Opinions in *Liversidge v Anderson*

Explanatory note

The following is the text of the opinions of the Law Lords in *Liversidge v Anderson* [1941] 1 UKHL 1. The majority opinions are given first, followed by the dissenting opinion of Lord Atkin. This document has been prepared by Francis Bennion, who has numbered the paragraphs for ease of reference.

Majority opinions in *Liversidge v Anderson*

Viscount Maugham[*] 1. I propose first to deal with the important question of the construction of the words in reg. 18b, 'If the Secretary of State has reasonable cause to believe', etc. that is, the question whether, as the appellant contends, the words require that there must be an external fact as to reasonable cause for the belief, and one therefore capable of being challenged in a Court of law, or whether, as the respondents contend, the words, in the context in which they are found, point simply to the belief of the Secretary of State founded on his view of there being reasonable cause for the belief which he entertains.

2. I hold that the suggested rule [namely that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown] has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved.

3. The language of the Act of 1939 . . . shows beyond a doubt that Defence Regulations may be made which must deprive the subject 'whose detention appears to the Secretary of State to be expedient in the interests of the public safety' of all his liberty of movement while the regulations remain in force. There can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend . . . on the unchallengeable opinion of the Secretary of State.

4. The only safeguards, [are] that detention 'appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm' and that he himself is subject to the control of Parliament.

5. I think we should approach the construction of reg. 18B of the General Regulations without any general presumption as to its meaning except the universal presumption . . . that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention.

6. . . . in the absence of a context the prima facie meaning of such a phrase as 'if A.B. has reasonable cause to believe' a certain circumstance or thing, it should be construed as meaning 'if there is in fact reasonable cause for believing that thing and if A.B. believes it'. But I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that if the thing to be believed is something which is essentially one within the knowledge of A.B. or one for the exercise of his exclusive discretion, the words might well mean: if A.B. acting on what he thinks is reasonable cause (and of course acting in good faith) believes the thing in question. In the present case there are a number of circumstances which tend to support the latter conclusion.

7. First, reg. 18B (1) and reg. 18B (1A) alike require the Secretary of State to have reasonable cause to believe two different things . . . I do not doubt that a court could investigate the question whether

[*] [1941] 1 UKHL 1, pp. 2-19.

there were grounds for a reasonable man to believe some at least of those facts if they could be put before the court. But then he must at the same time also believe something very different in its nature, namely, that by reason of the first fact, 'it is necessary to exercise control over' the person in question. To my mind this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law. If then in the present case the second requisite, as to the grounds on which the Secretary of State can make his order for detention, is left to his sole discretion without appeal to a court, it necessarily follows that the same is true as to all the facts which he must have reasonable cause to believe.

8. Secondly, it is admitted that the Home Secretary can act on hearsay and is not required to obtain any legal evidence in such a case, and clearly is not required to summon the person whom he proposes to detain and to hear his objections to the proposed order. Since the Home Secretary is not acting judicially in such a case, it would be strange if his decision could be questioned in a court of law.

9. Thirdly . . . it is obvious that in many cases [the Home Secretary] will be acting on information of the most confidential character, which could not be communicated to the person detained or disclosed in court without the greatest risk of prejudicing the future efforts of the Secretary of State in this and like matters for the defence of the realm. A very little consideration will show that the power of the court . . . to give directions for the hearing of proceedings in camera would not prevent confidential matters from leaking out, since such matters would become known to the person detained and to a number of other persons. It seems to me impossible for the court to come to a conclusion adverse to the opinion of the Secretary of State in such a matter . . . it constitutes in my opinion a very cogent reason for thinking that the words under discussion cannot be read as meaning that the existence of 'reasonable cause' is one which may be discussed in a court which has not the power of eliciting the facts which in the opinion of the Secretary of State amount to 'reasonable cause'.

10. Fourthly, it is to be noted that the person who is primarily entrusted with these most important duties is one of the Principal Secretaries of State, and a member of the Government answerable to Parliament for a proper discharge of his duties. I do not think he is at all in the same position as for example a police constable. It is not wholly immaterial to note that the Secretary of State is provided with one or more advisory committees (subsection (3)) and that he has to report to Parliament at least once in every month as to the action taken by him and the Orders he has made, and as to the number of cases in which he has declined to follow the advice of the advisory committee (subsection (6)). These provisions seem to point to the fact that the Secretary of State may be answerable to Parliament in carrying out duties of a very important and confidential nature . . .[After discussing the possibility of a right of appeal] The objections to an appeal in a case of mere suspicion and in time of war are not far to seek; but however that may be, an application to the High Court, with power to the judge to review the action of the Secretary of State, seems to be completely inadmissible, and I am unable to see that the words of the regulation in any way justify the conclusion that such a procedure was contemplated.

11. The main argument for the appellant, apart from the contention as to the principle of construction applicable to a case where the liberty of the subject is concerned which I have already dealt with, is based upon the difference of language used as regards the belief of the Secretary of State in different sections of the regulations . . . These considerations are not without weight, though three observations fall to be made. The first is that Orders in Council making regulations pursuant to an Act of Parliament do not in general receive the same attention and scrutiny as statutes, and it is important to remember that though they may be annulled, they cannot be amended in either House (see section 8 of the Act), so that errors in language if detected cannot be corrected. There are of course no three readings and no committee stage in either House In my opinion it would be a mistake to attribute the same force to an alteration of language in an amending Order in Council as in an amending statute. The second observation is that even in statutes changes of words often occur without a change of meaning The third observation is that the words 'has reasonable cause to

believe' are not without a probable meaning. It may well have been thought desirable to draw the attention of the Secretary of State to the fact that in certain cases, and in particular in cases in which he was considering the serious step of depriving a person of his liberty for an uncertain period, he must himself have considered whether there was reasonable cause for forming the belief which would justify his action.

12. Apart however from these considerations, I am of opinion that the arguments above enumerated in favour of the construction for which the Attorney General contends must greatly outweigh any arguments which your Lordships have heard on the other side and that his construction must prevail. The result is that there is no preliminary question of fact which can be submitted to the courts and that in effect there is no appeal from the decision of the Secretary of State in these matters provided only that he acts in good faith. It follows, and it is not disputed by the appellant's counsel, that on this view the application for particulars must fail.

13. I can deal much more shortly with the question whether an onus is thrown on the first respondent, the Secretary of State who made the order for detention, to give evidence to show that he had reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The order on its face purports to be made under the regulation and it states that the Secretary of State had reasonable cause to believe the facts in question. In my opinion the well-known presumption *omnia esse rite acta* applies to this order, and accordingly, assuming the order to be proved or admitted, it must be taken prima facie, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with. It will be noted that on the view I have expressed as to the construction of the regulation, it is the personal belief of the Secretary of State that is in question, and that if the appellant's contention on this point were correct the same question would arise in the numerous cases where an executive order depends on the Secretary of State or some other public officer being 'satisfied' of some fact or circumstance. It has never, I think, been suggested in such cases that the Secretary of State or public officer must prove that he was so 'satisfied' when he made the order. Just as the fact that the act of the Secretary of State acting in a public office is prima facie evidence that he has been duly appointed to his office, so his compliance with the provision of the statute or the Order in Council under which he purported to act must be presumed unless the contrary is proved.

Lord Macmillan[†] 1. . . . To require that a cause of belief shall be reasonable necessarily implies a reference to some standard of reasonableness. Is the standard of reasonableness which must be satisfied an impersonal standard independent of the Secretary of State's own mind or is it the personal standard of what the Secretary of State himself deems reasonable?

2. Between these two readings there is a fundamental difference in legal effect. In the former case the reasonableness of the cause which the Secretary of State had for his belief may, if challenged, be examined by a court of law in order to determine whether he had such cause of belief as would satisfy the ordinary reasonable man, and to enable the court to adjudicate upon this question there must be disclosed to it the facts and circumstances which the Secretary of State had before him in arriving at his belief. In the latter case it is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called upon to disclose to anyone the facts and circumstances which have induced his belief or to satisfy anyone but himself that these facts and circumstances constituted a reasonable cause of belief . . . The appellant claims that he is entitled to explore the mind of the Secretary of State in order to find out what was the state of his information, in the hope that when this is revealed it may prove to be such that the court will hold it not to afford a reasonable cause for the belief which the Secretary of State professed to entertain, when judged by the standard of the ordinary reasonable man. I am thus brought back to the point from which I started, for the answer to the question whether the appellant is entitled to explore the mind of the Secretary of State depends entirely on the true interpretation of the language in which his powers are conferred upon him . . .

[†] Ibid., pp. 43-57.

3. Had the phrase run in impersonal form—'If there is reasonable cause to believe'—there would have been more justification for maintaining that there was no ambiguity, though I should not even so have regarded the matter as beyond question. But the regulation does not so run. It reads—'If the Secretary of State has reasonable cause to believe'—and thus at once introduces a personal, not an impersonal, requirement. Holding then, as I do, that the opening words of the regulation are open to interpretation, I now propose to seek what aid I can from the permissible sources of guidance. In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the Regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time . . .

4. A perusal of the whole Act and of the subsequent Act of 1940 is sufficient to satisfy any reader of the extraordinary interferences with the citizen's most cherished rights of person and property which in the view of Parliament may be necessary and proper in the present grave national danger. In considering the interpretation of the Regulation authorising the Secretary of State to make detention orders I therefore bear in mind that Parliament has expressly contemplated that he should by regulation be empowered to do so at his absolute discretion. I also note as indicative of the abnormal and temporary character of the legislation that it is expressly limited in duration; with its expiry the power of detention will of course also come to an end. In the next place, it is relevant to consider to whom the emergency power of detention is confided. The statute has authorised it to be conferred upon a Secretary of State, one of the high officers of state who by reason of his position is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office and who has access to exclusive sources of information. In a question of interpreting the scope of a power it is obvious that a wide discretionary power may more readily be inferred to have been confided to one who has high authority and grave responsibility . . .

5. But how could a court of law deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy not of fact? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no Court can share. As Lord Parker said in *The Zamora* [1916] 2 A.C. 77 at p. 107:

> 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public'.

6. I may also quote the words of Lord Chancellor Finlay in *Rex v. Halliday* [1917] A.C. 260 at p. 269:

> 'It seems obvious 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'. The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence . . .'

7. Were the person detained left without any safeguard, this might be an argument against holding that an absolute discretion has been conferred upon the Secretary of State. But the argument is the other way when it is found, as it is in this regulation, that elaborate provision is made for the safeguarding of the detained person's interests. I refer to the constitution of advisory committees to which any person aggrieved by a detention order may make representations . . . It suggests that this special procedure was introduced for the very reason that review by the law courts was excluded. Yet here again the paramount concern not to diminish the personal authority and responsibility of the

Secretary of State is evidenced by the recognition of his right to decline to follow any advice given to him by an advisory committee. Nevertheless, says the appellant, he must accept the decision of a court of law, however contrary to his own view. I note a further safeguard in the requirement that the Secretary of State must at least every month report to Parliament as to the action taken by him under the Regulation (including the number of persons detained under Orders made thereunder) and as to the number of cases, if any, in which he has declined to follow the advice of an advisory committee . . .

8. In a matter at once so vital and so urgent in the interests of national safety, I am unable to accept a reading of the regulation which would prescribe that the Secretary of State may not act in accordance with what commends itself to him as a reasonable cause of belief without incurring the risk that a court of law would disagree with him and also without the further liability that should the court do so or if he cannot consistently with his duty disclose to the court the grounds of his belief he will be mulcted in damages for false imprisonment as having acted outwith his powers . . .

9. The liberty which we so justly extol is itself the gift of the law and, as Magna Carta recognises, may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention . . . in my opinion the production by the Secretary of State of an order of detention by him ex facie regular and duly authenticated, such as the House has before it in this case, constitutes a peremptory defence to any action of false imprisonment and places upon the Plaintiff the burden of establishing that the order is unwarranted, defective or otherwise invalid . . .

Lord Wright[‡] 1. . . by the end of the seventeenth century the old common law rule of the supremacy of law was restored and substituted for any theory of royal supremacy. All the courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute. It is in Burke's words a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulation, like reg. 18B, which has admittedly the force of a statute . . . is alleged to limit or curtail the liberty of the subject or vest in the Executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given . . .

2. I confess that notwithstanding all my prejudices in favour of upholding the liberty of the subject, I have come to a clear conclusion that the courts below were right in refusing the particulars asked for. . . In . . . *Stuart v. Anderson and Morrison* (1941, 2 A.E.R. 665), Tucker, J., adopted in an action for unlawful imprisonment substantially what I regard as the true construction of reg. 18B. He said in effect that it was clear from the regulation that the decision on this difficult matter was not to be entrusted to one of His Majesty's Judges, or to any ad hoc tribunal, but to the Home Secretary alone, and that the court has no jurisdiction to sit as an appellate tribunal on any decision of the Home Secretary, much less has the court power to try any case itself, in order to see if it would have come to the same conclusion as the Home Secretary if the legislature had entrusted the matter to a Judge. The Judge adds what is obvious: that the court might no doubt be called upon to decide questions of bona fides or mistaken identity, if they should ever arise . . .

3. The construction of [reg. 18b] is the substantial foundation of [the *Greene* case] as well as this. I ought therefore to advert here briefly to what was said on that issue. Scott, L.J., who gave the leading judgment, was of opinion that the decision of the Home Secretary was executive, not judicial, and that the Regulation made him the final judge of the reasonableness of the causes on which he took action. 'The whole Regulation,' said the Lord Justice, 'deals with a topic which is necessarily of a highly confidential character. It invites a decision . . . by an executive Minister of the Crown, who occupies a position of utmost confidence; who has at his disposal much secret information which ought not to be made public—above all during a war—who is under a duty to keep that information and its sources secret; and, finally, who cannot be compelled in any court to

[‡] Ibid., pp. 58-74.

divulge what he considers ought not in the national interest to be divulged' Mackinnon, L.J., who agreed with his brethren, said that the power of the Home Secretary to issue a valid order depended on the fulfilment of a condition, the existence of a state of mind in the Home Secretary, i.e., that he had reasonable grounds for believing certain facts to exist, and by implication that he honestly entertained that belief. Goddard, L.J., I think, also treats the material issue to be what is the Home Secretary's state of mind.

4. I find support for this view in *Rex v. Halliday* (supra), a habeas corpus case arising during the last war on a regulation very similar in its general character to reg. 18B . . . The majority of their Lordships held that the regulation was not ultra vires. Lord Finlay (p. 269) said that the measure was not punitive but precautionary. It was directed to taking precautions during the war against the dangers of espionage and sabotage which experience showed to be so serious.

> 'No crime,' he said, 'is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The duty of deciding this question is by the order thrown upon the Secretary of State, and an advisory committee presided over by a Judge of the High Court [which was the machinery under reg. 14B] is provided to bring before him any grounds for thinking that the order may properly be revoked or varied.'

5. He added that the suggested rule as to construing penal statutes in favour of the liberty of the subject had no reference to a case dealing with an executive measure by way of preventing a public danger. These wise words were concurred in by Lord Dunedin, who added that preventive measures in the shape of internment of persons likely to assist the enemy might obviously be necessary, and Parliament had risked the chance of abuse which is always theoretically present when absolute powers in general terms are delegated to an executive body, thinking that the restriction of the powers to the duration of the war was a sufficient safeguard. Lord Atkinson said:

> 'However precious the personal Liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement. It must not be assumed that the powers conferred upon the Executive by this Statute will be abused.'

6. These speeches embody statements of principle very relevant to the present case, and notwithstanding differences in the particular enactments, furnish an important and direct precedent for the conferring of powers to exercise preventive detention upon his own responsibility on the Home Secretary, and subject to theoretical exceptions not relevant here, ousting the jurisdiction of the Court . . .

7. . . In reg. 18B the Home Secretary is expressly empowered to make a detention order in the circumstances specified. What are these circumstances? They are a belief or mental state of the Minister. Except for the word 'reasonable,' which I shall later discuss, there is no reference to anything but his personal belief, because I think that actual belief is implied by the words 'has reasonable cause to believe'. His belief is something personal to himself. The reasonable cause can only be material in so far as it is an element present to his mind which determines his own belief. The 'cause to believe' is part of the content of his mind. The matters specified, except hostile origins and perhaps hostile associations, are matters of opinion or judgment, not matters of fact. It is essentially a matter of expert and instructed conclusion or suspicion whether or not the acts in which the subject has been concerned were such as to be prejudicial to the public safety or defence of the realm. Even more obviously is the belief or decision that by reason thereof it is necessary to exercise control over him a matter of executive discretion.

8. It is clear that the control is preventive, not punitive, and that the action is not judicial, but executive. The regulation places on the Secretary of State a public duty and trust of the gravest national importance. As I understand the regulation, it is a duty which he must discharge on his own responsibility to the utmost of his ability, weighing on the one hand the suspect's right to personal liberty, on the other hand the safety of the State in the dire national peril in which during this war it has stood and stands. All the circumstances of national safety to which this House adverted in *Rex v. Halliday* (supra) are present in this war, only with vastly increased urgency and gravity, because German methods for effecting the poisonous infiltration among British or allied subjects of their

purposes and schemes have been immensely more subtle and ingenious than in the last war. Even a judge may be allowed to take notice of the import of words like Fifth Columnists and Quislings and the like. It is the duty of the Secretary of State to check these underground and insidious activities of the enemy and their consequences, whether they result in sabotage or in anti-British propaganda or in weakening the national effort and endurance . . .

9. These and other like considerations make Lord Finlay's observation which I quoted above, that no tribunal could be imagined less appropriate than a Court of Law for deciding these questions, at least as applicable to reg. 18B as it was to reg. 14B under the earlier statute. I might go further and say that the court is not merely an inappropriate tribunal, but one the jurisdiction of which is unworkable and even illusory in these cases. In my judgment, a court of law could not have before it the information on which the Secretary of State acts, still less the background of statecraft and national policy which is what must determine the action which he takes upon it.

Lord Romer[§] 1. . . after giving the matter my most earnest consideration I have come to the clear conclusion that the construction for which the respondents are contending must be accepted. The arguments in favour of the other construction addressed to this House as well by the counsel for the appellants in the present case as by the counsel for the appellants in the case of *Greene v. The Secretary of State for Home Affairs* are undoubtedly of considerable force. But to accede to them would, or might in certain cases, lead to a result that neither Parliament nor the framers of the regulation could by any possibility have intended. Take for instance the case of a person against whom an order for detention has been made because the Secretary of State believes him to have been recently concerned in acts prejudicial to the public safety or the defence of the realm. If that person brings an action for false imprisonment or moves for a writ of habeas corpus the Secretary of State may be placed in the dilemma of having to make public information the disclosure of which may imperil the security of this country, or of having to refuse to disclose it with the result that the person detained, who may be a dangerous 'Fifth Columnist', will be released and set at liberty to continue his traitorous activities. For if the question of whether the Secretary of State had reasonable grounds for the belief on which his order was founded is one for a court of law to determine, it is plain that the court must be placed in full possession of all the relevant facts, and if some of those facts are withheld from it, even though it be by reason of public policy, it will have no option but to say that no reasonable grounds for his belief have been shown to exist, and the release of the detained person will follow as a matter of course. The Emergency Powers (Defence) Act, 1939 and the regulation will in that particular case have failed to remedy the mischief against which they were designed. What that mischief was sufficiently appears from section 1(1) of the Act . . .

2. It was urged on behalf of the appellant that there is no reason to fear that the Secretary of State will ever find himself placed in the dilemma to which I have referred, inasmuch as the trial of an action for false imprisonment or the proceedings in habeas corpus can always be heard in camera. So they can. But I am not at all impressed by this argument. Where the information in the possession of the Secretary of State is of such a nature that this country might be seriously prejudiced if it came to the ears of the enemy, the serious risk of leakage would inevitably deter him from disclosing it. A man who is willing to risk his liberty and his life in maintaining a traitorous intercourse with the enemy is not likely to be deterred from passing on such information by the penalties attaching to a disclosure of what has taken place at proceedings in camera.

3. It was strongly urged on behalf of the appellant that the expression 'if he has reasonable cause to believe' and similar expressions are well known to English law, which has consistently regarded them as postulating the existence in fact of reasonable grounds for belief. I will assume that this is so. But the context and circumstances in which they are used may force one to the conclusion that even the most familiar words and expressions are used in other than their ordinary meaning, and this is the case here. For the person who is to have reasonable cause to believe is not some minor official holding a subordinate position. He is the Secretary of State. The acts moreover concerning which the belief is to be entertained are not some infractions of our municipal law committed in times of peace. They are (amongst others) acts prejudicial to the public safety or the defence of the realm committed

[§] Ibid., pp. 75-85.

in a time of grave national danger and of such a nature that 'by reason thereof' it is necessary to exercise control over the person suspected of committing them. Whether or not the acts of some individual appear to be of this description is a question of which the Secretary of State must plainly be a better judge than any court of law can be . . .

4. It is, of course, true as has been said by my noble and learned friend Lord Atkin that the words 'if a man has a broken ankle' do not and cannot mean 'if he thinks he has a broken ankle'. But the regulation is not dealing with the state of a man's body. It is dealing with the state of a man's belief, in other words with the state of his thoughts. The words 'if a man has a belief that a certain thing exists' necessarily mean 'if he thinks that the thing exists'. And the word 'has' may well have been used in the regulation for the purpose of indicating that it is throughout concerned with the impression that is created upon the mind of the Secretary of State and not with the impression created upon a court of law. Not only is the belief to be his. The estimate of the reasonableness of the causes that have induced such belief is also to be his and his alone.

Lord Atkin's dissenting opinion

Lord Atkin[**] 1. I have prepared an Opinion which is applicable both to the case of *Liversidge v. Anderson* and to the case of *Greene v. Secretary of State for Home Affairs*, and I will proceed to read it.

2. These cases raise the issue as to the nature and limits of the authority of the Secretary of State to make orders that persons be detained under reg. 18B of the Defence (General) Regulations, 1939. The matter is one of great importance both because the power to make orders is necessary for the defence of the realm; and because the liberty of the subject is seriously infringed: for the order does not purport to be made for the commission of an offence against the criminal law: it is made by an executive Minister and not by any kind of judicial officer: it is not made after any inquiry as to facts to which the subject is party: it cannot be reversed on any appeal: and there is no limit to the period for which the detention may last. The material words of the regulation are as follows:

> 'If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations and that by reason thereof it is necessary to exercise control over him he may make an order against that person directing that he be detained.'

3. They are simple words, and as it appears to me obviously give only a conditional authority to the Minister to detain any person without trial: the condition being that he has reasonable cause for the belief which leads to the detention order. The meaning, however, which for the first time was adopted by the Court of Appeal in the *Greene* case and appears to have found favour with some of your Lordships, is that there is no condition: for the words 'if the Secretary of State has reasonable cause' merely mean: if the Secretary of State thinks that he has reasonable cause. The result is that the only implied condition is that the Secretary of State acts in good faith. If he does that, and who could dispute it or disputing it prove the opposite, the Minister has been given complete discretion whether he should detain a subject or not. It is an absolute power which so far as I know has never been given before to the executive: and I shall not apologise for taking some time to demonstrate that no such power is in fact given to the Minister by the words in question . . .

4. In the *Liversidge* case the only question raised is in an action for false imprisonment brought by the plaintiff. Following on a defence setting up detention under an order of the Secretary of State the plaintiff asked for particulars of the reasonable cause. The only question raised on the summons before the Judge in Chambers was on the onus of proof: and as both courts held that the onus was upon the plaintiff to show that there was no reasonable cause the order for particulars was refused. It is apparent that if at that time the courts had accepted the present construction no question of onus would have arisen: for no issue as to the actual existence of reasonable cause could arise. In the *Greene* case the application was by summons for a writ of habeas corpus. The Divisional Court took the same view of the onus as was adopted in the *Liversidge* case: and held that in view of the Secretary of State's affidavit in answer to the plaintiff's evidence the court was not satisfied that there had been no reasonable cause. These matters became irrelevant on the construction adopted by

[**] Ibid., pp. 20-44.

the Court of Appeal on appeal in *Greene's* case. The view there taken was that the words 'reasonable cause' cannot 'properly be construed as imposing an objective condition precedent of fact on which a person detained would be entitled to challenge the grounds for the Secretary of State's honest belief: . . . in short, that the condition 'is subjective not objective'. This view of the case at once disposed of any objection to the different grounds adopted by the Divisional Court: and is of such overwhelming importance compared with the issues raised in both cases up to that point that I proceed at once to deal with it, reserving till later what has to be said on the original onus.

5. It is surely incapable of dispute that the words 'If A has X' constitute a condition the essence of which is the existence of X and the having of it by A. If it is a condition to a right (including a power) granted to A, whenever the right comes into dispute the tribunal, whatever it may be, that is charged with determining the dispute must ascertain whether the condition is fulfilled. In some cases the issue is one of fact: in others of both fact and law. But in all cases the words indicate an existing something the having of which can be ascertained. And the words do not mean and cannot mean 'if A thinks that he has'. 'If A has a broken ankle' does not mean and cannot mean 'if A thinks that he has a broken ankle': 'if A has a right of way' does not mean and cannot mean 'if A thinks that he has a right of way.'

6. 'Reasonable cause' for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights then ordinarily the reasonableness of the cause, and even the existence of any cause, is in our law to be determined by the Judge and not by the tribunal of fact if the functions deciding law and fact are divided. Thus having established as I hope that the plain and natural meaning of the words 'having reasonable cause' imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed, I proceed to show that this meaning of the words has been accepted in innumerable legal decisions for many generations: that 'reasonable cause' for a belief, when the subject of legal dispute, has been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal. I will go further and show that until June or July of this year in connection with this reg. 18B, there never has been any other construction even submitted to the Courts in whatever context the words are found. [Passage relating to the powers of arrest of constables omitted.]

7. Can any person doubt that in respect of these powers given by statute to arrest for suspicion or belief of offences or intentions to commit offences other than felonies, the constable is in exactly the same position as in respect of his common law power to arrest on reasonable suspicion of felony, and that there is an 'objective' issue in case of dispute to be determined by the court? No other meaning has ever been suggested. The words moreover do not relate merely to powers of arrest. In any context in which they are used they give rise to a similar issue of law or fact cognisable by the court . . . The subjective test would startle any Judge versed in trying crimes . . .

8. So far I have sought to establish that the words in question are not ambiguous, that they have only one plain and natural meaning, that with that meaning the words have been used at common law and in numerous statutes, and that whenever they are used the courts have given them the meaning I suggest, have considered that they give rise to a justiciable issue, and that as to the 'subjective' meaning now contended for by the Secretary of State it has never at any time occurred to the minds of counsel or judges that the words are even capable of meaning anything so fantastic.

9. I will now proceed to show that in the Defence of the Realm Regulations themselves the persons responsible for the framing of them, may I call them for this purpose the legislators, have shown themselves to be fully aware of the true meaning of the words, have clearly appreciated the difference between having reasonable cause to believe, and believing without any condition as to reasonable cause, and have obviously used the words 'reasonable cause' in order to indicate that mere honest belief is not enough. The object is plainly that of the common law and previous Statutes, to secure some measure of protection for the public by providing a condition which if necessary can be examined by the courts. In the first place, when the decision is left to the Minister or other executive authority without qualification, the words omit the reference to reasonable cause. 'If it appears to the Secretary of State that any person is concerned' etc. (order as to publication, 2C.), 'Secretary of State may if it appears to him necessary' (order as to giving information, 6(3)); '

If it appears to a Secretary of State to 'be necessary' (order as to protected places, 12 (1)); so in 14B, 16A, 8A, 21, 40B, 43B. The wording is sometimes varied with the same result: 'If the Secretary of State is satisfied' (publication in newspaper, 2D), (articles likely to assist enemy, 4C.); 'satisfied 'that it is necessary or expedient' (prohibition of balloons 7(2)), (restricting movements of persons, 18A), (organisation subject to foreign influence, 18AA); similar words, 35(1), 396.

10. In all these cases it is plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good faith. Now let us examine the regulations which import the words 'reasonable cause', some in reference to the commission of an offence, some to a defence to a charge, and some to the powers given to executive officers to do acts for the protection of the state. There are as many as 23, and I take them in numerical order, but it will be obvious to which class they belong. [Passage listing the 23 powers omitted.]

11. I have pointed out that the words in question have a plain and natural meaning, that that meaning has been invariably given to them in statements of the common law and in statutes, that there has been one invariable construction of them in the Courts, and that the Defence of the Realm Regulations themselves clearly recognise that meaning, using different words where it is intended that the executive officer should have unqualified discretion. I have not so far called attention to the wording of reg. 18b itself, which as I venture to think establishes within nine lines the distinction which the appellants rely on. '(lA): If the Secretary of State has 'reasonable cause to believe any person to have been or to be a member of' a certain organisation 'and that it is necessary to exercise control over him he may make' a detention order. The organisations in question are defined as follows:

> 'Any organisation as respects which the Secretary of State is satisfied that either (a) the organisation is subject to foreign influence or control or (b) the persons in control of the organisation have or have had associations with persons concerned in the government of or sympathies with the system of government of, any Power with which His Majesty is at war.'

12. The organisations therefore are impugned if the Secretary of State is satisfied as to their nature: but the person is not to be detained unless the Secretary of State has reasonable cause to believe that he is a member. The contrast is all the more marked when the words of reg. 18B(1) 'If the Secretary of State has reasonable cause to believe any person to be of hostile associations' are compared with the words of reg. 18B(lA) which I have just quoted, which in substance say, as to (b), if the Secretary of State is satisfied that the persons in control of the organisation have hostile associations. Why the two different expressions should be used if they have the same 'subjective' meaning no one was able to explain. I suggest that the obvious intention was to give a safeguard to the individual against arbitrary imprisonment Finally, if all these considerations failed, if there were a certain ambiguity in the words 'has reasonable cause to believe,' the question would be conclusively settled by the fact that the original form of the regulation issued in September, 1939, gave the Secretary of State the complete discretion now contended for: 'The Secretary of State if satisfied,' etc. But it was withdrawn and published in November, 1939, in its present form. It is not competent to us to investigate what political reasons necessitated this change; but it is at least probable that it was made because objection had been taken to the arbitrary power: and it was seen that Parliament might intervene. What is certain is that the legislators intentionally introduced the well- known safeguard by the changed form of words.

13. If then the natural construction of the words indicates an objective condition to the power of the Minister to detain, whose existence must therefore in case of dispute be cognisable by a Court of Law, what room is there for any other construction? I will deal with the suggested inconvenience to the Minister or possible prejudice to the interests of the State later on. I venture to quote the words of the present Lord Chancellor in *Barnard v. Gorman* (1941) 3 A.E.R. 45, a case turning on the meaning of the word 'offender' in a section of the Customs Consolidation Act, 1876.

> 'Our duty in the matter is plain. We must not give the statutory words a wider meaning merely because on a narrower construction the words might leave a loophole for frauds against the Revenue. If on the proper construction of the section that is the result it is not for judges to attempt to cure it. That is the business of Parliament.'

14. In that case the words were that ‘the offender may be either detained or proceeded against by summons’; and the question was whether the word ‘offender’ necessarily connoted that the person detained had in fact committed an offence, or included a person who was reasonably suspected of having committed an offence. Inasmuch as the very words referred to proceeding by summons which necessarily involved an investigation into the guilt or not of the person in question, it was considered by all the members of this House quite clear that the word was capable of both meanings, and could not have been used in the same sentence in the narrower meaning for detention and the broader for summons.

15. The respondents sought to find support in the decision in *R. v. Halliday* (1917, A.C. 260), in which this House affirmed a decision of the Court of Appeal and of a Divisional Court of which I happened to be a member. In that case the regulation undisputedly gave to a Secretary of State unrestricted power to detain a suspected person, though only on the recommendation of an advisory committee presided over by a judge. The argument for the Appellant was that the regulation was ultra vires because, though the words of the Defence of the Realm Act under which that regulation was made were plainly wide enough to enable a regulation to be made giving unrestricted powers, yet they ought to be read with a limitation in favour of liberty. Every judge who dealt with the case, including the noble Lords, refused to limit the natural meaning of the words, pointing out that a state of war would itself tend to confine the construction to the plain meaning of the words, and would discourage any attempt to make the words lean in favour of liberty. What that case has to do with the present I cannot see. No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any Minister with unlimited power over the person and property of the subjects.

16. The only question is whether in this regulation they have done so. In the present case there is in the first place no ambiguity at all. And in the second place, even if it were open to a judge to consider the question of expediency, what are the suggested grounds which compel him to adopt the hitherto unheard of ‘subjective’ construction? It is said that it could never have been intended to substitute the decision of judges for the decision of the Minister: or, as has been said, to give an appeal from the Minister to the courts. But no one proposes either a substitution or an appeal. A judge’s decision is not substituted for the constable’s on the question of unlawful arrest: nor does he sit on appeal from the constable. He has to bear in mind that the constable’s authority is limited, that he can only arrest on reasonable suspicion: and the judge has the duty to say whether the conditions of the power are fulfilled. If there are reasonable grounds the judge has no further duty of deciding whether he would have formed the same belief: any more than if there is reasonable evidence to go to a jury the judge is concerned with whether he would have come to the same verdict. For instance, the Minister may have reasonable grounds on the information before him to believe that a person is of ‘hostile origin.’ If so any remedy by the Courts either in an action for false imprisonment or by way of habeas corpus is impossible though it should subsequently be proved beyond doubt that the Minister’s information was wrong and that the person was of purely British origin. The only remedy for such a mistake is to bring objections before the advisory committee, whose advice is not binding, and to make representations to the Minister himself.

17. But it is said the grounds of belief will or may be confidential matters of public importance and that it is impossible to suppose that the Secretary of State was intended to disclose either his grounds or his information to the court. The objection is answered by the very terms of the regulation itself. By subsections (4) and (5) the detained person has the right to make objections to an advisory committee, and it is the duty of the chairman ‘to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the chairman sufficient to enable him to present his case.’ These grounds and particulars must of course be furnished to the chairman by the Secretary of State, for otherwise the chairman has no means of knowledge. What are these grounds and these particulars but the very facts constituting the ‘reasonable cause’ which on the true construction might have to be investigated by the court? I find myself unable to comprehend how it can be compulsory, as it is, to furnish the objector before the committee with the grounds and particulars, and yet impossible in the public interest to furnish the objector with them in court. The supposed difficulty is grossly exaggerated, even if it is not a fantasy.

18. The present case of *Greene* illustrates this. On May 22, 1940, he was detained under an order which recited that the Home Secretary had reasonable cause to believe him to be a person of hostile association and that by reason thereof it was necessary to exercise control over him. On July 15 1940, he was served with a document headed

> 'Home Office, Advisory Committee, 6 Burlington Gardens, W.1. Reasons for order under Defence Regulation 18B in the case of Benjamin Greene. The order under Defence Regulation 18B was made against you for the following reasons. The Secretary of State has reasonable cause to believe that you have been recently concerned in acts prejudicial to the public safety and the defence of the realm and in the preparation and instigation of such acts and that it is necessary to exercise control over you. Particulars'. Then follow six paragraphs of particulars referring to his being concerned in the management and control of two named organisations and of the nature of speeches and writings of his, that he was privy to the activities of a named person in the publication of pro-German propaganda in a named periodical, that he was subsequent to the outbreak of the war communicating with persons in Germany concerned in the government of Germany, that he was desirous of establishing a National Socialist regime in Great Britain with the assistance, if received, of German armed forces, that he freely associated with persons of German nationality who he had reason to believe were agents of the German Government, and that there was reasonable cause to believe that he desired and intended to continue the actions aforesaid.

19. It is true that the 'reason' given was not that stated in the order, but it is explained that this was a mistake, and the 'particulars' are vouched in an affidavit of the Home Secretary as particulars of the original reason of 'hostile' association. It is obvious that no important reasons of State prevented the Home Secretary from disclosing the causes of his belief. But it is said that the sources of his information may be confidential. I think this in some cases is likely to be so: but I cannot think that this creates any difficulty. The Home Secretary has the right to withhold evidence that he can assure the court is confidential and cannot in the public interest be disclosed. He has in this case and in others sworn affidavits to the effect that the information he acted on was the result of reports and information from persons in responsible positions experienced in investigating matters of this kind: and that he accepted their information. Before the era of 'subjective' cause, and indeed afterwards, the Divisional Court and the Court of Appeal have accepted these affidavits as satisfactory proof of the existence of reasonable cause. This was not a view favoured by the Attorney General in the present case, for it weakens his case as to public mischief. But in fact if the affidavits are supported by statements by or on behalf of the Secretary of State vouching the necessity of withholding the names of the witnesses in the public interest, I personally agree with the former decisions and cannot see why if the Courts believe the Home Secretary and accept the substance of the information as constituting reasonable cause they should not be satisfied that reasonable cause has been shown.

20. The source of the information is merely a question going to the credibility of the person informed, and no doubt to the issue of reasonableness. But in police matters it is often withheld: and if for instance a constable defending an action for false imprisonment or wrongful arrest were to give in evidence that an informant whom he believed and had proved to be trustworthy had told him that the plaintiff was present at the scene of the felony in incriminating circumstances and the constable was corroborated by his inspector and sergeant but he declined to give the name of the informant, I think it clear that the court might accept the evidence as proving reasonable cause for suspicion. I agree with the Divisional Court in the case of *Greene*, accepting what appears at that time to be the contention of the Home Secretary, that the Home Secretary's affidavit establishes the particulars as constituting reasonable cause; I think that the members of the Court of Appeal, though infected with the 'subjective' virus, took the same view. In addition to this it must be remembered that by section 6 of the Emergency Powers (Defence) Act, 1939, there is complete power in the court to order proceedings to be heard in camera, and to prohibit the disclosure of any information concerning them. I cannot believe that proceedings for false imprisonment or for a writ of habeas corpus present more difficulties of this kind than does the trial of a spy.

21. Lastly, on this question of expediency I would recall that for months after the regulation came into force this suggested difficulty never presented itself to the minds of the Home Secretary and his

advisers: but on the contrary in *Ex parte Lees* (1941) 1 K.B. 72, the Home Secretary when represented by the present Solicitor General and the same junior counsel as in this case frankly accepted the burden of proving reasonable cause.

22. It was further said that the provision of safeguards in the regulation itself, the resort to the advisory committee, the providing of 'reasons and particulars', the right to make representations to the Secretary of State, indicate that the original power to detain was unconditional. But how unconvincing this appears. These safeguards are nothing compared with those given to a man arrested by a constable, who must at once be brought before a judicial tribunal who investigates the case in public. And yet the constable or anyone else empowered to arrest on reasonable cause is liable to an action if he has exceeded his authority.

23. What appears to me to be the only argument as to expediency put forward by the Respondent which has any weight was that derived from the second point of the powers given: 'reasonable cause to believe . . . that by reason thereof it is necessary to exercise control over him'. Adroitly the Attorney General dealt with this first. Can it be supposed, he said, that it was intended that the accumulated experience, instinct, knowledge of the Minister in coming to a decision on this matter could be replaced by a judgment of a court of law? But first things first. Before this decision is made there has to be a valid belief that the subject was of hostile origin, association, etc. Once this is established it is very unlikely that a Court would not in most cases accept as reasonable the Home Secretary's decision to detain.

24. But even on this part of the machinery for detention there is ample scope for an independent inquiry. Let us take the case of 'hostile origin'. If a man or a woman of hostile origin made the case that he or she had been loyal subjects for 30 or 40 years, were supporters of this country's war effort and had never taken any part in any hostile activity, would it not be open to the courts to consider whether by reason of the hostile origin it was necessary to control them? Could the Home Secretary support a mere order to detain all persons of hostile origin regardless of age, sex or antecedents? Or could he support an order against a subject who had been a member of an organisation which the Home Secretary was satisfied was now within lA(a) or (b) but had ceased to be for years and had genuinely disclaimed any sympathy with its present objects? It must be remembered that at the time of the issue of the regulation organisations of both left and right were under suspicion, and there may well have been good reasons for granting protection to persons who had merely at some time or other been members of them without more.

25. I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive. Their function is to give words their natural meaning, not perhaps in war time leaning towards liberty, but following the dictum of Pollock C.B. in *Bowditch v. Balchin* (1850, 5 Ex. 378), cited with approval by my noble and learned friend Lord Wright in *Barnard v. Gorman* (1941, 3 All E.R., at p. 55), 'in a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the Statute'. In this country amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of Kings Bench in the time of Charles I.

26. I protest, even if I do it alone, against a strained construction put upon words with the effect of giving an uncontrolled power of imprisonment to the Minister. To recapitulate. The words have only one meaning: they are used with that meaning in statements of the common law and in statutes; they have never been used in the sense now imputed to them: they are used in the defence regulations in the natural meaning: and when it is intended to express the meaning now imputed to them, different and apt words are used in the defence regulations generally and in this regulation in particular. Even if it were relevant, which it is not, there is no absurdity or no such degree of public mischief as would lead to a non-natural construction.

27. I know of only one authority which might justify the suggested method of construction.

> 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean different things.' 'The question is,' said Humpty Dumpty, 'which is to be master— ' that's all.' (Looking Glass, c. vi.)

28. After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has.' I am of opinion that they cannot, and that the case should be decided accordingly. If it be true, as for the foregoing reasons I am profoundly convinced it is, that the Home Secretary has not been given an unconditional authority to detain, the true decision in the two cases before us ought not to be difficult to make. In the Liversidge case the Plaintiff has delivered a statement of claim averring that he was wrongly imprisoned by the Defendant the Secretary of State. The defendant traverses the wrongful imprisonment and contents himself with the admission that he ordered the plaintiff to be detained under the regulation. The plaintiff asked for particulars of his reasonable cause to believe (a) as to hostile associations, (b) as to necessity to control him. In my opinion the plaintiff is not bound to rely on the traverse, though as a matter of pleading that, in my opinion, amounts to a positive allegation of authority to detain for which particulars may be asked.

29. The plaintiff's right to particulars however is based upon a much broader ground, a principle which again is one of the pillars of liberty in that in English law every imprisonment is prima facie unlawful, and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot in such proceedings as the present be questioned.

30. My noble and learned friend Lord Macmillan suggests that under a more exacting system of pleading the plaintiff: would have to aver the absence of reasonable grounds on the part of the Secretary of State. The English system of pleading was exacting enough a hundred years ago: but then and ever since, by reason of the presumption I have stated, the averment in an action against a constable for false imprisonment was in the form adopted in the present case, and the Defendant had to plead his justification with particulars. (*Holroyd v. Doncaster* (1826, 3 Bing, 492), and the cases cited earlier in this judgment.) There is no distinction of persons. The Defendant has to justify with particulars, and in my opinion the Plaintiff was clearly right in asking for particulars. If the defendant was able to satisfy the court that he could not give particulars in the public interest, the court would either not order particulars or, if the objection came after the order, would not enforce it. There was no evidence of this kind at the hearing of this summons, and in my opinion the appeal ought to be allowed and an order made in the terms of the summons.

31. In the *Greene* case the circumstances are not the same. It may be that in an application for a writ of habeas corpus the applicant could rely on the presumption against imprisonment and seek to throw the onus without more on the defendant. But in practice he does not do so. He puts material before the court to lead to the conclusion that the imprisonment was unlawful, and that is what the applicant did here. The Secretary of State appears to have been ready to meet the allegation of absence of reasonable cause. He referred to his order, to the particulars given by the advisory committee, which he insists were correct, and he made the affidavit already referred to that he acted on the information of reliable informants. His affidavit does not claim privilege in the correct form; but he instructed the Attorney General on his behalf to claim privilege which in this case, in the absence of any objection to this course by the applicant, must be taken to be sufficient. The Divisional Court were of opinion that, in view of this evidence, the applicant failed to satisfy them that there was an absence of reasonable cause. I have given my reasons for agreeing with them; and I would go further and say that in view of the particulars, as to which I take it to be proved that the Secretary of State had information which he could reasonably believe, the Secretary of State has established reasonable cause for believing both the hostile associations and the necessity to control.

32. Of course, if the subjective theory is right and the Secretary of State has indeed unconditional power of imprisonment, it was enough for him to say that he exercised the power. But it seemed to be suggested in argument that even if the power were conditional, yet it would be a good return by the Secretary of State to say that he had made the order in the terms of the regulation. This seems to

me, with respect, to be fantastic. A Minister given only a limited authority cannot make for himself a valid return by merely saying, 'I acted as though I had authority.' His *ipse dixit* avails nothing. A constable would make no valid return by saying 'I had reasonable cause for my arrest,' or 'I served the criminal at the time with a written notice that I was arresting him for reasonable suspicion of felony.' However, on my view of this the Secretary of State has made a return sufficient to indicate that the Divisional Court were right in refusing to order the writ to issue. I think that the appeal in this case should be dismissed.