] 3 WLR 1240 considered that the Commission had taken too narrow a view of what could constitute

a threat to national security in so far as it required the conduct relied on by the Secretary of State to be targeted at this country or its citizens. The Court of Appeal also considered, at p 1254, that the test was not whether it had been shown "to a high degree of probability" that the individual was a danger to national security but that a global approach should be adopted "taking into account the executive's policy with regard to national security". Accordingly they allowed the appeal and remitted the matter to the Commission for redetermination applying the approach indicated in their judgment.

7. The Court of Appeal in its judgement has fully analysed in detail the provisions of the Immigration Act 1971, the 1997 Act and the 1998 Rules. I adopt what the court has said and can accordingly confine my references to the legislation which is directly in issue on this appeal to your Lordships' House.

8. The 1971 Act contemplates first a decision by the Secretary of State to make a deportation order under section 3(5) of that Act, in the present case in respect of a person who is not a British citizen "(b) if the Secretary of State deems his deportation to be conducive to the public good". 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. The decision of the Secretary of State to make a deportation order is subject to appeal by section 15(1)(a) of the 1971 Act save that by virtue of section 15 (3)

> "A person shall not be entitled to appeal against a decision to make a deportation order against him if the ground of the decision was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature".

9. Despite this prohibition there was set up an advisory procedure to promote a consideration of the Secretary of State's decision under that Act. This however was held by the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413 not to provide an effective remedy within section 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmnd 8969). Accordingly the Commission was set up by the 1997 Act and by subsection 2(1)(c) a person was given a right to appeal to the Commission against:

> "any matter in relation to which he would be entitled to appeal under subsection 1(a) of section 15 of [the 1971 Act] (appeal to an adjudicator or the Appeal Tribunal against a decision to make a deportation order), but for subsection (3) of that section (deportation conducive to public good)."

The exclusion of the right of appeal if the decision to deport was on the ground that deportation was conducive to the public good on the basis that it was in the interests of national security or of the relations between the United Kingdom and any other country or for any other reasons of a political nature was thus removed.

10. Section 4 of the 1997 Act provides that the Commission:

> "(a) shall allow the appeal if it considers -
>
> > (i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or

(ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, and

(b) in any other case, shall dismiss the appeal."

11. It seems to me that on this language and in accordance with the purpose of the legislation to ensure an "effective remedy", within the meaning of article 13 of the European Convention, that the Commission was empowered to review the Secretary of State's decision on the law and also to review his findings of fact. It was also given the power to review the question whether the discretion should have been exercised differently. Whether the question should have been exercised differently will normally depend on whether on the facts found the steps taken by the Secretary of State were disproportionate to the need to protect national security.

12. From the Commission's decision there is a further appeal to the Court of Appeal on "any question of law material to" the Commission's determination: section 7(1).

13. The two main points of law which arose before the Court of Appeal are now for consideration by your Lordships' House. Mr Kadri QC has forcefully argued that the Court of Appeal was wrong on both points.

14. As to the meaning of "national security" he contends that the interests of national security do not include matters which have no direct bearing on the United Kingdom, its people or its system of government. "National security" has the same scope as "defence of the realm". For that he relies on what was said by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410B-C, and on the use of the phrases in a number of international conventions. Moreover he says that since the Secretary of State based his decision on a recommendation of the Security Services it can only be on matters within their purview and that their function, by section 1(2) of the Security Service Act 1989, was:

> "the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means."

He relies moreover on statements by groups of experts in international law, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, as approved on 1 October 1995 in Johannesburg which stressed as:

> "Principle 2. Legitimate national security interests
>
> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
>
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."

15. It seems to me that the appellant is entitled to say that "the interests of national security" cannot be used to justify any reason the Secretary of State has for wishing to deport an individual from the United Kingdom. There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported. But I do not accept that this risk has to be the result of "a direct threat" to the United Kingdom as Mr Kadri has argued. Nor do I accept that the interests of national security are limited to action by an individual which can be said to be "targeted at" the United Kingdom, its system of government or its people as the Commission considered. The Commission agreed that this limitation is not to be taken literally since they accepted that such targeting:

> "includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals".

16. I accept as far as it goes a statement by Professor Grahl-Madsen in *The Status of Refugees in International Law* (1966):

> "A person may be said to offend against national security if he engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned or in activities which are directed against a foreign government which as a result threaten the former government with intervention of a serious nature".

That was adopted by the Commission but I for my part do not accept that these are the only examples of action which makes it in the interests of national security to deport a person. It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate. Whether there is such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made.

17. In his written case Mr Kadri appears to accept (contrary it seems to me to his argument in the Court of Appeal that they were mutually exclusive and to be read disjunctively) that the three matters referred to in section 15(3) of the 1971 Act, namely "national security", "the relations between the United Kingdom and any other country" or "for other reasons of a political nature" may overlap but only if action

which falls in one or more categories amounts to a direct threat. I do not consider that these three categories are to be kept wholly distinct even if they are expressed as alternatives. As the Commission itself accepted, reprisals by a foreign state due to action by the United Kingdom may lead to a threat to national security even though this is action such as to affect "relations between the United Kingdom and any other country" or to be "of a political nature". The Secretary of State does not have to pin his colours to one mast and be bound by his choice. At the end of the day the question is whether the deportation is conducive to the public good. I would accept the Secretary of State's submission that the reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security, and that such co-operation itself is capable of fostering such security "by, *inter alia*, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states". There is a very large element of policy in this which is, as I have said, primarily for the Secretary of State. This is an area where it seems to me particularly that the Secretary of State can claim that a preventative or precautionary action is justified. If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom.

18. National security and defence of the realm may cover the same ground though I tend to think that the latter is capable of a wider meaning. But if they are the same then I would accept that defence of the realm may justify action to prevent indirect and subsequent threats to the safety of the realm.

19. The United Kingdom is not obliged to harbour a terrorist who is currently taking action against some other state (or even in relation to a contested area of land claimed by another state) if that other state could realistically be seen by the Secretary of State as likely to take action against the United Kingdom and its citizens.

20. I therefore agree with the Court of Appeal that the interests of national security are not to be confined in the way which the Commission accepted.

21. Mr Kadri's second main point is that the Court of Appeal were in error when rejecting the Commission's ruling that the Secretary of State had to satisfy them, "to a high civil balance of probabilities", that the deportation of this appellant, a lawful resident of the United Kingdom, was made out on public good grounds because he had engaged in conduct that endangered the national security of the United Kingdom and, unless deported, was likely to continue to do so. The Court of Appeal [2000] 3 WLR 1240, 1254, para 44 said:

> "However, in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a danger to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of

probability that he has performed any individual act which would justify this conclusion."

22. Here the liberty of the person and the practice of his family to remain in this country is at stake and when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof. But that is not the whole exercise. The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgement or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a "high civil degree of probability". Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good.

23. Contrary to Mr Kadri's argument this approach is not confusing proof of facts with the exercise of discretion—specific acts must be proved, and an assessment made of the whole picture and then the discretion exercised as to whether there should be a decision to deport and a deportation order made.

24. If of course it is said that the decision to deport was not based on grounds of national security and there is an issue as to that matter then "the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 372, 402. That however is not the issue in the present case.

25. On the second point I am wholly in agreement with the decision of the Court of Appeal.

26. In conclusion even though the Commission has powers of review both of fact and of the exercise of the discretion, the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him. On an appeal the Court of Appeal and your Lordships' House no doubt will give due weight to the conclusions of the Commission, constituted as it is of distinguished and experienced members, and knowing as it did, and as usually the court will not know, of the contents of the "closed" evidence and hearing. If any of the reasoning of the Commission shows errors in its approach to the principles to be followed, then the courts can intervene. In the present case I consider that the Court of Appeal was right in its decision on both of the points which arose and in its decision to remit the matters to the Commission for redetermination in accordance with the

principles which the Court of Appeal and now your Lordships have laid down. I would accordingly dismiss the appeal.

LORD STEYN

My Lords,

27. I am in agreement with the reasons given by Lord Slynn of Hadley in his opinion and I would also dismiss the appeal. I can therefore deal with the matter quite shortly.

28. Section 15(3) of the Immigration Act 1971 contemplated deportation of a person in three situations, viz where:

> "his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature."

The Commission thought that section 15(3) should be interpreted disjunctively. In the Court of Appeal [2000] 3 WLR 1240 Lord Woolf MR explained, at p 1253, para 40 that while it is correct that these situations are alternatives "there is clearly room for there to be an overlap." I agree. Addressing directly the issue whether the conduct must be targeted against the security of this country, Lord Woolf observed, at p 1251, para 34:

> "Whatever may have been the position in the past, increasingly the security of one country is dependent upon the security of other countries. That is why this country has entered into numerous alliances. They acknowledge the extent to which this country's security is dependent upon the security of other countries. The establishment of NATO is but a reflection of this reality. An attack on an ally can undermine the security of this country."

Later in his judgment, at pp 1253-1254, para 40, Lord Woolf said that the Government "is perfectly entitled to treat any undermining of its policy to protect this country from international terrorism as being contrary to the security interests of this country". I respectfully agree. Even democracies are entitled to protect themselves, and the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies. This broader context is the backcloth of the Secretary of State's statutory power of deportation in the interests of national security.

29. That brings me to the next issue. Counsel for the appellant submitted that the civil standard of proof is applicable to the Secretary of State and to the Commission. This argument necessarily involves the proposition that even if the Secretary of State is fully entitled to be satisfied on the materials before him that the person concerned may be a real threat to national security, the Secretary of State may not deport him. That cannot be right. The task of the Secretary of State is to evaluate risks in respect of the interests of national security. Lord Woolf expressed the point with precision as follows, at p 1254, para 44:

> "in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a danger to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask

whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion. Here it is important to remember that the individual is still subject to immigration control. He is not in the same position as a British citizen. He has not been charged with a specific criminal offence. It is the danger which he constitutes to national security which is to be balanced against his own personal interests."

The dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security, irresistibly supports this analysis. While I came to this conclusion by the end of the hearing of the appeal, the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.

30. The interpretation of section 4 of the Special Immigration Appeals Commission Act 1997 was not explored in any depth on the appeal to the House. Section 4 so far as relevant reads:

"(1) The Special Immigration Appeals Commission on an appeal to it under this Act - (a) shall allow the appeal if it considers - (i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, and (b) in any other case, shall dismiss the appeal. (2) Where an appeal is allowed, the Commission shall give such directions for giving effect to the determination as it thinks requisite, and may also make recommendations with respect to any other action which it considers should be taken in the case under the Immigration Act 1971; and it shall be the duty of the Secretary of State and of any officer to whom directions are given under this subsection to comply with them."

In the light of the observations of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413 Parliament has provided for a high-powered Commission, consisting of a member who holds or has held high judicial office, an immigration judge, and a third member, who will apparently be someone with experience of national security matters: see section 1 of and Schedule 1 to the 1997 Act and per Lord Woolf MR [2000] 3 WLR 1240, 1245, 1246, paras 11 and 17. Lord Woolf observed, at p 1254, para 42, that the Commission were correct to regard it as their responsibility to determine questions of fact and law. He added:

"The fact that Parliament has given SIAC responsibility of reviewing the manner in which the Secretary of State has exercised his discretion inevitably leads to this conclusion. Without statutory intervention, this is not a role which a court readily adopts. But SIAC's membership meant that it was more appropriate for SIAC to perform this role."

I respectfully agree. Not only the make-up of the Commission but also the procedures of the Commission serve to protect the interests of national security: Special Immigration Appeals Act Commission (Procedure) Rules 1998; see also the discussion of the new procedure in INLP, Vol. 12, No. 2, 1998 67-69.

31. Moreover the expression "in accordance with the law" in section 4 of the 1997 Act comprehends also since 2 October 2000 Convention rights under the Human Rights Act 1998. Thus article 8 (right of respect for family life), article 10 (freedom of expression) and article 11 (freedom of assembly and association) all permit such derogations as are prescribed by law and are necessary in a democratic society in the interests of national security. While a national court must accord appropriate deference to the executive, it may have to address the questions: Does the interference serve a legitimate objective? Is it necessary in a democratic society? In *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249 the European Court of Human Rights had to consider public interest immunity certificates involving national security considerations issued by the Secretary of State in discrimination proceedings. The court observed, at p 290, para 77:

> "the conclusive nature of the section 42 [Fair Employment (Northern Ireland) Act 1976] certificates had the effect of preventing a judicial determination on the merits of the applicants' complaints that they were victims of unlawful discrimination. The court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under article 6(1) of the Convention to submit a dispute to a court or tribunal in order to have a determination on questions of both fact and law cannot be displaced by the *ipse dixit* of the executive."

It is well established in the case law that issues of national security do not fall beyond the competence of the courts: see, for example, *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] QB 129; *R v Secretary of State for the Home Department, Ex p McQuillan* [1995] 4 All ER 400; *R v Ministry of Defence, Ex p Smith* [1996] QB 517 and *Smith and Grady v United Kingdom* (2000) 29 EHRR 493; compare also the extensive review of the jurisprudence on expulsion and deportation in P Van Dijk and G J H Van Hoof, *The Theory and Practice of the European Convention on Human Rights* 1998, 515-521. It is, however, self-evidently right that national courts must give great weight to the views of the executive on matters of national security. But not all the observations in *Chandler v Director of Public Prosecutions* [1964] AC 763 can be regarded as authoritative in respect of the new statutory system.

32. For the reasons given by Lord Woolf, the reasons given by Lord Slynn of Hadley, and my brief reasons, I would dismiss the appeal.

LORD HOFFMANN

My Lords,

The decision to deport

33. Mr Shafiq Ur Rehman is a Pakistani national. He came to this country in 1993 and was given limited leave to enter and to work as a minister of religion. In 1997 he applied for indefinite leave to remain. On 9 December 1998 the Home Secretary refused the application. His letter said that he was satisfied, on the basis of information from confidential sources, that Mr Rehman was involved with an Islamic

terrorist organisation called *Markaz Dawa Al Irshad* ("MDI") and that his continued presence in this country was a danger to national security. The Home Secretary also gave notice of his intention to make a deportation order under section 3(5)(b) of the Immigration Act 1971 on the ground that for the same reasons his deportation would be conducive to the public good.

The right of appeal

34. Until 1998 Mr Rehman would have had no right of appeal against the Home Secretary's decision to deport him. Ordinarily there is a right of appeal to an immigration adjudicator against a decision of the Secretary of State to make a deportation order under section 3(5): see section 15(1). The adjudicator hearing the appeal is required by section 19(1) to allow the appeal if he considers that the decision was "not in accordance with the law or with any immigration rules applicable to the case" or, where the decision involved the exercise of a discretion by the Secretary of State, "that the discretion should have been exercised differently". Otherwise, the appeal must be dismissed.

35. But this general right of appeal is excluded by section 15(3) if the ground of the decision to make the deportation order

> "was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature."

Parliament took the view that the need to preserve the confidentiality of the material taken into account by the Home Secretary in making a deportation order on one or other of these grounds made it impossible to allow an effective right of appeal. All that could be permitted was the right to make representations to an extra-statutory panel appointed by the Home Secretary to advise him.

36. In *Chahal v United Kingdom* (1996) 23 EHRR 413 the European Court of Human Rights decided that this procedure was inadequate to safeguard two of the deportee's Convention rights. First, he was entitled under article 13 to an effective remedy from an independent tribunal to protect his right under article 3 not to be deported to a country where there was a serious risk that he would suffer torture or inhuman or degrading treatment. Secondly, if he was detained pending deportation, he was entitled under article 5(4) to the determination of an independent tribunal as to whether his detention was lawful. The European court rejected the United Kingdom Government's argument that considerations of national security or international relations made it impossible to accord such a right of appeal. The court, at p 469, para 131, commended the procedure established by the Canadian Immigration Act 1976, under which the confidentiality of secret sources could be maintained by disclosing it only to a special security-cleared advocate appointed to represent the deportee who could cross-examine witnesses in the absence of the appellant (p 472, para 144).

37. The European Court also considered the argument that decisions on national security were essentially a matter for the executive and that it would contrary to principle to allow an independent tribunal to substitute its own decision on such matters for that of the responsible minister. It acknowledged, at p 468, para 127, that article 5(4) :

> "does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to article 5(1)."

The term "question of expediency" is regularly used by the European Court to describe what English lawyers would call a question of policy: see the discussion of the European cases in the recent case of *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

38. This was the background to the passing of the Special Immigration Appeals Commission Act 1997, under which Mr Rehman was able to appeal. The Act was intended to enable the United Kingdom to comply with the European Convention as interpreted by the court in Chahal's case. It established a Special Immigration Appeals Commission ("the Commission") with jurisdiction to hear various categories of appeals, including (under section 2(1)(c)) those excluded from the jurisdiction of the adjudicator by section 15(3) of the 1971 Act. Section 4(1) gave the Commission power to deal with such appeals in the same terms as the power conferred upon the adjudicator by section 19(1) of the 1971 Act. The 1997 Act enabled the Lord Chancellor to make procedural rules for the Commission and pursuant to this power he made the Special Immigration Appeals Commission (Procedure) Rules 1998. This follows the Canadian model in allowing part of the proceedings to be conducted at a private hearing from which the appellant may be excluded but represented by a special advocate.

The Home Secretary's reasons

39. Pursuant to rule 10(1)(a), the Home Secretary provided the Commission with a summary of the facts relating to his decision and the reasons for the decision. It said that Mr Rehman was the United Kingdom point of contact for MDI, an "extremist organisation" whose mujahidin fighters were known as Lashkar Tayyaba ("LT"). Mr Rehman was said to have been involved on MDI's behalf in the recruitment of British Muslims to undergo military training and in fund raising for LT. He was a personal contact of Mohammed Saeed, the worldwide leader of MDI and LT. The Security Service assessed that his activities directly supported a terrorist organisation.

40. The grounds upon which these activities were seen as a threat to national security was that, while Mr Rehman and his followers were unlikely to carry out acts of violence in the United Kingdom, his activities directly supported terrorism in the Indian subcontinent. Mr Peter Wrench, head of the Home Office Terrorism and Protection Unit, told the Commission that the defence of Uunited Kingdom national security against terrorist groups depended upon international reciprocity and co-operation. It was therefore in the security interests of the United Kingdom to co-operate with other nations, including India, to repress terrorism anywhere in the world.

41. An additional reason was that Mr Rehman had been responsible for an increase in the number of Muslims in the United Kingdom who had undergone some form of militant training and that the presence of returned trainees in the United Kingdom might encourage the radicalisation of the British Muslim community.

The Commission's decision

42. The Commission said that the appeal raised two issues. The first was whether Mr Rehman was engaged in the activities alleged by the Home Secretary. The second was whether his activities, so far as the Commission found them proved, were against the interests of the security of the United Kingdom. The view taken by the Commission was that the Home Secretary's allegations had to be established "to a high civil balance of probabilities". The Commission went through each of the principal allegations: (1) involvement in recruitment of British Muslims to go to Pakistan for terrorist training; (2) fund raising for LT; (3) sponsorship of individuals for militant training camps; and (4) creation of a group of returnees who had been given weapons training or been indoctrinated with extremist beliefs so as to create a threat to the security of the United Kingdom. In each case it said that it was not satisfied to the necessary standard of proof that the allegation had been made out.

43. On the question of whether Mr Rehman's activities, so far as proved, constituted a threat to national security, the Commission rejected the argument that the question of what could constitute a threat to national security was a matter for the Home Secretary to decide. It said that the definition of national security was a question of law which it had jurisdiction to decide. It examined various authorities and came to the conclusion that a person "may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people". It included within this definition activities against a foreign government "if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals".

44. Finally, the Commission said that the various grounds of decision which section 15(3) of the 1971 Act excluded from the jurisdiction of the adjudicator (and which consequently fell within the jurisdiction of the Commission) were to be read disjunctively:

> "Once the Secretary of State identified 'the public good' as being 'the interests of national security' as the basis of his decision, he cannot broaden his grounds to avoid difficulties which he may encounter in proving his case."

The Court of Appeal's decision

45. The Secretary of State appealed to the Court of Appeal [2000] 2 WLR 1240 under section 7 of the 1997 Act on the ground that the Commission had erred in law. The court (Lord Woolf MR, Laws LJ and Harrison J) allowed the appeal and remitted the appeal to the Commission for reconsideration in accordance with its judgment. Against that decision Mr Rehman appeals to your Lordships' House.

46. The Court of Appeal identified three errors of law. First, it considered that the Commission had given too narrow an interpretation to the concept of national security. It did not think that a threat to national security had to be "targeted" against this country and it accepted Mr Wrench's evidence of the need for international co-operation against terrorism as a legitimate point of view. It was sufficient that there

was a real possibility of adverse repercussions on the security of the United Kingdom, its system of government or its people.

47. Secondly, the Commission should not have treated national security, international relations and other political reasons as separate compartments. Conduct which adversely affected international relations, for example, could thereby have adverse repercussions on security.

48. Thirdly, it was wrong to treat the Home Secretary's reasons as counts in an indictment and to ask whether each had been established to an appropriate standard of proof. The question was not simply what the appellant had done but whether the Home Secretary was entitled to consider, on the basis of the case against him as a whole, that his presence in the United Kingdom was a danger to national security. When one is concerned simply with a fact-finding exercise concerning past conduct such as might be undertaken by a jury, the notion of a standard of proof is appropriate. But the Home Secretary and the Commission do not only have to form a view about what the appellant has been doing. The final decision is evaluative, looking at the evidence as a whole, and predictive, looking to future danger. As Lord Woolf MR said, at p 1254, para 44:

> "[T]he cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion."

49. My Lords, I will say at once that I think that on each of these points the Court of Appeal were right. In my opinion the fundamental flaw in the reasoning of the Commission was that although they correctly said that section 4(1) gave them full jurisdiction to decide questions of fact and law, they did not make sufficient allowance for certain inherent limitations, first, in the powers of the judicial branch of government and secondly, within the judicial function, in the appellate process. First, the limitations on the judicial power. These arise from the principle of the separation of powers. The Commission is a court, a member of the judicial branch of government. It was created as such to comply with article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmnd 8969). However broad the jurisdiction of a court or tribunal, whether at first instance or on appeal, it is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power. Secondly, the limitations on the appellate process. They arise from the need, in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker.

The separation of powers

50. I shall deal first with the separation of powers. Section 15(3) of the 1971 Act specifies "the interests of national security" as a ground on which the Home Secretary of State may consider a deportation conducive to the public good. What is meant by "national security" is a question of construction and therefore a question of law within the jurisdiction of the Commission, subject to appeal. But there is no difficulty about what "national security" means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgment and policy. Under

the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.

51. In *Chandler v Director of Public Prosecutions* [1964] AC 763 the appellants, campaigners for nuclear disarmament, had been convicted of conspiring to commit an offence under section 1 of the Official Secrets Act 1911, namely, for a purpose prejudicial to the safety or interests of the state to have entered a R.A.F. station at Wethersfield.
They claimed that their purpose was to prevent nuclear bombers from taking off and wanted the judge or jury to decide that stopping the bombers was not at all prejudicial to the safety or interests of the state. They said that, on the contrary, the state would be much safer without them. But the House ruled that whether having nuclear bombers was conducive to the safety of the state was a matter for the decision of the executive. A court could not question it.

52. Mr Kadri QC, who appeared for Mr Rehman, emphasised that section 4(1) of the 1997 Act gave the Commission the same full appellate jurisdiction as adjudicators had under the 1971 Act. But the question is not the extent of the Commission's appellate jurisdiction. It is whether the particular issue can properly be decided by a judicial tribunal at all. The criminal and appellate courts in *Chandler v Director of Public Prosecutions* had full jurisdiction over questions of fact and law in the same way as the Commission. The refusal of the House to re-examine the executive's decision that having nuclear bombers was conducive to the safety of the state was based purely upon the separation of powers. Viscount Radcliffe said, at p 798:

> "[W]e are dealing with a matter of the defence of the realm and with an Act designed to protect state secrets and the instruments of the state's defence. If the methods of arming the defence forces and the disposition of those forces are at the decision of Her Majesty's ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different."

53. Accordingly it seems to me that the Commission is not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security. Mr Kadri rightly said that one man's terrorist was another man's freedom fighter. The decision as to whether support for a particular movement in a foreign country would be prejudicial to our national security may involve delicate questions of foreign policy. And, as I shall later explain, I agree with the Court of Appeal that it is artificial to try to segregate national security from foreign policy. They are all within the competence of responsible ministers and not the courts. The Commission was intended to act judicially and not, as the European Court recognised in *Chahal v United Kingdom* 23 EHRR 413, to substitute its own opinion for that of the decision maker on "questions of pure expediency".

54. This does not mean that the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary, so as to "defeat the purpose for which the Commission was set up": see the Commission's decision. It is important neither to blur nor to exaggerate the area of responsibility entrusted to the

executive. The precise boundaries were analysed by Lord Scarman, by reference to Chandler's case in his speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 406. His analysis shows that the Commission serves at least three important functions which were shown to be necessary by the decision in Chahal. First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It is therefore open to the Commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir. In this respect the Commission's ability to differ from the Home Secretary's evaluation may be limited, as I shall explain, by considerations inherent in an appellate process but not by the principle of the separation of powers. The effect of the latter principle is only, subject to the next point, to prevent the Commission from saying that although the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it does not accept that this was contrary to the interests of national security. Secondly, the Commission may reject the Home Secretary's opinion on the ground that it was "one which no reasonable minister advising the Crown could in the circumstances reasonably have held". Thirdly, an appeal to the Commission may turn upon issues which at no point lie within the exclusive province of the executive. A good example is the question, which arose in Chahal itself, as to whether deporting someone would infringe his rights under article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.

The standard of proof

55. I turn next to the Commission's views on the standard of proof. By way of preliminary I feel bound to say that I think that a "high civil balance of probabilities" is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Sexual Abuse: Standard of Proof) (Minors)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

56. In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to

national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.

Limitations of the appellate process

57. This brings me to the limitations inherent in the appellate process. First, the Commission is not the primary decision-maker. Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission, despite its specialist membership, cannot match. Secondly, as I have just been saying, the question at issue in this case does not involve a yes or no answer as to whether it is more likely than not that someone has done something but an evaluation of risk. In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained. Such restraint may not be necessary in relation to every issue which the Commission has to decide. As I have mentioned, the approach to whether the rights of an appellant under article 3 are likely to be infringed may be very different. But I think it is required in relation to the question of whether a deportation is in the interests of national security.

58. I emphasise that the need for restraint is not based upon any limit to the Commission's appellate jurisdiction. The amplitude of that jurisdiction is emphasised by the express power to reverse the exercise of a discretion. The need for restraint flows from a common-sense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and the Commission.

Section 15(3) of the 1971 Act

59. Finally I come to the construction of section 15(3) of the 1971 Act, which excludes certain cases from the jurisdiction of the adjudicator and by the same definition brings them within the jurisdiction of the Commission under section 2(1)(c) of the 1997 Act. For the purpose of deciding whether an appeal is excluded by section 15(3), it is necessary only to decide that the Home Secretary's reasons fall into one or more of the specified categories. If his reasons could be said to relate to national security or foreign relations or possibly both, it is unnecessary to allocate them to one class or the other. The categories, with their sweeping-up words "or for other reasons of a political nature" do not create separate classes of reasons but a single composite class. In my opinion the other side of the coin, conferring jurisdiction on the Commission, operates in the same way. The Home Secretary does not have to commit himself to whether his reasons can be described as relating to national security, foreign relations or some other political category. The Commission has jurisdiction if they come under any head of the composite class.

60. In my view, therefore, the Commission was wrong to say that section 15(3) should be "read disjunctively". All that is necessary is that the appellant should be given fair notice of the case which he has to meet, in accordance with rule 10(1) of the Special Immigration Appeals Commission (Procedure) Rules 1998. It is unnecessary to engage in what may be a barren dispute over whether those reasons can be said to concern national security or foreign relations or be otherwise political, provided that they fall within the composite class of reasons which gives the Commission jurisdiction. What matters is not how the reasons are categorised but the reasons themselves and the facts relied upon to support them.

61. I would therefore dismiss the appeal. The case should be remitted to the Commission to hear and determine in accordance with the principles stated by the House.

62. Postscript. 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 on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. 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.

LORD CLYDE

My Lords,

63. I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Hoffmann. For the reasons he has given I too would dismiss this appeal.

LORD HUTTON

My Lords,

64. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Slynn of Hadley, Lord Steyn and Lord Hoffmann. I agree with them that the appeal should be dismissed on two grounds. The first is that the Commission fell into error in holding that for a person to constitute a threat against national security he must engage in, promote, or encourage violent activity

> "which is targeted at the United Kingdom, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals."

In my opinion the Court of Appeal was right to hold that the promotion of terrorism against any state is capable of being a threat to the security of the United Kingdom, and that there can be an overlap between the three situations referred to in section 15(3) of the Immigration Act 1971.

65. Secondly, I agree with my noble and learned friends that the Court of Appeal was right to hold that the Secretary of State was concerned to assess the extent of future risk and that he was entitled to make a decision to deport on the ground that an individual is a danger to national security, viewing the case against him as a whole, although it cannot be proved to a high degree of probability that he has carried out any individual act which would justify the conclusion that he is a danger.

66. I would dismiss the appeal.