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169 JP (20 Aug 2005) 651, 660

Government v Judiciary

Page 651

Constitutional Crisis: Special Report 1

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Nature of the Crisis

There appears to be a developing constitutional crisis over whether our Judges will do what the Government tells them in the human rights sphere or retain their independence.[1] The first shot was fired last December by Lord Hoffmann in what I will call *A v Home Secretary*.[2] Referring to the Government's anti-terrorism laws, His Lordship said in words which have been widely reviled:

> "The real threat to the life of the nation, in the sense of people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these."[3]

The Government's answer, which seemed to indicate that a constitutional crisis is now under way, was a two-barrelled discharge. The first barrel was fired by the Prime Minister at his press conference on August 5 2005[4]:

> "Let no one be in any doubt, the rules of the game are changing."

I presume he meant the rules governing the behaviour of our Judges. Here is the second barrel, delivered at a press interview with *Guardian* reporters[5]:

> "The Lord Chancellor, Lord Falconer, is planning to push through legislation that would for the first time tell judges how to interpret the Human Rights Act should they block the government's tough new deportation policy."

At his August 5 press conference the Prime Minister complained that over his Government's anti-terrorism legislation "regularly we have a defeat in Parliament or the courts". Referring to *A v Home Secretary* he said:

> "The anti-terrorism legislation [passed] after September 11th was declared partially invalid, the successor legislation hotly contested. But for obvious reasons, the mood now is different . . ."

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[1] I say "retain" their independence, but there are arguments for saying they have already lost it: see Francis Bennion, 'The great myth of judicial independence", *The Times* 13 July 2004, http://www.francisbennion.com/images/cuttings/2004/2004-003-cut-times-20040713.jpg.

[2] *A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 65, [2005] 3 All ER 169. Paragraph numbers in the following footnotes refer to this case.

[3] Para. [97].

[4] See http://www.number-10.gov.uk/output/page8041.asp.

[5] *The Guardian*, August 12, 2005.

Is the mood different among our Judges? I do not think so. Mr Blair went on to say that over the past two weeks there had been intensive meetings and discussions across Government to set a comprehensive framework for action in dealing with the terrorist threat in Britain He announced new grounds under existing law for deportation and exclusion, and the formation of a new Government unit "to drive this forward". He said Parliament is likely to be recalled early from the summer break.

The Guardian reported, regarding the initiative by the Lord Chancellor, Lord Falconer:

> "The legislation would force Judges to give equal weight in their assessment of cases to the interests of state security as to the rights of the individual deportee. Such a move could put ministers on a collision course with the UK courts which in recent months have clashed with the Government in their role as protector of civil liberties . . . In an interview with *The Guardian* Lord Falconer said he defended the civil rights role of judges and stressed he would only take the unprecedented step of amending the 1998 Human Rights Act if his hand were forced . . . Primary legislation setting out how the courts should interpret article 3 [prohibition of torture] 'is the sensible way of staying inside the convention, but have [*sic*] a sensible policy on deportation.'"[6]

Here we see the effect of Mr Blair's rash amendment to the British constitution whereby in 2003 the role of the Lord Chancellor was changed so that he became solely a politician. Mr Blair's original intention was to abolish the office altogether, which he thought he could do (and tried to do) by issuing a press release. At the time I criticised this move in a letter to *The Times*:

> "If we abolish the office of Lord Chancellor we shall deprive the unwritten British constitution of one of its most brilliant and useful features. It is unsatisfactory to have a complete separation of powers between judiciary, executive and legislature, because this does not allow for the settling of disagreements between them. The British

> genius has been to evolve, over the centuries, a Cabinet office, that of Lord Chancellor, which allows its holder to intercede at the centre and put forward and defend the views of the judiciary at the heart of government. This is of inestimable value constitutionally. Those who consider this office an anomaly, and want to get rid of it, do not understand its nature. I fear that applies to many of the so-called 'reforms' instituted by Mr Blair."[7]

This has now come home to roost with a vengeance. In the days when we had the head of the judiciary sitting in the Cabinet as Lord Chancellor a constitutional crisis between the Government and the Judges would never have been allowed to develop. One might say that Mr Blair has been "hoist with his own petard"[8].

For the benefit of younger readers perhaps I should explain that a petard was a medieval siege weapon filled with gunpowder which was stood against the wall of a castle to blow a hole in it. *Brewer* says: "The danger was lest the engineer who fired the petard should be blown up by the explosion".[9]

A v Home Secretary

As noted above, Mr Blair complained that his anti-terrorism legislation passed after September 11 was declared partially invalid by the court. He was referring to the decision of the House of Lords in the *A v Home Secretary*.[10] Was the Prime Minister's complaint justified?

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[6] Ibid.
[7] *The Times*, June 14 *2003* (lead letter).
[8] *Hamlet*, III iv.
[9] *Dictionary of Phrase and Fable* (Cassell, 1988), p. 853.
[10] See footnote 2.

Because of the constitutional importance of the case the Appellate Committee of the House of Lords was enlarged to nine Judges from its usual five. The appellants also numbered nine. The Appellate Committee decided by eight to one that the appeal succeeded on the main point, which concerned art 14 of the European Convention on Human Rights (the Convention). This reads:

> "*Prohibition of discrimination*
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> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The story of why art 14 was important in the case is very complicated, but I will tell it as simply and briefly as possible. The starting point is the Human Rights Act 1998 (Designated Derogation) Order 2001[11]. This proposed a derogation from art 5(1) [right to liberty and security of the person] of the Convention. Effect was given to this derogation by the Human Rights Act 1998 (Amendment No. 2) Order 2001[12]

The derogation was set out in these orders, which were quashed as part of the decision in *A v Home Secretary* (hence Mr Blair's grumble that his anti-terrorism legislation "was declared partially invalid").[13] The derogation recited resolution 1373 (2001) of the Security Council, which required all states to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit them. The derogation then said that a public emergency within the meaning of art 15(1) [derogation in time of war or public emergency] of the Convention, exists in the UK and provision was therefore made in the Anti-terrorism, Crime and Security Act 2001 for an extended power to arrest and detain a foreign national which applies where it is intended to remove or deport him from the UK but where that is not for the time being possible (for example because art 3 [prohibition of torture] would be infringed), with the consequence that the detention would be unlawful under existing domestic law powers.

Article 5(1)(f) of the Convention permits the detention of a person with a view to deportation only in circumstance where "action is being taken with a view to deportation" as laid down in *Chalal*[14]. Detention would cease to be permissible under art 5(1)(f) if the duration of the deportation proceedings was excessive. Where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with art 5(1)(f) as interpreted in *Chahal*, for example where the person has established that removal to their own country might result in their being subjected to torture. In addition, it may not be possible to prosecute the person for a criminal offence given the rules on the admissibility of evidence and the high standard of proof required. To the extent, therefore, that the exercise of the special power may be inconsistent with art 5(1), the Government decided to avail itself of the right of derogation conferred by art 15(1) of the Convention.

Human Rights Complications

Why did the House of Lords, by a majority of eight to one, quash the two derogation orders? Because they were held to contravene art 14 of the Convention.[15] How were they thought to do that? Because they resulted in a power to deport suspected terrorists who were non-nationals but not suspected terrorists who were nationals. Was this a valid reason? The answer given by the highly experienced Lord Woolf LJ in the Court of Appeal was no. He held, I

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[11] SI 2001/3644.
[12] SI 2001/4032.
[13] One of the confusions surrounding the case is that while there were two derogation orders (making the same point) the various judgments refer only to the first of them. But the second order must stand or fall with the first.
[14] *Chahal v UK* (1996) 23 EHRR 413 [112].
[15] See above.

believe correctly, that the cases were not comparable and that therefore art 14 was not infringed.[16]

I have stated that conclusion simply, but in fact the case and the law involved are highly complex. They are so complex that at first instance the Special Immigration Appeals Commission (SIAC), composed of Mr Justice Collins, Lord Justice Kennedy and Mr Mark Ockelton, found for the appellants, the Court of Appeal reversed SIAC and found for the Home Secretary, and the House of Lords reversed the Court of Appeal and found for the appellants, inflicting the indignity on the Government of quashing its derogation orders.

Page 653

What made the law so complicated? What produced the humiliation for Mr Blair? The Human Rights Act 1998, of which he is so proud. Again he is being hoist by his own petard.

So where are we with this clash between the Government and the Judges? The Government is responsible for the enactment of the Human Rights Act 1998, but the Judges are responsible for welcoming it wholeheartedly, applying it up to the hilt, and overlooking the grave juridical objections to it when they might have felt a duty to point them out. The Act has been laughably described as 'distinguished by its lack of technicality'.[17] In only two cases I am aware of have senior judges raised doubts about the wisdom of the human rights regime. Lord Browne-Wilkinson said of human rights law '[s]ometimes it seems that we could get rid of all other causes of action'.[18] Peter Smith J said that for a claimant to say his human rights have been infringed 'is becoming a catch-all'.[19]

The Future

Whether what I called at the beginning of this article a developing constitutional crisis will turn into any thing much remains to be seen. I shall keep a weather eye open, and report in this journal if and when it seems necessary.

Page 660

CONSTITUTIONAL CRISIS

The Lord Chancellor's announcement that the Government contemplate changing the law to instruct the Judges as to the correct interpretation on terrorist issues of the European Convention on Human Rights means that a major constitutional crisis is developing between the Government and the Judges. While the crisis continues we are publishing special reports by the constitutional lawyer Francis Bennion. The first of these is on p. 651 *ante*.

[16] *A and others v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2003] 1 All ER 816, at [47].
[17] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2001] EWCA Civ 713, [2001] 3 All ER393, at [7].
[18] *Craies on Legislation* (8th edn 2004, ed. Daniel Greenberg), p v.
[19] *Hanoman v Southwark London Borough Council* [2004] EWHC 2039 (Ch), [2005] 1 All ER 795, at [59].