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The Human-Rights Compliance of UK Anti-Terrorism Legislation in the Light of Domestic and International Case Law

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1. *Introduction.* – The spectre of international terrorism has prompted far-reaching legislative responses worldwide, strengthening the power of authorities to compress individual rights in order to enhance the collective right to security. This article sets out to explore the tensions between the UK's legislative and executive measures seeking to address the terrorist threat and the constraints imposed by the ECHR, in particular under Art. 3 (prohibition of torture), 5 (right to personal liberty), 6 (fair trial), 8 (respect for private life), 10 (freedom of expression), and 14 (non-discrimination). The first section of this article provides a brief overview of the counter-terrorism regime created in recent years under a series of controversial statutes. The following section outlines the general principles governing human-rights protection in the UK, and in particular the relevance of the ECHR in the domestic legal system. The article then proceeds to identify the main thematic areas of collision between the UK's human-rights obligations and anti-terrorism measures, starting from the analysis of the legal proceedings in which they were challenged before the British courts and the ECtHR. The conclusions discuss the limits of the judicial protection of human rights in the UK against the background of a permanent terrorist emergency, by com-

paring the approach of domestic courts to permissible interferences with the jurisprudence of the Court of Strasbourg.

2. *Overview of contentious UK anti-terrorism legislation.* – Whereas most other countries have become terrorism-conscious after the September 11, 2001 attacks against the US, the UK already possessed fairly wide experience in combating terrorism, due to many decades of violent struggle by elements of the nationalist community in Northern Ireland. In fact, some of the legislative measures enacted in response to international terrorism descend from strategies already adopted to tackle domestic terrorism, such as the internment of suspected terrorists and the proscription of organisations[1]. Even before 9/11, the *Terrorism Act 2000*, drawing on previous counter-terrorist legislation concerned with the situation in Northern Ireland[2], established a comprehensive approach to both domestic and international terrorism.

The main novelty introduced by *Terrorism Act 2000* is a particularly wide definition of terrorism for the purposes of the Act. Terrorism is defined in s.1(1)-(2) *Terrorism Act 2000* as the «use or threat» of a series of actions – «serious violence against the person», «serious damage to property», «endanger[ing] a person's life», «creat[ing] a serious risk to the health or safety of the public», action «designed seriously to interfere with or seriously to disrupt an electronic system» – in the pursuit of certain goals, namely «to influence the government or to intimidate the public» «for the purpose of advancing a political, religious or ideological cause». According to s.1(3) *Terrorism Act 2000*, the use or threat of any of the aforesaid actions «which involves the use of firearms or explosives» constitutes terrorism regardless of any goals. Further, s.1(5) extends the notion to «action taken for the benefit of a proscribed organisation». Significantly, s.1(4) specifies that the definition above includes action outside the UK, persons and property «wherever situated», and the public and governments of countries other than the UK. Thus, *Terrorism Act 2000* departed from the previous territorial jurisdiction and designed «a near universal model»[3], in that it expanded the competence

[1] See BRANDON, *Terrorism, human rights and the rule of law: 120 years of the UK's legal response to terrorism*, in *Criminal Law Review*, 2004, pp. 981 ff.; GREER, *Human rights and the struggle against terrorism in the United Kingdom*, in *EHRLR*, 2008, pp. 164 ff.; BONNER, *Responding to the crisis: legislating against terrorism*, in *LQR*, 2006, pp. 602 ff.

[2] *Civil Authorities (Special Powers) Act* (Northern Ireland) 1922, *Prevention of Terrorism Acts* (Northern Ireland) 1974-1989, Northern Ireland (Emergency Provisions) Act 1996.

[3] BRANDON, *op. cit.*, p. 987.

of domestic law-enforcement and judicial authorities to terrorist offences committed outside the UK or directed against foreign governments.

As commentators observed, «[t]he threat or use of action against an undemocratic or illegitimate government anywhere in the world for a political, ideological or religious purpose is therefore terrorism according to the TA 2000»[4]. If there was any doubt as to the admissibility of exceptions, the 2007 judgment of the Court of Appeal in *R.* v. *F* clarified that a claim that UK terrorist legislation did not apply to action against countries governed by tyrants and dictators was unfounded[5]. The applicant, found in possession of documents providing instructions on the set up of terrorist cells, contended that the material did not fall within the scope of s.1 *Terrorism Act 2000*, insofar as it was targeted at removing the Libyan Government, which was not protected by the Act, as it was a tyrannical regime. The court stressed that nothing in the wording of the statute limited the ambit of protection to countries with governments of any particular type, nor was there any reason to deprive the inhabitants of countries not governed by democratic principles of the protection of the Act[6]. The court further noted that s.58(3) *Terrorism Act 2000* did not permit as a «reasonable excuse» for the possession of documents useful to plan terrorist acts the fact that they aimed at changing an illegal or undemocratic regime. It insisted that, if Parliament had intended a similar defence, the statute would have expressly addressed the issue by an express restriction on the application of the Act to democratic countries or by providing that an individual with a genuine grievance about a tyrannical regime should fall outside the statutory provisions creating terrorist offences[7]. While it seems perfectly tenable to say that the motives of the perpetrators of acts of terrorism do not exculpate them when their action affects innocent civilians, the court's argument is less convincing when it comes to danger to life in respect of military targets or damage to regime-controlled property in undemocratic States. Further, concerns were expressed over a «trend that the UK government values friendship with oil-owning despots much more highly than the political freedom exercised by refugee underdogs»[8].

[4] *Ibidem*, p. 988.

[5] *Regina* v. *F*, [2007] Q.B. 960, para. 26-27.

[6] *Ibidem*.

[7] *Ibidem*, para. 38.

[8] WALKER, *Terrorism: Terrorism Act 2000, ss.1 and 58: possession of terrorist documents*, in *Criminal Law Review*, 2008, p. 165.

The universal jurisdiction of British authorities over terrorism offences also has a great impact on the proscription mechanism set up by the *Terrorism Act 2000*, another matter of controversy in respect of this Act[9]. S.3(4) *Terrorism Act 2000* allows the Home Secretary to place an organisation on a proscription list «if he believes that it is concerned in terrorism», which, according to s.3(5), means that it «commits or participates in acts of terrorism», «prepares for terrorism», «promotes or encourages terrorism», or, as lett. (d) problematically stipulates, «is *otherwise* concerned in terrorism»[10]. The effect of inclusion on the list of proscribed groups is the criminalization of membership, of provision of support for the group, and of the display of distinctive items of the group in public[11].

Moreover, ss.44-47 *Terrorism Act 2000* controversially introduced a power of stop and search for police constables in uniform. Under the above said provisions, an authorization may be given by a senior police officer (endorsed by the Home Secretary) for constables to stop and search vehicles or pedestrians for articles «which could be used in connection with terrorism». The authorization may be given if the officer «considers it *expedient* for the prevention of terrorism»[12]. A constable may exercise the power thus conferred «whether or not the constable has grounds for suspecting the presence of articles of that kind»[13]. The search takes place in public and failure to submit to it amounts to an offence punishable by imprisonment for up to six months or a fine or both[14].

In response to the 9/11 attacks, the UK adopted the *Anti-terrorism, Crime and Security Act 2001*, which further compresses civil liberties by introducing emergency powers «unprecedented in peacetime»[15]. The Act evidences an important feature of recent British counter-terrorism strategy, namely the «perception that an important element of the terrorist threat emanates from foreign nationals»[16]. Thus, ss.21-32 in Part 4 of the *Anti-terrorism, Crime and*

[9] See BRANDON, *op. cit.*, p. 996: «Proscription ... is rendered even less precise when so many organisations that are proscribed have little or no active presence in the United Kingdom. At a practical level, decisions about which organisations to proscribe must be informed by intelligence provided by agencies in other states, who may have their own political motives ...».

[10] s.3 *Terrorism Act 2000* (emphases added).

[11] ss.11-13 *Terrorism Act 2000.*

[12] s.44(3) *Terrorism Act 2000* (emphases added).

[13] s.45(1)(b) *Terrorism Act 2000.*

[14] s.47 *Terrorism Act 2000.*

[15] TOMKINS, *Legislating against terror: the Anti-terrorism, Crime and Security Act 2001*, in *PublL*, 2002, p. 220. See *id.* for a general overview of the Act.

[16] ELLIOTT, *The "war on terror", UK style: the detention and deportation of suspected terrorists*, in *ICON*, 2010, p. 132.

Security Act 2001 (*Immigration and Asylum*) allowed for the indefinite detention without trial of foreign nationals in respect of whom the Secretary of State had reasonable suspicion of involvement in international terrorism and who were therefore considered a threat to national security, but who could not be tried, for lack of sufficient evidence[17], nor deported, because of a real risk of ill-treatment in their countries of origin. As is well-known, the jurisprudence of the ECtHR has made plain that expelling foreign nationals towards a country where they are likely to suffer torture or other treatment prohibited by Art. 3 ECHR amounts to an indirect violation of the Convention[18], and this is so regardless of any national security considerations[19].

When the *Anti-terrorism, Crime and Security Act 2001* was adopted, commentators did not fail to express their perplexity: «If there is insufficient evidence to secure a conviction, why should that evidence now become sufficient to justify indefinite detention without trial?»[20]. The Strasbourg organs have emphasized that, while domestic authorities have more leeway to interfere with Art. 5 rights when national security is at stake, disproportionate individual sacrifice is unwarranted[21]. Further, even when a measure restricting the exercise of a right is prescribed by law, sufficient guarantees against arbitrariness need to be made available, and in particular access to a judge[22]. The UK government acknowledged that the arrest and indefinite detention of

[17] The lack of sufficient evidence derives from the fact that the Secretary of State's suspicion is usually based on intelligence information, primarily obtained through telephone tapping, whereas intercept evidence is not admitted in British courts. However, the choice to depart from criminal law by detaining persons in breach of due process, rather than lift the ban on intercept evidence in terrorism case, is at least paradoxical. See STARMER, *Setting the record straight: human rights in an era of international terrorism*, in *EHRLR*, 2007, pp. 128 ff.

[18] *Soering* v. *UK*, Application No. 14038/88, 7 July 1989; *D* v. *United Kingdom*, Application No. 30240/96, 2 May 1997; *Jabari* v. *Turkey*, Application No. 40035/98, 11 July 2000.

[19] *Chahal* v. *UK*, Application No. 22414/93, 11 November 1996; *Saadi* v. *Italy*, Application No. 37201/06, 28 February 2008.

[20] TOMKINS, *Legislating against terror*, cit., pp. 213 f.

[21] See e.g. *Aksoy* v. *Turkey*, Application No. 21987/93, 18 December 1996, para. 84; *Ferrari-Bravo* v. *Italy*, Application No. 9627/81, 14 March 1984, para. 18; *Sakik and others* v. *Turkey*, Applications No. 23878-83/94, 26 November 1997, para. 45. For an analysis of the ECtHR's criteria for balancing national security and human rights in fighting terrorism see DRAGHICI, *International organisations and anti-terrorist sanctions: no accountability for human rights violations?*, in *Critical Studies on Terrorism*, 2009 (vl. 2, n. 2), pp. 305 ff.

[22] See *Chahal*, cit., para. 119; *Brannigan and Mcbride* v. *UK*, Applications No. 14553-54/89, 25 May 2003, para. 48; *Aksoy*, cit., para. 83; *Ramirez Sanchez* v. *France*, Application No. 59450/00, 7 July 2006, para. 166. See further DRAGHICI, *loc. ult. cit.*

foreign suspects is incompatible with Art. 5.1.f ECHR (which only allows arrest and detention of aliens with a view to deportation), and entered a formal derogation notice pursuant to Art. 15.3[23]. A detainee can appeal against certification as a terrorist suspect by the Secretary of State before the *Special Immigration Appeals Commission*[24], however the evidence against the appellants may be withheld in order to protect the intelligence sources and national security interests. A «special advocate» procedure was introduced to compensate for the lack of transparency and *inter partes* procedure; unlike the applicant's counsel, the special advocate had access to confidential material affecting national security.

A few years later, following a declaration of incompatibility by the House of Lords, the above-mentioned provisions of the *Anti-terrorism, Crime and Security Act 2001* were repealed, and the *Prevention of Terrorism Act 2005* instituted an alternative mechanism in the form of the so-called «control orders»[25]. Under s.2(1) *Prevention of Terrorism Act 2005*, the Secretary of State is empowered to make a control order if he has «reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity» and «considers that it is necessary, for ... protecting members of the public from a risk of terrorism, to make a control order». According to s.1(4) *Prevention of Terrorism Act 2005*, the obligations that may be placed on a individual by virtue of a control order include, *inter alia*, restrictions «in respect of his work», «on his association or communications with specified persons or with other persons generally», «in respect of his place of residence or on the persons to whom he gives access to his place of residence», «a prohibition on his being at specified places or within a specified area at specified times», «a prohibition or restriction on his movements to, from or within the

[23] The Secretary of State made the *Human Rights Act 1998 (Designated Derogation) Order 2001*, the Secretary General of the Council of Europe was formally informed of UK's derogation from Art. 5.1, and the *Human Rights Act 1998 (Amendment No. 2) Order 2001* was made. The derogation was withdrawn in 2005, and the Secretary of State made the *Human Rights Act 1998 (Amendment) Order 2005*.

[24] *Special Immigration Appeals Commission* is a special tribunal established by the Special Immigration Appeals Commission Act 1997 to hear appeals against immigration decisions taken on national security grounds. In the procedure before *Special Immigration Appeals Commission*, the appellant cannot freely choose his legal representative, he is not informed of the full reasons of the decisions that concern him, and the proceedings may be held *in absentia*. See further details in TOMKINS, *Legislating against terror*, cit., pp. 217 f.

[25] For a general overview of the control orders scheme see MIDDLETON, *Control orders: out of control?*, in *Criminal Lawyer*, 2007, pp. 3 ff.

United Kingdom», «a requirement on him to surrender his passport», «to give access to specified persons to his place of residence or to other premises», «to allow specified persons to search that place», «to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means», and «to report to a specified person at specified times and places»[26]. While the severity of an order in a specific case depends on the range of restrictions imposed, it can be argued that the scheme generally affects the right to liberty, freedom of movement, respect for private life, freedom of communication and association.

The orders made by the Secretary of State (also called «non-derogating orders»)[27] last for a period of 12 months and can be subsequently renewed. The definition of terrorism-related activity that may give rise to a control order is rather broad and vague, encompassing any conduct encouraging or facilitating the preparation or instigation of acts of terrorism[28]. There is some degree of judicial supervision, insofar as the Secretary of State is usually expected to apply for the court's permission prior to making an order, safe where the urgency of the matter requires immediate action (s.3(1) *Prevention of Terrorism Act 2005*), and authorization is sought after the order was made (s.3(3) *Prevention of Terrorism Act 2005*). However, the scope of the review is rather limited, as «the function of the court is to consider whether the Secretary of State's decision that there are grounds to make that order is *obviously flawed*»[29]. Further, pursuant to s.3(5) *Prevention of Terrorism Act 2005*, «[t]he court may consider an application [by the Secretary of State] for permission

[26] s.1(5) *Prevention of Terrorism Act 2005* further specifies that the restriction of the controlled person's movements may include «a requirement on him to remain at or within a particular place or area (whether for a particular period or at particular times or generally)».

[27] s.2(3). Orders derogating from Art. 5 ECHR (s.1(10) *Prevention of Terrorism Act 2005*) can only be made by a court on the application of the Secretary of State (s.1(2)(b) *Prevention of Terrorism Act 2005*).

[28] s.1(9) *Prevention of Terrorism Act 2005* defines «involvement in terrorism-related activity» as any of the following: «(a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so; (c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so; (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity; and for the purposes of this subsection it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally».

[29] s.3(2)(a) *Prevention of Terrorism Act 2005* (emphases added).

... in the absence of the individual ..., without his having been notified of the application ... and ... without his having been given an opportunity ... of making any representations to the court». While control orders are not framed as criminal sanctions, these provisions raise concerns in respect of the fair trial guarantees of the controlled individuals.

In the aftermath of the July 2005 London underground bombings, the UK adopted the *Terrorism Act 2006*, which amongst other things introduced the ambiguous offences of «encouragement of terrorism» and «dissemination of terrorist publications», and increased the limit of pre-charge detention for terrorist suspects to 28 days. «Encouragement of terrorism» is defined as «a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism»[30]. A person is guilty of an offence not only if he or she intends the statement to encourage terrorism, but also if they are «reckless as to whether members of the public will be directly or indirectly encouraged» to commit or prepare terrorist acts[31]. Particularly problematic is indirect instigation, which is defined as a statement that «glorifies the commission or preparation (whether in the past, in the future or generally) of such acts»[32]. This has stimulated «furious debates about whether this offence might criminalize anyone who glorified the armed opposition to the Apartheid regime in South Africa (such as the reverend Nelson Mandela), and there were calls for the future prosecution of Cherie Booth, the wife of British Prime Minister Tony Blair, for stating in a speech that 'in view of the illegal occupation of Palestinian land I can well understand how decent Palestinians become terrorists'»[33]. Similarly, s.2 criminalizes the intentional or reckless direct or indirect incitement to terrorism through the distribution/circulation/loan/sale etc. of terrorist material (*i.e.* material glorifying terrorism or useful in the preparation of terrorist acts). The 2006 Act also amends the definition of terrorism in *Terrorism Act 2000* and *Anti-terrorism, Crime and Security Act 2001* so as to encompass threats or actions aimed at influencing or intimidating an international organisation[34].

[30] s.1(1) *Terrorism Act 2006.*
[31] s.1(2)(b)(i) *Terrorism Act 2006.*
[32] s.1(3)(a) *Terrorism Act 2006.*
[33] WALKER, *Clamping down on terrorism in the United Kingdom*, in *JICJ*, 2006, pp. 1141 f.
[34] s.34 *Terrorism Act 2006.*

More recently, the *Counter-Terrorism Act 2008* [CTA 2008] strengthened the existing preventative counter-terrorism legislation by limiting the right to respect for private life. The Act introduced a power for constables to take fingerprints and samples from controlled persons[35], and a requirement for convicted terrorists to notify the police of their whereabouts[36]. Also, s.75 *Counter-Terrorism Act 2008* further amends and widens the definition of terrorism in counter-terrorism statutes, in that the relevant conduct is the use or threat of certain actions for the purpose of advancing not only a political, religious or ideological cause, but also a «racial» cause.

In addition to primary legislation, the controversy concerning the admissible boundaries of the fight against terrorism extends to executive measures, such as the Terrorism (United Nations Measures) Order 2006 and the Terrorism (United Nations Measures) Order 2009, whereby the UK sought to give effect to UN Security Council Resolution 1373 (2001) and allow the Treasury to freeze the assets of suspected terrorists. The *Terrorist Asset-Freezing (Temporary Provisions) Act 2010* was subsequently introduced to legitimize the 2006 Order retrospectively after the Supreme Court declared it void. At present, the asset-freezing regime is governed by the recently adopted Terrorist Asset-Freezing etc. Act 2010.

3. *Human Rights standards of protection in the UK's legal system.* – While the UK was a party to the ECHR since 1953, hence responsible internationally for any violations of its conventional obligations, ECHR rights were not part of the law administered by UK courts until 2000, when the *Human Rights Act 1998* came into force. The *Human Rights Act 1998* incorporated the ECHR into domestic law, and made it directly enforceable in domestic courts, in fact a schedule to the Act reproduces the catalogue of rights in the ECHR verbatim. S.6(1)-(2) *Human Rights Act 1998* makes it «unlawful for a public authority[37] to act in a way which is incompatible with a Convention right», except when «as a result of one or more provisions of primary legisla-

[35] s.10 ff. *Counter-Terrorism Act 2008.*

[36] s.40 ff. *Counter-Terrorism Act 2008.*

[37] According to s.6(3) *Human Rights Act 1998*, «In this section "public authority" includes - (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament».

tion, the authority could not have acted differently», otherwise said the conduct contrary to the ECHR was requested by an Act of Parliament.

The obligations placed by the Act on UK courts include, pursuant to s.3, a rule of construction aimed at aligning all domestic law with the ECHR. This provision requires courts to interpret and apply primary and secondary legislation – «[s]o far as it is possible to do so» – in a manner consistent with the ECHR. Significantly, according to s.2(1) *Human Rights Act 1998*, British courts must «take into account» the case law of the Strasbourg Court when deciding a matter involving an ECHR right. Thus, while they are not technically bound by the judgments of the ECtHR as if it were a superior court creating precedent, domestic courts cannot ignore the interpretation of ECHR rights provided by Strasbourg jurisprudence. Moreover, s.4 empowers the highest courts (including the High Court and the Court of Appeal of England and Wales, and the Supreme Court – the former House of Lords) to make a declaration of incompatibility if they are satisfied that a provision of primary legislation is incompatible with a Convention right. However, while the courts may quash secondary legislation, there is no power to annul an Act of Parliament upon issuing a declaration of incompatibility. Primary legislation declared incompatible with the ECHR will remain in force until repealed or amended by the Parliament[38]. This is a direct consequence of the doctrine of parliamentary supremacy which lies at the core of UK's constitutional system.

Most important, s.7 *Human Rights Act 1998* enables individuals to rely on their ECHR rights before domestic courts whenever public authorities breach their obligations under s.6. This was expected to reduce the need for individuals to submit a petition to the Strasbourg Court, by guaranteeing the same result through a domestic lawsuit. S. 8 *Human Rights Act 1998* further empowers courts to offer adequate remedy (including damages) to individuals whose rights under the ECHR have been breached. However, this encounters the important limit stemming from s.6(2): a public authority will not be found in breach of its obligations under the Act if the conduct complained of, albeit in breach of ECHR, was requested by primary legislation. In that case, relying on the *Human Rights Act* is of little assistance to the individual applicant. All they can achieve is a declaration of incompatibility that

[38] See s.4(6) *Human Rights Act 1998*: «A declaration under this section ("a declaration of incompatibility") - (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made».

may trigger legislative reform in the future, if Parliament is willing to remedy the incompatibility found by the court.

The protection of human rights in the UK is further governed by the principle established by the 1999 judgment of the House of Lords in *Re Simms*[39], *i.e.* any interference with a fundamental right must have an express legal basis in an Act of Parliament. The relationship between human rights and parliamentary sovereignty was summarized by Lord Hoffmann as follows: «Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The *Human Rights Act 1998* will not detract from this power. ... Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.»[40]. Thus, the executive cannot use general provisions as implied authorization for human rights restrictions, and the courts must premise the construction of ambiguous provisions on the assumption that the provision sought to be human-rights compliant. Nonetheless, it also means that in the UK legal order human rights do not enjoy any superior/ "constitutional" rank, binding Parliament in the enactment of "ordinary" statutes. However improbable that may be, Parliament has unfettered discretion to curtail human rights. Unlike elsewhere in continental Europe or the United States, a provision inconsistent with fundamental rights would not be unconstitutional and susceptible to annulment by a constitutional court. Also, since no Parliament can bind a future Parliament, the *Human Rights Act 1998* itself may theoretically be repealed at any time. The only advantage the *Human Rights Act* has over other statutes is that it cannot be impliedly repealed by inconsistent legislation adopted later in time, but an express repeal is always possible[41].

[39] *R.* v. *Secretary of State for the Home Department Ex p. Simms*, [2000] 2 A.C. 115.

[40] *Ibidem*, p. 131. The case regarded a blanket exclusion of all professional visits by journalists to prisoners, introduced by the Secretary of State, on the ground that to allow any interviews would undermine proper control and discipline. The measure was found to be an excessive interference with a prisoner's right to free speech and right to seek access to justice, whereas general decision-making powers conferred by statute were presumed to have been enacted as subject to fundamental civil liberties. Prison regulations expressed in general language are also presumed to be subject to fundamental human rights.

[41] The notion that certain statutes, such as the European Communities Act 1972 or the Human Rights Act 1998, are particularly important, "constitutional" statutes, immune from

In *Re Simms* Lord Hoffmann also clarified the incidence of the *Human Rights Act* on the UK legal system: «The Human Rights Act 1998 will make three changes .... First, the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention on Human Rights and Fundamental Freedoms. ... Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 .... Thirdly, in those unusual cases in which the legislative infringement of fundamental human rights is so clearly expressed as not to yield to the principle of legality, the courts will be able to draw this to the attention of Parliament by making a declaration of incompatibility. It will then be for the sovereign Parliament to decide whether or not to remove the incompatibility». Thus, even after the adoption of *Human Rights Act 1998*, the judiciary is powerless before the will of Parliament to legislate in contrast with ECHR obligations. Nonetheless, it has been suggested that the Human Rights Act may ultimately reshape the doctrine of parliamentary sovereignty: «Dicey's assertion that under our constitution, "Parliament has the right to make or unmake any law whatever and further... no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament" may remain just about true, ... but with the additional gloss that privileges the values of human rights as a pillar of an evolving constitution»[42].

Bearing in mind these peculiarities of human-rights protection in the UK, the following section examines the challenges faced by some of the critical areas of UK anti-terrorism legislation identified in section 1 in domestic courts and before the European Court. It also attempts to critically appraise the attitude of the judiciary towards human rights against the background of national security concerns.

4. *Inconsistencies between the UK's human-rights obligations and anti-terrorism provisions emerging from the case law.* — 4.1. *The discrimination of foreign nationals suspected of involvement with terrorism.* – The protection of the fundamental rights of foreign nationals suspected of involvement in ter-

the doctrine of «implied repeal» (*lex posterior derogat anteriori*), can be found in the 2002 High Court judgment in *Thoburn* v. *Sunderland City Council (the "Metric Martyrs' case")*, [2002] EWHC 195 (Admin.), [2003] Q.B. 151.

[42] SMITH, *Human rights and the UK Constitution: can Parliament legislate "irrespective of the Human Rights Act"?*, in *Legal Information Management*, 2006, p. 280.

rorism was a major test for the UK's human-rights standards. In fact, «[h]uman rights law is at its most valuable when it stands between the interests of the majority and those of unpopular minorities»[43]. A matter of concern emerging from the case law is the discrimination of foreign suspects in the enjoyment of the right to personal liberty. As underlined above, since many terrorist suspects originated from countries to which deportation was prohibited under Art. 3 ECHR, s.23 of the *Anti-terrorism, Crime and Security Act 2001* allowed for the indefinite detention without trial of those suspects not susceptible to deportation. In 2004, in the case of *A* v. *Secretary of State for Home Department* (the *Belmarsh Prison* case/ *A (No. 1)*), the House of Lords was called upon to assess the compatibility of this provision with the *Human Rights Act 1998*[44].

The applicants in *A (No. 1)*, foreign nationals, had been certified by the Secretary of State as suspected international terrorists under s.21 *Anti-terrorism, Crime and Security Act 2001*, but their deportation was barred by the risk of ill-treatment in their countries of origin (hence the potential indirect violation of Art. 3 ECHR). They had consequently been detained under s.23 *Anti-terrorism, Crime and Security Act 2001* without charge or trial, in accordance with the derogation from Art. 5.1.f ECHR. The Special Immigration Appeal Commission had found that s.23 of the Act was inconsistent with Art. 5 and 14 ECHR insofar as it allowed the detention of suspected international terrorists in a way that discriminated against them by reason of their nationality. The decision of *Special Immigration Appeals Commission* was, however, reversed by the Court of Appeal, who found that the applicants' detention under s.23 *Anti-terrorism, Crime and Security Act 2001* on the ground that they posed a risk to national security did not breach UK's obligations under the ECHR[45]. The applicants appealed before the House of Lords.

The House of Lords first examined the derogation from Art. 5.1 ECHR pursuant to the *Human Rights Act 1998 (Designated Derogation) Order 2001*, to the effect that detention of foreign nationals suspected of terrorism, albeit not «with a view to deportation», was admissible. The majority of the court held that the issue whether there was a «public emergency threatening the life of the nation» within the meaning of Art. 15 ECHR involved a pre-eminently

[43] ELLIOTT, *op. cit.*, p. 145.

[44] *A and Others* v. *Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68.

[45] [2002] EWCA Civ 1502, [2004] Q.B. 335.

political judgment, therefore great weight had to be placed on the assessment of Government and Parliament. Although the derogation was, thus, in principle justified by the existence of an emergency situation, ss. 21 and 23 *Anti-terrorism, Crime and Security Act 2001* failed the proportionality test (adequacy and minimum interference necessary), insofar as the means employed to pursue the legitimate aim of protecting the community did not address the security threat rationally. On the one hand, they left out the threat presented by UK nationals suspected of being Al-Qaeda terrorists or supporters. On the other hand, the provisions permitted foreign suspects considered so dangerous as to make indefinite incarceration imperative to leave and pursue their activities abroad, where they could plot without restraint. Also, if the threat posed by UK suspects could be addressed without infringing their right to personal liberty, it had not been shown why similar measures, short of detention without trial, could not adequately address the threat presented by foreign nationals. For these reasons the measures were found not to be «strictly required» by the exigencies of the situation within the meaning of Art. 15.

The House of Lords also pointed out that the prohibition of discrimination on grounds of nationality or immigration status under Art. 14 ECHR had not been subject to derogation, therefore the decision to detain only one group of suspected international terrorists, defined by nationality or immigration status, was a breach of the Convention[46]. It also constituted a violation of Art. 26 of the *International Covenant on Civil and Political Rights*, and therefore was not consistent with the UK's other obligations under international law as requested by Art. 15 ECHR for valid derogations. As a result, the House of Lords quashed the Human Rights Act 1998 (Designated Derogation) Order 2001 and declared, under s.4 *Human Rights Act 1998*, that s.23 *Anti-terrorism, Crime and Security Act 2001* was incompatible with the HRA1998 Sch.1 Part I Art. 5 and Art. 14, insofar as it was disproportionate

[46] The question arises whether a derogation from Art. 14 would be possible at all. Art. 14 is not on the list of non-derogable rights for the purposes of Art. 15, and, unlike the ICCPR (Art. 4) and the Inter-American Convention on Human Rights (Art. 27), Art. 15 ECHR does not specify that derogating measures cannot be adopted in a discriminatory manner. However, Art. 15 states that the derogation must be compliant with the State's other obligations under international law, therefore a valid derogation from Art. 14 ECHR could not be entered without first securing a valid derogation from the equivalent article in the UN Covenant, which would be impossible due to the built-in proviso of non-discrimination in Art. 4.

and permitted detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status[47].

Notwithstanding the declaration of incompatibility, the applicants remained in detention without trial for another several months, as the declaration has non-binding effect[48]. They decided to take their case to Strasbourg and, in proceedings culminating in the 2009 Grand Chamber judgment in *A* v. *United Kingdom*[49], they complained of violations of their rights under Art. 3 and 5 of the European Convention. Firstly, the applicants complained that their indefinite detention in high security conditions amounted to ill-treatment prohibited by Art. 3 ECHR. The European Court found that the anguish generated by the indefinite detention was considerable, however the availability of mechanisms to challenge the lawfulness of detention did not completely rule out the prospect of freedom, so the threshold in Art. 3 for inhuman and degrading treatment had not been reached. This finding may appear questionable, considering the length of the applicants' detention without trial (approximately three years), and the intense mental suffering caused by the unlikely prospects of success of any challenge to the lawfulness of detention[50].

In respect of the lawfulness of detention, the Court recalled that the protection afforded by Art. 5 against the State's arbitrary interference with the right to liberty is a fundamental guarantee to which «everyone» is entitled, regardless of nationality[51], Art. 5.1.f permits the State, in enforcing immigration legislation, to detain aliens for short periods «with a view to deporta-

[47] The *House of Lords* refused the government's contention that the scheme in Part 4 *Anti-terrorism, Crime and Security Act 2001* was an immigration measure, which allowed for a legitimate distinction between nationals and non-nationals. The *House of Lords* determined that it was a security measure, and the treatment reserved to non-nationals suspected of terrorism had to be compared with the treatment of nationals suspected of terrorism, not with the treatment of non-nationals not suspected of terrorism. See TOMKINS, *Readings of A* v. *Secretary of State for the Home Department*, in *PublL*, 2005, p. 263.

[48] The Home Secretary announced in Parliament that they will remain incarcerated until new powers are enacted to replace Part 4 *Anti-terrorism, Crime and Security Act 2001* and allow the executive to impose restrictions on movement and association. See TOMKINS, *op. cit.*, pp. 259 f.

[49] *A. and Others* v. *the United Kingdom*, Application No. 3455/05, 19 February 2009.

[50] In fact, all the detainees suffered a deterioration of their mental health, and some of them were transferred to a secure mental hospital. See *ibidem*, para. 70-76. Arguably, the psychiatric damage may justify a finding of inhuman treatment.

[51] See Artt. 1, 5 and 14 ECHR.

tion», but detaining them indefinitely and keeping the deportation option «under active review», with no realistic prospect of expulsion due to the risk of ill-treatment, did not fall within that exception. The Court emphasized that "preventive detention" is incompatible with the right to liberty under Art. 5.1 in the absence of a valid derogation under Art. 15. In assessing the validity of the derogation, the Court considered that, as recognized by Strasbourg jurisprudence, national authorities are best placed to assess an emergency, therefore the *House of Lords'* findings were to be endorsed, unless manifestly unreasonable. The Court agreed that there was a credible threat of serious terrorist attacks against the UK: while the UK had not been targeted by *Al-Qaida* at the relevant time, the Court conceded that a State could not be expected to wait for a catastrophe to occur before taking action to prevent it[52], also, whereas the UK had been the only ECHR State to have lodged a derogation after 9/11, each government was entitled to make its own assessment of the threat[53].

The Court similarly found that the question of whether the measures were strictly required by the exigencies of the situation had been carefully considered by the *House of Lords*[54], and courts are State authorities to whom a margin of discretion should be afforded in deciding the scope of the measures required to address an emergency[55]. According to the ECtHR, the *House of Lords* had been correct in holding that the extended powers of detention were not immigration measures (where a distinction between nationals and non-nationals would be legitimate), but were rather concerned with national

[52] The ECtHR also referred to the bombings of the London underground in July 2005 which had subsequently confirmed the reality of the danger.

[53] The ECtHR had already recognized in *Brannigan and McBride* v. *UK*, Applications No. 14553-14554/89, 22 April 1993, that national authorities are better placed to assess the existence of an emergency for the purposes of Art. 15.

[54] In *Greece* v. *UK*, Application No. 176/56, 26 September 1958, the Strasbourg judge declared itself competent to assess both the existence of emergency and whether the measures were strictly required. See also *Aksoy* v. *Turkey*, cit., *Brannigan and McBride*, cit.

[55] Concerns were expressed over the willingness of the ECtHR to follow the decision of the domestic court rather than make its own assessment. ELLIOTT, *op. cit.*, pp. 137 f. suggests that, if the HL had adopted a highly deferential, though not unreasonable view to the proportionality of the measures, the ECtHR would have endorsed it without proper scrutiny. A better reading of *A* v. *UK* may be, however, that where the domestic court, despite a deference to other branches that does not bound the ECtHR, found the derogation to be invalid, the ECtHR will follow it, unless unreasonable. The ECtHR is likely to effect a closer scrutiny where the domestic court found the measure proportional.

security. Part 4 *Anti-terrorism, Crime and Security Act 2001* had been designed to deal with the threat of terrorist attack posed by both nationals and non-nationals, and the choice to address a security issue by means of an immigration measure had imposed a disproportionate and discriminatory burden on a group of suspects. Absent any evidence that the threat from non-nationals had been significantly more serious than that from nationals, the ECtHR was not persuaded to overturn the conclusion of the House of Lords that the difference in treatment was unjustified. The Court therefore concluded that the derogating measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals, thus violating Art. 5.1.

In respect of the procedures before the *Special Immigration Appeals Commission*, the ECtHR emphasized that, where a person is detained based on reasonable suspicion of unlawful conduct, the guarantee of procedural fairness in Art. 5.4 presupposes an opportunity for him to effectively challenge the allegations. While this generally requires full disclosure of the evidence against him, a strong public interest in maintaining the secrecy of some of the evidence (to protect vulnerable witnesses or intelligence sources) allows restrictions on the right to disclosure, as long as the detainee still has the possibility effectively to challenge the allegations. When the decision of *Special Immigration Appeals Commission* in proceedings challenging detention is based (entirely or to a significant extent) on confidential material, the suspect's procedural rights under Art. 5.4 ECHR are not satisfied. The ECtHR rejected the UK government's argument that the applicant's interests were protected by the «special advocate», insofar as the detainees were not placed in a position to properly instruct him if they did not receive sufficient information. In respect of a number of applicants, critical information supporting the allegations had not been disclosed, and thus a fair balance had not been struck between the public interests involved (national security, the safety of others) and the applicants' rights under Art. 5.4 to procedural fairness in their appeals to *Special Immigration Appeals Commission.* The Court also noted that the violations referred to above could not give rise to an enforceable claim for compensation before the domestic courts, which entailed a violation of Art. 5.5.

4.2. *Admissibility of "third-party torture" evidence and deportation based on "no torture" diplomatic assurances.* – Recent counter-terrorism strategies in the UK have evidenced a tendency to lower the standards of protection

against torture despite the absolute nature of the prohibition in international human rights law in general and under the ECHR in particular. There are, thus, two contentious areas in respect of the scope of obligations arising from the prohibition of torture: the admissibility of evidence obtained by torturous means abroad without the complicity of British authorities, and the practice of expelling terrorist suspects towards countries where they are at risk of suffering torture based on formal assurances from the receiving governments.

In a 2005 decision in the case of *A and Others* v. *Secretary of State for the Home Department (A No. 2)*[56], the House of Lords had the opportunity to consider the lawfulness of "third-party torture" evidence in proceedings before the Special Immigration Appeals Commission, which by virtue of Rule 44.3 of the Special Immigration Appeals Commission (Procedure) Rules 2003 is entitled to receive evidence that is not admissible in a court of law. The appellants had been certified by the Secretary of State as suspected international terrorists under s.21 *Anti-terrorism, Crime and Security Act 2001*, and detained without charge under s.23, in accordance with the derogation from *Human Rights Act 1998* Sch.1 Part I Art. 5 permitted by the Human Rights Act 1998 Order 2001. They had unsuccessfully appealed to the *Special Immigration Appeals Commission* under s.25 *Anti-terrorism, Crime and Security Act 2001*; the *Special Immigration Appeals Commission* maintained during the proceedings that the fact that evidence might have been procured by torture inflicted by foreign officials without British complicity was relevant to the weight of the evidence but not to its admissibility, and that there was no finding that any of the evidence from third parties abroad had been obtained in breach of Art. 3 ECHR. The Court of Appeal agreed that evidence obtained abroad allegedly under torture inflicted by foreign agents without the complicity of British authorities was admissible in appeals before *Special Immigration Appeals Commission*, while the use of torture was merely a circumstance affecting the weight to be given to the evidence[57].

The House of Lords took a stricter view on the matter[58]. Evidence which had been, or might have been, procured by torture was not admissible in British courts regardless of where the torture took place, and by whom or

[56] *A and Others* v. *Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71, [2006] 2 A.C. 221.

[57] [2004] EWCA Civ 1123, [2005] 1 W.L.R. 414.

[58] For an in-depth analysis of the judgment see SHAH, *The UK's anti-terror legislation and the House of Lords: the battle continues*, in *HRLRev*, 2006, pp. 416 ff.

under whose authority it had been inflicted. The court relied on a two-fold argument (reflecting the two submissions of the appellants): on the one hand, it stressed that a well-established common law principle firmly required courts to exclude third-party torture evidence as unreliable, unfair, offensive to the ordinary standards of humanity and decency, and incompatible with the correct administration of justice, and that the inadmissibility of confessions not proved to be voluntary was the most fundamental rule of English criminal law. On the other hand, the court emphasized that the international prohibition of the use of torture has achieved the status of peremptory norm, and referred to the universal consensus embodied in the 1984 International Convention Against Torture as well as to the absolute and non-derogable nature of the right enshrined in Art. 3 ECHR. Construing Rule 44.3 *Special Immigration Appeals Commission* (Procedure) Rules 2003 as to allow evidence obtained through third-party torture was incompatible with the absolute nature of the objection against torture, and only an express statutory provision could have displaced it.

In a certain sense, in *A (No. 2)* the House of Lords «eschewed judicial deference in the context of the fight against terrorism» and «continued its hands on approach, much evident in *A (No 1)*»[59]. However, the suggestion of the House of Lords is that the question of whether the objection against the use of torture-procured material could be overridden and, if so, in what circumstances, had to be left to the legislature. Thus, the problem for the House of Lords appears to stem from the lack of express provision by Parliament rather than from the absolute nature of the prohibition of torture *per se*. This is arguably a weak stance, implying that an express authorization would allow for the use of evidence obtained through torture abroad. If the court's demonstration concerning the fundamental objection against torture is commendable, its conclusion is rather disappointing.

A further element of concern in *A (No. 2)* regards the burden of proof for applicants who advance allegations of torture. The judgment indicated that the Commission was to decline to admit evidence if it concluded, on a balance of probabilities, that it had been obtained by torture; however, in case of doubt, *i.e.* if the Commission was unable to conclude that there was no real risk of evidence having been obtained by torture, the evidence could be admitted, and the doubts borne in mind when evaluating it. For the majority of

[59] FOSTER, *Detention without trial and the admissibility of torture evidence*, in *Coventry Law Journal*, 2005, p. 17.

the House of Lords, this position was supported by Art. 15 of the Torture Convention, according to which a statement cannot be used as evidence if it is «established» that it was made as a result of torture. This "licence" for the use of evidence where torture cannot be «established» with certainty, but cannot be ruled out, is troubling. The dissenting opinion of Lords Bingham, Nicholls and Hoffmann on the issue of burden of proof appears more sensible: if the Commission is unable to conclude that there was no real risk that the evidence had been obtained by torture, the evidence should be refused. This interpretation is more consistent with the absolute nature of the prohibition of torture, and with the fact that, as emphasized by the Strasbourg Court in *Tomasi* v. *France*[60], an individual who suffered ill-treatment prohibited by Art. 3 at the hands of the authorities while in detention or police custody faces a formidable difficulty in the attempt to collect conclusive evidence of police misconduct.

The readiness of UK authorities to observe the absolute prohibition of torture may also be called into question in the light of deportation cases. As recalled above, the Strasbourg jurisprudence firmly and consistently indicated that expelling an individual towards a country where he is likely to be subjected to ill-treatment contrary to Art. 3 ECHR constitutes an indirect violation by the deporting State, regardless of the threat he represents to national security and of any public policy considerations supporting the deportation (*Chahal* v. *UK*, *Saadi* v. *Italy*). After the repeal of the *Anti-terrorism, Crime and Security Act 2001* provisions allowing detention without trial of foreign suspects unsusceptible to deportation, the UK government sought to ensure the ECHR-consistency of deportations via the practice of formal assurances from the receiving States that the deported individuals would not suffer torture when returned. Commentators have deplored the «apparent official willingness to abandon suspects to their fate in the clutches of regimes wedded to torture with the flimsy device of a diplomatic assurance»[61].

In the 2009 case of *RB (Algeria)* v. *Secretary of State for the Home Department*[62], the House of Lords considered the lawfulness of deportation following "no torture" agreements. The UK government had entered such agreements in respect of the three applicants, one Jordanian and two Algerians, and the question before the court was whether the agreements enabled

[60] See *Tomasi* v. *France*, Application No. 12850/87, 27 August 1992.

[61] WALKER, *Clamping down on terrorism*, cit., p. 1147.

[62] *RB (Algeria)* v. *Secretary of State for the Home Department*, [2009] UKHL 10.

the UK to deport them without breaching Art. 3 ECHR. The House of Lords suggested that, unless they completely lacked credibility[63], the assurances obtained from the authorities of the receiving States that the deportees would not be tortured made deportation consistent with Art. 3. The assurances «do not have to eliminate all risk of inhuman treatment before they can be relied upon»[64], and «there is no rule of law that external monitoring is required»[65]. This approach is somewhat inconsistent with the principles established by the ECtHR, most notably in *Chahal* v. *UK*, *Saadi* v. *Italy* and *Ryabikin* v. *Russia*[66]. The ECtHR found that diplomatic assurances were not sufficient in themselves to make expulsion lawful; on the contrary, the value of assurances depended on whether they were made by credible governments, likely to adhere to those assurances. Also, there is a need for independent monitoring of fulfilment where evidence from human rights protection associations shows consistent patterns of violations of the prohibition of torture in the country of destination. Significantly, in none of the above-mentioned cases was the ECtHR persuaded that the assurances were sufficiently credible. By contrast, the standard of credibility imposed by the House of Lords' judgment appears less stringent. More important, on the facts, the conclusion in *RB* was at least problematic. The House of Lords was satisfied that there was no real risk of torture as a result of the diplomatic assurances provided by the Jordanian and Algerian governments, despite those governments' established patterns of torturous practice and, in the case of Algeria, the refusal to allow monitoring of the treatment of the returned individuals, as well as the fact that an Algerian applicant had already been tortured[67].

The case of *RB* also examined the relationship between lawful expulsion and the use of torture-procured evidence in trials abroad. The Algerian applicant in *RB* argued, *inter alia*, that, if returned, he would face an unfair

[63] See *ibidem*, para. 153: «[The prohibition of using torture-based evidence] does not require this state, the United Kingdom, to retain in this country to the detriment of national security a terrorist suspect unless it has a high degree of assurance that evidence obtained by torture will not be adduced against him in Jordan». The HL was unwilling to question *Special Immigration Appeals Commission*'s finding on whether assurances were sufficient to remove a substantial risk of torture, unless «the findings that were arrived at were such that no reasonable tribunal could have reached them» (para. 240).

[64] *Ibidem*, para. 114.

[65] *Ibidem*, para. 193.

[66] See *Chahal*, cit., para. 92; *Saadi*, cit., para. 147-148; *Ryabikin* v. *Russia*, Application No. 8320/04, 19 June 2008, para. 119-121.

[67] For further details and references see ELLIOTT, *op. cit.*, pp. 140 f.

trial, in which evidence previously obtained from him through torture would play a decisive role. According to the Strasbourg Court in *Mamatkulov and Askarov* v. *Turkey*, deportation is unlawful under Art. 6 ECHR only where the individual is likely to suffer a flagrant denial of justice if removed, *i.e.* a breach of fair trial guarantees so fundamental that it would impair the very essence of the right[68]. Surely, the ECHR States cannot be the guarantors of the same level of protection of all ECHR rights in the State of origin of immigrants unlawfully present and awaiting deportation, as recently suggested in *N* v. *UK*[69]. This would indeed impose a disproportionate responsibility on ECHR States and would excessively limit their sovereign right to regulate immigration into their territory. However, the decision in *HB* to allow deportation despite the acknowledgment that evidence extracted under torture will be used in court and with a decisive impact[70] may be questioned, if not under Art. 6 taken alone[71], under Art. 6 taken in conjunction with Art. 3.

The UK appears to have reservations in respect of the absolute nature of the right to protection against torture and to advocate for exceptions when national security interests are at stake. The intervention of the UK government in the proceedings before the European Court in *Saadi* v. *Italy* and *Ramzy* v. *Netherlands*[72] is highly eloquent. Its contention, rejected by the ECtHR, was that the *Chahal* principle (no extradition of terrorists towards countries where they may be subjected to torture) should no longer apply in a stringent manner in the post-2001 era. This stance illustrates the "exceptionality" approach of UK authorities to human rights in the fight against terrorism, which may lead to paradoxical consequences: it has thus been observed that the submission in *Ramzy* «appears to suggest a system whereby a level of evidence which in the contracting State is insufficient to convict an individual for terrorism-related offences, can nonetheless be sufficient to abrogate Art. 3 and justify sending this person back to torture»[73].

[68] *Mamatkulov and Askarov* v. *Turkey*, Applications No. 46827/99 and 46951/99, 4 February 2005, para. 88-91. See also *Soering*, cit., para. 113.

[69] See *N* v. *UK*, Application No. 26565/05, 27 May 2008, para: 44: an AIDS sufferer could not rely on Art. 3 to prevent deportation towards a country where she would not benefit from comparable health care facilities, unless she could prove «very exceptional circumstances».

[70] *Re RB*, para. 142,149.

[71] In fact the Court of Appeal had found that the circumstances amounted to real risk of flagrant denial of justice. See [2008] EWCA Civ 290, para. 48.

[72] *Ramzy* v. *Netherlands*, Application No. 25424/05, 27 May 2008, para. 125-130.

[73] MCKEEVER, *The Human Rights Act and anti-terrorism in the UK: one great leap forward by Parliament, but are the courts able to slow the steady retreat that has followed?*, in *PublL*, 2010, p. 125.

4.3. *Proscription lists and fair trial guarantees.* – Domestic litigation under the Terrorism Act 2000 revealed the potential breach of fair trial rights as a result of the practice of proscribing organisations suspected of involvement with terrorism. Under that Act, the Secretary of State made a number of proscription orders against many Islamic organisations based in other countries[74]. In *R. (on the application of the Kurdistan Workers' Party)* v. *Secretary of State for the Home Department*[75], the applicants argued that the proscription was based on unfair procedures, insofar as the draft list was laid before Parliament by the Secretary of State before they had an opportunity to make representations on their inclusion on the list, and Parliament considered all proposals at once, without proper debate on the merits of each case. It was also argued that the definition of terrorism in *Terrorism Act 2000* is too broad and vague, covering liberation movements against oppressive foreign governments, and failing to differentiate movements that exclusively attacked military targets from those attacking civilians. The claimants further complained of an interference with the right to free speech, freedom of assembly, and protection of reputation.

While acknowledging «the very serious consequences of proscription for rights as important as free speech and free assembly»[76], the High Court, perhaps disappointingly, refused permission to claim judicial review, finding that, in accordance with the legislative intention, the *Proscribed Organisations Appeal Commission*, rather than the Administrative Court, was the appropriate forum[77]. The court seemed to suggest that the opportunity to challenge the listing in advance was not fundamental, since other avenues were specifically made available for de-proscription after an order was made. Arguably, the temporary suspension of freedom of expression and assembly of the

[74] See The *Terrorism Act 2000 (Proscribed Organisations) (Amendment) Orders 2001-2011*, progressively adding new names to the proscription list.

[75] *R. (on the application of the Kurdistan Workers' Party)* v. *Secretary of State for the Home Department*; *R. (on the application of Ahmed)* v. *Secretary of State for the Home Department*, *R. (on the application of the People's Mojahedin Organisation of Iran)* v. *Secretary of State for the Home Department*, Queen's Bench Division (Administrative Court), [2002] EWHC 644 (Admin). The applicants sought judicial review of the decision to proscribe the People's Mojahedin Organisation of Iran ("PMOI"), the Kurdistan Workers' Party or Partiya Karkeren Kurdistan ("PKK") and Lashkar e Tayyabah ("LeT") under the *Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001.*

[76] *R. (on the application of the Kurdistan Workers' Party)*, cit., at 564.

[77] *Ibidem*, at 564-565. The court also underlined that the legal principles to be applied by either of the two fora were the same, *i.e.* s.5(3) *Terrorism Act 2000.*

members of an association is not a sufficient interference to question the court's approach, however the inclusion in an order together with *Al-Qaida* does affect the civil right to reputation under Art. 8 ECHR and would perhaps request an opportunity to challenge a proposed listing prior to the making of the proscription order.

More alarming yet in relation to Art. 6 ECHR is the right of access to a judge of individuals listed as suspects under a series of orders implementing UN Security Council resolutions under Chapter VII of the Charter[78]. In 2010, in *A* v. *HM Treasury; R (on the application of Youssef)* v. *HM Treasury; HM Treasury* v. *Al-Ghabra*[79], the new Supreme Court considered the lawfulness of two executive orders made in the exercise of powers conferred by s.1 United Nations Act 1946[80]. Both orders were aimed at giving effect to UN anti-terrorism measures designed to suppress and prevent the financing and preparation of acts of terrorism[81]. The *Terrorism (United Nations Measures) Order* 2006 established in Art. 4.2.a that the Treasury could designate any person as suspect of participation in terrorism-related activities and freeze his or her assets if it had «reasonable grounds» for suspecting that he or she committed, attempted to commit, participated in or facilitated the commission of acts of terrorism. Pursuant to Art. 3.1.b of the *Al-Qaida* and *Taliban* (United Nations Measures) Order 2006, any person designated by the Sanctions Committee of the UN Security Council became *ipso facto* a «designated person» under the Order. The two orders had the effect of depriving designated individuals of all their financial assets and resources for an indefinite period of time.

[78] Although it is not expressly stated in the text of the Convention, the ECtHR found access to a judge to be implicit in Art. 6 guarantees. See *Golder* v. *UK*, Application No. 4451/70, 21 February 1975, para. 28-36.

[79] *Ahmed and others* v. *HM Treasury (Nos 1 and 2), al-Ghabra* v. *Same, Regina (Youssef)* v. *Same*, [2010] UKSC 2, [2010] 2 W.L.R. 378.

[80] s.1(1) United Nations Act 1946 empowers the government to «make such provision as appears ... necessary or expedient for enabling [measures decided by the Security Council under Art. 41 UN Charter] to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order».

[81] See Art. 1 S/RES/1373 (2001): «Decides that all States shall: ... (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities».

In respect of the Terrorism (United Nations Measures) Order 2006, the Court noted that the «reasonable grounds for suspecting» test went beyond the obligations in UN Resolution 1373 (2001), in fact the resolution imposed the fund-freezing obligation in respect of persons «who commit, or attempt to commit ... or participate in or facilitate the commission of terrorist acts». While the resolution does not refer to a final criminal conviction – indeed the surprise effect of the measure would be compromised –[82], the mere suspicion by the Treasury arguably goes beyond what is strictly necessary or expedient to comply with the resolution. As a consequence, it goes beyond the scope of the 1946 Act. Further, the order affected the rights of the citizens without the necessary authority of Parliament, a practice condemned in *Re Pierson*[83]. The unlimited discretion conferred on the executive in the implementation of the resolution conflicted with the basic democratic rules; the Court recalled the principle in *Re Simms* according to which fundamental rights cannot be overridden by general or ambiguous words. Where compliance with Security Council mandatory resolutions affected the individual, the power to implement them by adopting Orders in Council under the 1946 Act was restricted, indeed decisions as to what was «necessary» or «expedient» for the purposes of s.1 could not be left to the uncontrolled judgment of the executive. S.1 was designed to enable the UK to fulfil its obligation to implement Security Council resolutions, but there was no indication that, by enacting the United Nations Act 1946, Parliament had envisaged the imposition of draconian restrictions on the freedom of individuals, and that it was willing to accept it as the cost of compliance with UN obligations[84]. By introducing the «reasonable suspicion» test as a means of giving effect to the relevant Security Council resolution, the Treasury had exceeded its powers under s.1(1) of the 1946 Act.

As far as the *Al-Qaida* and *Taliban* (*United Nations Measures*) *Order* 2006 was concerned, the House of Lords stressed that individuals designated by the Treasury on the sole ground that they had been designated by the Security Council's Sanctions Committee did not, because of the listing and delisting system operated by the Committee, have a means of contesting their

[82] See *Ahmed and others*, cit., para. 170 (Lord Rodger). For the different views of the Law Lords as to what would have been acceptable under the Act see *ibidem*, para. 129-143, 199, 230.

[83] *R.* v. *Secretary of State for the Home Department Ex p. Pierson*, [1998] A.C. 539.

[84] *Ahmed and others*, cit., para. 61, 145-155, 239-241.

designation[85]. The absence of an opportunity for judicial review meant that a designated individual had no effective remedy available. Again, any interference with human rights had to be authorized by Parliament, so the court found Art. 3.1.b of the Order to be *ultra vires*[86]. The merit of this decision lies in the fact that «restrictions upon the rights of citizens were made conditional upon the explicit seal of the democratic process»[87], but also in the reaffirmation of the role of the judiciary in preventing the abuses of the executive.

The House of Lords was less unequivocal with regard to the alleged unlawfulness of the Al-Qaida Order as a result of inconsistency with s.6(1) *Human Rights Act 1998*. It reiterated the principle affirmed earlier in *Al-Jedda*[88] that Art. 103 of the UN Charter ensured the priority of Charter obligations (including Security Council resolutions under Chapter VII) over any other international obligations, and that the obligations undertaken by the UK under the ECHR constituted no exception from this rule. However, it suggested that the Strasbourg Court had the authority to provide guidance for a uniform position across States parties about the extent to which, if at all, (certain) ECHR rights prevailed over Charter obligations[89]. The objection to the second order was, thus, not based on the ECHR, nor on the HRA, but on the principles governing the separation of powers in the UK[90].

[85] On the UN Sanctions Committee's listing and delisting procedures see DRAGHICI, *Suspected Terrorists' Rights Between the Fragmentation and Merger of Legal Orders: Reflections in Margin of the Kadi ECJ Appeal Judgment*, in *Washington University Global Studies Law Review*, 2009, pp. 629 ff.

[86] The court stressed that the UN Act 1946 cannot be used to enhance the powers of the executive (see para. 48-53, 174).

[87] JOHNSTON, NANOPOULOS, *The new UK Supreme Court, the separation of powers and anti-terrorism measures*, in *CLJ*, 2010, p. 219.

[88] *R. (on the application of Al-Jedda)* v. *Secretary of State for Defence* [2007] UKHL 58, [2008] 1 A.C. 332.

[89] Mr Al-Jedda lodged an application with the ECtHR on 3 June 2008 (application No. 27021/08), complaining that he was detained in Iraq by military forces in breach of Art.5.1 ECHR. The case is currently pending before the Grand Chamber, following a relinquishment of jurisdiction, and a hearing was held on 9 June 2010. The questions that will be addressed by the Court include the following issues: did Security Council RES. 1546 entirely exclude the application of Art. 5 ECHR? Should the resolution be interpreted in the light of Art. 5? If the requirements of Art. 5 were "qualified" by the obligations arising out of the resolution, in what way were they "qualified"?

[90] Given the "constitutional" relevance of statutes such as the Human Rights Act acknowledged in *Thoburn*, it is not clear why the court relied exclusively on the common law principle that human rights could only be restricted by Parliament, rather than on the fact that respect for human rights as guaranteed in the *Human Rights Act 1998* are part of the core val-

Notwithstanding these limits in the application of the ECHR, the majority of the House of Lords rejected the idea (which only found support in Lord Brown's partly dissenting opinion) that the second order, fully mandated by the Security Council resolution, had to be implemented at the expense of the domestic principles on the separation of powers and protection of human rights. The majority suggested that Parliament could choose to legislate contrary to human rights in order to fulfil UN obligations, but it could also decide that certain UN obligations will not be given effect because they conflict with fundamental principles. The impugned order was therefore found to be inconsistent with the constitutional safeguards in place in the UK. To be sure, under international law, reliance on domestic law does not excuse the failure to comply with an international treaty obligation[91], and the choice of the Parliament not to implement the decision would give rise to international responsibility. However, the finding of the House of Lords that any decision whether to comply with UN obligations affecting human rights lies with the Parliament strengthens the place of human rights in the UK's legal system. Also, «both dualism with regard to international law and domestic judicial scrutiny of the executive remain strong»[92].

To a certain extent, the judgment of the *House of Lords* in *A* v. *HM Treasury* recalls the 2008 decision of the then *European Court of Justice*[93] in the *Kadi* case[94]. The case was concerned with the clash between the obligation of European Union institutions to further member States' obligations under the UN Charter and the fundamental principles of the EU legal order (human rights and rule of law, including judicial scrutiny over the executive)[95]. The ECJ confirmed the paramountcy of UN Charter obligations in international law over the EU Treaties, but at the same time stressed that EU institutions had to safeguard the "constitutional" values of the Union. *A* v. *HM Treasury* differs from *Kadi* in that the Supreme Court failed to denounce the

ues of the British legal order, and as important a principle as the separation of powers. The *Human Rights Act* seems to be still perceived as the expression of an international obligation, rather than as a fundamental aspect of constitutional law.

[91] See Art. 27 *Vienna Convention on the Law of the Treaties* (*Internal law and observance of treaties*): «A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty».

[92] JOHNSTON, NANOPOULOS, *op. cit.*, p. 220.

[93] Now 'Court of Justice of the European Union' pursuant to the Lisbon Treaty reform.

[94] Case C-402/05 P, *Kadi* v. *Council of the European Union*, 2008 E.C.R. I-6351.

[95] On the judgment see further DRAGHICI, *Suspected Terrorists' Rights*, cit., pp. 627 ff.

inconsistency of the impugned orders with human rights *per se*, but rather seemed concerned with the constitutional balance, *i.e.* with protecting the prerogatives of Parliament. In fact, it did not question the substance of the measures impairing fundamental rights, but their formal adoption by an organ unauthorized to interfere with those rights. Nowhere in the judgment is there a suggestion that an Act of Parliament bringing about the same restrictions would be unlawful.

A further distinction lies in the fact that in *Kadi* the ECJ postponed the effect of the annulment for three months in order to allow the institutions to remedy the problems found without compromising the objective of the measures. Conversely, in *A* v. *HM Treasury; R (on the application of Youssef)* v. *HM Treasury; HM Treasury* v. *Al-Ghabra*[96], the Supreme Court did not find it appropriate to temporarily suspend the operation of the orders in which it declared the measures of the Treasury *ultra vires* and quashed them[97]. The Treasury submitted that suspension was necessary to enable steps to be taken to ensure that the UK remained in compliance with its international obligations under the UN Charter. The Supreme Court refused the application, finding that it could not allow a procedure designed to obfuscate the effect of its judgment. However, Lord Hope expressed the view that suspension would have been justified by the risk of serious damage to the efforts to defeat international terrorism, which went beyond the need to meet international obligations, but rather affected the national interest in addressing security threats. Considering that the objections to the measure were mostly concerned with the legal basis for its adoption, and in particular with the lack of parliamentary authority for the enactment of the measures, it cannot be seen why a suspension of several weeks was declined. Arguably, provisional suspension would have struck a fair balance between the security interest and the interests of the individuals affected. The reaction of the

[96] *HM Treasury* v. *Ahmed; HM Treasury* v. *al-Ghabra; R. (on the application of Youssef)* v. *HM Treasury*, [2010] UKSC 5.

[97] The Treasury applied to suspend the operation of the orders in respect of the Terrorism (United Nations Measures) Order 2006 arguing that an eight-week suspension would enable it to address the effects of the judgment by introducing primary legislation for consideration by Parliament. The Treasury also asked the court to suspend the operation of the orders in relation to the *Al-Qaida* Order for a period of six weeks to enable it to make an order under s.2 European Communities Act 1972 containing enforcement measures in support of EC Regulation 881/2002 implementing United Nations resolutions for the freezing of the funds and economic resources of persons associated with *Osama Bin Laden, Al-Qaida* or the *Taliban*.

Treasury to the judgment was an endeavour to secure the swift passage of the *Terrorist Asset-Freezing (Temporary Provisions) Act* 2010, which maintained the Orders imposing the asset-freezing regime in force until December 31, 2010. The Terrorist Asset-Freezing *etc.* Act 2010 was subsequently adopted to the same effect.

4.4. *«Control orders» as preventative punishment.* – The control orders established by the Prevention of Terrorism Act 2005 came under close scrutiny in 2007, in *Re JJ*, *Re E*, and *Re MB*[98]. In *Re JJ*[99], the *House of Lords* found that a control order imposing an 18-hour curfew and prohibiting contact with anyone who was not authorized by the *Home Office* amounted to a deprivation of liberty. The court stressed that the combined effect of a lengthy curfew period (the "controlees" were confined in one-bedroom flats except between 10 a.m.-4p.m.) and the exclusion of social contact (with the exception of persons having obtained clearance from the *Home Office*) was practically equivalent to solitary confinement for an indefinite duration. Relying on the Strasbourg Court's "open prison" case of *Guzzardi* v. *Italy*[100], the court pointed out that the order breached Art. 5 ECHR and was consequently null, insofar as the Secretary of State had no power to make orders incompatible with the ECHR. However, Lord Brown took the view that a confinement not exceeding a 16-hour curfew would not be sufficiently stringent to amount to a deprivation of liberty[101].

Conversely, in *E*[102] the appeal was dismissed, on the ground that the conditions imposed by the control order in that case were less intrusive than in *JJ*. According to their Lordships' assessment, a 12-hour curfew (below the 16-hour threshold suggested by Lord Brown's *obiter dictum*) amounted to restriction as opposed to deprivation of liberty. The other circumstances of the

[98] For a detailed analysis of the control order cases before the House of Lord see SANDELL, *Liberty, fairness and the UK control order cases: two steps forward, two steps back*, in *EHRLR*, 2008, pp. 120 ff.

[99] *Secretary of State for the Home Department* v. *JJ and Others*, [2007] UKHL 45, [2008] 1 A.C. 385.

[100] *Guzzardi* v. *Italy*, Application No. 7367/76, 6 November 1980.

[101] The adequacy of a fixed threshold at 16 hours under Art. 5 ECHR is open to debate. See SANDELL, *op. cit.*, p. 130: «whether this simple threshold can be reconciled with the requirement, established by the Strasbourg Court in *Engel*, to consider "a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question" is questionable».

[102] *Secretary of State for the Home Department* v. *E*, [2007] UKHL 47, [2008] 1 A.C. 499.

controlee's situation were also considered and distinguished from those in *JJ*: he was confined to his own home, where he lived with his family, there was no geographical limitation during the non-curfew hours, and social contact was less restricted. There had been, therefore, no breach of Art. 5.1 ECHR. The judgment also found that, while the *Home Secretary* had become aware of judgments in Belgium implicating *E* in terrorism-related offences, the control order was consistent with the *Prevention of Terrorism Act 2005* insofar as the obligation under s.8 for the Secretary of State to consult with the police on the prospects of successful criminal prosecution was not a prerequisite condition for the validity of the order.

In 2007 the *House of Lords* also heard two conjoined appeals in the cases *Secretary of State for the Home Department* v. *MB* and *Secretary of State for the Home Department* v. *AF*[103]. *MB* and *AF* had been subject to «non-derogating control orders», including, in the case of second appellant, a 14-hour curfew and the obligation to wear an electronic tag. In both cases the Secretary of State's application to make the control orders had been supported by open and closed statements: in *M's* case, the open statement maintained that he was an Islamist extremist who intended to travel to Iraq to fight against coalition forces, but the basis for those assertions was contained in the closed material. The open case against *F* was limited to a statement that he had links with Islamist extremists. *M* and *F* complained that the procedures contained in s.3 *Prevention of Terrorism Act 2005* were incompatible with Art. 6 ECHR, and asked the court to overturn the decision of the Court of Appeal that they were not[104]. The respondent Secretary of State cross-appealed against the decision that the obligations contained in the non-derogating control order imposed on *F* amounted to a deprivation of his liberty.

Thus, a first legal issue requiring the court's determination was whether the impact of the obligations imposed on F amounted to a deprivation of his liberty within the meaning of Art. 5 ECHR. Relying on *JJ* and *E*, the Law Lords concluded that the effect of the control order was not such as to deprive *F* of his personal liberty. The judgment did no address the complainant's right to freedom of movement, in fact the right is guaranteed in Art. 2 of Protocol 7 ECHR[105], to which the UK is not a

[103] *Secretary of State for the Home Department* v. *MB*; *Secretary of State for the Home Department* v. *AF* [*Re MB*], [2007] UKHL 46, [2008] 1 A.C. 440.

[104] [2006] EWCA Civ 1140.

[105] Art. 2 Protocol 7 reads: «Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. ...

party[106], and in Art. 12 ICCPR[107], binding on the UK but not enforceable in domestic courts. Thus, the court did not have an opportunity to assess whether the interference with the right to move freely within the territory of the State was «provided by the law» and «necessary» to protect national security.

The court also had to establish whether a control order amounted to a criminal charge for the purposes of Art. 6 ECHR, and whether the procedures provided for by s.3 *Prevention of Terrorism Act 2005* were compatible with Art. 6, considering that the orders had been made based entirely on material undisclosed to the claimants, with no specific allegation of terrorism-related activity contained in the open statements. In that respect the court found that control order proceedings did not involve the determination of a criminal charge, insofar as there was no assertion of criminal conduct but merely a suspicion, no specific criminal offence was identified, and the order was preventative rather than punitive or retributive in purpose. This analysis is not particularly persuasive, in fact Strasbourg jurisprudence suggests that the issue «turns upon consequences, not upon legislative or executive purpose»[108]; based on the consequences, one might argue that the appellants should have benefited from the guarantees in Art. 6 reserved to criminal proceedings. However, their Lordships accepted that, due to the far-reaching interference with the freedom of movement and the right to privacy inherent in a control order, and the equal application of Art. 6.1 ECHR to civil proceedings, the claimants should have received procedural protection commensurate with the gravity of the potential consequences. Relying on Strasbourg authorities, the *House of Lords* pointed out that a fair balance had to be

No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.»

[106] Protocol 4 to the ECHR was adopted in 1963 and became effective in 1968. It currently has 43 parties (out of the 47 members of the Council of Europe and parties to the ECHR), which do not include the UK. The UK signed in 1963 but never ratified.

[107] See Art. 12 ICCPR: «1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. ... 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. ...».

[108] SANDELL, *op. cit.*, p. 125.

struck between competing interests, and evidence could only be withheld if strictly necessary[109].

Moreover, the *House of Lords* was not persuaded that, in the light of the Strasbourg jurisprudence, the use of the special advocate procedure always compensated for the lack of access to evidence to the extent requested by Art. 6 ECHR[110]. If further specified that the best judge of whether the proceedings afforded a sufficient measure of procedural protection was the judge conducting the control order hearing: the latter was bound under the ECHR to quash the order where the protection appeared insufficient. However, since that would not necessarily be so in every case, the Law Lords did not issue a declaration of incompatibility of *Prevention of Terrorism Act 2005* with the ECHR, but preferred an interpretative direction: where the justification for the making of a control order lay wholly within material that could not be disclosed to the controlled person, Sch 1 para. 4(3)(d) of the *Prevention of Terrorism Act 2005*, enabling the court «to give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest» was to be implemented «except where to do so would be incompatible with the right of the controlled person to a fair trial»[111]. The preference for an interpretative direction instead of a request for an amendment of the law is not entirely satisfactory. It does not foster legal certainty, as it does not establish any clear parameters for the judges, and it is likely to result in further litigation.

The position in *Re MB* in respect of fair trial guarantees under *Prevention of Terrorism Act* 2005 was reiterated in 2009, when the House of Lords allowed three conjoined appeals, *Secretary of State for the Home Department* v. *F*, *E* v. *Secretary of State for the Home Department*, and *Secretary of State for the Home Department* v. *N*[112]. The court held that a person subject to a control order had to be provided with sufficient information on the allegations against him to enable him to properly instruct counsel to defend him. When the case against the controlee was based entirely or to a significant extent on closed material, fair trial rights under Art. 6 ECHR were not satisfied, how-

[109] Another observation needs to be added in respect of due process guarantees for persons subject to a control order.

[110] Note that according to Lord Hoffman, the special advocate procedure provided sufficient safeguards to satisfy Art. 6.

[111] The cases of M and F were remitted for consideration in the light of the Appellate Committee's conclusions.

[112] [2009] UKHL 28, [2009] 3 W.L.R. 74.

ever cogent the reasons for non-disclosure. The *House of Lords* also underlined the strong policy reasons against allowing legal proceedings against a person to take place while the person concerned is kept in ignorance of the case against him: the confidence of the wider public in the justice system was at stake.

4.5. *The absence of safeguards against the arbitrariness of police "stop and search"*. – One of the main shortcomings of UK anti-terrorist legislation evinced by the case law concerns the width of the discretion conferred to law-enforcement agents. In *Gillan and Quinton* v. *UK*[113], the powers of police officers pursuant to ss. 44-47 Terrorism Act 2000 to stop and search in public without reasonable suspicion of crime were considered insufficiently circumscribed and not adequately subject to safeguards against abuse. As detailed above, under *Terrorism Act 2000* a senior police officer may issue an authorisation, if he or she considers it «expedient for the prevention of acts of terrorism», permitting constables in uniform within a specified geographical area to stop and search any person «for articles of a kind which could be used in connection with terrorism», whether or not they have grounds for suspicion.

The applicants in *Gillan and Quinton* had been stopped and searched by police acting under ss. 44-47 *Terrorism Act 2000* for approximately twenty minutes in occasion of a peaceful demonstration against an arm fair in London. Gillan wished to join the demonstrators, whereas Quinton, a journalist, was covering the protest. The applicants unsuccessfully applied for judicial review; their appeals were ultimately dismissed by the *House of Lords*, who doubted whether an ordinary superficial search of the person could be said to show a lack of respect for private life within the meaning of Art. 8 ECHR, since the intrusion did not reach a sufficient level of seriousness[114]. Even accepting that Art. 8 was applicable, it found that the procedure was in accordance with the law, and a proper exercise of this express power could only be proportionate when seeking to counter the enormous danger of terrorism. Also, according to the Law Lords, who opted for a narrow interpretation of the meaning of «deprivation of liberty», Art. 5 had not been engaged, insofar as the applicants had not been arrested, handcuffed and confined.

[113] *Gillan and Quinton* v. *UK*, Application No. 4158/05, 12 January 2010.

[114] *R. (on the application of Gillan)* v. *Commissioner of Police of the Metropolis*; *R. (on the application of Quinton)* v. *Commissioner of Police of the Metropolis* [2006] 2 A.C. 307.

The Strasbourg Court disagreed with the analysis of the House of Lords. It considered that it was not possible to exclude the applicability of Art. 5; regrettably, however, since it found a violation of Art. 8, the Court chose not to make a final determination on whether stopping an individual for under 30 minutes for the purposes of the search, under threat of criminal charges if they refused to comply, constitutes a deprivation of liberty or a restriction upon liberty[115]. As to the applicability of Art. 8 ECHR, the Strasbourg Court considered that the use of coercive powers to require an individual to submit to a detailed search of their person, clothing and personal belongings amounted to a clear interference with the right to respect for private life[116]. The ECtHR rejected the proposition embraced by the House of Lords that a certain level of seriousness needs to be reached before Art. 8 is engaged. The fact that the search occurred in public, and the consequent discomfort of having personal information exposed to public view, further compounded the severity of the interference due to the humiliation and embarrassment involved[117]. The entire judgment consequently revolved around Art. 8[118].

In examining whether the interference was justified under the second paragraph of Art. 8, the Court stressed that the mere existence of a statutory basis was not sufficient. The Court insisted on a qualitative rather than formal understanding of the law: the excessive discretion conferred on police officials, and the consequent risk of arbitrariness, was not compatible with the ECHR notion of law, as there were no adequate legal safeguards to afford protection against unwarranted interference[119]. At the authorisation stage there was no requirement that the stop and search power be considered «necessary», but only «expedient». Nor was there any real check on the issu-

[115] See *Gillan* v. *UK*, cit., para. 56-57.

[116] *Ibidem*, para. 63.

[117] The court refused the government's analogy with searches of travellers at airports, because travellers may be seen as consenting to such a search by choosing to travel, they are aware of when the search will take place and can leave any personal items behind. The search powers under s.44 are qualitatively different: individuals can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search. See *ibidem*, para. 64.

[118] As pointed out by ASHWORTH, *Gillan and Quinton* v. *United Kingdom: human rights - article 5 - stop and search as deprivation of liberty*, in *Criminal Law Review*, 2010, p. 416 f., the fact that, unlike the HL, the ECtHR focused on Art. 8 rather than on Art. 5 was of little consequence: the measure failed the test of lawfulness, common to the two provisions, which made any distinction between the different permissible exceptions irrelevant.

[119] *Gillan*, cit., para. 77.

ing of authorisations by the executive[120]. Furthermore, the breadth of the discretion conferred on the individual police officer was problematic: the officers' decision to stop and search an individual was to be based exclusively on "professional intuition", in fact it was unnecessary for them to demonstrate any reasonable suspicion, and they were not required to even subjectively suspect the person. The only requirement was that the search had to be for the purpose of looking for articles which could be used in connection with terrorism, a category so wide as to cover many articles commonly carried by people in the streets and to allow an arbitrary use of the power[121]. Furthermore, since the only requirement upon which a police officer was authorized to act was so easily met, people affected by the exercise of such powers faced tremendous obstacles in showing that the authorisation was *ultra vires* or that an abuse of power had occurred. Judicial review or an action in damages to challenge the exercise of the stop and search powers by a police officer in a particular case were thus unlikely to be successful. The Court concluded that the powers of authorisation as well as those of stop and search under ss. 44 and 45 of the 2000 Act were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse, therefore failed to satisfy the «in accordance with the law» criterion.

In response to the *Gillan and Quinton* judgment, the Terrorism Act 2000 (Remedial) Order 2011 of March 2011 sought to remove the incompatibility of ss.44-47 *Terrorism Act 2000* with Art. 8 ECHR[122]. Art. 2 of the order provides that *Terrorism Act 2000* is to have effect as if ss. 44-47(1) were repealed. Art. 3 and Schedule 1 modify the 2000 Act so that it has effect as if new sec-

[120] The authorisation was subject to confirmation by the Secretary of State within 48 hours and was renewable after 28 days, and the Secretary of State could not alter the geographical coverage of an authorisation; moreover, although he or she could refuse confirmation or substitute an earlier time of expiry, in practice this had never been done. Also, the Independent Reviewer appointed under the 2000 Act had powers confined to reporting on the general operation of the statutory provisions, and no right to cancel or alter authorisations, despite the fact that in numerous reports he had expressed the view that «section 44 could be used less and I expect it to be used less».

[121] While not relevant for the instant case, statistics showed a discriminatory use of the powers against black and Asian persons. There was also a high risk that the widely framed powers could be misused against demonstrators in breach of Art. 10 and 11 ECHR.

[122] Made pursuant to the «urgency» procedure prescribed in para. 2.b and 4 of Schedule 2 to *Human Rights Act 1998*, the order is an emergency measure and will cease to have effect if, at the end of the period of 120 days beginning with the day on which it was made, a resolution has not been passed by each House of Parliament approving the Order.

tions 47A to 47C and Schedule 6B were inserted, providing that, if a senior officer «*reasonably suspects*» that an act of terrorism will take place and considers that the stop and search powers are «*necessary*» to prevent such an act, he or she may authorise the use of those powers in an area within their police force area no larger than necessary and for a period up to 14 days no longer than necessary. Where an authorisation is in place, an officer in uniform may stop and search a person or a vehicle to search for evidence that the person is a terrorist or that the vehicle is being used for terrorist purposes, whether or not the officer reasonably suspects that such evidence will be present. Art. 4 of the order requires the Secretary of State to issue a code of practice regulating the exercise of the new powers.

4.6. *The elusive boundaries of «encouragement of terrorism»*. – Freedom to «hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers» is protected under Art. 10.1 ECHR. While this is not an absolute right, any conditions, restrictions or penalties must be «prescribed by law» and «necessary in a democratic society» in the interests of, *inter alia*, «national security, territorial integrity or public safety, for the prevention of disorder or crime», pursuant to Art. 10.2 ECHR. A matter of concern under Art. 10 are the risks embedded in the imprecise formulation of provisions restricting freedom of speech in the Terrorism Act 2000 and the Terrorism Act 2006.

In a 2008 decision in the case of *R* v. *Zafar*[123], the Court of Appeal considered the criminalisation of possession of material for terrorism-related purposes in s.57 *Terrorism Act 2000*[124]. The court held that mere possession of an article was insufficient for an offence of possessing an article for a purpose connected with the commission, preparation or instigation of an act of terrorism under s.57; there had to be a direct link between the possession of

[123] *R.* v. *Zafar (Aitzaz); R.* v. *Butt (Akbar); R.* v. *Iqbal (Awaab); R.* v. *Raja (Mohammed); R.* v. *Malik (Usman)*, [2008] EWCA Crim 184; [2008] Q.B. 810. The appellants had been found in possession of extremist literature, including ideological propaganda, stored on computer hard drives and computer disks; the prosecution argued that they used it to incite one another to travel to Pakistan to receive training and then commit acts of terrorism in Afghanistan.

[124] S.57 *Terrorism Act 2000* provides: «(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. (2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism».

the article and the terrorist act with which the article was allegedly connected. The correct construction of s.57 required criminalisation only where a person was found to possess an article «in circumstances which give rise to a reasonable suspicion that he intends it to be used for the purpose of the commission, preparation or instigation of an act of terrorism». Since the trial judge had failed to instruct the jury that they had to be satisfied that the appellants intended to use the extremist material to incite others to fight in Afghanistan, the convictions were quashed. The judgment shows that, where restrictions on the right to freedom of expression are not clearly defined, they may not satisfy the requirement of being in accordance with the law and proportionate under Art. 10 ECHR. While the appellants' case was arguably borderline, the need for a direct and tangible link between possession and commission is indispensable to ensure that possession for the purposes of research, journalism or documentation is not caught by the provision. If that type of possession could only exculpate an individual based on the defence in s.57(2), the burden of proof would fall on the accused rather than on the prosecution, which is hardly consistent with the presumption of innocence[125].

The Terrorism Act 2006 also raises concerns in respect of freedom of expression. Firstly, in the light of the wide definition of «terrorism» *ratione materiae* and *loci* discussed above, the offence of «encouragement of terrorism» in s.1 encompasses speech prompting for resistance to an oppressive regime by means of violence against property or military objectives[126]. The wide contours of this offence raise doubts as to the fulfilment of the requirement «in accordance with the law» within the meaning of Art. 10.2. Also, the risks of criminalising speech that does not pursue the goal of incitement but is merely informative were disclosed by a 1994 "hate speech" case before the Strasbourg Court. In *Jersild* v. *Denmark*[127], a TV presenter and the head of the news section had been prosecuted and convicted for aiding and abetting

[125] While its is true that, as explained in *Zafar* (para. 15), if a defendant adduces evidence that raises an issue as to whether his possession of the article in question was for a purpose connected with the commission, preparation or instigation of an act of terrorism, the burden shifts to the prosecution of proving beyond reasonable doubt that the possession of the article was held for such purpose, the initial burden is on the defendant to gather such evidence.

[126] See McKeever, *op. cit.*, p. 128: «the UK legislation criminalises not merely violence against persons, but also against property, and many would argue that sabotage of property as a measure against a brutally repressive regime may indeed be legitimate».

[127] *Jersild* v. *Denmark*, Application No. 15890/89, 23 September 1994.

racist youths who made offensive remarks about black people in a television news magazine. The ECtHR found that the presentation intended to inform of, not to *propagate*, racist views, therefore the penalties were not «necessary» and violated Art. 10 ECHR.

5. *Concluding remarks on the judicial protection of human rights against the excesses of counter-terrorism.* – The analysis of the case law has evidenced a number of problems affecting UK anti-terrorism policies, including the discriminatory treatment of non-nationals suspected of involvement in terrorism, the admissibility of evidence exacted through torture abroad and the deportation to countries practising torture based on doubtful assurances, interferences with the right to personal liberty and privacy, especially in respect of police investigative powers, and the automatic asset-freezing of suspects designated by the UN Sanctions Committee with no opportunity for judicial review. The UK counter-terrorism strategy shows a «reluctance to deal with suspected terrorists via the regular criminal justice system»[128], a tendency to introduce *permanent exceptional* measures (arguably a contradiction in terms), and the adoption of purportedly preventative civil measures more draconian than many retributive sanctions under criminal law. Exceptionality has grown to be the normalcy, and inferior human rights standards seem to be acceptable in relation to suspects, and even more so to foreign nationals. The UK anti-terrorism regime is likely to affect a relatively small number of individuals; however, it does jeopardize the values upon which a democratic system based on the rule of law and respect for human rights is expected to function. A positive note of appraisal is nonetheless warranted: UK authorities did manifest an endeavour to comply with Strasbourg judgments, and to review national legislation in the light of declarations of incompatibility by the Supreme Court.

The case law has also highlighted three main problems with the judicial supervision of executive and legislative measures in the UK. One might have expected relatively homogeneous standards between the British courts and the ECtHR, insofar as the former are bound to protect ECHR rights to the same extent as the latter by virtue of the Human Rights Act 1998. If anything, the doctrine of the margin of appreciation (traditionally wide when national

[128] ELLIOTT, *op. cit.*, p. 132.

security is at stake)[129] should make Strasbourg protection less effective. However, the case law shows that, with a few notable exceptions, this assumption is not confirmed. A decade after the ECHR has become part of the domestic law, differences between the English judges and the Strasbourg court (such as in the *Gillan* case) «are [no longer] the product of inexperience, but of principled disagreement after analysis of the Convention jurisprudence, therefore need to be taken seriously»[130]. Arguably, the Strasbourg Court is free from the constitutional and political constraints curbing national courts' willingness to interfere with the decisions of the executive and the legislative branches. In domestic proceedings, disproportionate counter-terrorism policies are fostered by the deferential approach of UK courts, largely due to the perceived democratic legitimacy, accountability and specific institutional competence of the executive and the legislative organs[131]. In fact, UK courts seem to be quite easily satisfied that a measure is lawful so long as it is based on an express statutory provision, and are reluctant to question policy choices. Thus, in *JJ* Lord Brown indicated that the propriety of the control orders as a scheme «is a debate for the House in its legislative capacity», and limited the review to the particular circumstances of the case[132]. Conversely, the Strasbourg jurisprudence suggests that fighting terrorism while ensuring respect for human rights goes well beyond the existence of specific legislation. As it emphasized in *Gillan*, the expression «in accordance with the law» in the ECHR must be construed to mean consistent with the rule of law, which presupposes circumscribed powers and safeguards against abuse. However, British courts have shown some willingness to quash executive measures where the restrictions upon the exercise of a right were not explicitly authorized by Parliament (e.g. the asset-freezing cases); that said, and apart from a manifest violation of ECHR, courts will find that Parliament can decide that national security justifies interference with individual freedoms. Despite the general deferential approach of UK courts, one important

[129] See e.g. FOSTER, *Anti-terrorism, human rights and the constitutional role of the courts*, in *Coventry Law Journal*, 2005, pp. 69 f.

[130] BUXTON, *Terrorism and the European Convention*, in *Criminal Law Review*, 2010, p. 533.

[131] On the roots of judicial self-restraint in relation to terrorism see SCARAMUZZA, *Judicial deference versus effective control: the English courts and the protection of human rights in the context of terrorism*, in *Coventry Law Journal*, 2006, pp. 2 ff.; FELDMAN, *Human rights, terrorism and the risk: the role of politicians and judges*, in *PublL*, 2006, pp. 372 ff.

[132] *Re JJ*, cit., para. 86.

progress in terrorism cases is, however, that «there is now widespread support for the view that national security is no longer a non-justiciable issue»[133].

Further problems descend from the limited reach of the highest courts' findings of incompatibility with the ECHR under the HRA; in fact, the doctrine of parliamentary supremacy guarantees largely unfettered parliamentary discretion regardless of the findings of the courts. In addressing potential violations of human rights, the UK system appears vulnerable because of a structural constitutional weakness: the doctrine of parliamentary supremacy entails that even the highest courts remain unable to strike down legislation incompatible with ECHR requirements. As shown by the *Belmarsh Prison* cases, a declaration of incompatibility is no relief for the individual applicant, and has no consequence at all for potential future victims, unless Parliament is willing to repeal or amend its Act. This ultimately means that the *Human Rights Act 1998*, which sought to afford individuals a remedy domestically and make an application to Strasbourg unnecessary, has failed to achieve one of its primary goals.

Contemporary counter-terrorism in the UK appears concentrated on «the management of anticipatory risk», «the fabrication of precursor crimes which target preparatory acts», and on a «speculative basis for intervention»[134]. The precautionary approach to measures of protection against terrorism, however justified against the background of episodes of extraordinary violence, cannot lead to legislative schemes undermining the foundations on which the community has built its very existence. As Lord Hoffmann forcefully suggested in *A (No. 1)*[135], what most endangers the life of the nation is not the terrorist threat, but institutional responses that jettison the rule of law and the respect for human rights.

[133] KAVANAGH, *Judging the judges under the Human Rights Act: deference, disillusionment and the "war on terror"*, in *PublL*, 2009, p. 299.

[134] WALKER, *Conscripting the public in terrorism policing: towards safer communities or a police state?*, in *Criminal Law Review*, 2010 (vl. 6), pp. 441 f.

[135] See *A (No. 1)*, cit., para. 96-97: «Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community. ... 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».