Constitutional Crisis: Special Report 4

Evidence Obtained By Torture

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Introductory

> "The Law Lords have blown a third gaping hole in the Government's anti-terror laws with yesterday's ruling that secret evidence against terror suspects which may have been obtained through torture is inadmissible. Following last month's rejection by Parliament of 90-day detention without charge and last December's ruling against detention without trial for foreign nationals, it leaves the whole anti-terror edifice tottering."
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> *Daily Mail* December 9.

This is the fourth of my special reports on the ongoing crisis over the clash between the Government and the Judges on their interpretation of the European Convention on Human Rights (the Convention) and the Human Rights Act 1998 (the HRA).[1] This report is called forth by a special sitting of seven Law Lords to consider the use of evidence elicited by torture: *A and others v Secretary of State for the Home Department* (No.2) UKHL 71, [2006] 1 All ER 575. This reversed a Court of Appeal ruling. Judgment was only delivered on December 8 so this is a rushed job designed to reach you in time to be absorbed over Christmas, which I trust will nevertheless be a Merry one for all readers. The seven Law Lords produced a remarkable paradox, of which they seemed to be oblivious. More on that later.

A Few Preliminary Words on Torture

Before I even peruse the Appellate Committee's speeches, never mind analyse them for you, I will clear the way by setting out a few words on the treatment of torture in the law relating to terrorism. This is about how civilised people should react to uncivilised behaviour committed against them.

Torture is uncivilised, but so are suicide bombings directed against innocent civilians. We depend on security forces to protect us by detecting suspects and interrogating them to obtain information before it is too late. Necessarily, this kind of interrogation goes on in every country, for the evil is widespread. Many countries are accustomed to use torture in these interrogations; it has always been their way. Information is exchanged between countries. Being civilised, our own security agents do not practise torture. What do they do about information which is passed to them from a country which does practise torture and might have done so in the case they are dealing with?

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[1] For the previous reports see pp. 651, 812 and 913 *ante.* All these are on www.francisbennion.com.

Members of what Mary Robinson recently referred to as the human rights community[2] (as though we were not all in favour of supporting human rights) would be unhesitating in their instant response to this question. We should never use such tainted information. Not ever. In any way.

Others might be more cautious in their response. I now set out some basic questions.

1. What exactly is meant by "torture" here?
2. Is there a difference between using tainted evidence at the trial of a terrorist suspect and using it to check a threatened building to make sure explosives have not been planted?
3. Do we need to be *certain* the evidence is tainted or will mere suspicion do to rule it out?
4. Should the civil or criminal standard of proof prevail in judging whether evidence is tainted??
5. Does it make any difference if the torture in question was administered as part of the settled policy of the foreign state in question or by an oddball renegade acting unlawfully?
6. Has any investigation been done to find out whether those people are right who claim that torture produces only unreliable and inaccurate evidence because people will say anything to stop the pain?

The Question Posed in *A and others*

The central question which the House of Lords had to answer in *A and others* was framed by Lord Bingham of Cornhill as follows.[3] May the Special Immigration Appeals Commission (SIAC), a superior court of record established by statute, when hearing an appeal under the Anti-terrorism, Crime and Security Act 2001 s 25 by a person certified and detained under sections 21 and 23 of that Act, receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities?

Section 21 of the 2001 Act relies on the complicated definition of "terrorism" in the Terrorism Act 2000 s 1. This begins by specifying five types of "action"-

> (a) action which involves serious violence against a person,
> (b) action which involves serious damage to property or involves the use of firearms or explosives,
> (c) action which endangers a person's life, other than that of the person committing the action,
> (d) action which creates a serious risk to the health or safety of the public in any country or a section of the public,
> (e) action which is designed seriously to interfere with or seriously to disrupt an electronic system.

Any "action" of this type is terrorism if (1) it is used or threatened with the design to influence the government or to intimidate the public, or a section of the public, of any country and (2) the use or threat is made for the purpose of advancing a political, religious or ideological cause or for the benefit of a

Page 990

proscribed organisation.

What section 21 does is allow the Home Secretary to certify that a person is a suspected international terrorist, that is a person who (a) is or has been concerned in the commission,

[2] BBC Radio Four "Today", December 5, 2005.
[3] Paragraph [1].

preparation or instigation of acts of international terrorism, or (b) is a member of or belongs to an international terrorist group, or (c) has links with an international terrorist group.

Detention powers are given to the Home Secretary by section 23 of the 2001 Act. This says that a "suspected international terrorist" (that is a person certified as mentioned above) may be detained under the Immigration Act 1971 Sch 2 para 16 (detention of persons liable to examination or removal) or Sch 3 para 2 (detention pending deportation).

Section 25 of the 2001 Act gives a right of appeal to SIAC against certification. SIAC must cancel the certificate if it considers that there are no reasonable grounds for it or that for some other reason it should not have been issued.

A and the other appellants were certified by the Home Secretary and appealed to SIAC, which dismissed the appeals. On the central question set out above SIAC gave an affirmative answer. They ruled that the fact that evidence had, or might have, been procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible. The Court of Appeal upheld this decision.[4] Despite the repeal of the relevant provisions of the 2001 Act by the Prevention of Terrorism Act 2005, the appellants' right of appeal to the House of Lords against the Court of Appeal's decision is preserved by section 16(4) of the 2005 Act.

The House of Lords Verdict

The seven Law Lords were unanimous in reversing the Court of Appeal. Lord Bingham said he was "startled, even a little dismayed" at the acceptance by them of the argument that the objections to the reception of evidence obtained by torture "can be overridden by a statute and a procedural rule which makes no mention of torture at all".[5] This contravened the principle of legality.[6]

Evidence obtained by torture is ruled out at common law, by public international law, and by the European Convention on Human Rights art. 3, as well as in other ways. An impressive array of authorities was cited by their Lordships. Lord Bingham said-

> "The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention."[7]

The House took note of the fact that art. 3 of the European Convention mentions separately "torture" and "inhuman or degrading treatment or punishment" as if they are different things. This problem is resolved by UN Resolution 3452 (XXX) art 1[8]-

> 1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
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> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading

[4] [2004] EWCA Civ 1123, [2005] 1 WLR 414.
[5] Paragraph [51].
[6] For the principle of legality see F A R Bennion, *Statutory Interpretation* (4th edn 2002) pp. 702-703).
[7] Paragraph [52].
[8] Cited by Lord Bingham at paragraph [31].

treatment or punishment.

The Burden and Standard of Proof

The only disagreement between their Lordships concerned proof that evidence sought to be adduced had been, or might have been, obtained by torture. They decided by four to three that the test of what evidence should be admitted by SIAC should be that laid down by Lord Hope of Craighead.[9] He began by explaining that under the Special Immigration Appeals Commission (Procedure) Rules 2003[10] r. 44(3) "sources of all kinds may be relied upon, far removed from what a court of law would regard as the best evidence". He continued-

> "So it would be unrealistic to expect SIAC to demand that each piece of information be traced back to its ultimate source and the circumstances in which it was obtained investigated so that it could be proved piece by piece, that it was *not* obtained under torture. The threshold cannot be put that high. Too often we have seen how the lives of innocent victims and their families are torn apart by terrorist outrages. Our revulsion against torture, and the wish which we all share to be seen to abhor it, must not be allowed to create an insuperable barrier for those who are doing their honest best to protect us. A balance must be struck between what we would like to achieve and what can actually be achieved in the real world in which we all live. Articles 5(4) and 6(1) of the European Convention, to which Lord Bingham refers in para 62, must be balanced against the right to life that is enshrined in article 2 of the Convention."

Lord Hope chose to rely for his test on the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984[11] ("the Torture Convention"). Article 15 of this says: ""Each State Party shall ensure that any statement which is ***established*** to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."[12] He framed the test as follows, and this was accepted by the majority of their Lordships-

> "SIAC should refuse to admit the evidence if it concludes that the evidence ***was*** obtained by torture. I am also firmly of the view that, if it approaches the issue in this way, it

Page 991

> should apply the lower standard of proof. The liberty of the subject dictates this. So SIAC should not admit the evidence if it concludes on a balance of probabilities that it was obtained by torture. In other words, if SIAC is left in doubt as to whether the evidence was obtained in this way, it should admit it. But it must bear its doubt in mind when it is evaluating the evidence."[13]

This test is to be applied in any proceedings, and not just those before SIAC.[14]

The Paradox

I mentioned that the decision in ***A and others*** involves a paradox, which I will now explain. Lord Hope's exclusion rule applies to court proceedings because torture is regarded as detestable pitch that it would defile a court to touch. The following descriptions of this are found in the speeches in the case.

"In rejecting the use of torture . . . the common law was moved by the cruelty of the practice . . . by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice."[15]

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[9] Paragraphs [119]-[126].
[10] SI 2003/1034.
[11] 1990, Cm 1775.
[12] Emphasis added.
[13] Paragraph 118. Emphasis in original.
[14] Paragraphs [120], [121].

"By the common lawyers torture was regarded as . . . 'totally repugnant to the fundamental principles of English law' and 'repugnant to reason, justice, and humanity'."[16]

" . . . to countenance the use of evidence extracted or discovered by gross personal violence would, in my opinion, involve the State in moral defilement."[17]

" . . . the obtaining of evidence by the infliction of torture is so grave a breach of international law, human rights and the rule of law that any court degrades itself and the administration of justice by admitting it."[18]

". . . the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused."[19]

There are plenty more like that but I need not go on. Where then is the paradox? It lies in the fact that, despite such extreme language about the horrors of torture, in a different context the law accommodates it. This is well described in the speech of Lord Nicholls of Birkenhead[20]-

> "Countering international terrorism calls for a flow of information between the security services of many countries. Fragments of information, acquired from various sources, can be pieced together to form a valuable picture, enabling governments of threatened countries to take preventative steps. What should the security services and the police and other executive agencies of this country do if they know or suspect information received by them from overseas is the product of torture? Should they discard this information as 'tainted', and decline to use it lest its use by them be regarded as condoning the horrific means by which the information was obtained? The intuitive response to these questions is that if use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act in this way. Similarly, if tainted information points a finger of suspicion at a particular individual: depending on the circumstances, this information is a matter the police may properly take into account when considering, for example, whether to make an arrest. In both these instances the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.

So judges allow a much lower standard by the executive than they require from themselves. Lord Nicholls explains it this way-

> "The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do, they are of an essentially short-term interim character. Often there is an urgent need for action. It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the

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[15] Paragraph [11].
[16] Paragraph [12].
[17] Paragraph [17].
[18] Paragraph [18].
[19] Paragraph [19].
[20] Paragraphs [67]-[69].

> guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture."

It is not for me to venture any criticism of this reasoning, and I refrain from doing so. Like anyone else, I like to sleep safe in my bed.

Tailpiece

I began this article with a sensational extract from the *Daily Mail* saying that the Law Lords' decision in *A and others* had "blown a third gaping hole in the Government's anti-terror laws". Apparently this is not so. As I write, the Home Secretary Mr Charles Clarke announces that he welcomes the decision "which gives clarity about an extremely important and very difficult issue that requires more than an ill-formed reaction".[21]

So it's snooks to the *Daily Mail*. Perhaps the so-called constitutional crisis is over, and I can make this the last of my articles on it. We shall see.

[21] *Guardian*, December 13.