

## PROTECTING HUMAN RIGHTS IN AN AGE OF TERRORISM

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*Lord Dyson*\*

It is a huge honour and privilege for me to give this lecture. The list of those who have given the lecture in the past includes many who have helped to shape the law in a number of different democratic societies. It is humbling to have been added to that list. I have been involved with the British Friends of the Hebrew University for most of my professional life. For many years, I was chairman of the Legal Group. One of my most inspired decisions was to ask Lord Pannick QC to take over from me. He has discharged the role with his usual brilliance.

I imagine that most people have a *general* idea of what terrorism is. It is not new. The anarchists who were active especially in Russia in the nineteenth century and who sought to provoke social upheaval by violent means were regarded as terrorists. Anarchists seeking to cause terror in London to secure their political objectives form the background to Joseph Conrad's 1907 novel, *The Secret Agent*.<sup>1</sup> They would have been understood to be terrorists. Britain has experienced spasmodic outbursts of terrorist violence (or attempted violence) since at least the time of Guy Fawkes in 1605. More recently, it was subjected to three decades of terrorist violence at the hands of republicans and loyalists in Northern Ireland and mainland Britain. This terrorism was treated as a civil emergency, not a war, and the terrorists were treated as criminals and not combatants. It is worth noting that the British authorities, having resorted to internment of those suspected of involvement in terrorism and to methods of interrogation that have been condemned by the European Court of Human Rights (ECtHR or Strasbourg Court) as constituting inhuman and degrading treatment (contrary to Article 3 of the European Convention on Human Rights (the Convention)<sup>2</sup>), abandoned these methods as ineffective and counterproductive, alienating the very people on whose support the stability of the state depended. It is easy for those of us who lived through the Northern Ireland Troubles to forget how serious they were. Yet serious though they were, they were insignificant when compared with what was to come and insignificant when compared with what Israel has had to endure since its foundation.

The events of 9/11 and what has happened in many parts of the world since then have shocked the world. These types of act of terrorism have been fundamentally different from

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<sup>1</sup> Joseph Conrad, *The Secret Agent: A Simple Tale* (Methuen & Co 1907).

<sup>2</sup> European Convention on Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR).

what preceded them both as to the ends that they pursue and the means employed to pursue them. Take the Troubles in Northern Ireland as an example. The means adopted by the terrorists were on a relatively limited scale. They were carried out through an identifiable paramilitary organisation with a clear hierarchy and leadership. There was little doubt as to the political ends that they sought to achieve. On the other hand, the act of terrorism perpetrated on 9/11 and the many acts that have been perpetrated worldwide since then were on a massive scale and committed by various shadowy organisations with a diverse range of supporters in many parts of the world. Moreover, their ideology is spread at the press of a button through social media, with the result that attacks can be made by individuals anywhere in the world, and the means employed are becoming increasingly unpredictable.

These developments have caused authorities in democratic societies to re-appraise the orthodox approach to dealing with terrorism, which was described in these terms on 17 April 2000 by Madeleine Albright, the US Secretary of State, in a speech to the University of World Economy and Diplomacy at Tashkent in Uzbekistan:<sup>3</sup>

One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent citizens. Terrorism is a criminal act and should be treated accordingly – and that means applying the law fairly and consistently. We have found through experience round the world that the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights.

So what exactly is terrorism? There is an elaborate definition in our Terrorism Act 2000,<sup>4</sup> the essence of which is (i) the use or threat of action, which (ii) endangers the life of a person other than that of the person committing the action, where (iii) the use or threat is designed to influence the government or an international governmental organisation, or to intimidate the public or a section of the public, and (iv) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.<sup>5</sup> This is a very broad definition.

As David Anderson QC (the UK Independent Reviewer of terrorism legislation) observed in one of his annual reports, it is wide enough to include a campaigner or blogger who voices a religious objection to vaccination against diseases.<sup>6</sup> If the blogger's purpose is to influence the government and if his words are judged capable of creating a serious risk to public health, he could be treated as a terrorist, detained for long periods of time, prosecuted, have his assets frozen, and so on. Voicing support for him could also be a terrorist crime.

A terrorist is defined in the 2000 Act as a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism.<sup>7</sup> Thus ideologies are a pre-condition for

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<sup>3</sup> Tom Bingham, *The Rule of Law* (Penguin 2010) 133.

<sup>4</sup> Terrorism Act 2000 (UK).

<sup>5</sup> *ibid* s 1.

<sup>6</sup> David Anderson, 'The Terrorism Acts in 2013', Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, July 2014, 30.

<sup>7</sup> Terrorism Act (n 4) s 40.

terrorist acts which must seek to advance (in the words of section 1 of the 2000 Act) ‘a political, religious, racial or ideological cause’. As Mr Anderson says in his report of September 2015,<sup>8</sup> the evils of violent extremism are self-evident. No democracy that takes seriously the idea of individual liberty and self-determination (and, I would add, the duty to protect life) should tolerate those who threaten or incite violence irrespective of any claimed justification in politics, religion or social custom. While it is ultimately only social pressure that can cause such views to disappear, the state is entitled to use all legitimate means at its disposal to counter them, including prosecuting the various offences under the Terrorism Acts.

Non-violent extremism requires much greater caution. Most of us have little sympathy for those who campaign for a law against blasphemy or adultery, consider homosexuality to be an abomination, seek to deny the right to choose a religion, or maintain that sharia law is preferable to the law of the land. The response of a vigorous democracy is to take them on rather than to criminalise them, although the government may need to protect the vulnerable from indoctrination and intimidation, whether in schools, prisons, or even the family.

The 2000 Act gives the authorities extensive powers. The powers conferred by Schedule 7 have been the subject of considerable scrutiny by our courts. They authorise an ‘examining officer’ to stop, detain and question a person at a port or border area for the purpose of determining whether he or she appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. Strikingly, the powers may be exercised whether or not the officer has grounds for suspecting that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. A person who is questioned must give the officer any information in his or her possession which the officer requests and give the officer on request any document which he or she has and which is of a kind specified by the officer. Failure to comply is a criminal offence.

Any government that takes seriously its obligation to protect those who live in its country will want to do everything in its power to discharge that obligation: hence legislation like the Terrorism Act 2000. In such a climate, the human rights of individuals are likely to come under pressure. Should some or all of the human rights which we would normally seek to protect in normal circumstances somehow be limited or given less importance when it comes to taking on terrorists? There are many in the UK who would give a resounding affirmative answer to that question. Hostility to our Human Rights Act 1998<sup>9</sup> and the Convention has been common currency in the UK for some time now. This has been fuelled by some of the media: last year, for example, *The Telegraph* ran a headline ‘Human Rights Act Has Helped 28 Terrorists to Stay in the UK’.<sup>10</sup> There have been many more headlines to similar effect. There was widespread criticism in the media of the decision of our courts that Abu Qatada (a suspected terrorist) could not

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<sup>8</sup> David Anderson, ‘The Terrorism Acts in 2014’, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, September 2015, 55 paras 9.5–9.6.

<sup>9</sup> Human Rights Act 1998 (UK).

<sup>10</sup> Robert Mendick, ‘Human Rights Act Has Helped 28 Terrorists to Stay in UK’, *The Telegraph*, 31 January 2015.

be deported to Jordan because he would be likely to face a trial there in which key prosecution evidence had been obtained by torture.<sup>11</sup>

As a means of accommodating such court decisions, the UK government has concluded agreements with some states in the Middle East and North Africa that deportees will not be ill-treated if returned to those states. Such an agreement was made with Jordan which, somewhat surprisingly, Abu Qatada found acceptable. Deportations to Algeria have been permitted on the strength of formal assurances despite the absence of an agreement, although deportation to Libya was denied despite the existence of an agreement. This is a difficult area, not least because assessing assurances given by states that are guilty of routine torture can be a tricky business. Our courts do their best to assess the effectiveness of such assurances, but they are often not well placed to do so.

Human rights lawyers and responsible commentators know that the protection of human rights when national security is at stake is far more complicated than the popular media suggest. Human rights law acknowledges that there are some rights the full realisation of which must be balanced against competing considerations (such as national security) and that they may have to yield to those considerations. However, there are other rights which are unqualified and which are not required to be balanced against security considerations. Article 4 of the International Covenant on Civil and Political Rights allows states to derogate from some rights (subject to strict conditions) in times of public emergency:<sup>12</sup> see, too, the similar provision in Article 15 of the Convention.<sup>13</sup> Thus derogation is one way in which human rights law deals with challenges posed by terrorism. The other and more common way is to operate what is essentially a hierarchy of rights, with absolute non-derogable rights (such as the right to protection from torture or degrading treatment) at one end of the spectrum, and limited or qualified rights (such as the right to respect for family and private life and the rights to religious expression, freedom of expression, and freedom of assembly and association) at the other.

The non-derogable nature of the right not to be tortured under Article 3 of the Convention was asserted emphatically by the Strasbourg Court in *Chahal v United Kingdom*.<sup>14</sup> Mr Chahal was to be deported from the UK to India on the grounds that he posed a threat to national security in the UK. He opposed deportation on the grounds that there was a real risk that he would be tortured in India. The Court rejected the argument advanced by the UK that Article 3 rights had to be balanced against threats to national security.<sup>15</sup> Dr John Reid (then Home Secretary) described the judgment as 'outrageously disproportionate' and later suggested that those in the House of Commons who defended the decision 'just don't get it'.<sup>16</sup> In the subsequent case of *Saadi v*

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<sup>11</sup> *Othman (aka Abu Qatada) v Secretary of State for the Home Department* [2013] EWCA Civ 277.

<sup>12</sup> International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 4.

<sup>13</sup> ECHR (n 2) art 15.

<sup>14</sup> ECtHR, *Chahal v United Kingdom*, App no 70/1995/576/662, 15 November 1996.

<sup>15</sup> *ibid* para 79.

<sup>16</sup> Alan Travis, 'Anti-Terror Critics Just Don't Get It, Says Reid', *The Guardian*, 10 August 2006.

*Italy*<sup>17</sup> the Strasbourg Court strongly reaffirmed its approach in *Chahal*. The Court insisted that it did not underestimate the scale of the danger of terrorism and the threat it presents to the community, but that could not call into question the absolute nature of Article 3.<sup>18</sup>

I wish to refer to three recent English cases in which our courts have had to grapple with issues arising from the exercise of the wide-ranging powers given by the Terrorism Act 2000 to examining officers at ports and airports and the interplay between those powers and the human rights of the individuals who were subjected to their exercise.

In *Beghal v Director of Public Prosecutions*<sup>19</sup> the defendant went to visit her husband who was in custody in France in relation to terrorist offences. On her return, she was stopped at an airport and detained for almost two hours by police officers exercising their powers under the 2000 Act. She refused to answer most of the questions that she was asked. She was charged with wilfully failing to comply with a duty contrary to Schedule 7. At her trial, she submitted that the proceedings should be stayed as an abuse of the process of the court on the grounds that the powers given to the officers under Schedule 7 infringed her right to liberty, the privilege against self-incrimination and her right to privacy and family life under Articles 5, 6 and 8 of the Convention. The Supreme Court rejected all of these submissions.

It was not in dispute that the questioning and search under compulsion pursuant to Schedule 7 was an interference with the defendant's right to respect for his or her private life under Article 8, which was required to be justified under Article 8.2 as meeting the requirement of legality ('in accordance with the law') and as being a proportionate means of achieving a legitimate end. By a majority, the Supreme Court held that the legislation is 'in accordance with the law'<sup>20</sup> – that is, that it has some basis in domestic law, that the law is adequately accessible to the public, and that its operation is sufficiently foreseeable to enable people affected by it to regulate their conduct with a degree of certainty of outcome.

Of greater importance for present purposes is the fact that the requirement of legality calls for the law to contain sufficient safeguards to avoid the risks that (i) the power will be arbitrarily exercised, and (ii) unjustified interference with a fundamental right will occur. On this point, the main focus was on whether the fact that questioning was not dependent on the existence of objectively established grounds for suspicion meant that there were no adequate safeguards against the arbitrary exercise of the power. Lord Hughes (in the first majority judgment) said that the safeguards were sufficient.<sup>21</sup> These included the fact that the powers were restricted to those passing in and out of the country; the powers had to be exercised for the specified statutory purpose; they were exercised by specially trained and accredited police officers; the questioning was restricted to a period of six hours; there were restrictions on the type of search authorised by the statute; there was a requirement to give explanatory notice to those questioned, to permit consultation with a solicitor and notification of a third party; there was a requirement for records to

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<sup>17</sup> ECtHR, *Saadi v Italy*, App no 37201/06, 28 February 2008.

<sup>18</sup> *ibid* para 138.

<sup>19</sup> *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2016] AC 88.

<sup>20</sup> *ibid* para 29.

<sup>21</sup> *ibid* para 32.

be kept; the availability of judicial review; and there was continuous supervision by the Independent Reviewer.<sup>22</sup> I was party to a second majority judgment which gave slightly different reasons.<sup>23</sup> In his dissenting judgment, Lord Kerr asked the pertinent question: if the examining officer does not have to form a suspicion that the person is or has been concerned in the commission, preparation or instigation of acts of terrorism, how is the exercise of the powers to be reviewed by the courts?<sup>24</sup>

I did not find this an easy case to decide. In the end, I was influenced by the reasoning of the important Strasbourg decision of *Gillan v United Kingdom*<sup>25</sup> that, in considering whether the legality principle is satisfied in relation to a particular system, one must look not only at the provisions of the statute or other relevant instrument in question, but also at how the system actually works in practice.<sup>26</sup> To a lawyer schooled in the crucible of the common law, this may well seem unprincipled and unsatisfactory, but Strasbourg often adopts a pragmatic approach – and that is what it did here. It was significant that in *Beghal* the evidence showed that a relatively small number of people were interviewed under Schedule 7 and that number had decreased each year from 2009–10 to 2013–14.<sup>27</sup> Unlike the *Gillan* case, the exercise of the Schedule 7 powers had led to convictions for terrorist offences. Most significant of all was the fact that the Independent Reviewer was very positive about the way in which the Schedule 7 powers were being exercised. Indeed, he described the system as an essential ingredient in the fight against terrorism.<sup>28</sup>

I have spent a little time on this case because it shows how difficult it can be to apply the important ‘in accordance with the law’ safeguard. As in so many areas (including proportionality, to which I shall return a little later), the courts are required to make sensitive value judgments. It is not surprising that there is scope for more than one view.

I shall come back to *Beghal* when I consider the question of proportionality. Now I would like to mention a recent decision of the UK Court of Appeal which illustrates our approach to the legality principle. I do so because this principle has been in the spotlight in cases where the Court has been asked to decide how to resolve the tension between the state’s wish to take measures to safeguard national security and the interference with human rights that such measures may engender. In *R (Miranda) v Secretary of State for the Home Department*<sup>29</sup> the facts in brief were these. Mr Miranda, the husband of a journalist with *The Guardian* newspaper (Mr Greenwald), was carrying data provided by Edward Snowden through Heathrow airport. He was stopped, questioned and detained for nine hours under Schedule 7 of the 2000 Act and the hard drives that he was carrying were retained by the examining officers. Mr Miranda sought judicial review of the action taken against him on a number of grounds, including (i) that the Schedule 7 powers, being exercisable

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<sup>22</sup> *ibid* para 43.

<sup>23</sup> *ibid* paras 88–92.

<sup>24</sup> *ibid* para 100.

<sup>25</sup> ECtHR, *Gillan and Quinton v United Kingdom*, App no 4158/05, 28 June 2010.

<sup>26</sup> *ibid* paras 84–87.

<sup>27</sup> *Beghal* (n 19) para 89.

<sup>28</sup> *ibid*.

<sup>29</sup> [2016] EWCA Civ 6.

without prior judicial scrutiny, were for that reason incompatible with the right to freedom of expression guaranteed by Article 10 of the Convention, and (ii) that the use of the powers was a disproportionate interference with his right to protection of journalistic expression.<sup>30</sup>

The Court noted at the outset that this was a case about Article 10, whereas *Beghal* was a case about Articles 5, 6 and 8 of the Convention. The Strasbourg Court has always considered there to be a vital public interest in the protection of journalistic sources, it being one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. Press freedom is one of the anchors of a democratic system. It is clear enough that the Strasbourg jurisprudence requires prior or (in an urgent case) immediate *post factum* judicial oversight of interferences with Article 10 rights where journalists are required to reveal their sources.<sup>31</sup> In such cases, lack of judicial oversight means that there are no safeguards sufficient to make the interference with the right 'in accordance with the law' – that is, so as to avoid arbitrary interferences with the right. However, the *Miranda* case was not about the protection of a journalist's source. The source was known. The Court said that protection of a journalist's sources was no more than one aspect of a journalist's freedom of expression.<sup>32</sup> There was no reason in principle for drawing a distinction between disclosure of journalistic material *simpliciter* and disclosure of journalistic material which may identify a confidential source.

Basing itself on the decision in *Beghal*, the court below had held that the constraints on the exercise of the power were an adequate safeguard against its arbitrary exercise.<sup>33</sup> The particular features relied on were (i) the requirements of the general law that the power be exercised on a reasoned basis, proportionately and in good faith; (ii) the limitation on the meaning of terrorism given by reference to the mental or purposive elements prescribed by section 1(1)(b) and (c); (iii) the fact that the power could be exercised only at a port or border area; and (iv) the fact that the power of detention was limited to nine hours.<sup>34</sup> In giving the main judgment in the Court of Appeal, I said that these constraints did not afford effective protection of a journalist's Article 10 rights.<sup>35</sup> The central concern was that disclosure of journalistic material (whether or not it involved the disclosure of a journalist's source) undermines the confidentiality that is inherent in such material, and which is necessary to avoid the chilling effect of disclosure and to protect Article 10 rights. If journalists can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. The only real safeguard against the powers not being exercised rationally, proportionately and in good faith is the possibility of judicial review. However, that possibility provides little protection against the damage that occurs if journalistic material is disclosed when it should not be disclosed. The Court therefore declared that the stop power was incompatible with Article 10 of the Convention in

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<sup>30</sup> *ibid* paras 95–96.

<sup>31</sup> *ibid* para 101.

<sup>32</sup> *ibid* para 107.

<sup>33</sup> *ibid* para 98.

<sup>34</sup> *ibid* para 112.

<sup>35</sup> *ibid* para 113.

relation to journalistic material in that it was not subject to adequate safeguards against its arbitrary exercise.<sup>36</sup> It was for Parliament to enact a provision to provide such protection. The most obvious safeguard would be some form of judicial or other independent and impartial scrutiny conducted in such a way as to protect the confidentiality of the material.<sup>37</sup>

*Beghal* and *Miranda* illustrate well the difficulties that face the courts in deciding whether a legal system provides effective safeguards against the arbitrary exercise of a statutory power which interferes with the enjoyment of a qualified Convention right. The Supreme Court was split in *Beghal*. The Court of Appeal disagreed with the Divisional Court in *Miranda*. Whether a constraint provides an adequate safeguard is not a hard-edged question. As I have said, it calls for an exercise of judgment on which opinions may reasonably differ. In this respect it bears some resemblance to proportionality, an issue that was also raised in both cases. It is to that topic that I now wish to turn.

It was submitted in *Beghal* on behalf of the defendant that the questioning and search powers contained in Schedule 7 are incompatible with Article 8 of the Convention because they are disproportionate. I know that the Israeli courts have embraced the concept of proportionality with enthusiasm and have been in the vanguard in developing the principle in a subtle and sophisticated way. In cases concerning human rights protected by the Convention, our courts apply the proportionality test as the standard of review. In other cases, we have moved away from the austere irrationality standard of review to something more nuanced. In the recent case of *Keyu v Secretary of State for Foreign and Commonwealth Affairs*<sup>38</sup> our Supreme Court considered whether there should be a general move away from the traditional judicial review tests to one of proportionality. The Court decided that, if this were to be done, it should require consideration by an enlarged court.<sup>39</sup> So far this has not happened, but we are creeping forward in that direction. As long ago as 2003, I said in the *ABCIFER* case<sup>40</sup> that the case for the recognition of proportionality as part of English domestic law in cases which do not involve Community law or the Convention was a strong one, not least because proportionality is a more precise and sophisticated standard of review than the *Wednesbury* test,<sup>41</sup> although the latter has been relaxed in recent years, even in areas which have nothing to do with fundamental rights.<sup>42</sup> Indeed, the *Wednesbury* test is moving closer to proportionality. Although the Court said that it had difficulty in seeing what justification there now was for retaining the *Wednesbury* test, it was not for the Court of Appeal to perform its burial rites.<sup>43</sup>

So the *Wednesbury* test is still just about alive although, as I have said, there is no doubt that we apply the proportionality standard of review in cases involving alleged violations of

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<sup>36</sup> *ibid.*

<sup>37</sup> *ibid* para 119.

<sup>38</sup> *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

<sup>39</sup> *ibid* para 132.

<sup>40</sup> *The Association of British Civilian Internees – Far Eastern Region v Secretary of State for Defence* [2003] EWCA Civ 473 (*ABCIFER*).

<sup>41</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>42</sup> *ABCIFER* (n 40) para 35.

<sup>43</sup> *ibid.*



Convention rights. In *Bank Mellat v HM Treasury (No 2)*<sup>44</sup> Lord Sumption conveniently stated that four questions were inherent in the concept of proportionality:<sup>45</sup>

- (1) Is the objective of the measure under consideration sufficiently important to justify limitation of a fundamental right?
- (2) Is the measure rationally connected to the objective?
- (3) Could a less intrusive measure have been adopted?
- (4) Has a fair balance been struck between the individual rights and the interests of the community?

The second of these questions does not usually admit of more than one answer; it can be resolved by the application of objective criteria. The first, the third and especially the fourth questions raise issues of value judgment on which opinions may well differ. The first involves an assessment of the relative importance of the objective of the measure and the right that is affected by it. The third involves a judgment of whether the objective could be achieved by less intrusive means. The fourth involves an assessment of whether a fair balance has been struck between the right of the individual who is affected by the measure and the interests of the community that the measure is intended to serve. In varying degrees, the judicial responses to these questions depend on subjective considerations. Some judges give more weight than others to the protection of individual human rights in balancing these rights against the need to safeguard the security interests of the community at large. Some judges are more cautious and conservative than others. That is a fact of life. Differences of approach of this kind tend to be exposed particularly acutely when the court is asked to decide whether security measures interfere with human rights too much.

Issues of proportionality arose in both the cases of *Beghal* and *Miranda*. In *Beghal* it was not in dispute that the objective of Schedule 7 was the prevention and detection of terrorism and that this was sufficiently important to justify *some* intrusion into Article 8 rights. The power of questioning and search was rationally connected with that objective: it was designed to serve it and the evidence was that it was useful in achieving that end. The real complaint was that *any* questioning and searching was disproportionate unless it was based on an objectively established reasonable ground for suspecting the person concerned of being engaged in terrorist acts.<sup>46</sup> The defendant's case was that a less intrusive measure – namely a power based on objective grounds for suspicion – could and should have been adopted, and that by reason of its failure to do so, the legislation did not strike a fair balance.<sup>47</sup>

The majority of the Supreme Court held that the measure was not disproportionate, reasoning as follows. It was common ground that the state was entitled to a generous margin of judgment in striking the balance.<sup>48</sup> The importance to the public of the prevention and detection of acts of terrorism could hardly be overstated and the level of risk of such acts was at least as high as

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<sup>44</sup> *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.

<sup>45</sup> *ibid* para 20.

<sup>46</sup> *Beghal* (n 19) para 47.

<sup>47</sup> *ibid*.

<sup>48</sup> *ibid* para 48.

it had been at any time since the powers were introduced. The unanimous view of all independent observers was that the powers to question and search which were not grounded on objectively demonstrable reasonable suspicion of involvement in terrorism were of undoubted value in the struggle against terrorism.<sup>49</sup> The powers would not have the same utility if they were restricted to those in respect of whom a reasonable suspicion could be demonstrated to the satisfaction of a court.<sup>50</sup> The level of intrusion into the privacy of an individual was comparatively light and not beyond the reasonable expectation of those who travel across the UK's international borders.<sup>51</sup> Taking all the circumstances into account, the majority concluded that the questioning and associated search powers at the port represented a fair balance between the rights of the individual and the interests of the community at large.<sup>52</sup>

Lord Kerr took a different view. He agreed with the majority that they had identified the four relevant questions. He agreed that the objective of the Schedule 7 powers of counteracting terrorism was a legitimate aim and that obtaining information about whether a person appears to be a terrorist is rationally connected with that aim.<sup>53</sup> However, he said that while the state enjoys an area of discretionary judgment as to what measures are needed to pursue a particular aim, this does not relieve it of the obligation to produce some evidence that the specific means chosen were no more than is required.<sup>54</sup> There was no evidence that a suspicion-less power to stop, detain, search and question was the only way to achieve the goal of combating terrorism.<sup>55</sup> The absence of any evidence of a need for such a power led Lord Kerr to conclude that the measure did not strike a fair balance between the Article 8 rights of the persons affected by the powers and the security interests of the community at large. It is noteworthy that, despite it being common ground that the state was entitled to a generous margin of judgment, Lord Kerr held that Schedule 7 did not strike a fair balance.<sup>56</sup>

A similar issue arose in the *Bank Mellat* case to which I have referred. The Treasury made an order pursuant to Schedule 7 of the Terrorism Act 2000 prohibiting all persons operating in the financial sector in the UK from entering into or continuing to participate in any transaction or business relationship with Bank Mellat, an Iranian bank, on the grounds that the Treasury reasonably believed that the development or production of nuclear weapons in Iran posed a significant risk to the national interests of the UK. The bank applied to the court to set aside the order on a number of grounds, one of which was that the requirements were disproportionate to the risk posed to the national interests of the UK.<sup>57</sup> The majority of the Supreme Court acknowledged that the subject matter of the application lay in the areas of foreign policy and national security,

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<sup>49</sup> *ibid* para 49.

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid* para 51.

<sup>52</sup> *ibid*.

<sup>53</sup> *ibid* para 121.

<sup>54</sup> *ibid* para 123.

<sup>55</sup> *ibid*.

<sup>56</sup> *ibid* paras 126–28.

<sup>57</sup> *Bank Mellat* (n 44) para 10.

areas in which the Treasury was to be accorded a large margin of judgment,<sup>58</sup> and that the consequences of nuclear proliferation justified a precautionary approach and called for experienced executive judgment.<sup>59</sup> However, although the order had a rational connection with the objective of frustrating the Iranian weapons programme, the distinction made between the claimant bank and other Iranian banks was irrational and disproportionate.<sup>60</sup> The majority acknowledged that a large margin of judgment was required because of the importance of the public interest in nuclear non-proliferation, and the question of whether a measure is apt to limit the risk posed to the national interest by nuclear proliferation in a foreign country depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret.<sup>61</sup> This is something that is pre-eminently a matter for the executive.<sup>62</sup> For the majority, however, the margin of judgment was not sufficiently large to overcome the irrationality of the singling out of the claimant bank, and the measure was disproportionate to any anticipated contribution to obstructing Iran in financing its weapons programmes.

The minority analysed the evidence and concluded that an order directed against the claimant bank was neither pointless nor arbitrary.<sup>63</sup> The Court was in a poor position to weigh the effectiveness of a measure the object of which was to reduce (if not eliminate) Iran's ability to fund its weapons programmes. This was not an area in which the Court had any expertise.<sup>64</sup> It should hold that such a measure was irrational or disproportionate only if it was confident that this had been clearly demonstrated.<sup>65</sup> On the facts of the case, the Court was not confident that it had been.

Before leaving this topic, I wish to return to *Miranda*. It was submitted on behalf of Mr Miranda that the exercise of the Schedule 7 power against him was an unjustified and disproportionate interference with his right to freedom of expression. The issue turned on the fourth question: had the exercise of the power struck a fair balance between Mr Miranda's Article 10 rights and the security interests of the wider community?

The examining officers (and those who were directing their operations) knew that the material in the possession of Mr Miranda contained personal information that would allow individuals involved in security operations to be identified and that it was highly likely to describe techniques that had been crucial in counter-terrorism operations. Mr Miranda sought to challenge the defendants' evidence as to the actual or potential damaging effects of the dissemination of the material seized from him. Mr Miranda placed much weight on the need to have regard to the importance of 'responsible journalism' as a factor when weighing the competing interests in the case.<sup>66</sup> It was submitted on his behalf that the evidence of the defendants' witnesses indicated no more than a

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<sup>58</sup> *ibid* para 21.

<sup>59</sup> *ibid*.

<sup>60</sup> *ibid* para 27.

<sup>61</sup> *ibid* para 21.

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid* para 115.

<sup>64</sup> *ibid* para 200.

<sup>65</sup> *ibid*.

<sup>66</sup> *Miranda* (n 29) para 74.

theoretical risk that would arise only if key parts of the data were released into the public domain.<sup>67</sup> There was no evidence that there was a real risk that such disclosure would occur; nor was there anything to suggest that Mr Miranda, Mr Greenwald or *The Guardian* newspaper would not approach the question of publication with the appropriate degree of responsibility.

The Court of Appeal started its consideration of the issue of fair balance by saying that in determining the proportionality of a decision taken by the police in the interests of national security, the court should accord a substantial degree of deference to their expertise in assessing the risk to national security and in weighing it against countervailing interests.<sup>68</sup> This is because the police have the institutional competence and the constitutional responsibility to make such assessments and decisions.<sup>69</sup> As I understand it, the approach taken by the courts in Israel is somewhat different, as is well illustrated in the cases concerning the route of the security fence. The courts here accept that the military commander is the expert as regards the security considerations of one route as against another route. The courts do not normally second-guess the military when it comes to security assessments of particular decisions of this kind. They do not have the expertise to do so and are unlikely to have access to secret material which would be highly relevant to the decision that has been taken. I say 'normally' because one of the earliest lessons I learnt as a judge was never to say 'never'. There may be circumstances in which it can be shown, without fear of contradiction, that a decision taken by the military or the police ostensibly on grounds of national security cannot be justified, even on the basis of military or police considerations alone. In a case of this kind, the court is unlikely to give special weight to the expertise of the decision maker. Such cases are likely to be rare.

The courts in Israel have said that, whereas the military commander is the expert as to where, from a security point of view, the fence should be erected, the court has the expertise to determine whether harm caused to local residents by the proposed route is proportionate. This is the fair balance question to which I referred earlier. I am no expert in Israeli law, and it is not clear to me whether, in conducting the balance between the security benefits (as assessed by the military) and the interference with the rights of individuals caused by the decision to create those security benefits, the court gives any weight at all to the fact that the balancing exercise has been performed by the military itself. Is any margin of judgment accorded to the military? This is an important question.

As is shown by the decisions to which I have referred, our courts would accord such a margin of judgment. In *Miranda* we took into account the fact that the police were ultimately accountable to Parliament and that the constitutional responsibility for the protection of national security lies with the elected government.<sup>70</sup> The greater the risk to national security, the greater the weight that should be accorded to it when balancing it against a countervailing factor. The assessment by the police and the security service was that the risk in that case was substantial. They had the

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<sup>67</sup> *ibid* para 78.

<sup>68</sup> *ibid* para 79.

<sup>69</sup> *ibid*.

<sup>70</sup> *ibid*.

expertise and access to secret intelligence material which made it very difficult to challenge such an assessment in a court.<sup>71</sup> The greater the potential harm, the greater the weight that should be accorded to the community interests. The potential for harm in that case was very substantial. The Court of Appeal concluded that the compelling national security interests clearly outweighed Mr Miranda's Article 10 rights on the facts of that case.<sup>72</sup>

To end this lecture, I wish to return to the question of the protection of unqualified rights in an age of terrorism. I have already spoken about the unqualified right in Article 3 of the Convention not to be subjected to torture or degrading treatment. I should say something about the Article 6 right to a fair trial. This, too, is an unqualified right, although issues can arise as to the content of the right. The right to a fair trial is a cardinal requirement of the rule of law. It includes the right of a party to know the case he or she has to meet and the evidence on which it is based, particularly in criminal cases. This is trite and elementary, but terrorist cases pose particular challenges here too. Under the Prevention of Terrorism Act 2005<sup>73</sup> the Home Secretary had the power to make a control order against a person if he had reasonable grounds for suspecting the person to be or to have been involved in terrorism-related activity and he considered that it was necessary, in order to protect the public against the risk of terrorism, to make such an order.<sup>74</sup> The order could not lawfully deprive the controlled person of his liberty, but could contain obligations not far short of house arrest, the cumulative effect of which could render any normal life impossible.

Following the making of such an order, there had to be a hearing before a judge at which the question would be considered of whether the Home Secretary's decision to make the order was flawed.<sup>75</sup> It would be flawed if there was no evidence reasonably capable of supporting the order. However, under the 2005 Act and the rules made under it, no information was to be made available to the controlled person or his lawyers if disclosure would be contrary to the public interest.<sup>76</sup> A special advocate could be appointed to represent the interests of the controlled person, but on condition that the advocate did not share with the controlled person or his lawyers information judged to be contrary to the public interest.<sup>77</sup> This could be very prejudicial to the interests of the controlled person who, if the information were disclosed to him, might be able to provide a 'knock-out blow' which would completely destroy its effect. Here we find the tension between an unqualified right (the right to a fair hearing) and the community interest in national security exposed in a particularly acute form. It is not surprising that the lawfulness of the special advocate procedure was tested in our courts and in Strasbourg in a number of cases. The limitations of the special advocate system have been the subject of much criticism. Those who have acted as special advocates have spoken eloquently of the difficulties they face in representing their clients

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<sup>71</sup> *ibid* para 82.

<sup>72</sup> *ibid* para 84.

<sup>73</sup> Prevention of Terrorism Act 2005 (UK).

<sup>74</sup> *ibid* s 2.

<sup>75</sup> *ibid* s 3.

<sup>76</sup> *ibid* Sch, ss 2, 4.

<sup>77</sup> *ibid* s 7.

effectively when operating in what has been described as a ‘Kafkaesque’ setting. In the end, though, the courts decided that the special advocate system did not violate Article 6. A compromise solution was devised: Article 6 required that in such cases the ‘gist’ of the evidence relied on against the party had to be disclosed.

I am conscious that I have touched on only a few aspects of the vexed, difficult and important subject of my lecture. Terrorists present a real and continuing threat. In a nuclear age, the potential to wreak havoc is alarming. It is the duty of all responsible governments and security forces to do everything in their power to minimise the threat – but not at any price. Striking the balance in the right place between doing everything possible to reduce, if not eliminate, the threat on the one hand, and protecting the human rights of individuals potentially affected by those steps on the other, is one of the biggest challenges of our time.