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Qualified freedom

What happens when Strasbourg gets it wrong? **Rowan Pennington–Benton** & **Richard Cornes** report

IN BRIEF

- *A v United Kingdom*: the European Court of Human Rights held that it was unlawful for the UK to detain terrorist suspects without disclosing at least some evidence against them. The implications of this for control orders, the use of sensitive evidence and domestic judicial discretion under the HRA 1998 are discussed.

There is an argument that foreign nationals suspected of terrorist activities, and detained pending deportation, are in a "three walled prison": they are free to leave detention at any point, as long as they agree to leave the UK altogether. For many, however, this "freedom" is a legal fiction, for on return home to certain of their countries there is the risk of arrest, torture, and even loss of life. Here is the prison's fourth wall. That reality was first recognised in *Chahal v UK* [1996] 23 EHRR 413, ECHR 22414/93. The European Court of Human Rights (ECtHR) held that a deporting state would be in breach of the European Convention on Human Rights (the Convention) if the receiving state was likely to abuse the deportee's fundamental rights.

The first response to *Chahal* was to legislate to allow for indefinite detention within the UK, and enter a derogation from Art 5 of the Convention. When this approach was held to also breach fundamental rights, a system of control orders was designed whereby suspects were released from detention but subject to surveillance and restrictions amounting, at times, to house arrest.

HRA 1998, s 2(1)

The recent decision of the House of Lords in *Secretary of State for the Home Department v AF* (No 3) [2009] 3 All ER 643 applying jurisprudence of the ECtHR, now puts this system in question. That is a subject we will return to, but first let us consider another potential legal fiction: domestic judicial freedom under s 2(1) of the Human Rights Act 1998 (HRA 1998). Section 2(1) requires UK courts to "take into account" ECtHR jurisprudence. It was envisaged during passage of the Act that UK courts would be free to depart from it where appropriate. In particular, it was thought that it might be permissible in cases involving factors specific to the UK. The case law since enactment has not followed this approach however.

First, s 2 has been interpreted as creating a "floor" of human rights protection with the UK courts under a duty to follow clear and consistent ECtHR jurisprudence (see Lord Slynn in *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23). Some commentators celebrated that section 2(1) provided a "floor" but not, it was thought, a "ceiling". Expectations however of a progressive domestic-led human rights jurisprudence daring to go beyond the "ceiling" offered by the ECtHR, have been dashed (see Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 1 AC 323, [2004] UKHL 26).

Sideways movement

What though of sideways movement? Are UK courts free to adopt the thrust of ECtHR jurisprudence, but apply it a contextually sensitive way in the cases before them? To this end Professor Jane Wright argues that ECtHR jurisprudence "embodies very general principles which have to be mediated into national legal cultures" (*Public Law*, [2009], Jul, 595-616). ECtHR decisions are not therefore prescriptive; instead they lay down "core values" to be interpreted and applied by the domestic courts (see Lord Bingham, *Huang v Secretary of State for the Home Department* [2007] 4 All ER 15). To return to the decision in *AF* though it seems that the "walls" may now be closing in.

The *AF* case concerned an appeal against control orders imposed under s 2 of the Prevention of Terrorism Act 2005. The orders were made on the basis that the secretary of state had reasonable grounds for suspecting that the "controlees" were, or had been, involved in terrorism-related activity. In each case the individual could not be deported to their country of origin, yet releasing them into the community unsupervised was felt to be a threat to public safety. Provisions of the Act allow, in short, for the court to sanction or make control orders based (at least in part) on closed evidence, where it would be contrary to the public interest, ie national security and the prevention of crime, for that evidence to be disclosed to the individual. Closed hearings are held where the evidence is shown to "special advocates" who try to represent the interests of the individual. Once that evidence is revealed however the advocate is usually barred from having any further contact with his or her client.

> **"When the ECtHR gets it wrong, the UK courts must be entitled to respond in some meaningful way"**

The ECtHR decision

A similar issue arose before the ECtHR in *A v United Kingdom* [2009] All ER (D) 203 (Feb), concerning detention orders imposed under the old regime, again on the basis of closed evidence. The

court held that special advocates could not perform their functions "in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions". Thus, where the detention was based "solely or to a decisive degree on closed material, the procedural requirements of [the deprivation of liberty safeguards under Art 5] would not be satisfied." An earlier ruling of the House of Lords in *MB* [2008] 1 AC 440 had preferred a more flexible approach, holding that even in such cases, it might still be possible—through the use of closed hearings and special advocates—to guarantee the controlee a sufficient degree of procedural and substantive justice. This would be confined to where the closed evidence was of such a damning nature that it could not realistically be refuted.

It was clear however that *A v United Kingdom* laid down a rigid rule. It was equally clear that the reasoning under Art 5 would apply also to Art 6 (right to a fair trial) in relation to control orders. Lord Carswell in *AF* recognised that "not all may be persuaded that the Grand Chamber's ruling is the preferable approach"[108]. Nonetheless, in agreement with his fellow law lords, he held that the decision governed. In the words of Lord Rodger "we have no choice: Argentoratum locutum, iudicium finitum—Strasbourg has spoken, the case is closed."[98]. Lord Hoffmann expressed consternation, holding that the decision of the ECtHR was "wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism." Nonetheless he too held that the House had "no choice but to submit".

Domestic discretion

Whether or not one sympathises with Lord Hoffmann's position, there is an important underlying question: if the domestic court strongly disagrees with a decision of the ECtHR, what can it do about it? This brings us back to HRA 1998, s 2. Lord Sylnn in *Alconbury* accepted that there might be "special circumstances" under s 2 allowing a departure from ECtHR jurisprudence. Is potential destruction of the system of control orders, and the unsupervised release of possibly dangerous persons, such a circumstance? In order to answer this, we need to be clear about the nature of the "floor" created by s 2.

Lord Slynn's justification was deceptively simple: if the domestic court departs from a decision of the ECtHR, the complainant will go to Strasbourg, which will ordinarily follow its own jurisprudence. In other words, if the government is going to be held in breach of the Convention by a judicial body, it may as well be a domestic one. Similarly, Lord Hoffmann held that a failure to follow *A v United Kingdom* would "almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so." This last sentence is particularly illuminating.

Breach of international law

Prior to HRA 1998, the UK as a state was routinely held in breach of the Convention by Strasbourg. This was on the basis that all domestic judicial remedies had been exhausted, yet the rights of the individual remained unprotected. Whether the courts were applying statute or the common law, it was understood however that they were for the most part bound to apply or develop it without extensive reference to, or reliance on, the Convention or Strasbourg jurisprudence. Consequently, it was seldom considered to be the domestic courts' "fault" when the UK was found in breach. HRA 1998 changed this. It gives the domestic court the opportunity to makes its own findings of violations of the Convention. A failure to do so— particularly in the face of a decision of the ECtHR on the very point—is increasingly seen as a negation of the court's duty to avoid the UK being found in breach at the international level.

Implicit in the dictum of Lord Hoffmann (above), is the proposition that, in failing to find a violation, the domestic court (not Parliament in enacting the particular offending legislation; nor the government as its architect and proponent) would be the actor directly responsible for placing the UK in breach of its international obligations. This line of argument is not unreasonable: HRA 1998 as a whole was intended to "bring rights home"; to provide a domestic remedy, reducing the need to use the expensive and protracted Strasbourg scheme of justice. Is this argument sufficient however to effectively displace—in all cases—the power expressly and deliberately preserved under s 2? When the ECtHR gets it "wrong" surely the UK courts must be entitled to correct, or at least respond in some meaningful way.

Getting it wrong

But what do we mean by "wrong"? We return at this point to the discussion of "walls" and whether the domestic courts are free to apply the Convention principles in a way that recognises and accords with the intricacies and complexities of the domestic context. This is arguably a prerequisite, without which the foundations of the floor under s 2 crumble. Where the ECtHR fails to accord a sufficient margin of appreciation, or it misunderstands the domestic legal position or even its context, its decision may, arguably, be considered "wrong". In such circumstances should UK courts really be required to follow Strasbourg's line?

Judicial dissent can of course be registered in different ways. An oft-quoted example of the ECtHR getting it wrong is *Osman v United Kingdom* (1998) 5 BHRC 293. In *Barrett v Enfield* [2001] 2 AC 550 Lord Brown-Wilkinson exposed the flaw in its reasoning. Three years later the ECtHR in *Z v United Kingdom* (2002) 34 EHRR 97, after careful consideration of the dictum in *Barrett*, resiled somewhat from its position in *Osman*.

Two points arise in this respect:

- The first is that it may be premature to think that applying "wrong" decisions of the ECtHR will necessarily keep the UK out of the dock in Strasbourg (see Lord Slynn in *Alconbury*).
- The second is that, cases such as *Osman* and *Z* show the potential for opening a form of dialogue between the domestic and European courts concerning the application of Convention rights.

Disgruntled domestic judges express their disdain for the reasoning of the ECtHR, and eventually (possibly) that expression is put before the ECtHR. It is questionable however whether this somewhat circuitous (not to mention haphazard and uncertain) process is the most appropriate method of registering dissent. In those rare cases where the margin of discretion has been rendered "theoretical and illusory"—such that the powers of the domestic court have been unjustifiably curtailed—a more robust approach under s 2(1) of HRA 1998 may not just be defensible, but necessary. NLJ

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