

*Introductory Note by Francis Bennion*

The following letter by me was published in the *Denning Law Journal* for 1988. The lecture it refers to by Professor A W B Simpson was later published in his theatrically titled collection *In the Highest Degree Odious: detention without trial in wartime Britain* (Oxford: Clarendon Press 1992).

The final paragraph of the letter refers to pages 665 and 679 of the first edition of my book *Statutory Interpretation*. This should now be read as a reference to pages 131, 466-467, 956, 976 and 1046 of *Bennion on Statutory Interpretation* (LexisNexis Butterworths, 5<sup>th</sup> edn 2008)

The letter is followed by a contribution from Henry Heuzenroeder which gives a contrary view.

### **Defending *Liversidge v Anderson***

I was sent by Child & Co a copy of Professor A W B Simpson's lecture entitled 'Rhetoric, Reality, and Regulation 18b', which I read with mounting dismay. It struck me as long on the first titular element, and lamentably short on the second. Had I been present at its delivery in the St Cross building in Oxford (where I have a room), I would have felt bound to utter a protest.<sup>1</sup> As Professor Simpson tells me his lecture is to be republished in your journal I request that this letter accompany it.

Having spent nearly six years as an RAF pilot (1941-1946), and later having worked for some fifteen years on and off in Whitehall, I am equipped to detect that the lecture, like many academic statements on wartime internment under reg 18b, ignores a basic factor. It assumes without proving that the defence of liberty and the rule of law require such measures as reg 18b to be condemned. Thus Professor Simpson says that the imprisonment of persons under reg 18b was 'in flagrant violation' of the rule of law<sup>2</sup>, that reg 18b was an 'infamous conception' amounting to the erosion of the rule of law<sup>3</sup>, that it was a 'monstrous birth'<sup>4</sup>, and that the judges deciding cases under it lacked a commitment to civil liberties<sup>5</sup>.

The factor Professor Simpson fails to mention, but must surely be aware of, is that the defence of liberty may imperatively require measures such as reg 18b in times of emergency, and the rule of law allows for this. Politicians of all parties grasp, as Paddy Ashdown MP (a contender for leadership of the Social and Liberal Democrats) is reported as saying in *The Independent* of 24 June 1988 that, 'the first civil liberty is the ability to be safe and to live in peace'. If for some peculiar reason Professor Simpson does not accept the existence of this countervailing factor, which to most people is self-evident, then I suggest that academic rigour at least requires him, in a lecture of this kind, to explain why. Instead, his thesis proceeds by blandly ignoring the possibility that the factor exists.

In my book *Statutory Interpretation* (Butterworth, 1984) I deal with *Liversidge v Anderson* in several places. Readers may be interested to look at the passages on pp 665 and 679 in particular. I cite the remark by Lord Finlay LC in *R v Halliday* [1917] AC 260, 269, a case on

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<sup>1</sup> This and the preceding sentence were omitted on publication of the letter at the insistence of the editor, Professor P H Pettit. So much for academic freedom of speech.

<sup>2</sup> Page 2.

<sup>3</sup> Page 6.

<sup>4</sup> Page 8.

<sup>5</sup> Page 31.

the predecessor of reg 18b, that ‘no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law’.

As I vividly remember from the days of 1940-41, when as a 17-year old clerk I travelled daily by tube from Harrow to London to work in the City during the blitz, the liberty of all of us was dramatically threatened by the Nazis. That liberty was protected, not infringed, by reg 18b. So I hope Professor Simpson will feel able to accept, and reflect in his future publications on the topic (I understand he is writing a book on it), that there are two sides to the question whether reg 18b infringed ‘liberty’. That applies whether or not there were individual cases where in fact a detention under reg 18b was not justified. Such errors (if they occurred) were lamentable and I deplore them. Unfortunately however administrative arrangements cannot be expected always to work perfectly in a country under constant enemy attack. In dire necessity furthermore the executive must take over from the judiciary, which is why martial law is recognised in international law (on this point I venture to refer to pp 289 and 777 of my book).

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**A Response to Francis Bennion’s Defence of *Liversidge v. Anderson***

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In July 2007 Mr Francis Bennion and I had a brief and impromptu email debate about his support for the majority speeches in *Liversidge v. Anderson* [1942] AC 206. He kindly asked me to set out my position for use as a counterpoint view on his website. In an age of a renewed threat of violence to the *salus populi* this contentious topic raises its head again. We would all naturally wish it were otherwise.

It is not my aim to restate or defend Professor Brian Simpson’s arguments, but rather to advance my own reasons for respectfully agreeing with Lord Atkin’s famous dissent.

Lawyers often refer to the principle of legality to read down legislation that interferes with fundamental rights, such as liberty. The posited imposition of administrative detention in various circumstances is a paradigm example, where the principle of legality might be applied. The same principle is used to favour a construction that preserves the jurisdiction of the courts to supervise the executive. This is necessary to preserve a position where courts are able to ensure that the executive does not act unlawfully; for the very concept of the rule of law has always required as much.

These, however, were not the issues before the House in *Liversidge*. There was no ouster clause, and the successful argument was about reading the regulation *contrary* to its natural meaning. The regulation’s trigger to permit executive imprisonment was that “*the Secretary of State has reasonable cause to believe*” certain matters about a person’s hostile origin or associations, such that it was necessary that the person be detained. The argument that found favour with a majority of the House was that the words did not mean what they said, but should be read to mean “*the Secretary of State thinks that he has reasonable cause to believe.*” Rather than reading the words down to preserve personal liberty, they were read *up* to the detriment of liberty.

Mr Bennion's argument in support of this interpretation is as I read it, essentially rooted in two matters. First, in times of war or unrest the highest civil liberty is the ability of the general populace to be safe and live in peace, and this is said to justify an interpretation of the regulation that departed from a natural meaning. Secondly, because of its functional nature, a court is not in any position to gainsay the subjective assessment of the Secretary. In my view, the first argument elides the complexity of the situation; the second is empirically wrong. But neither is sufficient to justify reading the regulation *up* to the detriment of personal liberty.

It may be accepted, immediately, that it may be necessary in extreme cases to detain persons, be they engaged in incipient terrorist activities, or during wartime and unrest if they are spies, or fifth columnists in the sense used by General Mola. The problem is that history teaches that uncontrolled powers of detention are manifestly overused and are used against innocent persons. The officials entrusted with these extreme powers are naturally risk averse. There is no material cost to them in detaining an innocent; a failure to detain a subversive has unthinkable consequences to the mind of an official. The inevitable result is that people are detained on a whiff of suspicion. Against vulnerable elements of the population malicious canards abound. A frightened populace bays for blood. This is nothing short of a recipe for a human rights disaster. If the first human right is to be "*safe and live in peace*" as Mr Bennion states, then an innocent wrongly detained has had that right breached. As the detention is lawful there is no remedy to be had, even in damages.

While no system is perfect, safeguards can be put in place that leave the executive with a free enough hand. Detention can be reviewed on a periodic basis. Provided it can be done consistent with the integrity of secret sources, a detainee can have the opportunity to know what is alleged against them, and to challenge it. In the modern world steps less than incarceration can be taken, such as utilizing control orders and tracking bracelets. My point is that powers of the extreme and inscrutable kind at issue in *Liversidge* are not necessary to protect the public, even in a blitz. A more focused law is possible.

Being a regulation, a more focused law could have been instituted expeditiously. Had Lord Atkin's view prevailed, I am sure that an amendment would have been made with no ill effect caused by the delay. When I read civil liberties with Professor Sir David G T Williams QC as a tutor, he told me that the original *Official Secrets* legislation was debated by Parliament for less than fifteen minutes!

In any event, reading *up* a law providing for incarceration has an unnerving similarity to certain aspects of Nazi jurisprudence. On 28 June 1935, article 170a of the German criminal Code was enacted by a decree of Hitler, which required judges to read up the natural meaning of the words in the code, and apply them by analogy to criminalize situations where expedient to Nazi theory. While clearly the Law Lords in the majority did not set out to pervert the law, in the way Nazi judges did, the similarity in the process is striking. At least the Nazi judges could point to a statutory justification for their actions.

Secondly, it is empirically wrong to say that courts are functionally unable to review decisions or consider issues involving national security and the like. Since the decision in *Alister v. The Queen* (1984) 154 CLR 404 Australian courts have taken the plunge and regularly receive sensitive material in many contexts, such as telecommunication interception warrants, and to make control orders under Division 104 of the *Criminal Code Act 1995* (Cth) (as amended in late 2005). Under the *Witness Protection Act 1996* (SA) courts are even given a jurisdiction to order various things to be done to change a person's identity because they are under threat, and review sensitive police intelligence in the process.

Mr Bennion refers to his experience as an RAF pilot and taking the tube to work as a clerk during the blitz. This brings to life as it were the value of the *salus populi*. But the *populi* also

include detained innocents. To make good my counterpoint, I briefly relate some family history.

My great-great grandfather Heinrich came from the Kingdom of Hannover. His parents were minor aristocrats, and of course prior to the ascension of Queen Victoria owed allegiance to the Hanoverian succession. After attending the University of Göttingen Heinrich emigrated to the province of South Australia in 1847. His sons, William (my direct ancestor) and Edmund became lawyers and commenced a tradition that has continued through my grandfather, my father and to myself. William practiced as a solicitor in the Barossa Valley. South Australia had attracted a significant German migration, and it was some ten percent (10%) of the population by 1914.<sup>1</sup> Many of the leading local lawyers were of German origin. When war erupted, Commonwealth troops raided the parliamentary Chambers of the Attorney-General, Hermann Homberg and ransacked his papers.<sup>2</sup> No apology was ever tendered. There was an attempt to confiscate my great-great grandmother's share portfolio. Many farmers in the Barossa were put in internment camps, despite the fact that a large number had sons fighting with the ANZACs.<sup>3</sup> During the World War II my grandfather happened to know the official (a retired Brigadier) who was put in charge of internments of people with German names, as the Brigadier and my grandfather had been to boarding school together. My grandfather gave personal assurances, and intervened on behalf of locals. The disaster of the Great War did not occur a second time. There was no threat to the local war effort!

I think the internment and general persecution of the local German population is now seen as a significant mistake. It is certainly a matter of historical importance in Australia.<sup>4</sup> It was one reason why I acted in the asylum seeker indefinite detention cases,<sup>5</sup> which themselves show the constant overreaction by governments. When the political mood changed, refugee advocates (of all people!) had their houses gazetted as detention centres so they could billet asylum seekers. Only the mere form of blanket mandatory detention remained, and the substance of the situation mocked the alleged reasons earlier advanced for such a draconian regime in the first place.

Similar abuses of citizens of Japanese origin occurred in the United States, in cases such as *Hirabayashi v. United States* 320 US 81 (1943) and *Korematsu v. United States* 323 US 214 (1944). It was subsequently determined that the court was misled by the government in *Korematsu v. United States* 584 F. Supp 1406 (1983). The absurdity of the situation there was made clear in *Ex parte Mitsuyi Endo* 323 US 283 (1944) where the government had actually admitted that they assessed Miss Endo as loyal and were detaining a citizen during the war merely because she was of Japanese extraction.

Finally, I would point out that as precedent *Liversidge* struggled to tread water almost as soon as the second World War ended. Lord Radcliffe in presenting the Privy Council's advice in *Nakkuda Ali v. Jayaratne* [1951] AC 66 at 76-77 politely confined *Liversidge* to an interpretation of the regulation the House had there considered – effectively neutering the decision as the particular regulation had been repealed at the end of the war. In depreciating any broader operation his Lordship threw support behind the reasoning in Lord Atkin's dissent. By 1980 Lord Diplock felt that the time had come “to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps,

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<sup>1</sup> Harmstorf, I, *Insights into South Australian History Vol 2: South Australia's German History and Heritage*, Historical Society of South Australia Inc, Adelaide, 1994, p 2 (<http://www.saadv.com.au/sa-germanhistory01e.html#Settlement>).

<sup>2</sup> Churches, S C, *Letter re Appointment of European Migrants to Australian Superior Courts* (1979) 53 Australian Law Journal 231.

<sup>3</sup> On the barbarity of the interment camps, see generally Chapter 5, of Dr Harmstorf's book (supra).

<sup>4</sup> It has even spawned an opera called *Barossa*, by Ralph Middenway with librettist Andrew Taylor. I was told by Ms Vera Bochmann who was involved as a consultant in its writing, that two of the characters were based on my grandfather and great uncle.

<sup>5</sup> *Al Masri v. Minister for Immigration* (2002) 192 ALR 609; *Minister for Immigration v. Al Khafaji* (2004) 219 CLR 664.

*excusably, wrong and the dissenting speech of Lord Atkin was right.*”: *R v. IRC; Ex parte Rossminster Ltd* [1980] AC 952 at 1011. In *George v. Rockett* (1990) 170 CLR 104 at 112 a unanimous decision of the High Court of Australia sitting as seven judges referred to Lord Atkin’s dissent as “*famous, and now orthodox*”. Obviously even without the modern overlay of the *Human Rights Act 1998* (UK), as a matter of pure precedent *Liversidge* would be unlikely to survive a root and branch challenge if an identical regulation were reinstated.