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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**TERRORISM AND HUMAN RIGHTS**

**SPEECH BY**

**LORD CHIEF JUSTICE PHILLIPS**

**AT THE 68<sup>th</sup> PLENARY SESSION OF  
THE VENICE COMMISSION  
(Venice, 13-14 October 2006)**

We are today facing a new kind of terrorism. Terrorism inspired by an ideology that treats as enemies those whose way of life is espoused by the vast majority in the democracies against whom the terrorism is aimed; terrorism whose motivation is not a desire for independence, but simply ideological hatred. And the ideology is so strong that some at least of those who share it are prepared to destroy themselves in order the more effectively to destroy others. The suicide bomber is a new phenomenon and one against whom the theory that punishment deters crime is manifestly inapplicable.

In a time of national emergency the reaction of those running a country, or those who make a country's laws, is to detain without trial those suspected of being at risk of committing subversive activities. However the difficulty in conferring such powers on the United Kingdom Government lies in the incorporation of the European Convention on Human Rights into our domestic law and the approach to the interpretation of that Convention of the Strasbourg Court. The Convention has brought the Government into collision with the English courts, and I propose briefly to describe that collision.

Many terrorist suspects in the United Kingdom have fled there from their own countries, often as illegal immigrants, and have sought asylum. Under the Refugee Convention the United Kingdom would be entitled to send them home if they posed a threat to the security of the United Kingdom. The Strasbourg Court, however, in the case of *Chahal*, held that Article 3 of the Convention will be violated if a terrorist suspect is sent home and this will expose him to the risk of torture or inhumane treatment.

The next problem arises as a result of Article 5 of the Convention. This prohibits detention, except in certain prescribed circumstances. Suspicion of being a terrorist is not one of them. So you cannot send the terrorist suspect home and you cannot lock him up on mere suspicion.

The final problem arises as a result of Article 6 of the Convention. If you are in a position lawfully to deport an alien, or to pose restrictions on him, Article 6 should give him a right to challenge your actions in the court and further entitle him to a fair trial. But the material that demonstrates that an individual is a terrorist may have been obtained by covert surveillance and be material that the Security Services are not prepared to make public, because of the effect that this will have on their activities. How do you have a fair trial in such circumstances?

The UK Government has not yet found away round the Article 3 problem, although it is seeking to challenge the *Chahal* decision in another case which is before the Strasbourg court.

The Government has sought to get round the Article 6 problem in an ingenious way which it believed, perhaps not correctly, had received the approval of the Strasbourg Court. Special Advocates are appointed who are allowed to see all the 'closed' evidence against the terrorist suspect, and to argue on his behalf before the court in a closed hearing. They are not, however, allowed to disclose to the suspect what this evidence is.

So far as the Article 5 problem is concerned, the Government initially did nothing. After 9/11, however, they hastened to address the problem. Article 15 of the Human Rights

Convention permits a State to derogate from Article 5 'to the extent strictly required by the exigencies of the situation---in time of war or other public emergency threatening the life of the nation'. On 11 November 2001 the Government made an order derogating from Article 5(1) of the Convention in respect of

“foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom”

Relying on this derogation, Parliament then passed the Anti-Terrorism, Crime and Security Act 2001. Part 4 of that Act was particularly controversial. It permitted the Home Secretary to detain a suspect indefinitely by certifying that he reasonably believed that his presence in the United Kingdom was a risk to national security and suspected that he was a terrorist. This legislation was challenged and the case ultimately came before the House of Lords, our highest court. The decision of the House of Lords in *A v Secretary of State for the Home Office* was one of the most dramatic to have been given in my time in the law.

Exceptionally 9 Law Lords sat to her it instead of the usual five. Their speeches run to over 100 pages. The first issue was whether there was indeed a 'public emergency threatening the life of the nation' that justified the making of the derogation order. 8 out of 9 held that there was. They applied the meaning of this phrase that had been advanced by the Strasbourg Court in the case of *Lawless v Ireland*:

“an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.

The majority held that such a situation prevailed in the United Kingdom. Lord Hoffman, in a lone and Churchillian dissent, applied a more fundamental test, which gave the words a more literal meaning. He said

“Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.”

He added:

“The real threat to the life of the nation, in the sense of a people living in accordance with traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism can achieve”

This statement was received with enthusiasm by the liberal groups but not by Ministers, who considered that it violated the rule that a judge should not descend into politics. The fact remains that no other signatory to the Human Rights Convention had found it necessary to derogate from Article 5.

The second issue before the Law Lords was whether the terms of the Derogation Order and of the Act satisfied the requirement that they should infringe the Convention to no greater extent than was "strictly required by the exigencies of the situation." Seven members of the House of Lords concluded that they did not. Three factors weighed particularly in their reasoning. The first was the importance that the United Kingdom has attached, since at least Magna Carta, to the liberty of the subject. The second was that the measures applied only to foreign nationals. There were plenty of terrorist suspects of British nationality. How could it be necessary to detain foreign suspects without trial if it was not necessary to lock up the British subjects. Finally the measures permitted those detained to opt to leave the country, if they were so dangerous this did not seem logical, for they would be free to continue their terrorist activities overseas.

Accordingly the House of Lords quashed the derogation order and made a declaration that the Act was incompatible with the Convention.

This dealt a severe blow to the Government's anti-terrorism strategy. It responded by repealing the offending legislation and passing a new Act, the Prevention of Terrorism Act 2005. This Act allows, amongst other things, the Government to impose Control Orders which place restrictions on those suspected of being involved in terrorism, provided that the restrictions fall short of 'depriving the suspects of their liberty', for this would infringe Article 5.

I have, presiding over the Court of Appeal, heard two appeals against control orders. The first alleged that there was a breach of Article 6 because the suspect could not, in a fair trial, challenge the control order. Objection was taken, among other things, to the procedure of closed material and the special advocate. It was argued : you cannot have a fair trial if the defendant does not know the case against him. We dismissed that appeal. We held that that special procedure was, in the case of suspected terrorists, as fair as one could reasonably get. That decision is, I believe, under appeal to the House of Lords and, if the Lords uphold our decision, it may well go to Strasbourg.

A week later we heard the second appeal. This was brought by six terrorist suspects each of whom was required by the Control Orders imposed on him to remain in a very small flat, not in an area of his choosing, for 18 hours out of 24. The remaining six hours each day was a period of only relative freedom, in that each could not go outside a modest geographical area, nor arrange to meet anyone who had not obtained official clearance. Visitors to the flat required similar clearance. The flats were subject to random searches by the police. Each subject was restricted to a single land telephone line – the inference being that this would be monitored.

We had no hesitation in ruling that these restrictions, when taken together, amounted to deprivation of liberty and fell outside the powers conferred by the Act. We quashed the Orders. The Government's response has been to impose fresh orders, with the curfew period reduced from 18 hours to 14 hours a day. I have little doubt that these will now be challenged on the basis that the restrictions still amount to deprivation of liberty. Watch this space.

These are examples of what the press like to portray as conflict between the Government and the judges. There is no such conflict. We are doing no more than duty

for which we were appointed of enforcing the rule of law. Some of the media call for repeal of the Human Rights Act. They are in my view misguided. Terrorism is spawned by ideology and the ultimate battle is one of ideology. Respect for human rights must, I suggest, be a key weapon in that battle. I have no doubt that the United Kingdom Government shares this view.