HOUSE OF LORDS SESSION 2004–05
[2004] UKHL 56
on appeal from: [2002] EWCA Civ 1502

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

A (FC) and others (FC) (Appellants) *v.* Secretary of State for the Home Department (Respondent)
X (FC) and another (FC) (Appellants) *v.* Secretary of State for the Home Department (Respondent)

ON
THURSDAY 16 DECEMBER 2004

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell

HOUSE OF LORDS

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LORD BINGHAM OF CORNHILL

My Lords,

1. The nine appellants before the House challenge a decision of the Court of Appeal (Lord Woolf CJ, Brooke and Chadwick LJJ) made on 25 October 2002 ([2002] EWCA Civ 1502, [2004] QB 335). The Court of Appeal allowed the Home Secretary's appeal against the decision of the Special Immigration Appeals Commission (Collins J, Kennedy LJ and Mr Ockelton) dated 30 July 2002 and dismissed the appellants' cross-appeals against that decision: [2002] HRLR 1274.

2. Eight of the appellants were certified by the Home Secretary under section 21 of the Anti-terrorism, Crime and Security Act 2001 on 17 or 18 December 2001 and were detained under section 23 of that Act on 19 December 2001. The ninth was certified on 5 February 2002 and detained on 8 February 2002. Two of the eight December detainees exercised their right to leave the United Kingdom: one went to Morocco on 22 December 2001, the other (a French as well as an Algerian citizen) went to France on 13 March 2002. One of the December detainees was transferred to Broadmoor Hospital on grounds of mental illness in July 2002. Another was released on bail, on strict conditions, in April 2004. The Home Secretary revoked his certification of another in September 2004, and he has been released without conditions.

3. The appellants share certain common characteristics which are central to their appeals. All are foreign (non-UK) nationals. None has been the subject of any criminal charge. In none of their cases is a criminal trial in prospect. All challenge the lawfulness of their detention. More specifically, they all contend that such detention was inconsistent with obligations binding on the United Kingdom under the European Convention on Human Rights, given domestic effect by the Human Rights Act 1998; that the United Kingdom was not legally entitled to derogate from those obligations; that, if it was, its derogation was nonetheless inconsistent with the European Convention and so ineffectual to justify the detention; and that the statutory provisions under which they have been detained are incompatible with the Convention. The duty of the House, and the only duty of the House in its judicial capacity, is to decide whether the appellants' legal challenge is soundly based.

4. In argument before the House, Liberty made written and oral submissions in support of the appellants, as it did in the courts below. Amnesty International made written submissions, also in support of the appellants. Special advocates were instructed by the Treasury Solicitor, but were not in the event called upon.

The background

5. In July 2000 Parliament enacted the Terrorism Act 2000. This was a substantial measure, with 131 sections and 16 Schedules, intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism. Relevantly for present purposes, that Act defined "terrorism" in section 1, which reads:

> "1 Terrorism: interpretation
>
> (1) In this Act 'terrorism' means the use or threat of action where -
>
> (a) the action falls within subsection (2),
>
> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it –
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
>
> (4) In this section -
>
> (a) 'action' includes action outside the United Kingdom,
>
> (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

6. On 11 September 2001 terrorists launched concerted attacks in New York, Washington DC and Pennsylvania. The main facts surrounding those attacks are too well known to call for recapitulation here. It is enough to record that they were atrocities on an unprecedented scale, causing many deaths and destroying property of immense value. They were intended to disable the governmental and commercial power of the United States. The attacks were the product of detailed planning. They were committed by terrorists fired by ideological hatred of the United States and willing to sacrifice their own lives in order to injure the leading nation of the western world. The mounting of such attacks against such targets in such a country inevitably caused acute concerns about their own security in other western countries, particularly those which, like the United Kingdom, were particularly prominent in their support for the United States and its military response to Al-Qaeda, the organisation quickly identified as responsible for the attacks. Before and after 11 September Usama bin Laden, the moving spirit of Al-Qaeda, made threats specifically directed against the United Kingdom and its people.

7. Her Majesty's Government reacted to the events of 11 September in two ways directly relevant to these appeals. First, it introduced (and Parliament, subject to amendment, very swiftly enacted) what became Part 4 of the Anti-terrorism, Crime and Security Act 2001. Secondly, it made the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644) ("the Derogation Order"). Before summarising the effect of these measures it is important to understand their underlying legal rationale.

8. First, it was provided by para 2(2) of Schedule 3 to the Immigration Act 1971 that the Secretary of State might detain a non-British national pending the making of a deportation order against him. Para 2(3) of the same schedule authorised the Secretary of State to detain a person against whom a deportation order had been made "pending his removal or departure from the United Kingdom". In *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 it was held, in a decision which has never been questioned (and which was followed by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97), that such detention was permissible only for such time as was reasonably necessary for the process of deportation to be carried out. Thus there was no warrant for the long-term or indefinite detention of a non-UK national whom the Home Secretary wished to remove. This ruling was wholly consistent with the obligations undertaken by the United Kingdom in the European Convention on

Human Rights, the core articles of which were given domestic effect by the Human Rights Act 1998. Among these articles is article 5(1) which guarantees the fundamental human right of personal freedom: "Everyone has the right to liberty and security of person". This must be read in the context of article 1, by which contracting states undertake to secure the Convention rights and freedoms to "everyone within their jurisdiction". But the right of personal freedom, fundamental though it is, cannot be absolute and article 5(1) of the Convention goes on to prescribe certain exceptions. One exception is crucial to these appeals:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (f) the lawful arrest or detention of ….. a person against whom action is being taken with a view to deportation ….."

Thus there is, again, no warrant for the long-term or indefinite detention of a non-UK national whom the Home Secretary wishes to remove. Such a person may be detained only during the process of deportation. Otherwise, the Convention is breached and the Convention rights of the detainee are violated.

9. Secondly, reference must be made to the important decision of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413. Mr Chahal was an Indian citizen who had been granted indefinite leave to remain in this country but whose activities as a Sikh separatist brought him to the notice of the authorities both in India and here. The Home Secretary of the day decided that he should be deported from this country because his continued presence here was not conducive to the public good for reasons of a political nature, namely the international fight against terrorism. He resisted deportation on the ground (among others) that, if returned to India, he faced a real risk of death, or of torture in custody contrary to article 3 of the European Convention which provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Before the European Court the United Kingdom contended that the effect of article 3 should be qualified in a case where a state sought to deport a non-national on grounds of national security. This was an argument which the Court, affirming a unanimous decision of the Commission, rejected. It said, in paras 79-80 of its judgment:

> "79. Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading

> treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.
>
> 80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees."

The Court went on to consider whether Mr Chahal's detention, which had lasted for a number of years, had exceeded the period permissible under article 5(1)(f). On this question the Court, differing from the unanimous decision of the Commission, held that it had not. But it reasserted (para 113) that "any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress". In a case like Mr Chahal's, where deportation proceedings are precluded by article 3, article 5(1)(f) would not sanction detention because the non-national would not be "a person against whom action is being taken with a view to deportation". A person who commits a serious crime under the criminal law of this country may of course, whether a national or a non-national, be charged, tried and, if convicted, imprisoned. But a non-national who faces the prospect of torture or inhuman treatment if returned to his own country, and who cannot be deported to any third country and is not charged with any crime, may not under article 5(1)(f) of the Convention and Schedule 3 to the Immigration Act 1971 be detained here even if judged to be a threat to national security.

10. The European Convention gives member states a limited right to derogate from some articles of the Convention (including article 5, although not article 3). The governing provision is article 15, which so far as relevant provides:

> "*Derogation in time of emergency*
>
> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take

> measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

A member state availing itself of the right of derogation must inform the Secretary General of the Council of Europe of the measures it has taken and the reasons for them. It must also tell the Secretary General when the measures have ceased to operate and the provisions of the Convention are again being fully executed. Article 15 of the Convention is not one of the articles expressly incorporated by the 1998 Act, but section 14 of that Act makes provision for prospective derogations by the United Kingdom to be designated for the purposes of the Act in an order made by the Secretary of State. It was in exercise of his power under that section that the Home Secretary, on 11 November 2001, made the Derogation Order, which came into force two days later, although relating to what was at that stage a proposed derogation.

The Derogation Order

11. The derogation related to article 5(1), in reality article 5(1)(f), of the Convention. The proposed notification by the United Kingdom was set out in a schedule to the Order. The first section of this, entitled "Public emergency in the United Kingdom", referred to the attacks of 11 September and to United Nations Security Council resolutions recognising those attacks as a threat to international peace and security and requiring all states to take measures to prevent the commission of terrorist attacks, "including by denying safe haven to those who finance, plan, support or commit terrorist attacks". It was stated in the Schedule:

> "There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom."

The next section summarised the effect of what was to become the 2001 Act. A brief account was then given of the power to detain under the Immigration Act 1971 and reference was made to the decision in *Hardial Singh*. In a section entitled "Article 5(1)(f) of the Convention" the effect of the Court's decision in *Chahal* was summarised. In the next section it was recognised that

the extended power in the new legislation to detain a person against whom no action was being taken with a view to deportation might be inconsistent with article 5(1)(f). Hence the need for derogation. Formal notice of derogation was given to the Secretary General on 18 December 2001. Corresponding steps were taken to derogate from article 9 of the International Covenant on Civil and Political Rights 1966, which is similar in effect to article 5, although not (like article 5) incorporated into domestic law.

The 2001 Act

12. The 2001 Act is a long and comprehensive statute. Only Part 4 ("Immigration and Asylum") has featured in argument in these appeals, because only Part 4 contains the power to detain indefinitely on reasonable suspicion without charge or trial of which the appellants complain, and only Part 4 is the subject of the United Kingdom derogation. Section 21 provides for certification of a person by the Secretary of State:

> "21 Suspected international terrorist: certification
>
> (1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably -
>
> (a) believes that the person's presence in the United Kingdom is a risk to national security, and
>
> (b) suspects that the person is a terrorist.
>
> (2) In subsection (1)(b) 'terrorist' means a person who -
>
> (a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,
>
> (b) is a member of or belongs to an international terrorist group, or
>
> (c) has links with an international terrorist group.
>
> (3) A group is an international terrorist group for the purposes of subjection (2)(b) and (c) if –
>
> (a) it is subject to the control or influence of persons outside the United Kingdom, and
>
> (b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.
>
> (4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.
>
> (5) In this Part -
>
> 'terrorism' has the meaning given by section 1 of the Terrorism Act 2000 [see para 5 above], and

'suspected international terrorist' means a person certified under subsection (1).

13. Section 22(1) of the Act provides:

"22 Deportation, removal &c

(1) An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of –

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration."

The actions specified in subsection (2) include the making of a deportation order. It is clear that subsection (1)(a) is directed to articles 3 and 5(1)(f) of the Convention and the decision in *Chahal*. Subsection (1)(b) is directed primarily to the case where a non-national cannot for Convention reasons be returned to his home country and there is no other country to which he may be removed.

14. Section 23(1) is the provision most directly challenged in these appeals. It provides:

"23 Detention

(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by -

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration."

For present purposes the relevant provision specified in subsection (2) is para 2 of Schedule 3 to the Immigration Act 1971, the effect of which I have outlined in para 8 above.

15. The Act makes provision in section 24 for the grant of bail by the Special Immigration Appeals Commission ("SIAC"), in section 25 for appeal to SIAC against certification by a certified suspected international terrorist, in section 26 for periodic reviews of certification by SIAC, in section 28 for periodic reviews of the operation of sections 21 to 23, in section 29 for the expiry (subject to periodic renewal) of sections 21 to 23 and for the final expiry of those sections, unless renewed, on 10 November 2006. By section

21(8), legal challenges to certification are reserved to SIAC. Section 30 gives SIAC exclusive jurisdiction in derogation matters, which are defined to mean:

> "(1)(a) a derogation by the United Kingdom from Article 5(1) of the Convention on Human Rights which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or
>
> (b) the designation under section 14(1) of the Human Rights Act 1998 (c 42) of a derogation within paragraph (a) above."

The appellants' challenge in these proceedings was brought under this section. Section 122, in Part 14 of the Act, provided for appointment by the Secretary of State of a committee of not fewer than seven Privy Counsellors to review the whole of the Act within two years. Part 4 of the Act came into force on 14 December 2001, the date on which the Act received the royal assent.

Public emergency

16. The appellants repeated before the House a contention rejected by both SIAC and the Court of Appeal, that there neither was nor is a "public emergency threatening the life of the nation" within the meaning of article 15(1). Thus, they contended, the threshold test for reliance on article 15 has not been satisfied.

17. The European Court considered the meaning of this provision in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, a case concerned with very low-level IRA terrorist activity in Ireland and Northern Ireland between 1954 and 1957. The Irish Government derogated from article 5 in July 1957 in order to permit detention without charge or trial and the applicant was detained between July and December 1957. He could have obtained his release by undertaking to observe the law and refrain from activities contrary to the Offences against the State (Amendment) Act 1940, but instead challenged the lawfulness of the Irish derogation. He failed. In para 22 of its judgment the Court held that it was for it to determine whether the conditions laid down in article 15 for the exercise of the exceptional right of derogation had been made out. In paras 28-29 it ruled:

> "28. In the general context of Article 15 of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed. Having thus established the natural and customary meaning of this conception, the Court must determine whether the facts and circumstances which led the

> Irish Government to make their Proclamation of 5 July 1957 come within this conception. The Court, after an examination, finds this to be the case; the existence at the time of a 'public emergency threatening the life of the nation' was reasonably deduced by the Irish Government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.
>
> 29. Despite the gravity of the situation, the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally, but the homicidal ambush on the night of 3 to 4 July 1957 in the territory of Northern Ireland near the border had brought to light, just before 12 July – a date, which, for historical reasons, is particularly critical for the preservation of public peace and order – the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland."

18. In the *Greek Case* (1969) 12 YB 1 the Government of Greece failed to persuade the Commission that there had been a public emergency threatening the life of the nation such as would justify derogation. In para 153 of its opinion the Commission described the features of such an emergency:

> "153. Such a public emergency may then be seen to have, in particular, the following characteristics:
>
> (1) It must be actual or imminent.
>
> (2) Its effects must involve the whole nation.
>
> (3) The continuance of the organised life of the community must be threatened.
>
> (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate."

In *Ireland v United Kingdom* (1978) 2 EHRR 25 the parties were agreed, as were the Commission and the Court, that the article 15 test was satisfied. This was unsurprising, since the IRA had for a number of years represented (para 212) "a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants". The article 15 test was accordingly not discussed, but

the Court made valuable observations about its role where the application of the article is challenged:

> "(a) *The role of the Court*
>
> 207. The limits on the Court's powers of review are particularly apparent where Article 15 is concerned.
>
> It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.
>
> Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Art. 19), is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision."

The Court repeated this account of its role in *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, adding (para 43) that

> "in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."

The Court again accepted that there had been a qualifying emergency when the applicants, following a derogation in December 1988, were detained for periods of six days and four days respectively in January 1989. In *Aksoy v Turkey* (1996) 23 EHRR 553 the Court had little difficulty in accepting, and the applicant did not contest, that a qualifying public emergency existed. This was, again, an unsurprising conclusion in the context of Kurdish separatist terrorism which had claimed almost 8000 lives. The applicant in *Marshall v United Kingdom* (10 July 2001, Appn No 41571/98) relied on the improved security situation in Northern Ireland to challenge the continuing validity of the United Kingdom's 1988 derogation. Referring to its previous case law, the Court rejected the application as inadmissible, while acknowledging (pp 11-12) that it must

> "address with special vigilance the fact that almost nine years separate the prolonged administrative detention of the applicants Brannigan and McBride from that of the applicant in the case before it."

19. Article 4(1) of the ICCPR is expressed in terms very similar to those of article 15(1), and has led to the promulgation of "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) 7 HRQ 3. In paras 39-40, under the heading "Public Emergency which Threatens the Life of the Nation", it is said:

> "39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:
>
> (a) affects the whole of the population and either the whole or part of the territory of the State, and
>
> (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.
>
> 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4."

20. The appellants did not seek to play down the catastrophic nature of what had taken place on 11 September 2001 nor the threat posed to western democracies by international terrorism. But they argued that there had been no public emergency threatening the life of the British nation, for three main reasons: if the emergency was not (as in all the decided cases) actual, it must be shown to be imminent, which could not be shown here; the emergency must be of a temporary nature, which again could not be shown here; and the practice of other states, none of which had derogated from the European Convention, strongly suggested that there was no public emergency calling for derogation. All these points call for some explanation.

21. The requirement of imminence is not expressed in article 15 of the European Convention or article 4 of the ICCPR but it has, as already noted, been treated by the European Court as a necessary condition of a valid derogation. It is a view shared by the distinguished academic authors of the Siracusa Principles, who in 1985 formulated the rule (applying to the ICCPR):

> "54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger."

In submitting that the test of imminence was not met, the appellants pointed to ministerial statements in October 2001 and March 2002: "There is no immediate intelligence pointing to a specific threat to the United Kingdom, but we remain alert, domestically as well as internationally;" and "[I]t would be wrong to say that we have evidence of a particular threat."

22. The requirement of temporariness is again not expressed in article 15 or article 4 unless it be inherent in the meaning of "emergency." But the UN Human Rights Committee on 24 July 2001, in General Comment No 29 on article 4 of the ICCPR, observed in para 2 that:

> "Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature."

This view was also taken by the parliamentary Joint Committee on Human Rights, which in its Eighteenth Report of the Session 2003-2004 (HL paper 158, HC 713, 21 July 2004), in para 4, observed:

> "Derogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary. According to the Government and the Security Service, the UK now faces a near-permanent emergency."

It is indeed true that official spokesmen have declined to suggest when, if ever, the present situation might change.

23. No state other than the United Kingdom has derogated from article 5. In Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe resolved (para 9) that:

> "In their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights."

It also called on all member states (para 12) to:

> "refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the

> rights and liberties guaranteed under its Article 5 (right to liberty and security)."

In its General Comment No 29 on article 4 of the ICCPR, the UN Human Rights Committee on 24 July 2001 observed (in para 3):

> "On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation, in situations not covered by article 4."

In Opinion 1/2002 of the Council of Europe Commissioner for Human Rights (Comm DH (2002) 7, 28 August 2002), Mr Alvaro Gil-Robles observed, in para 33:

> "Whilst acknowledging the obligation of governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11th 2001 cannot, on their own, be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the present circumstances. Detailed information pointing to a real and imminent danger to public safety in the United Kingdom will, therefore, have to be shown."

The Committee of Privy Counsellors established pursuant to section 122 of the 2001 Act under the chairmanship of Lord Newton of Braintree, which reported on 18 December 2003 (*Anti-terrorism, Crime and Security Act 2001 Review:* Report, HC 100) attached significance to this point:

> "189. *The UK is the only country to have found it necessary to derogate from the European Convention on Human Rights.* We found this puzzling, as it seems clear that other countries face considerable threats from terrorists within their borders."

It noted that France, Italy and Germany had all been threatened, as well as the UK.

24. The appellants submitted that detailed information pointing to a real and imminent danger to public safety in the United Kingdom had not been shown. In making this submission they were able to rely on a series of reports

by the Joint Committee on Human Rights. In its Second Report of the Session 2001-2002 (HL paper 37, HC 372), made on 14 November 2001 when the 2001 Act was a Bill before Parliament, the Joint Committee stated (in para 30):

> "Having considered the Home Secretary's evidence carefully, we recognise that there may be evidence of the existence of a public emergency threatening the life of the nation, although none was shown by him to this Committee."

It repeated these doubts in para 4 of its Fifth Report of the Session 2001-2002 (3 December 2001). In para 20 of its Fifth Report of the Session 2002-2003 (HL paper 59, HC 462, 24 February 2003), following the decisions of SIAC and the Court of Appeal, the Joint Committee noted that SIAC had had sight of closed as well as open material but suggested that each House might wish to seek further information from the Government on the public emergency issue. In its report of 23 February 2004 (Sixth Report of the Session 2003-2004, HL Paper 38, HC 381), the Joint Committee stated, in para 34:

> "Insufficient evidence has been presented to Parliament to make it possible for us to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation."

It adhered to this opinion in paras 15-19 of its Eighteenth Report of the Session 2003-2004 (HL Paper 158, HC 713), drawing attention (para 82) to the fact that the UK was the only country out of 45 countries in the Council of Europe which had found it necessary to derogate from article 5. The appellants relied on these doubts when contrasting the British derogation with the conduct of other Council of Europe member states which had not derogated, including even Spain which had actually experienced catastrophic violence inflicted by Al-Qaeda.

25. The Attorney General, representing the Home Secretary, answered these points. He submitted that an emergency could properly be regarded as imminent if an atrocity was credibly threatened by a body such as Al-Qaeda which had demonstrated its capacity and will to carry out such a threat, where the atrocity might be committed without warning at any time. The Government, responsible as it was and is for the safety of the British people, need not wait for disaster to strike before taking necessary steps to prevent it striking. As to the requirement that the emergency be temporary, the Attorney General did not suggest that an emergency could ever become the normal state of affairs, but he did resist the imposition of any artificial temporal limit to an emergency of the present kind, and pointed out that the emergency which had been held to justify derogation in Northern Ireland in 1988 had been accepted as continuing for a considerable number of years (see *Marshall v United*

Kingdom (10 July 2001, Appn No 41571/98) para 18 above). Little help, it was suggested, could be gained by looking at the practice of other states. It was for each national government, as the guardian of its own people's safety, to make its own judgment on the basis of the facts known to it. Insofar as any difference of practice as between the United Kingdom and other Council of Europe members called for justification, it could be found in this country's prominent role as an enemy of Al-Qaeda and an ally of the United States. The Attorney General also made two more fundamental submissions. First, he submitted that there was no error of law in SIAC's approach to this issue and accordingly, since an appeal against its decision lay only on a point of law, there was no ground upon which any appellate court was entitled to disturb its conclusion. Secondly, he submitted that the judgment on this question was pre-eminently one within the discretionary area of judgment reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament.

26. The appellants have in my opinion raised an important and difficult question, as the continuing anxiety of the Joint Committee on Human Rights, the observations of the Commissioner for Human Rights and the warnings of the UN Human Rights Committee make clear. In the result, however, not without misgiving (fortified by reading the opinion of my noble and learned friend Lord Hoffmann), I would resolve this issue against the appellants, for three main reasons.

27. First, it is not shown that SIAC or the Court of Appeal misdirected themselves on this issue. SIAC considered a body of closed material, that is, secret material of a sensitive nature not shown to the parties. The Court of Appeal was not asked to read this material. The Attorney General expressly declined to ask the House to read it. From this I infer that while the closed material no doubt substantiates and strengthens the evidence in the public domain, it does not alter its essential character and effect. But this is in my view beside the point. It is not shown that SIAC misdirected itself in law on this issue, and the view which it accepted was one it could reach on the open evidence in the case.

28. My second reason is a legal one. The European Court decisions in *Ireland v United Kingdom* (1978) 2 EHRR 25; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539; *Aksoy v Turkey* (1996) 23 EHRR 553 and *Marshall v United Kingdom* (10 July 2001, Appn. No. 41571/98) seem to me to be, with respect, clearly right. In each case the member state had actually experienced widespread loss of life caused by an armed body dedicated to destroying the territorial integrity of the state. To hold that the article 15 test was not satisfied in such circumstances, if a response beyond that provided by the ordinary course of law was required, would have been perverse. But these features were not, on the facts found, very clearly present in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15. That was a relatively early decision of the European Court, but it has never to my knowledge been disavowed and the House is required by section 2(1) of the 1998 Act to take it into account. The decision may perhaps be explained as showing the breadth of the margin of appreciation accorded by the Court to national authorities. It

may even have been influenced by the generous opportunity for release given to Mr Lawless and those in his position. If, however, it was open to the Irish Government in *Lawless* to conclude that there was a public emergency threatening the life of the Irish nation, the British Government could scarcely be faulted for reaching that conclusion in the much more dangerous situation which arose after 11 September.

29. Thirdly, I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety. As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called "relative institutional competence". The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, para 62, per Lord Hoffmann. The appellants recognised this by acknowledging that the Home Secretary's decision on the present question was less readily open to challenge than his decision (as they argued) on some other questions. This reflects the unintrusive approach of the European Court to such a question. I conclude that the appellants have shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question.

Proportionality

30. Article 15 requires that any measures taken by a member state in derogation of its obligations under the Convention should not go beyond what is "strictly required by the exigencies of the situation." Thus the Convention imposes a test of strict necessity or, in Convention terminology, proportionality. The appellants founded on the principle adopted by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture,*

Fisheries, Lands and Housing [1999] 1 AC 69, 80. In determining whether a limitation is arbitrary or excessive, the court must ask itself:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

This approach is close to that laid down by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103, paras 69-70, and in *Libman v Attorney General of Quebec* (1997) 3 BHRC 269, para 38. To some extent these questions are, or may be, interrelated. But the appellants directed the main thrust of their argument to the second and third questions. They submitted that even if it were accepted that the legislative objective of protecting the British people against the risk of catastrophic Al-Qaeda terrorism was sufficiently important to justify limiting the fundamental right to personal freedom of those facing no criminal accusation, the 2001 Act was not designed to meet that objective and was not rationally connected to it. Furthermore, the legislative objective could have been achieved by means which did not, or did not so severely, restrict the fundamental right to personal freedom.

31. The appellants' argument under this head can, I hope fairly, be summarised as involving the following steps:

(1) Part 4 of the 2001 Act reversed the effect of the decisions in *Hardial Singh* [1984] 1 WLR 704 and *Chahal* (1996) 23 EHRR 413 and was apt to address the problems of immigration control caused to the United Kingdom by article 5(1)(f) of the Convention read in the light of those decisions.
(2) The public emergency on which the United Kingdom relied to derogate from the Convention right to personal liberty was the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters.
(3) While the threat to the security of the United Kingdom derived predominantly and most immediately from foreign nationals, some of whom could not be deported because they would face torture or inhuman or degrading treatment or punishment in their home countries and who could not be deported to any third country willing to receive them, the threat to the United Kingdom did not derive solely from such foreign nationals.
(4) Sections 21 and 23 did not rationally address the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters because (a) it did not address the threat presented by UK nationals, (b) it permitted foreign nationals suspected of being Al-Qaeda terrorists or their supporters to pursue their activities abroad if there was any country to which they were able to go, and (c) the sections permitted the certification and detention of persons who were not suspected of presenting any threat

to the security of the United Kingdom as Al-Qaeda terrorists or supporters.

(5) If the threat presented to the security of the United Kingdom by UK nationals suspected of being Al-Qaeda terrorists or their supporters could be addressed without infringing their right to personal liberty, it is not shown why similar measures could not adequately address the threat presented by foreign nationals.

(6) Since the right to personal liberty is among the most fundamental of the rights protected by the European Convention, any restriction of it must be closely scrutinised by the national court and such scrutiny involves no violation of democratic or constitutional principle.

(7) In the light of such scrutiny, neither the Derogation Order nor sections 21 and 23 of the 2001 Act can be justified.

32. It is unnecessary to linger on the first two steps of this argument, neither of which is controversial and both of which are clearly correct. The third step calls for closer examination. The evidence before SIAC was that the Home Secretary considered "that the serious threats to the nation emanated predominantly (albeit not exclusively) and more immediately from the category of foreign nationals." In para 95 of its judgment SIAC held:

> "But the evidence before us demonstrates beyond argument that the threat is not so confined. [i.e. is not confined to the alien section of the population]. There are many British nationals already identified - mostly in detention abroad - who fall within the definition of 'suspected international terrorists,' and it was clear from the submissions made to us that in the opinion of the [Home Secretary] there are others at liberty in the United Kingdom who could be similarly defined."

This finding has not been challenged, and since SIAC is the responsible fact-finding tribunal it is unnecessary to examine the basis of it. There was however evidence before SIAC that "upwards of a thousand individuals from the UK are estimated on the basis of intelligence to have attended training camps in Afghanistan in the last five years," that some British citizens are said to have planned to return from Afghanistan to the United Kingdom and that "The backgrounds of those detained show the high level of involvement of British citizens and those otherwise connected with the United Kingdom in the terrorist networks." It seems plain that the threat to the United Kingdom did not derive solely from foreign nationals or from foreign nationals whom it was unlawful to deport. Later evidence, not before SIAC or the Court of Appeal, supports that conclusion. The Newton Committee recorded the Home Office argument that the threat from Al-Qaeda terrorism was predominantly from foreigners but drew attention (para 193) to

> "accumulating evidence that this is not now the case. The British suicide bombers who attacked Tel Aviv in May 2003, Richard Reid ('the Shoe Bomber'), and recent arrests suggest

> that the threat from UK citizens is real. Almost 30% of Terrorism Act 2000 suspects in the past year have been British. We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals."

33. The fourth step in the appellants' argument is of obvious importance to it. It is plain that sections 21 and 23 of the 2001 Act do not address the threat presented by UK nationals since they do not provide for the certification and detention of UK nationals. It is beside the point that other sections of the 2001 Act and the 2000 Act do apply to UK nationals, since they are not the subject of derogation, are not the subject of complaint and apply equally to foreign nationals. Yet the threat from UK nationals, if quantitatively smaller, is not said to be qualitatively different from that from foreign nationals. It is also plain that sections 21 and 23 do permit a person certified and detained to leave the United Kingdom and go to any other country willing to receive him, as two of the appellants did when they left for Morocco and France respectively (see para 2 above). Such freedom to leave is wholly explicable in terms of immigration control: if the British authorities wish to deport a foreign national but cannot deport him to country "A" because of *Chahal* their purpose is as well served by his voluntary departure for country "B". But allowing a suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country. It seems clear from the language of section 21 of the 2001 Act, read with the definition of terrorism in section 1 of the 2000 Act, that section 21 is capable of covering those who have no link at all with Al-Qaeda (they might, for example, be members of the Basque separatist organisation ETA), or who, although supporting the general aims of Al-Qaeda, reject its cult of violence. The Attorney General conceded that sections 21 and 23 could not lawfully be invoked in the case of suspected international terrorists other than those thought to be connected with Al-Qaeda, and undertook that the procedure would not be used in such cases. A restrictive reading of the broad statutory language might in any event be indicated: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. The appellants were content to accept the Attorney General's concession and undertaking. It is not however acceptable that interpretation and application of a statutory provision bearing on the liberty of the subject should be governed by implication, concession and undertaking.

34. Some of these features of the 2001 Act were the subject of comment by the European Commissioner for Human Rights in his Opinion 1/2002 (28 August 2002):

> "36. The proportionality of the derogating measures is further brought into question by the definition of international terrorist organisations provided by section 21(3) of the Act. The section would appear to permit the indefinite detention of an individual suspected of having links with an international

terrorist organisation irrespective of its presenting a direct threat to public security in the United Kingdom and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.

37. Another anomaly arises in so far as an individual detained on suspicion of links with international terrorist organisations must be released and deported to a safe receiving country should one become available. If the suspicion is well founded, and the terrorist organisation a genuine threat to UK security, such individuals will remain, subject to possible controls by the receiving state, at liberty to plan and pursue, albeit at some distance from the United Kingdom, activity potentially prejudicial to its public security.

38. It would appear, therefore, that the derogating measures of the Anti-Terrorism, Crime and Security Act allow both for the detention of those presenting no direct threat to the United Kingdom and for the release of those of whom it is alleged that they do. Such a paradoxical conclusion is hard to reconcile with the strict exigencies of the situation."

The Newton Committee, while expressing no opinion on the legality of Part 4 of the 2001 Act, echoed the Commissioner's criticisms:

"185. The Part 4 detention powers present a number of problems that range from fundamental issues of principle to practical procedural difficulties. We are not persuaded that the powers are sufficient to meet the full extent of the threat from international terrorism. Nor are we persuaded that the risks of injustice are necessary or defensible.

186. Some of these problems arise because Part 4 is an adaptation of existing immigration and asylum legislation, rather than being designed expressly for the purpose of meeting the threat from international terrorism.

…..

"192. The Part 4 process *only tackles the threat from foreigners suspected of having links with al Qaeda or its associated networks.* It does not, therefore, address the threat:

a. from British nationals with similar links; or from

b. anyone in the UK with links to other foreign terrorist causes.

…..

"195. *Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism*. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence,

> security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.
>
> …..
>
> "203. We consider the shortcomings described above to be sufficiently serious to strongly recommend that the Part 4 powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency. New legislation should:
>
> a. deal with all terrorism, whatever its origin or the nationality of its suspected perpetrators; and
> b. not require a derogation from the European Convention on Human Rights."

35. The fifth step in the appellants' argument permits of little elaboration. But it seems reasonable to assume that those suspected international terrorists who are UK nationals are not simply ignored by the authorities. When G, one of the appellants, was released from prison by SIAC on bail (*G v Secretary of State for the Home Department* (SC/2/2002, Bail Application SCB/10, 20 May 2004), it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.

36. In urging the fundamental importance of the right to personal freedom, as the sixth step in their proportionality argument, the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day. Recent statements, not in themselves remarkable, may be found in *In re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, 603 and *In re Wasfi Suleman Mahmod* [1995] Imm A R 311, 314. In its treatment of article 5 of the European Convention, the European Court also has recognised the prime importance of personal freedom. In *Kurt v Turkey* (1998) 27 EHRR 373, para 122, it referred to "the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities" and to the need

to interpret narrowly any exception to "a most basic guarantee of individual freedom". In *Garcia Alva v Germany* (2001) 37 EHRR 335, para 39, it referred to "the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned". The authors of the Siracusa Principles, although acknowledging that the protection against arbitrary detention (article 9 of the ICCPR) might be limited if strictly required by the exigencies of an emergency situation (article 4), were nonetheless of the opinion that some rights could never be denied in any conceivable emergency and, in particular (para 70 (b)),

> "no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge; ….."

37. While the Attorney General challenged and resisted the third, fourth and fifth steps in the appellants' argument, he directed the weight of his submission to challenging the standard of judicial review for which the appellants contended in this sixth step. He submitted that as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment. Just as the European Court allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere. The Attorney General drew attention to the dangers identified by Richard Ekins in "Judicial Supremacy and the Rule of Law" (2003) 119 LQR 127. This is an important submission, properly made, and it calls for careful consideration.

38. Those conducting the business of democratic government have to make legislative choices which, notably in some fields, are very much a matter for them, particularly when (as is often the case) the interests of one individual or group have to be balanced against those of another individual or group or the interests of the community as a whole. The European Court has recognised this on many occasions: *Chassagnou v France* (1999) 29 EHRR 615, para 113, and *Hatton v United Kingdom* (2003) 37 EHRR 611, paras 97-98, may be cited as recent examples. In para 97 of *Hatton*, a case which concerned aircraft noise at Heathrow, the Court said:

> "At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a

> democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight."

Where the conduct of government is threatened by serious terrorism, difficult choices have to be made and the terrorist dimension cannot be overlooked. This also the European Commission and Court have recognised in cases such as *Brogan v United Kingdom* (1988) 11 EHRR 117, para 80; *Fox, Campbell & Hartley v United Kingdom* (1990) 13 EHRR 157, paras 32, 34; and *Murray v United Kingdom* (1994) 19 EHRR 193, para 47. The same recognition is found in domestic authority: see, for example, *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, paras 28, 62.

39. While any decision made by a representative democratic body must of course command respect, the degree of respect will be conditioned by the nature of the decision. As the European Court observed in *Fretté v France* (2002) 38 EHRR 438, para 40,

> "….. the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of Contracting States."

A similar approach is found in domestic authority. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381, Lord Hope of Craighead said:

> "It will be easier for such [a discretionary] area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection."

Another area in which the court was held to be qualified to make its own judgment is the requirement of a fair trial: *R v A (No 2)* [2002] 1 AC 45, para 36. The Supreme Court of Canada took a similar view in *Libman v Attorney General of Quebec* (1997) 3 BHRC 269, para 59. In his dissenting judgment (cited with approval in *Libman*) in *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199, para 68, La Forest J, sitting in the same court, said:

> "Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be."

See also McLachlin J in the same case, para 135. Jackson J, sitting in the Supreme Court of the United States in *West Virginia State Board of Education v Barnette* 319 US 624 (1943), para 3, stated, speaking of course with reference to an entrenched constitution:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts ….. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."

40. The Convention regime for the international protection of human rights requires national authorities, including national courts, to exercise their authority to afford effective protection. The European Court made this clear in the early case of *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48:

> "The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines."

Thus the European Commissioner for Human Rights had authority for saying (Opinion 1/2002, para 9):

> "It is furthermore, precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations. This is, indeed, the essence of the principle of the subsidiarity of the protection of Convention rights."

In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 the traditional *Wednesbury* approach to judicial review was held to afford inadequate protection. It is now recognised that "domestic courts must themselves form a judgment whether a Convention right has been breached" and that "the intensity of review is somewhat greater under the proportionality approach": *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, paras 23, 27.

41. Even in a terrorist situation the Convention organs have not been willing to relax their residual supervisory role: *Brogan v United Kingdom* above, para 80; *Fox, Campbell & Hartley v United Kingdom*, above, paras 32-34. In *Aksoy v Turkey* (1996) 23 EHRR 553, para 76, the Court, clearly referring to national courts as well as the Convention organs, held:

> "The Court would stress the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law."

In *Korematsu v United States* 584 F Supp 1406 (1984) para 21, Judge Patel observed that the Supreme Court's earlier decision (323 US 214 (1944))

> "stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."

Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 observed, in para 27, that

> "….. the court's role under the 1998 Act is as the guardian of human rights. It cannot abdicate this responsibility."

He went on to say, in para 54:

> "But judges nowadays have no alternative but to apply the Human Rights Act 1998. Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to

> the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts."

42. It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it

> "The courts are charged by Parliament with delineating the boundaries of a rights-based democracy" ("Judicial Deference: servility, civility or institutional capacity?" [2003] PL 592, 597)".

See also Clayton, "Judicial deference and 'democratic dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998" [2004] PL 33.

43. The appellants' proportionality challenge to the Order and section 23 is, in my opinion, sound, for all the reasons they gave and also for those given by the European Commissioner for Human Rights and the Newton Committee. The Attorney General could give no persuasive answer. In a discussion paper Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society (Cm 6147, February 2004) the Secretary of State replied to one of the Newton Committee's criticisms in this way:

> "32. It can be argued that as suspected international terrorists their departure for another country could amount to exporting terrorism: a point made in the Newton Report at paragraph 195. But that is a natural consequence of the fact that Part 4 powers are immigration powers: detention is permissible only pending deportation and there is no other power available to detain (other than for the purpose of police enquiries) if a foreign national chooses voluntarily to leave the UK. (Detention in those circumstances is limited to 14 days after which the person must be either charged or released.) Deportation has the advantage moreover of disrupting the activities of the suspected terrorist."

This answer, however, reflects the central complaint made by the appellants: that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. The conclusion that the Order and section 23 are, in Convention terms, disproportionate is in my opinion irresistible.

44. Since, under section 7 of the Special Immigration Appeals Commission Act 1997 and section 30(5) of the 2001 Act, an appeal from SIAC lies only on a point of law, that is not the end of the matter. It is necessary to examine SIAC's reasons for rejecting this part of the appellants' challenge. They are given in para 51 of SIAC's judgment, and are fourfold:

(1) that there is an advantage to the UK in the removal of a potential terrorist from circulation in the UK because he cannot operate actively in the UK whilst he is either not in the country or not at liberty;
(2) that the removal of potential terrorists from their UK communities disrupts the organisation of terrorist activities;
(3) that the detainee's freedom to leave, far from showing that the measures are irrational, tends to show that they are to this extent properly tailored to the state of emergency; and
(4) that it is difficult to see how a power to detain a foreign national who had not been charged with a criminal offence and wished to leave the UK could readily be defended as tending to prevent him committing acts of terrorism aimed at the UK.

Assuming, as one must, that there is a public emergency threatening the life of the nation, measures which derogate from article 5 are permissible only to the extent strictly required by the exigencies of the situation, and it is for the derogating state to prove that that is so. The reasons given by SIAC do not warrant its conclusion. The first reason does not explain why the measures are directed only to foreign nationals. The second reason no doubt has some validity, but is subject to the same weakness. The third reason does not explain why a terrorist, if a serious threat to the UK, ceases to be so on the

French side of the English Channel or elsewhere. The fourth reason is intelligible if the foreign national is not really thought to be a serious threat to the UK, but hard to understand if he is. I do not consider SIAC's conclusion as one to which it could properly come. In dismissing the appellants' appeal, Lord Woolf CJ broadly considered that it was sensible and appropriate for the Secretary of State to use immigration legislation, that deference was owed to his decisions (para 40) and that SIAC's conclusions depended on the evidence before it (para 43). Brooke LJ reached a similar conclusion (para 91), regarding SIAC's findings as unappealable findings of fact. Chadwick LJ also regarded SIAC's finding as one of fact (para 150). I cannot accept this analysis as correct. The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom*, above. Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review. So would excessive deference, in a field involving indefinite detention without charge or trial, to ministerial decision. In my opinion, SIAC erred in law and the Court of Appeal erred in failing to correct its error.

Discrimination

45. As part of their proportionality argument, the appellants attacked section 23 as discriminatory. They contended that, being discriminatory, the section could not be "strictly required" within the meaning of article 15 and so was disproportionate. The courts below found it convenient to address this discrimination issue separately, and I shall do the same.

46. The appellants complained that in providing for the detention of suspected international terrorists who were not UK nationals but not for the detention of suspected international terrorists who were UK nationals, section 23 unlawfully discriminated against them as non-UK nationals in breach of article 14 of the European Convention. That article provides:

> "*Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

It is well established that the obligation on the state not to discriminate applies only to rights which it is bound to protect under the Convention. The appellants claim that section 23 discriminates against them in their enjoyment of liberty under article 5. Article 14 is of obvious importance. In his influential work "*An International Bill of the Rights of Man*" (1945), p 115, Professor Hersch Lauterpacht wrote:

> "The claim to equality before the law is in a substantial sense the most fundamental of the rights of man."

Jackson J reflected this belief in his well-known judgment in *Railway Express Agency Inc v New York* 336 US 106, 112-113 (1949), when he said:

> "I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

More recently, the Privy Council (per Lord Hoffmann, *Matadeen v Pointu* [1999] 1 AC 98, 109) observed, with reference to the principle of equality:

> "Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour."

47. The United Kingdom did not derogate from article 14 of the European Convention (or from article 26 of the ICCPR, which corresponds to it). The Attorney General did not submit that there had been an implied derogation, an argument advanced to SIAC but not to the Court of Appeal or the House.

48. The foreign nationality of the appellants does not preclude them from claiming the protection of their Convention rights. By article 1 of the Convention (which has not been expressly incorporated) the contracting states undertook to secure the listed Convention rights "to everyone within their jurisdiction". That includes the appellants. The European Court has recognised the Convention rights of non-nationals: see, for a recent example, *Conka v Belgium* (2002) 34 EHRR 1298. This accords with domestic authority. In *Khawaja v Secretary of State for the Home Department* [1984] 1 AC 74:

> "Habeas corpus protection is often expressed as limited to 'British subjects'. Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed."

49. It was pointed out that nationality is not included as a forbidden ground of discrimination in article 14. The Strasbourg Court has however treated nationality as such. In *Gaygusuz v Austria* (1996) 23 EHRR 364, para 42, it said:

> "However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention."

The Attorney General accepted that "or other status" would cover the appellants' immigration status, so nothing turns on this point. Nationality is a forbidden ground of discrimination within section 3(1) of the Race Relations Act 1976 and the Secretary of State is bound by that Act by virtue of section 19B(1). It was not argued that in the present circumstances he was authorised to discriminate by section 19D.

50. The first important issue between the parties was whether, in the present case, the Secretary of State had discriminated against the appellants on the ground of their nationality or immigration status. The Court gave guidance on the correct approach in the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, para 10:

> "In spite of the very general wording of the French version ('*sans distinction aucune*'), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ('without discrimination'). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms

> recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.
>
> It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question, the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

The question is whether persons in an analogous or relevantly similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction, and whether and to what extent differences in otherwise similar situations justify a different treatment in law: *Stubbings v United Kingdom* (1996) 23 EHRR 213, para 70. The parties were agreed that in domestic law, seeking to give effect to the Convention, the correct approach is to pose the questions formulated by Grosz, Beatson and Duffy, *Human Rights: The 1998 Act and the European Convention* (2000), para C14-08, substantially adopted by Brooke LJ in *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617, para 20, and refined in the later cases of *R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), [2002] 3 All ER 994, para 52, [2003] EWCA Civ 797, [2003] 3 All ER 577, paras 56-61, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 3 WLR 113, paras 133-134 and *R(S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196. As expressed in para 42 of this last case the questions are:

> "(1) Do the facts fall within the ambit of one or more of the Convention rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (3) If so, was the difference in treatment on one or more of the proscribed grounds under article 14? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the

sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?"

51. It is plain that the facts fall within the ambit of article 5. That is why the United Kingdom thought it necessary to derogate. The Attorney General reserved the right to argue in another place at another time that it was not necessary to derogate, but he accepted for the purpose of these proceedings that it was. The appellants were treated differently from both suspected international terrorists who were not UK nationals but could be removed and also from suspected international terrorists who were UK-nationals and could not be removed. There can be no doubt but that the difference of treatment was on grounds of nationality or immigration status (one of the proscribed grounds under article 14). The problem has been treated as an immigration problem.

52. The Attorney General submitted that the position of the appellants should be compared with that of non-UK nationals who represented a threat to the security of the UK but who could be removed to their own or to safe third countries. The relevant difference between them and the appellants was that the appellants could not be removed. A difference of treatment of the two groups was accordingly justified and it was reasonable and necessary to detain the appellants. By contrast, the appellants' chosen comparators were suspected international terrorists who were UK nationals. The appellants pointed out that they shared with this group the important characteristics (a) of being suspected international terrorists and (b) of being irremovable from the United Kingdom. Since these were the relevant characteristics for purposes of the comparison, it was unlawfully discriminatory to detain non-UK nationals while leaving UK nationals at large.

53. Were suspected international terrorists who were UK nationals, the appellants' chosen comparators, in a relevantly analogous situation to the appellants? The question, as posed by Laws LJ in *R (Carson) v Secretary of State for Work and Pensions* [2003] 3 All ER 577, para 61, is whether the circumstances of X and Y are so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X. The Court of Appeal thought not because (per Lord Woolf, para 56) "the nationals have a right of abode in this jurisdiction but the aliens only have a right not to be removed". This is, however, to accept the correctness of the Secretary of State's choice of immigration control as a means to address the Al-Qaeda security problem, when the correctness of that choice is the issue to be resolved. In my opinion, the question demands an affirmative answer. Suspected international terrorists who are UK nationals are in a situation analogous with the appellants because, in the present context, they share the most relevant characteristics of the appellants.

54. Following the guidance given in the *Belgian Linguistic Case (No 2)* (see para 50 above) it is then necessary to assess the justification of the differential treatment of non-UK nationals "in relation to the aim and effects of the measure under consideration". The undoubted aim of the relevant

measure, section 23 of the 2001 Act, was to protect the UK against the risk of Al-Qaeda terrorism. As noted above (para 32) that risk was thought to be presented mainly by non-UK nationals but also and to a significant extent by UK nationals also. The effect of the measure was to permit the former to be deprived of their liberty but not the latter. The appellants were treated differently because of their nationality or immigration status. The comparison contended for by the Attorney General might be reasonable and justified in an immigration context, but cannot in my opinion be so in a security context, since the threat presented by suspected international terrorists did not depend on their nationality or immigration status. It is noteworthy that in *Ireland v United Kingdom* (1978) 2 EHRR 25 the European Court was considering legislative provisions which were, unlike section 23, neutral in their terms, in that they provided for internment of loyalist as well as republican terrorists. Even so, the Court was gravely exercised whether the application of the measures had been even handed as between the two groups of terrorists. It seems very unlikely that the measures could have been successfully defended had they only been capable of application to republican terrorists, unless it were shown that they alone presented a threat.

55. The Attorney General also made a more far-reaching submission. He relied on the old-established rule that a sovereign state may control the entry of aliens into its territory and their expulsion from it. He submitted that the Convention permits the differential treatment of aliens as compared with nationals. He also submitted that international law sanctions the differential treatment, including detention, of aliens in times of war or public emergency.

56. In support of the first of these submissions he relied on *Moustaquim v Belgium* (1991) 13 EHRR 802, a case in which a Moroccan national, convicted of serious offences, was ordered to be deported. The Court rejected a complaint under article 14, holding (in para 49) that the applicant's position could not be compared with that of Belgian juveniles, since they had a right of abode in their own country and could not be expelled from it. It is indeed obvious that in an immigration context some differentiation must almost inevitably be made between nationals and non-nationals since the former have a right of abode and the latter do not. Further examples may be found in *Agee v United Kingdom* (1976) 7 DR 164 and *Maaouia v France* (2000) 33 EHRR 1037. The Convention recognises in article 5(1)(f) that a non-national may be lawfully detained pending deportation, and that is a position in which a national could never find himself. The question is whether and to what extent states may differentiate outside the immigration context.

57. In Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe held that "The combat against terrorism must be carried out in compliance with national and international law and respecting human rights". The Committee of Ministers of the Council of Europe on 11 July 2002 adopted "Guidelines on human rights and the fight against terrorism". These recognised the obligation to take effective measures against terrorism, but continued:

> "All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment ….."

Restrictions of human rights must be necessary and proportionate. The Commissioner for Human Rights in Opinion 1/2002 (28 August 2002, para 40) observed, with reference to the 2001 Act:

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

In its General Policy Recommendations published on 8 June 2004, the European Commission against Racism and Intolerance, a Council of Europe body, considered it the duty of the state to fight against terrorism; stressed that the response should not itself encroach on the values of freedom, democracy, justice, the rule of law, human rights and humanitarian law; stressed that the fight against terrorism should not become a pretext under which racial discrimination was allowed to flourish; noted that the fight against terrorism since 11 September 2001 had in some cases resulted in the adoption of discriminatory legislation, notably on grounds of nationality, national or ethnic origin and religion; stressed the responsibility of member states to ensure that the fight against terrorism did not have a negative impact on any minority group; and recommended them

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

58. The Universal Declaration of Human Rights 1948 affirmed, in articles 1 and 2, the general principles of equality and non-discrimination. On 13 December 1985 the General Assembly of the United Nations made a Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live. This declaration recognised (article 2) that states might establish differences between nationals and aliens but required that laws and regulations should not be incompatible with the international legal obligations of the state, including those in the field of human rights. Aliens should enjoy (article 5) "in accordance with domestic law and subject to the relevant international obligations of the state in which they are present" the right not to be deprived of liberty except on such grounds and in accordance with such procedures as are established by law and the right to be equal before the courts.

59. The Human Rights Committee is the United Nations body charged with interpretation of the ICCPR and adjudication of questions arising under it. In General Comment No 15, adopted in 1986, the Committee ruled:

> "1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction' (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.
>
> 2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant."

The Committee went on to rule, in para 7, that "Aliens have the full right to liberty and security of the person" and that "Aliens are entitled to equal protection by the law".

60. Article 4 of the ICCPR, which permits derogation, contains two conditions found in article 15 of the European Convention ("to the extent strictly required by the exigencies of the situation" and "provided that such measures are not inconsistent with their other obligations under international law") and one that is not expressly found ("and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"). In General Comment No 29, adopted on 24 July 2001 (and therefore before the events of 11 September) the Human Rights Committee considered article 4 and article 26 (non-discrimination) of the ICCPR. The Committee said:

> "8. According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or

dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant."

61. The Security Council of the United Nations, in Resolution 1456 adopted on 20 January 2003, required that

> "6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."

The UN Commission on Human Rights published on 26 May 2003 a report which quoted General Comment No 15 (para 58 above) and stated:

> "The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective."

62. The International Convention on the Elimination of All Forms of Racial Discrimination 1966 provided, in article 1 (so far as relevant):

> "1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
>
> 3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
>
> 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in

> order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

This might be understood to remove discriminatory treatment of non-citizens from the scope of the Convention. But the Committee established under article 8 to supervise and report on the implementation of the Convention has made plain that it does not sanction such discrimination. In General Recommendation XI adopted in 1993 it stated:

> "3. The Committee further affirms that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights."

In General Recommendation 14, adopted in the same year, the Committee asserted (para 1):

> "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights."

It continued, in para 2:

> "2. The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."

The Committee gave special attention to the United Kingdom, and in its Concluding Observations on the United Kingdom (10 December 2003, CERD/C/63/CO/11), in para 17, said:

> "17. The Committee is deeply concerned about provisions of the Anti-Terrorism Crime and Security Act which provide for the indefinite detention without charge or trial, pending deportation, of non-nationals of the United Kingdom who are suspected of terrorism-related activities.
>
> While acknowledging the State party's national security concerns, the Committee recommends that the State party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, the Committee draws the State party's attention to its statement of 8 March 2002 in which it underlines the obligation of States to 'ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.'"

The Committee returned to this subject at its 64th session in February-March 2004, when it adopted General Recommendation 30, entitled "Discrimination against non-citizens." The Committee there defined the responsibilities of states parties to the Convention in these terms:

> "1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2, provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;
> 2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognised and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;
> 3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality

between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;"

It went on to recommend (paras 10 and 20) that states should:

"10. Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.

20. Ensure that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law."

63. The materials I have cited are not legally binding on the United Kingdom. But there is no European or other authority to support the Attorney General's submission. On the other hand, the Council of Europe is the body to which the states parties to the European Convention belong. The Attorney General in his written case accepted that article 14 of the European Convention and article 26 of the ICCPR are to the same effect. And the United Kingdom has ratified the Convention on the Elimination of Racial Discrimination. These materials are inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency. In the "Paris Minimum Standards of Human Rights Norms in a State of Emergency" (1985) 79 AJIL 1072, 1074, the International Law Association, considering both article 4 of the ICCPR and article 15 of the European Convention, concluded:

"2. The power to take derogatory measures as aforesaid is subject to five general conditions:

. . .

(b) Such measures must be strictly proportionate to the exigencies of the situation.

(c) Such measures must not be inconsistent with the other obligations of the state under international law.

(d) Such measures must not involve any discrimination solely on the ground of race, colour, sex, language, religion, nationality or social origin."

64. The Newton Committee, in para 194 of its Report, observed:

> "There are also arguments of principle against having *discriminatory provisions* with which we have a good deal of sympathy, but it is the arguments of limited efficacy in addressing the terrorist threat that weigh most heavily with us."

In his discussion paper published in response to the Newton Report ("Counter-Terrorism Powers" - see para 43 above) the Secretary of State said:

> "36. Secondly Lord Newton proposed that new legislation should apply equally to all nationalities including British citizens. The Government believes it is defensible to distinguish between foreign nationals and our own citizens and reflects their different rights and responsibilities. Immigration powers and the possibility of deportation could not apply to British citizens. While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to the support from all parts of the public that is so essential to countering the terrorist threat."

65. In its Second Report of the Session 2001-2002, drawn up very shortly after publication of the Bill which became the 2001 Act, the Joint Committee expressed concern at the potentially discriminatory effect of the proposed measure. In paras 38-39 it said:

> "38. Second, by relying on immigration legislation to provide for the detention of suspected international terrorists, the Bill risks discriminating, in the authorization of detention without charge, between those suspected international terrorists who are subject to immigration control and those who have an unconditional right to remain in the United Kingdom. We are concerned that this might lead to discrimination in the enjoyment of the right to liberty on the ground of nationality. If that could not be shown to have an objective, rational and

proportionate justification, it might lead to actions which would be incompatible with Article 5 of the ECHR either taken alone or in combination with the right to be free of discrimination in the enjoyment of Convention rights under Article 14 of the ECHR. It could also lead to violations of the right to be free of discrimination under Article 26 and the right to liberty under Article 9 of the ICCPR.

39. We raised this matter with the Home Secretary in oral evidence. Having considered his response, *we are not persuaded that the risk of discrimination on the ground of nationality in the provisions of Part 4 of the Bill has been sufficiently taken on board*."

In para 32 of its Fifth Report of the Session 2002-2003 (24 February 2003, HL paper 59, HC 462), following the Court of Appeal's decision in these proceedings, the Joint Committee observed that the Government might have to review its position on discrimination in the light of any further decision. In its Sixth Report of the Session 2003-2004 (23 February 2004), HL paper 38, HC 381, para 35, the Joint Committee expressed deep concern "about the human rights implications of making the detention power an aspect of immigration law rather than anti-terrorism law" and warned of "a significant risk that Part 4 violates the right to be free of discrimination under ECHR Article 14." Following the Report of the Newton Committee and the Secretary of State's discussion paper published in response to it, the Joint Committee returned to this subject in its Eighteenth Report of the Session 2003-2004 (21 July 2004), HL paper 158, HC 713, paras 42-44:

"42. The discussion paper rejects the Newton Report's recommendation that new legislation replacing Part 4 ATCSA 2001 should apply equally to all nationalities including British citizens. It states the Government's belief that it is defensible to distinguish between foreign nationals and UK nationals because of their different rights and responsibilities.

43. We have consistently expressed our concern that the provisions of Part 4 ATCSA unjustifiably discriminate on grounds of nationality and are therefore in breach of Article 14 ECHR. Along with Lord Newton, we find it extraordinary that the discussion paper asserts that seeking the same power to detain British citizens would be 'a very grave step' and that 'such draconian powers would be difficult to justify.'

44. The interests at stake for a foreign national and a UK national are the same: their fundamental right to liberty under Article 5 ECHR and related procedural rights. Article 1 of the ECHR requires States to secure the Convention rights to *everyone within their jurisdiction.* Article 14 requires the enjoyment of Convention rights to be secured without discrimination on the ground of nationality. The Government's explanation in its discussion paper of its reluctance to seek the

> same powers in relation to UK nationals appears to suggest that it regards the liberty interests of foreign nationals as less worthy of protection than exactly the same interests of UK nationals, which is impermissible under the Convention."

66. SIAC concluded that section 23 was discriminatory and so in breach of article 14 of the Convention. It ruled, in paras 94-95 of its judgment:

> "94. If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terrorists – and we can see powerful arguments in favour of such a derogation – the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as [counsel for the appellants] contends, the threat stems exclusively or almost exclusively from that alien section.
>
> 95. But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified – mostly in detention abroad – who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined. In those circumstances we fail to see how the derogation can be regarded as other than discriminatory on the grounds of national origin."

67. The Court of Appeal differed from SIAC on the discrimination issue: [2004] QB 335. Lord Woolf CJ referred (para 45) to a tension between article 15 and article 14 of the European Convention. He held (para 49) that it would be "surprising indeed" if article 14 prevented the Secretary of State from restricting his power to detain to a smaller rather than a larger group. He held (para 56) that there was objective and reasonable justification for the differential treatment of the appellants. Brooke LJ (paras 102, 132) also found good objective reasons for the Secretary of State's differentiation, although he also relied (paras 112-132) on rules of public international law. Chadwick LJ found (para 152) that since the Secretary of State had reached his judgment on what the exigencies of the situation required, his decision had to stand, and that "The decision to confine the measures to be taken to the detention of those who are subject to deportation, but who cannot (for the time being) be removed, is not a decision to discriminate against that class on the grounds of nationality" (para 153).

68. I must respectfully differ from this analysis. Article 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 remains in full force. Any discriminatory measure inevitably affects a smaller

rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of article 14. It was also a violation of article 26 of the ICCPR and so inconsistent with the United Kingdom's other obligations under international law within the meaning of article 15 of the European Convention.

69. Brooke LJ also resolved the discrimination issue in favour of the Secretary of State in reliance on a public international law argument (see paras 112-132 of his judgment) which the Attorney General addressed to the Court of Appeal and repeated in the House. The first step in this argument was to assert the historic right of sovereign states over aliens entering or residing in their territory. Historically, this was the position: see *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, paras 11-12. But a sovereign state may by international treaty restrict its absolute power over aliens within or seeking to enter its territory, and in recent years states have increasingly done so. The Attorney General submitted that international law sanctioned the detention of aliens in time of war or public emergency, and for this purpose drew attention to a number of instruments which it is necessary briefly to consider:

(1) *The Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949*. This instrument envisaged the internment of alien enemies in time of war or armed conflict. It is not suggested that the United Kingdom is, in a legal sense, at war or involved in an armed conflict, and it has no bearing on these appeals.

(2) *The Geneva Convention Relating to the Status of Refugees 1951*. The Attorney General submitted that article 9 of this Convention, permitting states to take provisional measures "in time of war or other grave and exceptional circumstances", was apt to cover the detention of the appellants. He referred to material supporting that interpretation: Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953), pp 94-96; Grahl-Madsen, *Commentary on the Refugee Convention 1951* (republished by UNHCR 1997), pp 26-29; UNHCR Executive Committee Conclusion 44 in the Report of the 37th Session (1986), "Detention of Refugees and Asylum Seekers", para (b); UNHCR Revised Guidelines on "Applicable Criteria and Standards Relating to the Detention of Asylum Seekers" (February 1999), guideline 3; Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996), p 247, fn 2. It is, however, permissible under article 33(2) of the Refugee Convention to return to his home country a refugee at risk of torture or inhuman treatment in that country, a course which the European Convention precludes (see para 9 above). It cannot therefore avail the Secretary of State to show that the detention of the appellants is permissible under the Refugee Convention if it is not permissible under the European Convention because it is the latter which he is said to have violated.

(3) *The Convention on the Status of Stateless Persons 1954.* Article 9 of this Convention corresponds to article 9 of the Refugee Convention. The same comment applies to it.

(4) *The ICCPR.* The Attorney General pointed out, quite correctly, that article 4(1) of the ICCPR, in requiring that a measure introduced in derogation from Covenant obligations must not discriminate, does not include nationality, national origin or "other status" among the forbidden grounds of discrimination: see Goodwin-Gill, "International Law and the Detention of Refugees and Asylum Seekers" (1986) 20 International Migration Rev 193, 199; Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*: *Cases, Materials, and Commentary*, 2nd ed (2004), p 829, para 25.61. It appears that this was deliberate: UN Doc E/CN. 4/SR. 330 (United Nations Economic and Social Council, Commission on Human Rights, Eighth Session, 313th meeting, 10 June 1952), pp 3-4. However, by article 2 of the ICCPR the states parties undertake to respect and ensure to all individuals within the territory the rights in the Covenant "without distinction of any kind, such as race ….., national or social origin ….. or other status". Similarly, article 26 guarantees equal protection against discrimination "on any ground such as race, ….. national or social origin ….. or other status". This language is broad enough to embrace nationality and immigration status. It is open to states to derogate from articles 2 and 26 but the United Kingdom has not done so. If, therefore, as I have concluded, section 23 discriminates against the appellants on grounds of their nationality or immigration status, there is a breach of articles 2 and 26 of the ICCPR and so a breach of the UK's "other obligations under international law" within the meaning of article 15 of the European Convention.

(5) *The UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live 1985*. As is apparent from the wording of this Declaration, quoted in para 58 above, it sanctions differences in the treatment of nationals and aliens only so long as they are not "incompatible with the international legal obligations of the State, including those in the field of human rights". Section 23 is incompatible with articles 5(1)(f) and 14 of the European Convention and articles 2, 9 and 26 of the ICCPR, all of which express international obligations of the United Kingdom.

(6) *The EC Treaty.* The Attorney General pointed out that article 39(3) of the EC Treaty is so drafted as not to encroach on member states' general right to control the entry and activity of aliens, and the 13th recital to Council Directive 2000/43/EC expressly excludes differences based on nationality from the scope of the Directive. It cannot, however, avail the Secretary of State that the United Kingdom is not in breach of the EC Treaty and this Directive if it is in breach of the European Convention.

(7) *The European Convention*. It was pointed out, quite correctly, that article 16 sanctions the imposition by member states of restrictions on the political activity of aliens. To that extent, as in the context of immigration, aliens are distinguishable from citizens. But there is nothing in the Convention to warrant the discriminatory detention of aliens against whom action is not being taken with a view to deportation or extradition.

(8) Reference was made to three United States authorities. In the first of these, *Shaughnessy v United States, ex rel Mezei* 345 US 206 (1953), the applicant was held not to be entitled to the protection of the due process clause because, although he had previously lived in the United States for some twenty five years before a nineteen month break, he was treated on his return as not having entered the country. This is not a decision which would be followed by the European Court, which in *D v United Kingdom* (1997) 24 EHRR 423, para 48, showed some impatience with what in *Lynch v Cannatella* 810 F 2d 1363 (1987), para 27, was called "the entry fiction":

> "Regardless of whether or not he ever entered the United Kingdom in the technical sense it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention since 21 January 1993."

In *Fernandez v Wilkinson* 505 F Supp 787 (1980) the alien had again not been admitted to the United States, but despite the "time-honoured legal fiction" of non-entry Judge Rogers, sitting in the US District Court for Kansas, drew on customary international law to hold that the alien could not be detained indefinitely when there was no prospect of removing him. The alien in *Zadvydas v Davis* 533 US 678 (2001) had been admitted to the United States and a majority of the Supreme Court held that he could not be detained indefinitely if there was no prospect of removing him. The court did not have to consider the position of aliens judged to present a terrorist risk (p 696) but might well have sanctioned indefinite detention in such circumstances given the heightened deference shown by US courts to the judgments of the political branches with respect to national security: see *Chae Chan Ping v United States* 130 US 581 (1889); Wilsher, "The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives" (2004) 53 ICLQ 897, 912-917. It would however seem that such a ruling would be contrary to the American Convention on Human Rights 1969. In its *Report on Terrorism and Human Rights* (22 October 2002), the Inter-American Commission on Human Rights stated:

> "350 ….. Even in respect of rights that may be the subject of limitation or derogation, states must comply strictly with the conditions regulating the permissibility of such limitations or derogations, which in turn are based upon the fundamental principles of necessity, proportionality and non-discrimination.
>
> 351 Also non-derogable under international human rights law and international humanitarian law is the requirement that states fulfil their obligations without

> discrimination of any kind, including discrimination based upon ….. national or social origin."

US authority does not provide evidence of general international practice.

70. Neither singly nor cumulatively do these materials, in my opinion, support a conclusion other than that which I have expressed.

71. Having regard to the conclusions I have already reached, I think it unnecessary to address detailed arguments based on alleged breaches of articles 3 and 6 of the European Convention. I express no opinion on those questions, nor on a question relating to the admissibility of evidence obtained by torture which was not argued before SIAC or the Court of Appeal in the part of these proceedings which is now the subject of appeal.

72. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry and Baroness Hale of Richmond, and on all questions of substance I agree with them.

73. I would allow the appeals. There will be a quashing order in respect of the Human Rights Act 1998 (Designated Derogation) Order 2001. There will also be a declaration under section 4 of the Human Rights Act 1998 that section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status. The Secretary of State must pay the appellants' costs in the House and below.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

74. Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified.

75. The government contends that these post-9/11 days are wholly exceptional. The circumstances require and justify the indefinite detention of non-nationals suspected of being international terrorists.

76. The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals. The extended power of detention conferred by Part 4 of the Anti-terrorism, Crime and Security Act 2001 applies only to persons who are not British citizens. It is difficult to see how the extreme circumstances, which alone would justify such detention, can

exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists.

77. Three years have now elapsed since the terrorist attacks of 11 September 2001. A significant number of persons suspected of terrorist involvement in this country are British citizens. In the case of these nationals the government has, apparently, felt able to counter the threat they pose by other means. Although they too present a threat to national security, in their case the government has not found it necessary to resort to the extreme step of seeking an extended power of detention comparable to that contained in the 2001 Act.

78. No satisfactory explanation has been forthcoming on this point. The government has vouchsafed no persuasive explanation of why national security calls for a power of indefinite detention in one case but not the other. Non-nationals may comprise the predominant and more immediate source of the threat to national security, but they are not the only source.

79. All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.

80. But Parliament has charged the courts with a particular responsibility. It is a responsibility as much applicable to the 2001 Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 as it is to all other legislation and ministers' decisions. The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor.

81. In the present case I see no escape from the conclusion that Parliament must be regarded as having attached insufficient weight to the human rights of non-nationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exception all the individuals currently detained have been imprisoned now for three years and there is no prospect of imminent release. It is true that those detained may at any time walk away from their place of

detention if they leave this country. Their prison, it is said, has only three walls. But this freedom is more theoretical than real. This is demonstrated by the continuing presence in Belmarsh of most of those detained. They prefer to stay in prison rather than face the prospect of ill treatment in any country willing to admit them.

82. Nor is the vice of indefinite detention cured by the provision made for independent review by the Special Immigration Appeals Commission. The commission is well placed to check that the Secretary of State's powers are exercised properly. But what is in question on these appeals is the existence and width of the statutory powers, not the way they are being exercised.

83. The difficulty with according to Parliament the substantial latitude normally to be given to decisions on national security is the weakness already mentioned: security considerations have not prompted a similar negation of the right to personal liberty in the case of nationals who pose a similar security risk. The government, indeed, has expressed the view that a 'draconian' power to detain British citizens who may be involved in international terrorism 'would be difficult to justify': Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society (February 2004, Cm 6147), para 36. But, in practical terms, power to detain indefinitely is no more draconian in the case of a British citizen than in the case of a non-national. There is no significant difference in the potential adverse impact of such a power on (1) a national and (2) a non-national who in practice cannot leave the country for fear of torture abroad.

84. Part of the explanation for the difference in treatment may be that the government has misconceived the human rights of non-nationals in this situation. A prominent part of the submissions of the Attorney General was to the effect that as a matter of international law (1) states may intern non-nationals who present a threat to national security and (2) states may accord different treatment to nationals and non-nationals. This line of argument suggests that when promoting Part 4 of the 2001 Act and seeking an extended statutory power of indefinite detention the government may have regarded the human rights of non-nationals in this field as less weighty than the corresponding human rights of nationals. If that was the government's understanding, it was in my view mistaken. Unwanted aliens who cannot be deported, as much as nationals, are not to be detained indefinitely without charge or trial save in wholly exceptional circumstances.

85. Be that as it may, for the reason given earlier and the reasons stated more fully by my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Rodger of Earlsferry, I too would allow these appeals and make the order proposed by Lord Bingham of Cornhill.

LORD HOFFMANN

My Lords,

86. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill and I gratefully adopt his statement of the background to this case and the issues which it raises. This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.

87. At present, the power cannot be exercised against citizens of this country. First, it applies only to foreigners whom the Home Secretary would otherwise be able to deport. But the power to deport foreigners is extremely wide. Secondly, it requires that the Home Secretary should reasonably suspect the foreigners of a variety of activities or attitudes in connection with terrorism, including supporting a group influenced from abroad whom the Home Secretary suspects of being concerned in terrorism. If the finger of suspicion has pointed and the suspect is detained, his detention must be reviewed by the Special Immigration Appeals Commission. They can decide that there were no reasonable grounds for the Home Secretary's suspicion. But the suspect is not entitled to be told the grounds upon which he has been suspected. So he may not find it easy to explain that the suspicion is groundless. In any case, suspicion of being a supporter is one thing and proof of wrongdoing is another. Someone who has never committed any offence and has no intention of doing anything wrong may be reasonably suspected of being a supporter on the basis of some heated remarks overheard in a pub. The question in this case is whether the United Kingdom should be a country in which the police can come to such a person's house and take him away to be detained indefinitely without trial.

88. The technical issue in this appeal is whether such a power can be justified on the ground that there exists a "war or other public emergency threatening the life of the nation" within the meaning of article 15 of the European Convention on Human Rights. But I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law.

89. The exceptional power to derogate from those rights also reflected British constitutional history. There have been times of great national emergency in which habeas corpus has been suspended and powers to detain

on suspicion conferred on the government. It happened during the Napoleonic Wars and during both World Wars in the twentieth century. These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised. But the necessity of draconian powers in moments of national crisis is recognised in our constitutional history. Article 15 of the Convention, when it speaks of "war or other public emergency threatening the life of the nation", accurately states the conditions in which such legislation has previously been thought necessary.

90. Until the Human Rights Act 1998, the question of whether the threat to the nation was sufficient to justify suspension of habeas corpus or the introduction of powers of detention could not have been the subject of judicial decision. There could be no basis for questioning an Act of Parliament by court proceedings. Under the 1998 Act, the courts still cannot say that an Act of Parliament is invalid. But they can declare that it is incompatible with the human rights of persons in this country. Parliament may then choose whether to maintain the law or not. The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with our constitutional traditions.

91. What is meant by "threatening the life of the nation"? The "nation" is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the "life" of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity.

92. This, I think, is the idea which the European Court of Human Rights was attempting to convey when it said (in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15) that it must be a "threat to the organised life of the community of which the State is composed", although I find this a rather dessicated description. Nor do I find the European cases particularly helpful. All that can be taken from them is that the Strasbourg court allows a wide "margin of appreciation" to the national authorities in deciding "both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it": *Ireland v United Kingdom* (1978) 2 EHRR 25, at para 207. What this means is that we, as a United Kingdom court, have to decide the matter for ourselves.

93. Perhaps it is wise for the Strasbourg court to distance itself from these matters. The institutions of some countries are less firmly based than those of others. Their communities are not equally united in their loyalty to their values and system of government. I think that it was reasonable to say that terrorism in Northern Ireland threatened the life of that part of the nation and the territorial integrity of the United Kingdom as a whole. In a community riven by sectarian passions, such a campaign of violence threatened the fabric of organised society. The question is whether the threat of terrorism from Muslim extremists similarly threatens the life of the British nation.

94. The Home Secretary has adduced evidence, both open and secret, to show the existence of a threat of serious terrorist outrages. The Attorney General did not invite us to examine the secret evidence, but despite the widespread scepticism which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction, I am willing to accept that credible evidence of such plots exist. The events of 11 September 2001 in New York and Washington and 11 March 2003 in Madrid make it entirely likely that the threat of similar atrocities in the United Kingdom is a real one.

95. But the question is whether such a threat is a threat to the life of the nation. The Attorney General's submissions and the judgment of the Special Immigration Appeals Commission treated a threat of serious physical damage and loss of life as necessarily involving a threat to the life of the nation. But in my opinion this shows a misunderstanding of what is meant by "threatening the life of the nation". Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said:

> "Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours"

96. This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

97. For these reasons I think that the Special Immigration Appeals Commission made an error of law and that the appeal ought to be allowed. Others of your Lordships who are also in favour of allowing the appeal would do so, not because there is no emergency threatening the life of the nation, but

on the ground that a power of detention confined to foreigners is irrational and discriminatory. I would prefer not to express a view on this point. I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

LORD HOPE OF CRAIGHEAD

My Lords,

98. I wish at the outset to pay tribute to the way which my noble and learned friend Lord Bingham of Cornhill has described the background to this case and set out all the relevant materials. With the benefit of the introduction which he has so helpfully provided, and without attempting to rehearse again every detail, I add these comments to explain why I have reached the same conclusions as he has done on all points.

99. Although these appeals are concerned with general issues and not with the cases of each of the appellants individually, their importance to them is nevertheless very great. Two cardinal principles lie at the heart of the argument. It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual. Among these rights is the individual's right to liberty.

100. It is impossible ever to overstate the importance of the right to liberty in a democracy. In the words of Baron Hume, *Commentaries on the Law of Scotland respecting Crimes*, 4th ed (1844), vol 2, p 98:

> "As indeed it is obvious, that, by its very constitution, every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law, - that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it may be, not informed of the nature of the charge against him, or the name of the accuser."

These were not idle words. When Hume published the first edition of his *Commentaries* in 1797 grave abuses of the kind he described were within living memory. He knew the dangers that might lie in store for democracy

itself if the courts were to allow individuals to be deprived of their right to liberty indefinitely and without charge on grounds of public interest by the executive. The risks are as great now in our time of heightened tension as they were then.

101. There is a third principle which the court must also recognise when it is called upon to perform its central function, which is to strike the balance between the public interest and the right to liberty. It is that the right to liberty belongs to each and every individual. Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms enshrines this right, and section 1 of the Human Rights Act 1998 has made it part of our law. Article 5(1) defines the only situations in which a person may be deprived of his liberty, and it begins with the word "Everyone". The right to liberty is to be enjoyed without discrimination, as article 14 of the Convention makes clear. The basic principle is that the right belongs to everyone, whoever they may be and wherever they may have come from, who happen to be within the Contracting State's territory. Everyone enjoys this right. It is a right, not a privilege. And it is accorded to everyone within the jurisdiction, as article 1 of the Convention declares. It is not given just to British citizens and those who have the right of abode in this country – not just to "British nationals".

102. When he was opening his argument the Attorney General said that the Human Rights Act 1998 (Designated Derogation) Order 2001 was a legitimate and proportionate response to a group of foreign nationals who had no right to be here with a view to protecting the rights of millions of people in the United Kingdom who were at risk of attack by international terrorists. His description of the persons against whom the Derogation Order was directed as a group of foreign nationals who had no right to be here was carefully chosen. The proposition that they were to be seen, in his words, as a subset of aliens who posed a threat to this country was later to form an important part of his argument on the discrimination issue. He submitted that, as it was legitimate for the State to distinguish between British nationals and aliens in the field of the control of immigration, their respective positions were not for the purposes of the discrimination argument to be regarded as analogous.

103. The right of the state to control immigration has, of course, long been recognised in international law. It forms the background to article 5(1)(f) of the Convention. This is why a Contracting State is permitted to deprive aliens, who have no right to be in the country, of their liberty for the purpose of preventing their unauthorised entry or with a view to their deportation or extradition. But it would be a serious error, in my opinion, to regard this case as about the right to control immigration. This is because the issue which the Derogation Order was designed to address was not at its heart an immigration issue at all. It was an issue about the aliens' right to liberty.

104. As the Schedule to the Derogation Order was right to point out, article 5(1)(f) permits the detention of a person with a view to detention only in circumstances where action is being taken with a view to deportation. It is clear, too, that deportation will cease to be permissible under that article if

deportation proceedings are not prosecuted with due diligence: *Chahal v United Kingdom* (1996) 23 EHRR 413, 465, para 112. It was appreciated that the exercise of the extended power to detain which is now contained in section 23 of the Anti-terrorism, Crime and Security Act 2001 might be inconsistent with the state's obligations under article 5(1). The purpose of the Order was to enable the United Kingdom to exercise the extended power against a suspected international terrorist so that he could be detained under the Immigration Act 1971, despite the fact that his removal from this country was prevented either temporarily or permanently.

105. The Secretary of State was, of course, entitled to discriminate between British nationals on the one hand and foreign nationals on the other for all the purposes of immigration control, subject to the limitations established by the *Chahal* case. What he was not entitled to do was to treat the right to liberty under article 5 of the Convention of foreign nationals who happen to be in this country for whatever reason as different in any respect from that enjoyed by British nationals. How, one might ask, can such treatment be reconciled with article 33 of the United Nations Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906)? Indefinite detention for reason of their nationality is one of the evils against which refugees who would otherwise be expelled are entitled to protection under that article. A refugee who is faced with the prospect of that treatment abroad is protected, according to the principle set out in the preamble to the Convention that human beings shall enjoy fundamental rights and freedoms without discrimination. Why should that protection be any less complete while he remains here?

106. I would therefore take as my starting point the proposition that the article 5 right to liberty is a fundamental right which belongs to everyone who happens to be in this country, irrespective of his or her nationality or citizenship. The court is obliged to subject the Derogation Order and the legislation that resulted from it as it affects foreign nationals to the same degree of scrutiny as it would have to be given if it had been designed to deprive British nationals of their right to liberty.

107. The Attorney General also submitted that a wide margin of discretion should be accorded at each stage in the analysis to the executive and to Parliament. He based this submission on the claim of these branches of government to democratic legitimacy, on the fact that the executive was best placed to consider the risks and on the special nature of the intelligence exercise. I accept at once that the executive and the legislature are to be accorded a wide margin of discretion in matters relating to national security, especially where the Convention rights of others such as the right to life may be put in jeopardy: *Leander v Sweden* (1987) 9 EHRR 433, 453, para 59; *Chassagnou v France* (1999) 29 EHRR 615, 687, paras 112-113. But the width of the margin depends on the context. Here the context is set by the nature of the right to liberty which the Convention guarantees to everyone, and by the responsibility that rests on the court to give effect to the guarantee to minimise the risk of arbitrariness and to ensure the rule of law: *Aksoy v Turkey* (1996) 23 EHRR 553, 588, para 76. Its absolute nature, save only in the

circumstances that are expressly provided for by article 5(1), indicates that any interference with the right to liberty must be accorded the fullest and most anxious scrutiny.

108. Put another way, the margin of the discretionary judgment that the courts will accord to the executive and to Parliament where this right is in issue is narrower than will be appropriate in other contexts. We are not dealing here with matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and to the legislature. We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate. It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority. The intensity of the scrutiny will nevertheless vary according to the point that has to be considered at each stage as one examines the question that was referred to the Special Immigration Appeals Commission ("SIAC") under section 30 of the 2001 Act. This is whether the Derogation Order and Part 4 of the 2001 Act are incompatible with the appellants' Convention rights.

Article 15(1) - the Derogation Order

109. The first point that has to be examined is the wording of article 15. It allows states to derogate from their obligations under the Convention, but only in the circumstances that it sets out. It provides:

> "(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided such measures are not inconsistent with its other obligations under international law."

110. Leaving a state of war aside as it does not arise in this case, the wording of this article can be broken down into three parts, each of which can be put in the form of a question. (1) Is the situation facing the High Contracting Party a public emergency which threatens the life of the nation? (2) Are the measures strictly required by the exigencies of the situation which has arisen? (3) Are the measures inconsistent with the High Contracting Party's other obligations under international law?

111. The phrase "threatening the life of the nation" is unique to article 15(1). But a similar phrase appears in article 4(3)(c). It permits service in the form of forced or compulsory labour to be exacted in case of an emergency or calamity "threatening the life or well-being of the community." The situation contemplated by these expressions was described in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, 31, para 28 as an "exceptional situation of crisis or

emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."

112. The present tense which this formulation uses might be thought to indicate a situation that has already arisen. But the European Commission in *The Greek Case* (1969) 12 YB 1, 72, para 153 adopted the word "imminent" which was used in the French text of the court's judgment in *Lawless*. So it has been recognised that derogation is permitted in the face of an emergency which has not yet happened but is imminent. The European Court has said that it will accord a large margin of appreciation to States in their assessment of the question whether the situation with which they are faced constitutes an actual or an imminent emergency: *Ireland v United Kingdom* (1978) 2 EHRR 25, 92, para 207. In the domestic legal order also great weight must be given to the views of the executive, for the reasons that were explained by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 194, 195, paras 57, 62.

113. Then there is the question whether the measures that are contemplated are "strictly required" by the exigencies of the situation. This too is another matter as to which, according to the jurisprudence of the European Court, a large margin of appreciation is granted to the contracting states. But, as the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, pointed out in paras 7 and 8 of his Opinion 1/2002 on certain aspects of the United Kingdom's derogation from article 5(1) dated 28 August 2002, the separation of powers whereby the government's legislative proposals are subject to the approval of Parliament and, on enactment, to review by the courts is a constitutive element of democratic government. So particular importance must be attached to the effectiveness of the process of scrutiny by the judiciary where the question raised is whether interference with the right to liberty is strictly required by the emergency. This is because the right to liberty is within its area of responsibility. As Mr Gil-Robles put it in para 9:

> "It is, furthermore, precisely because the Convention presupposes domestic controls in the form of preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations."

114. Accordingly the fact that the European Court will accord a large margin of appreciation to the contracting states on the question whether the measures taken to interfere with the right to liberty do not exceed those strictly required by the exigencies of the situation cannot be taken as the last word on the matter so far as the domestic courts are concerned. Final responsibility for determining whether they do exceed these limits must lie with the courts, if the test which article 15(1) lays down is to be applied within the domestic system with all the rigour that its wording indicates.

The public emergency

115. The question whether there is a public emergency of the kind contemplated by article 15(1) requires the exercise of judgment. The primary meaning of the word is an occurrence that is sudden or unexpected. It has an extended meaning – a situation of pressing need. A patch of fog on the motorway or a storm which brings down power lines may create a situation of emergency without the life of the nation being under threat. It is a question of degree. The range of situations which may demonstrate such a threat will extend from the consequences of natural disasters of all kinds to the consequences of acts of terrorism. Few would doubt that it is for the executive, with all the resources at its disposal, to judge whether the consequences of such events amount to an emergency of that kind. But imminent emergencies arouse fear and, as has often been said, fear is democracy's worst enemy. So it would be dangerous to ignore the context in which the judgment is to be exercised. Its exercise needs to be watched very carefully if it is a preliminary to the invoking of emergency powers, especially if they involve actions which are incompatible with Convention rights.

116. I am content therefore to accept that the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament. The judgment that has to be formed on these issues lies outside the expertise of the courts, including SIAC in the exercise of the jurisdiction that has been given to it by Part 4 of the 2001 Act. But in my opinion it is nevertheless open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency, and to scrutinise the submission by the Attorney General that for the appellants to be deprived of their fundamental right to liberty does not exceed what is "strictly required" by the situation which it has identified. The use of the word "strictly" invites close scrutiny of the action that has been taken. Where the rights of the individual are in issue the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights. In my opinion it is the proper function of the judiciary to subject the government's reasoning on these matters in this case to very close analysis. One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency.

117. The evidence which was placed before SIAC in this case was divided into two parts: material which could be made public and "closed material". Your Lordships have not been shown the closed material, and the Attorney General said that he was not asking for that material to be seen. The material which could be made public is contained in two Open Generic Statements which were prepared on behalf of the Home Secretary and in two witness statements by Mr Robert Whalley, a senior civil servant of the Home Office, dated 1 March 2002 and 19 June 2002.

118. There is ample evidence within this material to show that the government were fully justified in taking the view in November 2001 that there was an emergency threatening the life of the nation. As Mr Whalley put

it in his first witness statement, the United Kingdom was at danger of attacks from the Al Qaeda network which had the capacity through its associates to inflict massive casualties and have a devastating effect on the functioning of the nation. This had been demonstrated by the events of 11 September 2001 in New York, Pennsylvania and Washington. There was a significant body of foreign nationals in the United Kingdom who had the will and the capability of mounting co-ordinated attacks here which would be just as destructive to human life and to property. There was ample intelligence to show that international terrorist organisations involved in recent attacks and in preparation for other attacks of terrorism had links with the United Kingdom, and that they and others posed a continuing threat to this country. There was a growing body of evidence showing preparations made for the use of weapons of mass destruction in this campaign. In his second witness statement Mr Whalley said that it was considered that the serious threats to the nation emanated predominantly, albeit not exclusively, and more immediately from the category of foreign nationals.

119. The picture which emerges clearly from these statements is of a current state of emergency. It is an emergency which is constituted by the threat that these attacks will be carried out. It threatens the life of the nation because of the appalling consequences that would affect us all if they were to occur here. But it cannot yet be said that these attacks are imminent. On 15 October 2001 the Secretary of State said in the House of Commons that there was no immediate intelligence pointing to a specific threat to the United Kingdom: see Hansard (HC Debates, col 925). On 5 March 2002 this assessment of the position was repeated in the government's response to the Second Report of the House of Commons Select Committee on Defence on the Threat from Terrorism (HC 348, para 13) where it was stated that it would be wrong to say that there was evidence of a particular threat. I would not conclude from the material which we have seen that there was no current emergency. But I would conclude that the emergency which the threats constitute is of a different kind, or on a different level, from that which would undoubtedly ensue if the threats were ever to materialise. The evidence indicates that the latter emergency cannot yet be said to be imminent. It has to be recognised that, as the attacks are likely to come without warning, it may not be possible to identify a stage when they can be said to be imminent. This is an important factor, and I do not leave it out of account. But the fact is that the stage when the nation has to face that kind of emergency, the emergency of imminent attack, has not been reached.

120. The distinction which is to be drawn between these two situations is important. The situation which is said to require the derogation is the situation which we face now, not the situation that might arise at some unknown time in the future. The life of the nation is said to be threatened. But do the exigencies of the situation which we face now require that the appellants be deprived of their right to liberty? All the factual material which may provide an answer to this question is in the hands of the Home Secretary. But has he asked himself the right question in his analysis of this material? And did SIAC ask itself the right question when it was examining the decision of the Home Secretary?

Strictly required

121. In my opinion there were two questions that had to be addressed in order to determine whether or not the derogation that was proposed was strictly required. One was what its effects would be on the individuals who were to be affected by it. The other was whether, given those effects and the way British nationals who posed the same threat to the life of the nation were to be dealt with, derogating from the right to liberty of those individuals was strictly necessary. The second question is relevant to the discrimination issue, but I think that it also bears directly on the question whether the derogation went beyond what was strictly required. As I understand its judgment, SIAC too appreciated this point although it dealt with it at the end of the judgment as a discrimination issue. What this part of article 15(1) requires the contracting state to do is to consider with the greatest care whether an alternative course of action can be taken to deal with the exigencies of the situation produced by the emergency which will make derogation from its obligations under the Convention unnecessary.

122. The effects on the individual of a derogation that deprives him of his right to liberty will vary according to the nature, and above all the length, of the emergency. It will usually be impossible to say when an emergency arises how long it will last. But in some cases it may be perfectly obvious from the outset that it will last for a very long time, perhaps indefinitely. That seems to be the situation in this case. A timetable of events is built into the Act for the review of the operation of sections 21 to 23, and their duration is limited: see sections 28 and 29. Section 29(7) provides that those sections shall by virtue of that subsection cease to have effect at the end of 10 November 2006. But if the emergency persists, and the government is right in its belief that the derogation is strictly required to deal with it, the powers which these sections give to certify and detain suspected international terrorists will have to be renewed. It is a reasonable assumption that, if the situation remains unchanged, Parliament will be asked to re-enact them for a further period. All the signs are that the detentions that result from the exercise of these powers will continue indefinitely and that the period of its duration for the future will be measured not in months but years – and no one can yet say how many.

123. The Attorney General said that the first priority of the government is to prosecute those whom it suspects of being involved in international terrorism. But the appellants fall into the category of those whom, for a variety of reasons relating to the sources or quality of the evidence, it is unable or unwilling to prosecute. He then said that the appellants' place of detention has three walls, not four. There is no safe country to which they can be extradited, but they are free to leave the United Kingdom at any time if they wish and can find another safe country to which they can go. He pointed out that two aliens who were initially detained under section 23 of the Act have already done so – one to France and the other to Morocco. But it would be more accurate to say that the detainees who remain here are in a cul-de-sac from which, as they have no safe country to go to, there is no escape.

124. To tell a man that he is to be incarcerated for a fixed period is one thing. To tell him that he is to be incarcerated for a period that has no end in sight is quite another. And the longer the time the incarceration will last with no end in sight the worse it is. The gravity of this interference leads inevitably to the question posed by article 15(1) which is whether, if this is the nature of the emergency, the derogation is strictly required to deal with it. This raises the further question whether there is some other way of dealing with the emergency which will not be incompatible with the Convention rights. If there is some other way of dealing with it that will meet this test, the prolonged and indefinite detention without trial of those affected by the Derogation Order cannot be said to be what the exigencies of the situation strictly require.

125. Mr Whalley said in para 18 of his second witness statement that consideration was given at the time of the decision to derogate, and again at the time of the review on 18 June 2002, to the issue whether it would be appropriate to introduce a power of detention covering both British nationals and foreign nationals, but that it had been concluded that there were significant differences between these two categories. In para 19 he said that it was considered by the Secretary of State that the serious threats to the nation emanated predominantly (albeit not exclusively) and more immediately from the category of foreign nationals. In para 20 he acknowledged that a person removed to another country could re-engage in terrorist activity and might continue to be involved in acts of terrorism or the organisation of such acts from the country to which he was removed and that those acts might be directed against the United Kingdom. But he said that there was evidence to suggest, and that the Security Service so advised, that the steps which had been taken in the United Kingdom since 11 September 2001, including the measures under challenge, had had a significant effect in making it more difficult to operate here. In para 21 he said that one of the adverse effects arising from the continuing and unrestricted presence in the United Kingdom of suspected terrorists who could not be removed to third countries was the perception in other countries, particularly Muslim countries, that the United Kingdom was weak in its response to international terrorists operating in this country.

126. I do not question this assessment. But there is a difference between a course of action that is obviously desirable and a course of action that is strictly required. Article 15(1) does not permit derogation unless the test of what is strictly required is satisfied. It is acknowledged that there are some British nationals who are thought also to present a threat to the life of the nation because they too are suspected of involvement in international terrorism. The Attorney General accepted that there may be others whom the powers in sections 22 and 23 cannot touch because, although they are not British nationals, they have a right to remain in this country. These include people whom, although suspected of involvement in international terrorism, the government is unable or unwilling to prosecute. They too cannot be removed to third countries. Yet it was decided not to introduce measures for their detention. In their case such measures, it must be assumed, were not thought to be strictly required by the exigencies of the situation that had been

identified. If the threat was such that their detention was strictly required, a measure would have had to be introduced to provide for this. But that step has not been taken.

127. Mr Whalley does not explain in either of his two witness statements what is being done to counter the threat from those in this country not covered by sections 21 to 23 who present the same threat as the foreign nationals. He does not say that the threat from them was regarded as insignificant. Nor does he explain why it was considered acceptable to permit those who could do so to go to France or Morocco where, as no action was taken to prevent this, they would be free to continue their activities. SIAC said in para 95 of its judgment that the evidence which was before it demonstrated beyond argument that the threat was not confined to aliens who have no right to be here and that there were many British nationals at liberty in the United Kingdom who could, like the appellants, be defined as suspected international terrorists. It had the benefit of seeing the "closed material" and of hearing submissions on it, as well as the material in the Open Generic Statements which contain numerous references to the activities of British nationals. The Attorney General accepted that it was not being said that the threat from those who were at liberty in the United Kingdom was de minimis. He said that their right was of a different kind from that of foreign nationals, so the balance was being struck differently in their case.

128. The point that Mr Whalley makes is that the threat from those who are at liberty is less immediate. But he draws no distinction between these two groups as regards the extent to which they are in touch with terrorist organisations or as regards other aspects of their activities. I infer that the problem which was thought to be in need of being addressed in the case of foreign nationals immediately, and was capable of being so addressed, was the perception in some countries that the United Kingdom was a safe option. This was because it could encourage terrorists to travel to this country, thus reducing its ability with its allies to tackle the threat from them: Mr Whalley's first witness statement, para 20. As the Attorney General put it, the threat is an international one. It had been judged at the highest level that it was necessary to persuade other countries how they should respond to it. Setting an example to other countries, and dispelling the idea that this country was a safe haven for terrorists, was a legitimate aim in view of the nature of the emergency. But the question is whether, applying the test of what was strictly required, the means chosen were proportionate.

129. The Attorney General, for understandable reasons, was not willing to elaborate on the measures that were being taken to contain the threat to the life of this nation from British nationals. But he said that a number of measures were in place for the protection of the public, and that those involved were being prosecuted where possible. He explained that any response which provided for the indefinite detention of those people would have had to have been a different response, as they were not subject to immigration control. The distinction which was drawn between their case and that of the foreign nationals was that the foreign nationals had no right to be here. For British nationals the measure would have had to have provided for a form of detention

that had four walls. It would have had to have been more draconian. But that answer, while true, does not meet the objection that the indefinite detention without trial of foreign nationals cannot be said to be strictly required to meet the exigencies of the situation, if the indefinite detention without trial of those who present a threat to the life of the nation because they are suspected of involvement in international terrorism is not thought to be required in the case of British nationals.

130. SIAC dealt with this issue in paras 37 to 45 of its judgment [2002] HRLR 1274. The standard of scrutiny that it set for itself in para 43 was that described by the European Court in *Ireland v United Kingdom* (1978) 2 EHRR 25, 95, at para 214. The court said that it was not its function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. It also drew guidance from the judgment in the Supreme Court of Canada of McLachlin J in *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199, 342, para 160 where she said that the law must be carefully tailored so that rights are impaired no more than necessary, but that the tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator.

131. In my opinion SIAC fell into an error of law at this point. These references set too low a standard for the scrutiny that the national court must carry out in order to test the proposition that the derogation is strictly necessary. When the European Court talks about affording a margin of appreciation to the assessment of the British Government it assumes that its assessment will at the national level receive closer scrutiny. As I said earlier, the fact that the European Court will accord a large margin of appreciation to the contracting states on the question whether the measures taken do not exceed those strictly required by the exigencies of the situation cannot be taken as the last word on the matter so far as the domestic courts are concerned. That is especially so in this case, as section 30 of the 2001 Act itself recognises that the derogation may be reviewed by the judiciary. McLachlin J's description of the approach which is taken to the scrutiny of legislation by the Supreme Court of Canada does not fit the precise wording of article 15(1) as to the standard that must be achieved by the derogation. As Brooke LJ in the Court of Appeal [2004] QB 335, 373, para 94 observed, it is much safer to rely on the jurisprudence surrounding the convention that we are currently interpreting if there is any significant difference in the language being construed.

132. I would hold that the indefinite detention of foreign nationals without trial has not been shown to be strictly required, as the same threat from British nationals whom the government is unable or unwilling to prosecute is being met by other measures which do not require them to be detained indefinitely without trial. The distinction which the government seeks to draw between these two groups – British nationals and foreign nationals – raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also. It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required

that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat.

133. As Mr Pannick QC put it for Liberty, section 23 of the 2001 Act is not rationally connected to the legislative objective. If the threat is as potent as the Secretary of State suggests, it is absurd to confine the measures intended to deal with it so that they do not apply to British nationals, however strong the suspicion and however grave the damage it is feared they may cause. There is also the point that foreign nationals who present the same threat are permitted, if they can safely do so, to leave this country at any time. Here too there is a clear indication that the indefinite detention of those who remain here as a means of countering the same threat is disproportionate.

Discrimination

134. I said earlier that it would be a serious error to regard the right to control immigration as decisive of the discrimination issue in this case. This was because the issue which the Derogation Order was designed to address was not at its heart an immigration issue. Yet the Attorney General insisted that the relevant comparators for the purposes of the discrimination issue were other aliens, not British nationals who present the same threat. He said that nationals and aliens are in a different position so far as concerns their right to be in the country, so it was legitimate for a contracting state to assess that their respective positions in the present context were not similar: *Moustaquim v Belgium* (1991) 13 EHRR 802, 815-816, paras 48, 49. It was well recognised both in international law and under the European Convention that each state has the right to control immigration into its territory, and this right extended to the right of extradition and to detention when this was required on grounds of national security: *Nishimura Ekiu v United States* (1892) 142 US 651, 659; Goodwin-Gill, "International Law and the Detention of Refugees and Asylum Seekers" (1986) 20 International Migration Rev 193, 196-202; *Chahal v United Kingdom* (1996) 23 EHRR 413, 454-455, para 73. So in assessing the legitimacy of different treatment as between aliens and nationals it was relevant to be informed about the principles which normally prevail in democratic societies and about what these societies actually do as a matter of practice: *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 284, para 10. Materials outside the European Convention itself were relevant to this assessment. This point lay at the heart of his argument.

135. The proviso to article 15(1) states that the measures that are taken by a High Contracting Party under that article must not be inconsistent with its other obligations under international law. What those obligations are depends, of course, on the context and on the obligations under the Convention from which the High Contracting Party seeks to derogate. Article 4 (1) of the International Covenant on Civil and Political Rights, which permits derogation in time of public emergency, is in almost identical terms. But it contains the

additional proviso that such measures do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

136. The issue is whether it is permissible for the state to discriminate between aliens and its own nationals as regards their article 5 Convention right to liberty. Article 14 of the Convention provides that the enjoyment of the rights and freedoms which it sets forth shall be secured without discrimination on any ground such as, inter alia, national origins: see also article 26 of the International Covenant on Civil and Political Rights which prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as national or social origin. The discipline which these provisions inject, and which article 4(1) of the International Covenant also recognises, is a vital part of international human rights law. A state is not permitted to discriminate against an unpopular minority for the good of the majority. If it was a sufficient answer to those who rely on article 14 of the Convention to say that it was permissible under international law for the state to discriminate between aliens and its own nationals on the grounds of national security, there would be no need for the state to derogate from its obligations under article 5 in the case of aliens. But it is conceded, rightly, that derogation from article 5 is necessary if the appellants are to be detained indefinitely.

137. This concession acknowledges that the right of contracting states to treat aliens differently from their own nationals is subject to their obligations under international human rights law. In our case the state's obligations under the European Convention form part of its international obligations. *Oppenheim's International Law*, 9th ed (1992), vol 1, pp 909-910, para 404 states:

> "Apart from certain general requirements of customary international law, such as those which impose on a state international responsibility for denial of justice to aliens, or which require it to observe in its treatment of aliens certain minimum international standards, states are nowadays often under many treaty obligations as to the treatment of aliens in their territories."

In *Chahal v United Kingdom* (1996) 23 EHRR 413, 457, para 80 the European Court said that the protection afforded by article 3 of the Convention against ill-treatment was wider than that provided by articles 32 and 33 of the United Nations 1951 Convention relating to the Status of Refugees under which states are permitted to expel aliens on the grounds of national security. The assertion in this judgment of the primacy of the state's obligations under the European Convention must be understood as extending to the protections afforded by article 5 and by article14 also.

138. The question then depends on the precise circumstances in which the contracting state seeks to treat aliens and British nationals differently. If immigration control was the issue in this case, as the Attorney General

submits, the argument that the state was entitled to treat these two groups differently would appear to be unanswerable. The same would be so if there were national security grounds for treating them differently in their enjoyment of the right to liberty. But that is not this case. It is not disputed that a significant threat to national security comes from a significant number of British nationals. It must follow, in my opinion, that the treatment which is afforded to aliens who present a threat to national security is to be compared with the treatment that is afforded to British nationals who present the same threat. SIAC said that the derogation could not fail to be regarded as other than discriminatory on grounds of national origin: [2002] HRLR 1274, para 95. Having studied the open material that is before us, I think that the conclusion that the derogation is discriminatory is inescapable.

Conclusion

139. I too would allow the appeals. I would quash the Human Rights Act 1998 (Designated Derogation) Order 2001. I would declare that section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with the right to liberty in article 5 of the European Convention on Human Rights on the ground that it is not proportionate, and that it is incompatible with article 14 of the Convention on the ground that it discriminates against the appellants in their enjoyment of the right to liberty on the ground of their national origin.

LORD SCOTT OF FOSCOTE

My Lords,

140. I gratefully adopt my noble and learned friend Lord Bingham of Cornhill's description of the factual and statutory background to these appeals and his exposition of the relevant authorities. I am in complete agreement with the conclusions he has reached and wish to add only a few observations of my own.

The issue

141. The issue in these appeals is not whether the indefinite executive detention of these appellants under section 23 of the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act") is lawful. The merits of the case against each appellant allegedly justifying his detention has not been argued in these proceedings. That issue is for another day and other proceedings and may well come before your Lordships in due course. It is possible that in those proceedings it will be held in relation to one or some or all of the appellants that his or their detention was not justified and was therefore unlawful. But that issue is not before your Lordships now.

142. It has not been suggested, nor could it be suggested, that the 2001 Act is otherwise than an effective enactment made by a sovereign legislature. It was passed by both Houses of Parliament and received the Royal Assent.

Whether the terms of the 2001 Act are consistent with the terms of the European Convention on Human Rights ("the ECHR") is, so far as the courts of this country are concerned, relevant only to the question whether a declaration of incompatibility under section 4 of the Human Rights Act 1998 should be made. The making of such a declaration will not, however, affect in the least the validity under domestic law of the impugned statutory provision. The import of such a declaration is political not legal.

143. So what is the point of these proceedings and these appeals, with nine of your Lordships sitting in judgment, with intervention from the National Council of Civil Liberties and from Amnesty International and with avid attention from the media? An answer might be that the object of the proceedings is to obtain a court order quashing the Human Rights Act 1998 (Designated Derogation) Order 2001 ("the Order"), whereby the United Kingdom, purporting to act in pursuance of article 15 of the ECHR, announced its intention to derogate from article 5(1) of the ECHR by enacting Part 4 of the 2001 Act. The Special Immigration Appeals Commission ("SIAC") did quash the Order and made a declaration of incompatibility of Part 4 with the ECHR. The Court of Appeal disagreed. It set aside the quashing of the Order and the declaration of incompatibility. Your Lordships are asked to reinstate the quashing order and the declaration of incompatibility.

144. The effect, my Lords, of all this on the lawfulness under domestic law of the incarceration of the appellants is nil. A challenge to the lawfulness of their incarceration requires a challenge to be made to the exercise by the Home Secretary of the statutory powers conferred on him by section 23 of the 2001 Act. That challenge is not made in these proceedings. The SIAC judgment (delivered by Collins J), and your Lordships' opinions if these appeals succeed, may show that the enactment of Part 4 of the 2001 Act represented a breach of the United Kingdom's treaty obligations under the ECHR but will not show that the detention of the appellants is unlawful under domestic law. The ECHR is not part of domestic law except to the extent that it has become so under the 1998 Act. The 1998 Act did not entrench the articles of the ECHR so as to bar Parliament from subsequently enacting legislation inconsistent with those articles. Parliament can, if it wishes to do so, enact such legislation. The courts, whose duty it is to construe and apply Parliamentary enactments, will not readily assume that Parliament has intended the inconsistency. But if the statutory language is clear, and *a fortiori* if, as here, Parliament has expressed its intention to enact a provision inconsistent with the ECHR article in question, the courts must apply and give effect to the statutory language notwithstanding the inconsistency. The statutory provision may represent a breach by the United Kingdom of its treaty obligations under the ECHR but will nonetheless constitute valid and enforceable legislation. The 1998 Act did not, and could not, deprive Parliament of its power to legislate inconsistently with the ECHR.

145. The normal and proper function of the courts of this country is to adjudicate on the rights and liabilities under domestic law of citizens (or of institutions with legal personality) or to adjudicate on the validity of executive

actions or omissions that may affect those rights and liabilities. It is not, normally, the function of the courts to entertain proceedings the purpose of which is to obtain a ruling as to whether an Act of Parliament is compatible with an international treaty obligation entered into by the executive. The executive cannot make laws for the United Kingdom otherwise than pursuant to and within the constraints imposed by an enabling Act of Parliament. The executive has extensive and varied prerogative powers that it can exercise in the name of the Crown but none that permit lawmaking. In being asked, therefore, to perform the function to which I have referred, the courts are, it seems to me, being asked to perform a function the consequences of which will be essentially political in character rather than legal. A ruling that an Act of Parliament is incompatible with the ECHR does not detract from the validity of the Act. It does not relieve citizens from the burdens imposed by the Act. It provides, of course, ammunition to those who disapprove of the Act and desire to agitate for its amendment or repeal. This is not a function that the courts have sought for themselves. It is a function that has been thrust on the courts by the 1998 Act.

The 1998 Act

146. Section 1 of the 1998 Act defined as "the Convention rights" a number of specified articles of the ECHR and enacted that -

> "Those articles are to have effect for the purposes of this Act subject to any designated derogation …
>
> (as to which see section 14 …)."

Article 5 was one of the specified articles but article 15 of the ECHR, entitled "Derogation in time of emergency" (the text of which is set out in para 10 of the opinion delivered by my noble and learned friend Lord Bingham of Cornhill) was not. Unlike the specified articles article 15 did not, therefore, become part of our domestic law. It remained, and remains, no more than an article in a treaty to which the United Kingdom, by act of the executive, adheres.

147. Section 3(1) of the 1998 Act says that

> "So far as it is possible to do so, primary and subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights."

but subsection (2)(b) makes clear that the section

> "… does not affect the validity, continuing operation or enforcement of any incompatible primary legislation …"

and section 4(2) says that if a court comes to the conclusion that a provision of primary legislation is not compatible with a Convention right, the court "may make a declaration of that incompatibility". The section does not identify the intended purpose of the declaration. It is, presumably, intended that the declaration will draw public attention to the incompatibility.

148. Section 14 of the 1998 Act deals with designated derogations. These include

> "any derogation by the United Kingdom from an article of the Convention or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State."

And subsection (6) says that

> "A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation."

So the Secretary of State may make an order declaring in advance that the United Kingdom is proposing to enact legislation that is inconsistent with a Convention right. Section 14 does not so state but it is beyond argument that the validity under domestic law of the legislation once enacted is not dependent on there having been a derogation order. With or without a derogation order Parliament can enact legislation inconsistent with a Convention right provided that the statutory language makes clear the Parliamentary intention to do so.

149. It is noteworthy that section 14 makes no reference to article 15 of the ECHR. Article 15 describes the circumstances in which signatories to the Convention may derogate from their obligations under the Convention and bring into effect measures inconsistent with the Convention. This may only be done

> "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law"
>
> (article 15(1))

These article 15 limitations on the power to derogate are not incorporated into section 14 of the 1998 Act. Indeed, section 14 prescribes no limitations of any sort on the Secretary of State's power to make a designated derogation order.

150. It seems to me somewhat of a puzzle why section 14 was necessary at all. The 1998 Act does not assume to restrict Parliament's power to enact legislation inconsistent with the ECHR. So what was the purpose of the

designated derogation section? The purpose was, perhaps, simply to enable it to be made clear that the inconsistency was deliberate and not inadvertent, and thereby to constitute an aid to the courts in construing the statutory provision.

The Derogation Order 2001

151. The main issue that has been debated before your Lordships is whether the Order was validly made by the Secretary of State or should be quashed. It seems to have been assumed that the Order could only be upheld if it could be justified as an exercise of the article 15 power of derogation. The Attorney General expressly accepted that that must be so and did not seek to uphold the Order on the ground that whatever its status if tested by reference to article 15 it was a valid exercise by the Secretary of State of the order-making power conferred by section 14 of the 1998 Act. I have found this another puzzle because article 15 is not one of the specified articles incorporated into domestic law by the 1998 Act and is not referred to in section 14.

152. In the preamble to the Order the Secretary of State purported to be exercising his section 14 powers but in the Schedule to the Order, in which the proposed notification of the derogation from article 5(1) is set out, the derogation is described as an exercise of "the right of derogation conferred by article 15(1) of the Convention". For the reasons I have indicated I have difficulty in understanding how the scope of the authority conferred by section 14 to make a designated derogation order can be regarded as limited by the terms of article 15 of the ECHR. But since the Attorney General was content to argue the case on the footing that the Order did have to be justified under article 15 I will set aside my doubts and consider the case on that footing.

153. Was the Order compliant with article 15? Three sub-issues need to be considered. First, was there a "public emergency threatening the life of the nation"? This is the threshold criterion. If it is satisfied then, second, was the enactment of section 23 of the 2001 Act "strictly required by the exigencies of the situation"? If so then, third, was section 23 inconsistent with the United Kingdom's other obligations under international law? On these three questions I have already expressed my agreement with the conclusions expressed by Lord Bingham of Cornhill. I have also had the advantage of reading the opinions of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond and am in broad agreement with the views that they have expressed. I need add only a few comments of my own.

Was there a public emergency threatening the life of the nation?

154. The Secretary of State's case that this threshold criterion has been met is based upon the horrific example of the 11 September attack on the Twin Towers in New York, on the belief that those responsible may target allies of the United States for similar atrocities (a belief given credibility by the recent attack in Madrid) and on the assertion that available intelligence indicates the reality and imminence of a comparable terrorist attack on the United Kingdom. The Secretary of State is unfortunate in the timing of the judicial

examination in these proceedings of the "public emergency" that he postulates. It is certainly true that the judiciary must in general defer to the executive's assessment of what constitutes a threat to national security or to "the life of the nation". But judicial memories are no shorter than those of the public and the public have not forgotten the faulty intelligence assessments on the basis of which United Kingdom forces were sent to take part, and are still taking part, in the hostilities in Iraq. For my part I do not doubt that there is a terrorist threat to this country and I do not doubt that great vigilance is necessary, not only on the part of the security forces but also on the part of individual members of the public, to guard against terrorist attacks. But I do have very great doubt whether the "public emergency" is one that justifies the description of "threatening the life of the nation". Nonetheless, I would, for my part, be prepared to allow the Secretary of State the benefit of the doubt on this point and accept that the threshold criterion of article 15 is satisfied.

"To the extent strictly required by the exigencies of the situation"

155. Section 23 constitutes, in my opinion, a derogation from article 5(1) at the extreme end of the severity spectrum. An individual who is detained under section 23 will be a person accused of no crime but a person whom the Secretary of State has certified that he "reasonably … suspects … is a terrorist" (section 21(1)). The individual may then be detained in prison indefinitely. True it is that he can leave the United Kingdom if he elects to do so but the reality in many cases will be that the only country to which he is entitled to go will be a country where he is likely to undergo torture if he does go there. He can challenge before the SIAC the reasonableness of the Secretary of State's suspicion that he is a terrorist but has no right to know the grounds on which the Secretary of State has formed that suspicion. The grounds can be made known to a special advocate appointed to represent him but the special advocate may not inform him of the grounds and, therefore, cannot take instructions from him in refutation of the allegations made against him. Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated whether accurately or inaccurately with France before and during the Revolution, with Soviet Russia in the Stalinist era and now associated, as a result of section 23 of the 2001 Act, with the United Kingdom. I can understand, conceptually, that the circumstances constituting the "public emergency threatening the life of the nation" might be of such an order as to justify describing section 23 as a measure "strictly required by the exigencies of the situation". But I am unable to accept that the Secretary of State has established that section 23 is "strictly required" by the public emergency. He should, at the least, in my opinion, have to show that monitoring arrangements or movement restrictions less severe that incarceration in prison would not suffice.

156. I have nothing to add to what my noble and learned friends have said about the United Kingdom's other obligations under international law but for the reasons given in the foregoing paragraph I conclude that the Secretary of State has failed to justify the Order as a derogation permitted by article 15.

Article 14 – discrimination

157. The Order purported to derogate only from article 5(1). It did not purport to derogate from article 14 which prohibits discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin …" etc. Detention under section 23 cannot be imposed on British nationals. It can only be invoked against immigrants who have no right of residence in this country. But a terrorist may be an immigrant or may be homegrown. The differentiation between suspected terrorists who are immigrants with no right of residence and suspected terrorists who are British nationals is, in my opinion, plainly discriminatory. The difference between the two groups, namely, that one group has the right of residence and the other group does not, seems to me to be irrelevant to the issue as to what measures are required in order to combat the threat of terrorism that their presence in this country may be thought by the Secretary of State to present.

158. The Secretary of State argues that measures restricted in their application to those suspected terrorists who do not have rights of residence will suffice to combat the "public emergency" and that to extend the measures to everyone who was a suspected terrorist would be to go further than was "strictly required". In my opinion, however the article 15 requirement does not justify a discriminatory distinction between different groups of people all of whom are suspected terrorists who together present the threat of terrorism and to all of whom the measures, if they really were "strictly necessary" would logically be applicable. If those who are suspected terrorists include some non-Muslims as well as Muslims, it would, in my opinion, be irrational and discriminatory to restrict the application of the measures to Muslims even though the bulk of those suspected are likely to profess to be Muslims. Some might well not be professed Muslims. Similarly, it would be irrational and discriminatory to restrict the application of the measures to men although the bulk of those suspected are likely to be male. Some might well be women. Similarly, in my opinion, it is irrational and discriminatory to restrict the application of the measures to suspected terrorists who have no right of residence in this country. Some suspected terrorists may well be home-grown.

159. The discriminatory character of section 23 has the result that the section is incompatible with article 14 of the ECHR. Moreover, in my opinion, the Order fails to satisfy the criteria imposed by article 15 not only on the ground that section 23 goes further than "the extent strictly required by the exigencies of the situation" but also because its discriminatory effect deprives it of the requisite proportionality.

Conclusion

160. For these reasons, and those given by my noble and learned friends I conclude that the Order is not compliant with article 15 of the ECHR. I understand the Attorney General to have accepted that this conclusion would require the Order to be quashed. I venture to repeat my doubts about this. article 15 is not part of domestic law and the authority conferred by section 14 to make derogation orders is not expressed to be subject to article 15

limitations. In the circumstances, however, I too would make the Order suggested by Lord Bingham of Cornhill.

LORD RODGER OF EARLSFERRY

My Lords,

161. In the aftermath of the attacks on targets in the United States of America on 11 September 2001 Her Majesty's Government had to consider what steps they should take to guard against the risk of similar attacks in this country. In particular, they had to consider what should be done about suspected international terrorists living here who might be involved in plotting such attacks ("suspects"). In principle, the nationality of the suspects would be irrelevant to the threat that they posed. If a man is holding a gun at your head, it makes no difference whether he has a British or a foreign passport in his pocket. Similarly, if a network of terrorists is planning an attack on the life of the nation, the danger is the same, irrespective of the nationality of the individuals involved. So the question for ministers was how they were to counteract any risk from suspects living here, whether they were foreign or British.

162. In some cases the foreign suspects could be deported – though no information is available as to the number who actually were deported after the 9/11 attacks. For other foreign suspects this was not possible, since they would be exposed to inhuman or degrading treatment or punishment if sent back to their country of origin. Their deportation would therefore involve a breach of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and so was forbidden: *Chahal v United Kingdom* (1996) 23 EHRR 413. Even before the attacks on the United States, the Home Secretary had identified the appellants as persons he wished to deport but could not, because of article 3. One of the aims of the Government in introducing the Bill which became the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act") was to deal with foreign suspects of this kind. When section 23 came into force on 14 December 2001 it gave the Home Secretary the power to detain those foreign suspects who could not be deported. Within a matter of days all but one of the appellants had been detained. For the most part, they are still detained and are likely to remain in detention for the foreseeable future, probably at least until the power lapses at the end of 10 November 2006. By contrast, the Government did not invite Parliament to pass legislation for the detention of British suspects who, by definition, could also not be deported. They remain at liberty. Although the Attorney General declined to tell the House what was being done to counter the threat that the British suspects pose to the life of the nation, it must be assumed in the Government's favour that ministers have good grounds for being satisfied that the threat can be properly contained by using the other powers available to the police and security services. The Attorney General did not suggest that there was any obstacle to the police and security services exercising these powers in the same way in relation to foreign suspects.

163. For the purpose of these proceedings the Home Secretary accepts that, normally, the detention power in section 23 would violate the detained suspects' rights under article 5(1) of the Convention. Section 23 therefore purports to derogate from article 5(1). To be valid, a derogation must comply with the requirements of article 15(1):

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

There are three requirements. First, the measures must be taken in time of war or other public emergency threatening the life of the nation. Secondly, the state party may take measures derogating from its obligations only "to the extent strictly required by the exigencies of the situation." Lastly, the measures must not be inconsistent with the state's other obligations under international law.

164. Article 15 is not one of the articles that are reproduced in our domestic law by section 1(1) and (2) of the Human Rights Act 1998. So nothing in that Act would permit a domestic court to adjudicate on any alleged breach of it. But a derogation is given effect in domestic law by the making of a designation order under section 14(1). Under section 1(1) and (2) the order operates to restrict the effect of the Convention right in question in our domestic law. Section 30(2) and (5) of the 2001 Act provide that any derogation from article 5(1), relating to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or the designation of that derogation in terms of section 14(1) of the 1998 Act, may be questioned in legal proceedings before SIAC and in an appeal from their decision. Parliament thereby conferred on those detained under the 2001 Act this special right to challenge the derogation from their article 5(1) Convention rights. If the right is to be meaningful, the judges must be intended to do more than simply rubber-stamp the decisions taken by ministers and Parliament.

165. I can deal briefly with the appellants' argument relating to the first requirement of a valid derogation. In December 2001 the United Kingdom was not at war. Was there, however, some other public emergency threatening the life of the nation? The appellants say not. Not without some hesitation, especially in the light of the speech of my noble and learned friend, Lord Hoffmann, I have concluded that this submission falls to be rejected. The situation in December 2001 was no less grave than other situations which the European Court of Human Rights has regarded as constituting a "public emergency threatening the life of the nation" in terms of article 15(1). For instance, in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, 31 – 32, para 28 the Court held that the Irish government had reasonably deduced the existence of such a state from a combination of factors:

> "in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957."

The (relatively modest) scale of the terrorist activities in question can be gauged from the summary of the facts at p 18. Similarly, in its admissibility decision in *Marshall v United Kingdom*, 10 July 2001, unreported, the fourth section of the Court noted that in 1998 the authorities in Northern Ireland continued to be confronted with the threat of terrorist violence, even although, by that time, its actual incidence had gone down. There had therefore been no return to normality and there was no basis for the Court to controvert the authorities' assessment of the situation in the Province in terms of the threats which organised violence posed for the life of the community and the search for a peaceful settlement. In this connexion the Court went on to recall:

> "that by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogation necessary to avoid it...."

166. The unheralded attacks on the United States in September 2001 form the backdrop to the Government's decision to derogate. They were mounted by terrorists who had gained entry to the United States and had lain low, waiting for their opportunity. The attacks were on an unprecedented scale and were carried out by ruthless men who were prepared to kill themselves and any number of innocent people in pursuit of their goal. More than fifty of the victims of the attacks were British. There was good reason for the Government to think that, as the principal ally of the United States, this country was likely to be a prime target for any further similar attacks. And, in the days that followed, spokesmen for Al Qa'ida specifically linked Britain with the United States and Israel as a potential target for future attacks. The Government had access to reports from MI5 and MI6 and to the expertise of officials from those organisations in interpreting and analysing the available intelligence about the level of the threat. When examining the Government's overall assessment of the situation, the courts must bear in mind that they do not have that expertise. Mr Emmerson QC observed, rightly, that in the autumn of 2001 the Home Secretary had stated that there was no immediate intelligence pointing to a specific threat to the United Kingdom. The following spring, he had said that it would be wrong to say that the Government had evidence of a particular threat. But these statements in no way invalidate the Government's assessment that the country was facing a risk of devastating attacks at some unspecified time, against which the Government might have to take measures which would not have been

considered necessary before the events of 11 September. SIAC examined all the material placed before them, including the closed material, and were satisfied that it justified the conclusion that a public emergency threatening the life of the nation existed. Like the Court of Appeal, I detect no error in SIAC's approach in reaching that conclusion, and I would accordingly accept it.

167. The next precondition for a valid derogation in terms of article 15(1) is that the exigencies of the situation facing the country in December 2001 "strictly required" the introduction of the power of detention in section 23. So in these proceedings the Home Secretary must show that the exigencies of the situation "strictly required" the detention of foreign suspects, even although it did not require the detention of British suspects. Unless he shows this, the derogation is not to be regarded as valid and the derogation order must be quashed.

168. On the facts of this particular case consideration of the second issue inevitably entails a comparison of the different ways in which foreign and British suspects have been treated. Despite what the Court of Appeal appear to have thought, however, acceptance of the appellants' argument does not necessarily involve saying that the British suspects should also have been detained. Rather, the appellants say that, in the absence of any satisfactory evidence that members of the two groups posed substantially different threats, the judgment of the Government and of Parliament, that the exigencies of the situation did not require the detention of British suspects, undermines their simultaneous judgment that it was necessary to detain those foreign suspects who could not be deported. For this purpose the disparity of treatment between the two groups is not said, in itself, to give rise to a breach of the Convention but simply to point to the conclusion that, in terms of article 15(1), the detention of the foreign suspects was not in fact strictly required. If that inference is correct, then the derogation is invalid.

169. The disparity of treatment comes into another argument for the appellants, however. It relates to the third requirement in article 15(1), that any measure should not be inconsistent with the United Kingdom's other obligations under international law. The appellants say that the provision for detaining only foreign suspects is not merely incompatible with article 5(1) but inconsistent with the United Kingdom's obligation under article 14 to secure to people within their jurisdiction the enjoyment of their article 5(1) rights without discrimination on the ground of national origin. Alternatively, it is inconsistent with the United Kingdom's corresponding obligations under articles 9 and 26 of the ICCPR. For this reason, the appellants submit, even if section 23 cleared both the first two hurdles in article 15(1) of the Convention, it would fall at the third.

170. SIAC found in the appellants' favour on that point, [2002] HRLR 1274, 1313, para 95. The Court of Appeal took the opposite view, however, on the basis that the foreign suspects who cannot be deported have, unlike British nationals, no more right to remain, only a right not to be removed, which means legally that, for the purposes of article 14, they come into a

different class from those who have a right of abode: [2004] QB 335, 361 - 362, para 47 per Lord Woolf CJ.

171. I am, with respect, unable to accept this reasoning. It is true, of course, that no violation of article 14 occurs merely because a foreigner with no right of abode can be deported and can be detained with a view to deportation (article 5(1)(f)), whereas a national of the country concerned cannot: *Moustaquim v Belgium* (1991) 13 EHRR 802, 816, para 49. In this case, however, so far as the need for detention is concerned, the critical factor is not the suspects' immigration status but the threat that they are suspected of posing to the life of the nation: that is why, although the Secretary of State had previously wanted to deport the appellants, it was only after 9/11 that steps were taken to provide for their detention. In being thought to pose this kind of threat, the foreign suspects are comparable with the British suspects.

172. In any event, even supposing that, for the purposes of article 14, there were a distinction in terms of their immigration status which would justify detaining foreign suspects in circumstances where British suspects were not detained, the Government would still have to show that the detention of the foreign suspects was strictly required in terms of article 15(1). The Court of Appeal considered that it was - inter alia because they took the view that SIAC had made a finding of fact, which could not be overturned, that the derogation was strictly required by the exigencies of the situation: [2004] QB 335, 355, para 35 per Lord Woolf CJ; at p 373, para 91 per Brooke LJ and at p 386, para 150 per Chadwick LJ.

173. Unfortunately, the Court of Appeal misconstrued the decision of SIAC. It by no means constituted a finding of fact in favour of the Secretary of State which foreclosed further consideration of the issue. SIAC dealt with the matter in paras 37 – 53 of their judgment under the overall heading "Are the measures taken 'strictly required'?" Within that heading, they divided the topic into a number of compartments. In paras 41 – 45, under the sub-heading "Other measures available", SIAC rejected the appellants' arguments that detention was not strictly required because legislation could have been introduced to permit the use of telephone intercept evidence and the Terrorism Act 2000 already contained wide-ranging provisions which gave adequate protection. Under the sub-heading "Rational connexion" they then turned, in paras 46 – 53, to the appellants' various arguments that there was no rational connexion between the measures adopted and the objectives which the Government sought to attain. In paras 47 – 49 they rejected the appellants' "over-inclusiveness" argument and then, in paras 50 – 51, the "Prison with Three Walls" argument. In paras 52 and 53 SIAC referred to two "Other matters". The first was the appellants' contention that it was irrational to limit the detention powers to foreign nationals. SIAC found it convenient to consider the arguments on this issue later, in paras 79 to 96 of their judgment, along with the arguments relating to article 14. Finally, in para 53 SIAC rejected the appellants' argument that the provisions for judicial and democratic supervision in the 2001 Act were inappropriate and insufficient.

174. The upshot is that in paras 37 – 53 of their judgment SIAC found in favour of the Government on all of the points that they decided at that stage in regard to the question "Are the measures taken 'strictly required'?" My noble and learned friend, Lord Bingham of Cornhill, has rejected their reasons for accepting the Government's argument on one of these points, the Prison with Three Walls. But, even supposing that SIAC were right on that particular point, they still left over till later one of the other relevant points, viz the appellants' contention relating to the allegedly irrational disparity of treatment between the foreign and British suspects. And, when they came to consider that matter along with the alleged breach of article 14, in para 95 they came down in favour of the appellants. That conclusion must be read back into para 52 of SIAC's judgment in order to see how they determined the point that they had reserved. When that is done, it is clear that SIAC's ultimate conclusion was that it was irrational to limit the detention power to foreign suspects. Hence the answer to the overall question which SIAC was considering in paras 37 to 53 of their judgment was that the measures taken by the Government were not "strictly required". I return to the point in paras 186 and 187 below. Far from determining this omnibus issue in favour of the Secretary of State, therefore, they determined it against him. The real question is whether there is any proper basis for an appellate court to overturn SIAC's decision, which was based on their assessment of the evidence.

175. There is nothing to suggest that SIAC erred in their general approach to the issues which they had to decide. When scrutinising a decision which has been taken on grounds of national security, SIAC and the appellate courts must accord an appropriate degree of deference to the measures adopted by the Government and by Parliament. In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 the House held that SIAC had failed to appreciate the nature of their role when reviewing a deportation decision which the Home Secretary had taken in the interests of national security. Not surprisingly, therefore, at an early stage in their judgment in this case SIAC reminded themselves that it is particularly necessary to allow a margin of discretion to the Home Secretary, as the primary decision-maker in matters relating to national security, and quoted the relevant passage from paras 57 and 58 of the speech of my noble and learned friend, Lord Hoffmann, in *Rehman.* SIAC's judgment is peppered with references to the need for them to accord the appropriate margin to the executive and legislature in relation to the various points that they had to consider. Indeed my noble and learned friend, Lord Hope of Craighead, considers that SIAC gave not too little, but too much leeway to the executive and legislature.

176. If the provisions of section 30 of the 2001 Act are to have any real meaning, deference to the views of the Government and Parliament on the derogation cannot be taken too far. Due deference does not mean abasement before those views, even in matters relating to national security. Even in such matters what Simon Brown LJ said in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 754, holds true: "There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts." Indeed the considerable deference which the European Court of Human Rights shows to the views of

the national authorities in such matters really presupposes that the national courts will police those limits. Moreover, by enacting section 30, Parliament, including the democratically elected House of Commons, gave SIAC and the appellate courts a specific mandate to perform that function – a function which the executive and the legislature cannot perform for themselves - in relation to this derogation. The legitimacy of the courts' scrutiny role cannot be in doubt.

177. On a broader view, too, scrutiny by the courts is appropriate. There is always a danger that, by its very nature, a concern for national security may bring forth measures that are not objectively justified. Sometimes, of course, as with the Reichstag fire, national security can be used as a pretext for repressive measures that are really taken for other reasons. There is no question of that in this case: it is accepted that the measures were adopted in good faith. But good faith does not eliminate the risk that, because of an understandable concern for national security, a measure may be taken which, on examination, can be seen to go too far. For example, even though it was a bona fide response to the crisis facing the nation in the summer of 1940, the mass detention of German and Italian enemy aliens, including many refugees, is sometimes thought – rightly or wrongly - to be a case in point. So, in these proceedings, even though detention of foreign suspects was introduced in good faith on grounds of national security, SIAC and the appellate courts have a limited, but none the less important, duty to check whether, as article 15(1) stipulates, the measure was strictly required by the exigencies of the situation.

178. In discharging that duty British courts are performing their traditional role of watching over the liberty of everyone within their jurisdiction, regardless of nationality. In the words of La Forest J in *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199, 277, "Courts are specialists in the protection of liberty...." Here the exercise happens to take the particular form of examining the grounds for the derogation from the basic guarantees in article 5 of the Convention, which aim to secure the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities: *Kurt v Turkey* (1998) 27 EHRR 373, 447, para 122. In performing this role and checking whether detention of the foreign suspects, such as the appellants, was strictly required, the courts are entitled to have regard to the extent of the inroad which it makes into the liberty of those foreign suspects: the greater the inroad, the greater the care with which the justification for it must be examined. On any view, the inroad into the appellants' liberty is far-reaching. It is true, of course, that they will be released from detention if they can find another country which will take them and where they do not face the risk of inhuman or degrading treatment. Two of the appellants have been able to take that route. For most of the others, however, the reality is that they have already been detained for three years and their detention is likely to continue for at least two more years. In fact it is likely to go on for even longer if the legislation is renewed in 2006, since in October 2003 the Director General of the Security Service saw no prospect of a significant reduction in the threat posed to the United Kingdom and its interests from Islamist terrorism over the following five years and, she feared, for a considerable number of years after that. The acute question is whether the exigencies of the situation strictly required a small number of foreign suspects to endure indefinite detention of

this kind while, in the judgment of the Government and Parliament, an undisclosed number of British suspects could safely be allowed to remain at liberty. SIAC had to answer this question on the basis of the evidence placed before it.

179. In his second witness statement, Mr Bob Whalley, the Head of the Terrorism and Protection Unit in the Home Office, put forward three reasons why the Home Secretary had decided to limit the power of detention to foreign suspects.

180. One was that foreign nationals are subject to immigration control and that it remains the Home Secretary's intention to remove the persons concerned from the United Kingdom, at a future date, using the United Kingdom's immigration powers. Since the Secretary of State wished to remove them even before September 2001, this is plainly right in the case of the appellants. As I have already pointed out, however, since they were previously at liberty, the reason for detaining them under section 23 cannot be that the Secretary of State would like to deport them. The reason is that, after 9/11, they are suspected of presenting a threat to the life of the nation. In this, the relevant, respect they are comparable to the British suspects.

181. Another reason given by Mr Whalley is that a measure dealing with foreign suspects was required because of a perception in other countries, including Moslem countries, that the United Kingdom was weak in its response to international terrorists operating in its territory. At best, such a consideration could only be a makeweight: it could not justify the detention of the appellants without trial, if there were no other valid reason for detaining them.

182. In his submissions the Attorney General attached most importance to the reason given in para 19 of Mr Whalley's second witness statement:

> "First, it was considered by the Secretary of State that the serious threats to the nation emanated predominantly (albeit not exclusively) and more immediately from the category of foreign nationals."

There was no elucidation or elaboration of what exactly Mr Whalley meant by the threat emanating "more immediately" from the category of foreign nationals. Whatever its importance, however, Mr Whalley's statment is simply one element in the material which was before SIAC and on which they had to reach their conclusion.

183. Although most of the serious threats may have come from foreign nationals, by its very terms Mr Whalley's statement shows that serious threats were also considered to emanate, to a not insignificant extent, from British nationals. This is borne out by other passages in the material which the Government placed before SIAC. I pick out some of them. The *Amended Open Statement on International Terrorism linked to Usama Bin Laden and Al*

Qaida in the UK describes the way that the terrorists operated through networks, with training camps in Afghanistan. It comments that "a number of those attending the camps have come from (and after training returned to) the UK and other countries in Europe." It is estimated that upwards of a thousand individuals from the United Kingdom attended; there is nothing to suggest that those coming from, and returning to, the United Kingdom did not include British nationals. Indeed, para 26 of the Statement shows that the "shoe bomber" Richard Reid, a British national, attended a training camp in Afghanistan in 1998. The *Amended Addendum to the Open Generic Statement* mentions that 9 British citizens were detained as a consequence of Coalition action in Afghanistan and Pakistan and points out that the attendance of one of them at a mosque in London facilitated the process whereby he became involved in terrorism. The Addendum also refers to two British citizens who were suspected of being involved in a planned attack. One of them was convicted of possession of explosives with intent to endanger life and sentenced to 20 years in prison. In his summary the author of the Addendum says that it reinforces knowledge of the United Kingdom as a logistics and recruitment base: "the nine British citizens detained [in Afghanistan and Pakistan], as well as Richard REID and Zacarias MOUSSAOUI, provide clear evidence of the effectiveness of the networks to recruit in and from the UK." Finally, in para 27 of the *Amended Addendum to the Open Derogation Statement* the author summarises the position by saying that the backgrounds of those detained in Afghanistan and Pakistan "show the high level of involvement of British citizens and those otherwise connected with the UK in the terrorist networks".

184. Having considered not only the open evidence, including this material, but the closed evidence as well, SIAC explained their conclusion on article 14 in this way, [2002] HRLR 1274, 1313, paras 94 - 95:

> "If there is to be an effective derogation from the right to liberty enshrined in article 5 in respect of suspected international terrorists – and we can see powerful arguments in favour of such a derogation – the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as the Attorney General contends, the threat stems exclusively or almost exclusively from that alien section.
>
> 95. But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified – mostly in detention abroad – who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the respondent there are others at liberty in the United Kingdom who could be similarly defined. In those circumstances we fail to see how the derogation can be regarded as other than discriminatory on the grounds of national origin."

In their view the evidence demonstrated beyond argument that the threat did not stem exclusively or almost exclusively from the alien section of the population. Since there could be discrimination in terms of article 14 only if the foreign and British suspects both posed a comparable threat, plainly SIAC concluded on the evidence that they did indeed do so. In other words SIAC were not satisfied that there was a material difference in the nature of the threat posed by foreign suspects such as would provide a rational justification for their detention while British suspects were not detained.

185. It is important to remember that SIAC had seen not only the open material but the closed material as well. So they knew what the closed material contained and what bearing it had on the issues to be determined. Their assessment was that it was obvious that the closed material was most relevant to the first issue, whether there was an emergency threatening the life of the nation: [2002] HRLR 1274, 1286, para 14. The Court of Appeal did not see the closed material and, on due consideration, the Attorney General decided that it would not assist his case for your Lordships to do so. It is therefore appropriate to proceed on the view that, on the disparity of treatment issue, there is nothing in the closed material which significantly alters the picture to be derived from the open material. In particular, while, as a general observation, it is undoubtedly true, as Brooke LJ remarked, [2004] QB 335, 375, para 103, that "five generals and their chiefs of staff may pose a more serious and immediate threat than 5,000 foot-soldiers", there is nothing in the open material which gives the slightest basis for inferring that the foreign suspects made up the generals and chiefs of staff, while the British suspects provided the foot-soldiers. On the contrary, as I have noted, the open material contains evidence that British citizens were involved at a high level in the terrorist networks. In these circumstances SIAC's conclusion cannot be discounted on the speculative basis that they had somehow overlooked closed evidence to the contrary effect, which would have provided an objective basis for the distinction that the Secretary of State drew. In my view, therefore, SIAC applied the correct approach and the conclusion which they reached was open to them on the material before them. There is no basis for an appellate court to interfere with that conclusion.

186. If, then, as SIAC concluded, the threat posed by the foreign and British suspects was comparable, one would expect that the measures strictly required to deal with the threat from all the suspects would be the same. The fact that the foreign suspects were to be detained, while the British suspects were not, gives rise to two possible further conclusions: either both the foreign and the British suspects should have been detained in order to avert the threat or else it was unnecessary to detain either of them for that purpose.

187. SIAC favoured the first of these possible conclusions since they could see powerful arguments for the view that there should be a derogation to permit detention of suspects. They therefore held, in terms of the issue which they had reserved in para 52 of their judgment, that it was irrational to limit the detention power to foreign suspects. Since the limitation on the power was irrational, it followed that the power could not be "strictly required" in terms of article 15(1). It followed also that the distinction between those suspects

who were detained and those who were not detained was being drawn, irrationally, on the basis, not of the threat that they posed, but of their national origin, contrary to article 14. The derogation was therefore invalid because it failed to meet both the second and third requirements of article 15(1).

188. The starting point for SIAC's view is that there are powerful arguments in favour of detaining both groups of suspects. The Government's assessment is, however, that it is not necessary to detain the British suspects in order to contain the threat that they pose. That is implicit in the entire policy that they adopted and emerges in any event from para 36 of the Home Office discussion paper on *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* issued in February 2004:

> "While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify."

I consider it right to defer to the Government's considered judgment that it would be difficult to justify taking draconian powers to detain British suspects. In other words, the Government believe that they could not show that the indefinite detention of British suspects was justified, and hence strictly required, in terms of article 15(1), in order to meet the threat that they pose to the life of the nation. Starting from that premise, SIAC's conclusion, that the threats posed by the foreign and British suspects are comparable, leads to the further conclusion that the detention of the foreign suspects is not strictly required either. That further conclusion is not affected by the theoretical distinction that the foreign suspects can end their detention at any time by leaving for another country, whereas the British suspects could not. As the facts of the present cases demonstrate, the reality is that most of the foreign suspects who are detained cannot actually leave: they have nowhere to go and so face remaining in detention, indefinitely, for years on end.

189. My Lords, I have anxiously considered all the evidential and other material, as well as the arguments which the Attorney General advanced to justify the legislation. Proceeding on the same basis as the Government and Parliament, that detention of the British suspects is not strictly required to meet the threat that they pose to the life of the nation, I have come, however, to the conclusion that the detention of the foreign suspects cannot be strictly required, either, to meet the comparable threat that they pose. The second requirement of article 15(1) is accordingly not satisfied. Equally, it follows that there has been a breach of article 14 and that the third of the requirements for a valid derogation under article 15(1) is not satisfied either.

190. The Attorney General presented submissions on a number of other points, including the international law position. On these matters I respectfully agree with the conclusions reached by Lord Bingham of Cornhill in his comprehensive speech. I would accordingly allow the appeal, hold that the power to detain foreign suspects in section 23 of the 2001 Act was not

"strictly required" by the exigencies of the situation and make the order and declaration proposed by Lord Bingham.

LORD WALKER OF GESTINGTHORPE

My Lords,

191. As all your Lordships recognise, these are very important and difficult appeals. Your Lordships have to consider the balancing of one of the most fundamental human freedoms—freedom from imprisonment for an indefinite period, without indictment, trial or conviction on a criminal charge—with one of the state's most basic and imperative duties—the duty of safeguarding the lives and well-being of its citizens and others resident in the United Kingdom. It is unnecessary to repeat citations as to the importance of these two principles.

192. The detention without trial of terrorist suspects is therefore a crucial instance—probably the most crucial instance of all—of the problems of reconciling individual human rights with the interests of the community, and of determining the proper functions, in this process, of different arms of government. My noble and learned friend Lord Hoffmann has recently addressed the latter topic in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 192-193, paras 50-54 (and also in his postscript, written after 11 September 2001, at p 195, para 62 and in *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 240, paras 74-76. His observations are well known and I need not repeat them (see also, in *Rehman*, the observations of Lord Slynn of Hadley, at p183, para 17 and Lord Steyn, at p 187, para 31). Safeguarding national security is (with the possible exception of some questions of macro-economic policy and allocation of resources) the area of policy in which the courts are most reluctant to question or interfere with the judgment of the executive or (a fortiori) the enacted will of the legislature. Nevertheless the courts have a special duty to look very closely at any questionable deprivation of individual liberty. Measures which result in the indefinite detention in a high-security prison of individuals who have not been tried for (or even charged with) any offence, and who may be innocent of any crime, plainly invite judicial scrutiny of considerable intensity.

193. This dilemma is heightened by the secrecy which necessarily attends most issues of national security. As my noble and learned friend Lord Rodger of Earlsferry pointed out in the course of argument, a portentous but non-specific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government. Whether or not patriotism is the last refuge of the scoundrel, national security can be the last refuge of the tyrant. It is sufficient to refer (leaving aside more recent and probably more controversial examples) to the show trial and repression which followed the Reichstag fire in Berlin and the terror associated with the show trials of Zinoviev, Bukharin and others in Moscow during the 1930s. It is therefore important to note that in this appeal no attack is made on the good

faith of the Secretary of State, or any other individual or group of individuals in the executive or legislative arms of government. It is not suggested that the Secretary of State or any of his officials has given misleading or disingenuous reasons for their actions. What is said is that they have asked themselves the wrong questions, and have reached irrational and disproportionate answers.

194. Another special feature of these appeals is that your Lordships are concerned with a derogation from the European Convention on Human Rights. Article 15 (1) of the Convention provides:

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

The derogation was effected by the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644) made on 11 November 2001 and coming into force on 13 November 2001. The terms of the derogation (set out in a schedule to the Order and repeated almost word for word in the *note verbale* sent to the Secretary General of the Council of Europe on 18 December 2001) described the public emergency as follows:

> "There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom."

It then referred to the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act") as follows:

> "As a result of the public emergency, provision is made in the [2001 Act], *inter alia*, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers."

195. The appellants and the interveners challenged the validity of the derogation on three main grounds (with a considerable degree of overlap between the second and third grounds):

(a) that there was not in November 2001 a "public emergency threatening the life of the nation" within the meaning of article 15;

(b) that the measures taken by and under the 2001 Act were not "strictly required by the exigencies of the situation";

(c) that those measures were on the contrary irrational, discriminatory and disproportionate.

The first ground of challenge is a question of fact and degree which does not depend on the terms of the 2001 Act (except that by section 30 of the 2001 Act a "derogation matter", as defined in that section, can be called into question only before or on appeal from SIAC, the Special Immigration Appeals Commission). The second and third grounds depend crucially on the terms of the 2001 Act and the factual evidence adduced before SIAC (of which your Lordships have seen the open part, but not the closed part). There are other subsidiary grounds of challenge. It is readily apparent that the fact that a state has decided to make a derogation from the Convention does not close the door to an examination of human rights issues. On the contrary, it opens the door even wider, because of the need for the measures to be "strictly required by the exigencies of the situation". Your Lordships have had the benefit of submissions in support of the appeals not only from leading counsel for the two sets of appellants but also (in writing and orally) on behalf of Liberty and (in writing only) on behalf of Amnesty International as interveners. Every possible line of argument has been explored, with a very full citation of human rights case law and other materials.

196. The appropriate intensity of scrutiny of decisions in this crucial area—involving both national security and individual liberty—presents a real dilemma which is fully discussed in your Lordships' speeches. I am not sure that I can usefully add much to the views expressed by others but I will make a few brief observations. For my part I think that in a case of this sort the court has to proceed at two different levels. The court should show a high degree of respect for the Secretary of State's appreciation, based on secret intelligence sources, of the security risks; but at the same time the court should subject to a very close scrutiny the practical effect which derogating measures have on individual human rights, the importance of the rights affected, and the robustness of any safeguards intended to minimise the impact of the derogating measures on individual human rights. In doing so the court must allow for the fact that it may be impossible for the intelligence services to identify the target or predict the scale of a violent attack by international terrorists (whose methods involve secrecy, deception and surprise). The likely effects of a natural disaster (such as a hurricane or a volcanic eruption) are, within limits, more easily predictable than those of attacks by terrorists who

(on the evidence) may have access to biological, chemical or even radiological or nuclear weapons.

197. The Strasbourg Court has in *Ireland v United Kingdom* (1978) 2 EHRR 25 approved what amounts to a precautionary approach to measures of protection against terrorist activity. It said in its judgment, at p 95, para 214):

> "It is certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. The Court must do no more than review the lawfulness, under the Convention, of the measures adopted by that Government from 9 August 1971 [the date of introduction of internment] onwards. For this purpose the Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied."

The reference to the Court is of course to the European Court of Human Rights itself. But in my view the same principle applies, with little less force, to review by a national court. The judgment continued, at p 96, para 220:

> "When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of article 15 must leave a place for progressive adaptations."

198. In his written and oral submissions the Attorney General understandably emphasised the shocking and unprecedented nature of the outrages carried out in the United States on 11 September 2001; and, equally understandably, none of those arguing for the appeals to be allowed dissented from this emphasis. I think this may have led to insufficient attention being directed, in the course of argument, to the state of the United Kingdom's anti-terrorist legislation immediately before 11 September 2001. The United Kingdom Government's legislative reaction to what happened in the United States had to start from the law as it stood at that time.

199. There is a helpful background summary by Professor A T H Smith in the chapter on offences against the state in *English Public Law* (edited by Professor David Feldman, 2004), p 1334. I will set it out in full:

> "It would be a mistake to suppose that the UK law devoted to the suppression of terrorism is particularly modern, let alone a reaction to the events that convulsed the world following the attacks in the United States in September 2001. Continuing problems in Northern Ireland meant that the statute books were replete with offences directed against terrorist groups and their activities. Some time before the American events and in the light of a continued improvement of the situation in Northern Ireland, it had been decided to replace the legislation hitherto designated as 'temporary' with a revised framework. The opportunity was to be taken at the same time to acknowledge that there was an increasingly international dimension to terrorism, and the result was the Terrorism Act 2000. Further initiatives were taken in response to the American atrocities, in the Anti-terrorism, Crime and Security Act 2001. These confirm and extend the measures relating to, for example, proscribed organizations, ie organizations (including Irish and other domestic or foreign groups) membership of or support for which is a criminal offence. The jurisdiction of the courts was extended to cover inciting terrorism overseas, and to deal with bribery and corruption outside this country. The law was also extended in certain respects to cater for the situation where the motivation for the commission of offences against the person or public order offences was religious hatred. The Acts additionally offer extended police powers, including powers to set up cordons, compulsory obtaining of testimony and evidence, additional disclosure powers in connection with financial organizations, account monitoring information, arrest without warrant, stop and search, search of premises, search of persons, parking restrictions, port and border controls, retention of communications data, electronic surveillance, curtailment of access to legal advice and the right to silence, and prohibitions on torture."

There is also some detailed material in Professor Clive Walker's *Blackstone's Guide to the Anti-Terrorism Legislation* (2002), another work to which I acknowledge my indebtedness.

200. The Terrorism Act 2000 ("the 2000 Act") in its original form was a substantial enactment which received the Royal Assent on 20 July 2000 and came into force (for the most part) on 19 February 2001. (These dates may be compared with those of the first two major Al-Qa'ida attacks on United States interests, the bombing of the embassies in Kenya and Tanzania on 7 August 1998 and the bombing of the USS Cole on 12 October 2000). As Professor Smith points out, the 2000 Act took account both of the improved security position in Northern Ireland and the increasingly international character of terrorism. It also took account of the imminent coming into force of the Human Rights Act 1998 (for instance, section 118 of the 2000 Act, dealing with reverse burdens of proof, was introduced by amendment of the Bill after the decision of your Lordships' House in *R v Director of Public Prosecution,*

Ex p Kebilene [2000] 2 AC 326, in which judgment was given on 28 October 1999).

201. The 2000 Act in its original form made many significant changes in the measures, most of them of an emergency nature, which had previously been in force to combat terrorism. There are detailed studies of the Act in Professor Walker's book and in an article by J J Rowe QC in [2001] Crim LR 527. For present purposes the most notable points are these. The Act contained (in section 1) a new definition, in wide terms, of terrorism. This is set out in the speech of my noble and learned friend Lord Bingham of Cornhill. The Act continued the earlier system of proscription of terrorist organisations. Schedule 2 to the Act sets out a list of proscribed organisations, and the Secretary of State can add to the list by statutory instrument. In its original form, Schedule 2 was restricted to organisations operating in, or closely connected with, Northern Ireland. Al-Qa'ida and the other organisations relevant to these appeals were added to the list by an order (the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001 (SI 2001/1261)) made on 28 March 2001 and coming into force on the following day.

202. The 2000 Act did not provide for exclusion orders of the type permitted by section 5 of the Prevention of Terrorism (Temporary Provisions) Act 1989 or for detention of the type permitted by section 36 of the Northern Ireland (Emergency Provisions) Act 1996. Both those statutes were repealed. (Large scale internment began in Northern Ireland in August 1971 under earlier legislation but was sharply reduced and then discontinued after direct rule began in March 1972: see the useful summary in *Ireland v United Kingdom* (1978) 2 EHRR 25, 33-58, paras 20-91 and especially pp 36-44, paras 34-60. The powers conferred by the 1996 Act were not, in the event, exercised.)

203. Parliament's decision not to include powers of internment in the 2000 Act was the subject of vigorous debate, described in Professor Walker's book at p31. Experience during the first and second world wars had shown that large-scale internment produced many injustices (and in some cases, interfered with the war effort) with no obvious gain to national security (see Professor Brian Simpson's work, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain*, (1992), drawn on by my noble and learned friend Lord Bingham of Cornhill in his 2002 Romanes Lecture, "Personal Freedom and the Dilemma of Democracies" (2003) 52 ICLQ 841). Experience in Northern Ireland showed that (in conditions of internal sectarian violence rather than international war) internment was also a major obstacle to political progress and reconciliation. It was described (in the context of Northern Ireland) as "the terrorist's friend". It is not surprising, nor can it be a matter of criticism, that when the provisions of the 2000 Act came to be reconsidered after the shocking events of 11 September 2001, there was still a strong reluctance to reintroduce general powers of internment.

204. The 2000 Act in its original form did not alter the law in relation to the state of affairs revealed by the decision of the Strasbourg Court in *Chahal v United Kingdom* (1996) 23 EHRR 413. That case is described in Lord

Bingham's speech. The judgment of the Strasbourg Court covers several important points, but for present purposes it is sufficient to note three points:

> (a) article 3's prohibition on torture is absolute, and Chahal could not be returned to India;
>
> (b) his detention during the protracted litigation, lengthy though it was, was not unreasonable or unlawful, but he could be detained only so long as his deportation was the end in view;
>
> (c) the limited degree of judicial review of his detention and proposed deportation infringed article 5(4) of the Convention.

205. The outcome was that Chahal was released from detention and continued to live in this country. Parliament enacted the Special Immigration Appeals Commission Act 1997 establishing SIAC in order to provide the necessary degree of judicial review (SIAC's jurisdiction is extended by Part 4 of the 2001 Act). SIAC's procedure (following a Canadian precedent approved by the Strasbourg Court in *Chahal*, p 469, para 131) makes use of special advocates to protect the interests of suspected terrorists without compromising intelligence sources. Apart from the 1997 Act, Parliament did not before 2001 take steps to meet any threat to national security revealed by the decision in *Chahal*. In his speech in *Rehman* (which was, as already noted, largely written before but delivered after 11 September 2001) Lord Hoffmann simply noted, [2003] 1 AC 153, 193, para 54:

> "If there is a danger of torture, the Government must find some other way of dealing with a threat to national security".

That is what Part 4 of the 2001 Act was intended to do.

206. In summary, the reach of the legislation, in relation to Al Qa'ida and its satellite organisations, was established and has been extended in three stages: first the 2000 Act; then the extension of the list of proscribed organisations so as to include Al Qa'ida and its satellites; and finally the further measures introduced, after the events of 11 September 2001, by the 2001 Act. The 2001 Act is also a substantial statute, containing 129 sections and 8 schedules. It makes many amendments to the 2000 Act and introduces other provisions covering a number of different matters including freezing orders, weapons of mass destruction, security of pathogens and toxins, nuclear security and aircraft security. Only Part 4 (sections 21 to 36), being concerned with alterations in immigration and asylum law, is aimed exclusively at persons who are not British nationals (had Brooke LJ, in para 111 of his admirable judgment in the Court of Appeal, understood the 2001 Act as a whole to be targeted at non-national terrorists alone, he would have been mistaken; but para 96 of his judgment makes clear that in para 111 he must have been referring to Part 4 alone: see [2004] QB 335, 377). Some provisions of the 2001 Act create new criminal offences in respect of acts

performed overseas by British nationals only (see for instance sections 44, 47(7), 50(6) and 79(5)).

207. In these appeals attention has of course focused on Part 4 of the 2001 Act, since it contains the only provisions in respect of which the British Government thought it necessary to make a derogation from the Convention. Those are the measures which must be shown to be strictly required by the exigencies of the situation. But it would be a mistake, in my view, to divorce them entirely from their context, that is as part of a major enactment most of whose provisions are aimed impartially at British nationals and non-nationals, and some of whose provisions (those creating offences committed overseas) are aimed exclusively at nationals.

208. As to whether the 2001 Act was passed at a time of "public emergency threatening the life of the nation" within the meaning of article 15, both SIAC and the Court of Appeal concluded that there was such an emergency, and (in common with most of the House) I agree with their conclusion. A danger of terrorist action may be imminent even though there is uncertainty as to when, where and how the terrorists attack. Indeed (especially as the terrorists may try to use bacteriological, chemical, radiological or nuclear weapons) the uncertainty increases the gravity of the emergency, since it creates widespread anxiety and the need for comprehensive precautions. Given the requirement (under article15) for a strictly proportionate response to the emergency, there is no reason to set the threshold very high, and the jurisprudence of the European Court of Human Rights in the cases concerning Northern Ireland and the Irish Republic (especially the first, *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 and the most recent, *Marshall v United Kingdom* App No 41571/98, 10 July 2001) shows that the Court has not set it very high.

209. I have the misfortune to differ from most of your Lordships as to whether the derogating measures are proportionate, rational and non-discriminatory, or are in the alternative disproportionate, irrational and offensively discriminatory. In the circumstances it would be inappropriate for me to add much to the already considerable volume of your Lordships' reasons; but it would also be inappropriate, in such an important case, not to set out briefly the reasons for my dissent. I hardly need add that having had the great advantage of reading and considering in draft all your Lordships' speeches, it is only with great diffidence that I have arrived at, and I still maintain, a different opinion. I do so for three main reasons:

(1) When this country is faced, as it is, with imminent threats from enemies who make use of secrecy, deception and surprise, the need for anti-terrorist measures to be "strictly necessary" must be interpreted in accordance with the precautionary principle recognised by the Strasbourg Court in *Ireland v United Kingdom.*
(2) I agree with the Court of Appeal, and very respectfully disagree with SIAC and the majority of the House, on the issue of discrimination.
(3) SIAC is an independent and impartial tribunal of unquestioned standing and expertise. It carefully considers any appeal by a

> suspected terrorist, and periodically reviews any of its decisions which have been adverse to a detained suspect. I would in no way dissent from condemning the odiousness of indefinite detention at the will of the Executive, but such a description cannot be applied to detention under Part 4 of the 2001 Act without so much qualification as to amount almost to contradiction.

I will add some brief comments on the second and third points.

210. As to discrimination, I greatly respect the views of the majority, but I consider that there has been insufficient recognition that Part 4 of the 2001 Act is only a small (although undoubtedly important) part of Parliament's response to the events of 11 September 2001. Part 4 is (as its heading indicates) the only part of the 2001 Act which is concerned with immigration. It is also the only part of the 2001 Act in respect of which the Government felt it necessary to make a derogation from the Convention. But in my view it does not follow from those two facts that the Government can be said to have acted irrationally in using immigration control as the means of dealing with non-nationals suspected of involvement in terrorism. Those liable to be detained under Part 4 are only a small subset of non-national terrorist suspects, that is those who cannot be deported because of an apprehension of torture after their return home. All the other provisions of the 2001 Act are aimed at any terrorists or (in some cases) suspected terrorists, regardless of nationality (except that, as already noted, some offences under the 2001 Act can be committed only by nationals).

211. What is said on behalf of the appellants is that non-nationals who cannot be deported (because they would be at risk of torture contrary to Article 3) are in the same position as British nationals, in that they cannot be deported from the United Kingdom, and that they should therefore be treated in the same way. To detain one group but not the other is, it has been argued, unjustified discrimination between fair comparators. Lord Bingham has in his speech cited the approach proposed by Lord Steyn in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, para 42, amplifying the formulation by Brooke LJ in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, para 20. The amplified formulation is useful so far as it goes but to my mind its drawback is that it hangs everything on the word "analogous" in the fourth question. Further analysis of the issue, and the competing interests at stake, has to be undertaken in order to answer the question whether the suggested comparators are in a relevantly analogous situation. This point was made by Laws LJ in *R (Carson) v Secretary of State for Work and Pensions* [2003] 3 All ER 577, para 61 and by my noble and learned friend Baroness Hale of Richmond in *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113, para 134. There are attractions in the simpler test which Laws LJ proposes, but again it may still be necessary to spell out the process of reasoning adopted by his "rational and fair-minded person".

212. Mr Emmerson QC, for the first group of appellants, accepted that there was a difference between the suggested groups of comparators but he described it as technical. In my view the difference, seen in this context, is by

no means technical. It is fundamental. British citizens have a right of abode (under sections 1 and 2 of the Immigration Act 1971). They cannot be deported, whatever crimes they have committed or may be thought likely to commit. There is therefore no question of their being detained with a view to deportation, regardless of whether there is any risk of their being tortured if sent overseas, or of whether there is any safe country to receive them. There is not therefore any question of detaining British citizens in "a prison with three walls" (the phrase used in the courts below in recognition of the fact that a suspected terrorist detained under Part 4 is free to choose, as two of Mr Emmerson's clients have chosen, to return to his own country, or to a country in which he has a status of dual nationality). Suspected terrorists who are British citizens could be detained only in "a prison with four walls"—that is, to use the normal phrase, they would have to be interned. Their internment would be both a grave invasion of their individual human rights and a drastic reversal of the considered choice of the legislature as enacted in the 2000 Act.

213. Mr Rabinder Singh QC (one of the counsel appearing for Liberty in the Court of Appeal and in this House) has in a recent lecture ("Equality: The Neglected Virtue" [2004] EHRLR 141, 151) criticised the Court of Appeal's reversal of SIAC's decision on the discrimination point:

> "Whenever a person argues that a measure is discriminatory the state could always caricature the argument as an argument that the state has not gone far enough.
>
> To take an extreme example which one hopes would never happen in this country: suppose the state announces that there is an economic crisis and that it is necessary in the public interest that property should be seized without compensation. It seeks to derogate from Art. 1 of Protocol 1. But then suppose that the state announces that the only property which is to be seized is that belonging to Jewish people. Immediately the question of discrimination arises. In one sense it could be said that the state has acted more proportionately by drafting its measure in a narrow way rather than by hitting everyone in society. But no one could seriously suggest that such a measure was compatible with human rights principles, because it would constitute the most offensive kind of discrimination."

214. That would indeed be discrimination of the most offensive kind. If instead the state decided to impose on every adult member of the public a capital levy of £10,000, there would be a semblance of equality, but it would still be irrational and unfair since it would have a far harsher effect on some members of the public (that is, those of modest means) than on other richer members of the public. A levy of £10,000 on every member of the public owning assets of over £100,000 would be more rational and fair, but would still produce grievances in borderline cases, and where property-owners could not raise money on their assets. To take another example slightly closer to the present appeals, a decision to seal off and evacuate some part of a town because of an imminent emergency would have a far greater effect on those

who were permanent residents owning houses in the area, as compared with persons who were transient lodgers. Their cases would not be the same, and different treatment would be not only justified but also necessary. In each case the government must aim at "careful tailoring", to use McLachlin J's metaphor in *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199, 342, para 160:

> "As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator."

215. In this case a power of interning British citizens without trial, and with no option of going abroad if they chose to do so, would be far more oppressive, and a graver affront to their human rights, than a power to detain in "a prison with three walls" a suspected terrorist who has no right of abode in the United Kingdom, and whom the government could and would deport but for the risk of torture if he were returned to his own country. Detention of non-national suspects is still a cause of grave concern, and I share the anxieties expressed by Lord Woolf CJ in para 9 and by Brooke LJ in para 86 of their respective judgments in the Court of Appeal. But in my view Part 4 of the 2001 Act is not offensively discriminatory, because there are sound, rational grounds for different treatment.

216. This conclusion is in line with the decision of the European Court of Human Rights in *Moustaquim v Belgium* (1991) 13 EHRR 802, 816, para 49. The brevity of the Court's judgment on the point shows that it was regarded as clear and uncontroversial. The Court's decision in *Gaygusuz v Austria* (1996) 23 EHRR 364, by contrast, was a case of unjustifiable discrimination, since in the field of contributory social security benefits there was no good reason for discriminating against the applicant because he was not an Austrian citizen. He had worked in Austria and paid his social security contributions, and there was no good reason for discriminating against him on the ground of his nationality.

217. As I have said, the detention without trial of non-national suspected terrorists is a cause of grave concern. But the judgment of Parliament and of the Secretary of State is that these measures were necessary, and the 2001 Act contains several important safeguards against oppression. The exercise of the Secretary of State's powers is subject to judicial review by SIAC, an independent and impartial court, which under sections 25 and 26 of the 2001 Act has a wide jurisdiction to hear appeals, and must also review every certificate granted under section 21 at regular intervals. Moreover the legislation is temporary in nature. Any decision to prolong it is anxiously considered by the legislature. While it is in force there is detailed scrutiny of

the operation of sections 21 to 23 by the individual (at present Lord Carlile QC) appointed under section 28. There is also a wider review by the Committee of Privy Councillors appointed under section 122. All these safeguards seem to me to show a genuine determination that the 2001 Act, and especially Part 4, should not be used to encroach on human rights any more than is strictly necessary.

218. I think it is also significant that in a period of nearly three years no more than seventeen individuals have been certified under section 21. Of course every single detention without trial is a matter of concern, but in the context of national security the number of persons actually detained (now significantly fewer than 17) is to my mind relevant to the issue of proportionality. Liberty in its written submissions (para 8) appears to rely on the small number of certifications as evidence that there is not a sufficiently grave emergency. That is, I think, a striking illustration of the dilemma facing a democratic government in protecting national security. I would dismiss these appeals.

BARONESS HALE OF RICHMOND

My Lords,

219. I have read with admiration and complete agreement the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote and Lord Rodger of Earlsferry. They have said everything that could possibly be said. I have nothing original to add. But this is the most important case to come before the House since I have been a member. Perhaps the most helpful thing that I can do is to provide a simple summary of the principles governing what we are doing and why we are doing it.

220. We do not have power in these proceedings to order that the detainees be released. This is not a challenge to the individual decisions to detain them. That may come before us in future. It is in that context that the issue of the admissibility of evidence which may have been obtained by the use of torture abroad could arise. But that issue is not before us at present. Before us is a challenge to the validity of the law under which the detainees are detained. That law is contained in an Act of Parliament, the Anti-terrorism, Crime and Security Act 2001. The Human Rights Act 1998 is careful to preserve the sovereignty of Parliament. The courts cannot strike down the laws which the Queen in Parliament has passed. However, if the court is satisfied that a provision in an Act of Parliament is incompatible with a Convention right, it may make a declaration of that incompatibility (under section 4 of the 1998 Act). This does not invalidate the provision or anything done under it. But Government and Parliament then have to decide what action to take to remedy the matter.

221. The Convention right in question here is the right under article 5(1):

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases . . .".

222. There are then listed six possible reasons for depriving a person of his liberty, none of which applies here. These people are not detained under article 5(1)(f) "with a view to deportation or extradition" because they cannot be deported and no other country has asked for their extradition. They are being detained on suspicion of being international terrorists, a reason which does not feature in article 5. It does not feature because neither the common law, from which so much of the European Convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned. It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.

223. Yet that is what the 2001 Act allows. The Home Secretary may issue a certificate (under section 21) if he reasonably (a) believes that a person's presence here is a risk to national security, and (b) suspects that he is a terrorist. A terrorist is someone who takes part in acts of international terrorism, belongs to an international terrorist group, or merely supports or assists such a group. These are all likely to be criminal offences under the Terrorism Act 2000 or other legislation. But a person so certified can be detained indefinitely (under section 23) without being charged with or tried for any criminal offence (indeed one of the detainees has been tried and acquitted of such an offence). There are safeguards, as the Attorney General has rightly pointed out, greater than under any earlier internment powers. Belmarsh is not the British Guantanamo Bay. Their cases must be reviewed by the Special Immigration Appeals Commission (SIAC). SIAC can see all the material which was available to the Home Secretary. But much of this is 'closed' so that the detainee and his lawyers cannot see it. Instead there are 'special advocates' who can see it, cross-examine witnesses, and make representation to SIAC about it, and may even persuade SIAC that some of the material should be disclosed to the detainee. But they cannot discuss it with or take instructions from the detainee, so they do not know whether he might have an answer to it. The detainee does not know a good deal of the case against him. He is not even interviewed by the authorities so that he can attempt to give some account of himself, (although that might be rather limited if they cannot tell him what they have against him). SIAC does know the case against him, but all it can do is decide whether the Home Secretary's belief and suspicion were in the circumstances reasonable. SIAC does not decide whether the detainee actually is an international terrorist as defined in the Act, merely whether the Home Secretary reasonably suspects that he is. Suspicion is an even lower hurdle than belief: belief involves thinking that something *is* true; suspicion involves thinking that something *may be* true. It is not surprising that, of the 16 who have been detained under section 23 so far, only one has

had his certificate cancelled by SIAC. Another has had his certificate discharged by the Home Secretary. Two others have left for other countries. For the rest there is no end in sight and no clear idea of what they might be able to do to secure their release. One has been transferred to Broadmoor (we have not been told the legal basis for this) and another has been granted bail by SIAC on very strict conditions of house arrest because of his mental condition. If we have any imagination at all, this should come as little surprise. We have always taken it for granted in this country that we cannot be locked up indefinitely without trial or explanation.

224. Article 5 applies to 'everyone'. States who are parties to the European Convention are required by article 1 to secure the rights and freedoms defined in the Convention to 'everyone within their jurisdiction'. This includes everyone physically present within their territory. So it was necessary for the United Kingdom to depart from its normal obligations under the Convention in order to enact this legislation. Departure is permitted under article 15:

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

225. The rights defined in the Convention have become rights in United Kingdom law by virtue of the Human Rights Act; but section 1(2) provides that the rights defined in the Convention articles shall have effect subject to any 'designated derogation'. This means a derogation designated in an order made by the Secretary of State under section 14, in this case the Human Rights Act 1998 (Designated Derogation) Order 2001. Such an order would not be within his powers if it provided for a derogation which was not allowed by the Convention. Section 30(2) and (5) of the 2001 Act allow the detainees to challenge this derogation from their article 5(1) rights in proceedings before SIAC and in an appeal from SIAC's decision. Thus it is that we have power to consider the validity of the Derogation Order made by the Secretary of State and to quash it if it is invalid. If the Derogation Order is invalid, it follows that detention powers under the 2001 Act are incompatible with the Convention rights as defined in the Human Rights Act and that we have power to declare it so. It will then be for Parliament to decide what to do about it.

226. The courts' power to rule on the validity of the derogation is another of the safeguards enacted by Parliament in this carefully constructed package. It would be meaningless if we could only rubber-stamp what the Home Secretary and Parliament have done. But any sensible court, like any sensible person, recognises the limits of its expertise. Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government and its advisers. They may, as recent events have shown, not always get it right. But courts too do not always get things right. It would be very surprising if the courts were better able to make that sort of judgment

than the Government. Protecting the life of the nation is one of the first tasks of a Government in a world of nation states. That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny. If a Government were to declare a public emergency where patently there was no such thing, it would be the duty of the court to say so. But we are here considering the immediate aftermath of the unforgettable events of 11 September 2001. The attacks launched on the United States on that date were clearly intended to threaten the life of that nation. SIAC were satisfied that the open and closed material before them justified the conclusion that there was also a public emergency threatening the life of this nation. I, for one, would not feel qualified or even inclined to disagree.

227. But what is then done to meet the emergency must be no more than "is strictly required by the exigencies of the situation". The Government wished to solve a problem which had three components: (1) it suspected certain people living here of being international terrorists – in the very broad definition given to that term by the Act; but (2) either it could not or it did not wish to prove this beyond reasonable doubt by evidence admissible in a court of law; and (3) it could not solve the problem by deporting them, either for practical or for legal reasons.

228. The Government knew about certain foreign nationals presenting this problem, because they were identified during the usual immigration appeals process. But there is absolutely no reason to think that the problem applies only to foreigners. Quite the reverse. There is every reason to think that there are British nationals living here who are international terrorists within the meaning of the Act; who cannot be shown to be such in a court of law; and who cannot be deported to another country because they have every right to be here. Yet the Government does not think that it is necessary to lock them up. Indeed, it has publicly stated that locking up nationals is a Draconian step which could not at present be justified. But it has provided us with no real explanation of why it is necessary to lock up one group of people sharing exactly the same characteristics as another group which it does not think necessary to lock up.

229. The Attorney General's arguments were mainly directed to the entirely different question of whether it is justifiable in international law to treat foreigners differently from nationals. The unsurprising answer is that some differences in treatment are indeed allowed. Foreigners do not have to be given the same rights to participate in the politics and government of the country as have citizens (see article 16 of the Convention). Nor do they have to be given the same rights to come or to stay here; if they are here, they may be refused entry or deported (and detained for that purpose under article 5(1)(f)). But while they are here they have the same human rights as everyone else. This includes not being forcibly removed to a place where they are liable to suffer torture or other severe ill-treatment contrary to article 3 of the Convention. It also includes not being locked up except in the circumstances allowed under article 5.

230. The Attorney General did argue that it would have been discriminatory to lock up the nationals as well as the foreigners, because the foreigners are free to leave this country if they can and want to do so, but nationals have no other country which has an obligation to receive them. It is correct that we have no power to force our nationals to go, unless some other country wishes to extradite them. But if it is necessary to lock anyone up in a 'prison with three walls', the reality is that it will depend upon the personal circumstances of each individual whether he has in fact somewhere else to go. Some nationals may, for example, have dual nationality or friends in foreign countries which are happy to receive them. But the very fact that it is a prison with only three walls also casts doubt upon whether it is "strictly required by the exigencies of the situation". What sense does it make to consider a person such a threat to the life of the nation that he must be locked up without trial, but allow him to leave, as has happened, for France where he was released almost immediately?

231. The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation.

232. It is also inconsistent with our other obligations under international law from which there has been no derogation, principally article 14 of the European Convention. This states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

233. This has five components, some of which overlap: (i) people belonging to a particular group or status (ii) must not be singled out for less favourable treatment (iii) from that given to other people who are in the same situation (iv) in relation to the enjoyment of their Convention rights (v) unless there is an objective justification for the difference in treatment.

234. Article 14 would make it unlawful to single out foreign nationals for less favourable treatment in respect of their article 5 rights whether or not the derogation from those rights was "strictly required by the exigencies of the situation". It is wrong to single them out for detention without trial if detention without trial is *not* strictly required to meet the exigencies of the situation. It is also wrong to single them out for detention without trial if detention without trial *is* strictly required, if there are other people who are in the same situation and there is no objective justification for the difference in treatment. Like cases must be treated alike.

235. Are foreigners and nationals alike for this purpose? The Attorney General argued that they are not. The foreigners have no right to be here and we would expel them if we could. We only have to allow them to stay to protect them from an even worse invasion of their human rights. Hence, he argued, the true comparison is not with suspected international terrorists who are British nationals but with foreign suspected international terrorists who can be deported. This cannot be right. The foreigners who can be deported are not like the foreigners who cannot. These foreigners are only being detained because they cannot be deported. They are just like a British national who cannot be deported. The relevant circumstances making the two cases alike for this purpose are the same three which constitute the problem: a suspected international terrorist, who for a variety of reasons cannot be successfully prosecuted, and who for a variety of reasons cannot be deported or expelled.

236. Even then, the difference in treatment might have an objective justification. But to do so it must serve a legitimate aim and be proportionate to that aim. Once again, the fact that it is sometimes permissible to treat foreigners differently does not mean that every difference in treatment serves a legitimate aim. If the situation really is so serious, and the threat so severe, that people may be detained indefinitely without trial, what possible legitimate aim could be served by only having power to lock up some of the people who present that threat? This is even more so, of course, if the necessity to lock people up in this way has not been shown.

237. Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities. As Thomas Jefferson said in his inaugural address:

> "Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable . . . The minority possess their equal rights, which equal law must protect, and to violate would be oppression."

238. No one has the right to be an international terrorist. But substitute "black", "disabled", "female", "gay", or any other similar adjective for "foreign" before "suspected international terrorist" and ask whether it would be justifiable to take power to lock up that group but not the "white", "able-bodied", "male" or "straight" suspected international terrorists. The answer is clear.

239. I would therefore allow the appeals, quash the derogation order, and declare section 23 of the 2001 Act incompatible with the right to liberty in article 5(1) of the European Convention.

LORD CARSWELL

My Lords,

240. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill, and for the reasons which he has given, which also appear in the opinions of those of your Lordships who have reached the same conclusions, I would allow the appeals and make the order which he proposes.