6. English Law and Evidence Obtained by Torture: Vindication of Basic Principle or Judicial Abnegation? Implications of *A* v. *Secretary of State for the Home Department.*

Patrick Birkinshaw

> There can be few issues on which international legal opinion is more clear than on the condemnation of torture.[1]
>
> Unhappily, condemnatory words are not always matched by conduct.[2]

Many of the chapters in this book deal with the question of torture in a philosophical, pragmatic, jurisprudential, socio-cultural or broad contextual sense. The present chapter deals with a specific point of law raised in the case *A(FC)*[3] but to understand what was involved in resolving that point of law, it is necessary to outline some features behind the background to present terrorist activity and the UK government's response to international terrorism. The point of law raised is of vital importance. Furthermore, if the arguments of Dershowitz are supported, namely as torture is widely practised in 'civilized states' we should stop being hypocritical and torture should be made lawful under strict judicial conditions,[4] it would be difficult to see why the next step should not be taken: that statements extracted by torture should be admissible in judicial proceedings – the point at issue in *A(FC)*. And if statements, why not confessions? The universal condemnation of torture since the Second World War would then count for nothing.[5] Behind the judgment of the appellate committee of the House of Lords is a warning from Holdsworth: 'Once torture has become acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it.'[6]

1 *A (FC)* v. *Secretary of State for the Home Department* [2005] UKHL 71 per Lord Bingham para. 33.
2 Ibid, per Lord Nicholls para. 67.
3 See note 1 above.
4 A. Dershowitz *Shouting Fire: Civil Liberties in a Turbulent Age* (Boston, Little Brown and Company, 2002). The debate about torture is legion but an antidote to Dershowitz is J. Waldron's 'Torture and Positive Law: Jurisprudence for the White House' *Columbia Law Review* 105 (2005): 1681-1750.
5 See D. M. Rejali *Torture and Democracy* (Princeton, Princeton University Press, 2008).
6 W. F. Holdsworth *History of English Law* (London, Methuen, 1922), vol 5 pp. 194-95.

A. Terrorism in the UK

Despite the long history of Irish Republican terrorism within the United Kingdom it is surprising that the decision in *A(FC)* raised points of law that had not previously been addressed by British or Northern Irish courts. Were statements obtained by torture admissible before a judicial tribunal in the UK? Previous case law and legislation had focused upon the admissibility or otherwise of *confessions* obtained by improper means and s. 76 of the Police and Criminal Evidence Act 1984 excluded such confessions. The situation in *A(FC)* raised the question of the admissibility of evidence from a third party, which had allegedly been obtained by torture overseas without the involvement of British agents and which had been used as intelligence to order executive detention of suspected terrorists within the UK. That novel point had arisen because of the global context in which terrorism operated and because of the contention that national security was now an internationally influenced concern and not simply a national one. That was the result of the House of Lords decision in *Rehman* v. *Secretary of State for the Home Department* which had given a new meaning to terrorism and actions contrary to the interests of national security.[7]

Within this evolving context, governments faced the problem of having within their jurisdiction individuals suspected of terrorist activity who were not citizens of the UK but who could not be deported to their place of origin or elsewhere because of the risk of breaches of the European Convention on Human Rights (ECHR) in the way they would be treated in those countries, specifically torture or inhuman and degrading treatment under Article 3 ECHR. This was the effect of the Strasbourg Court of Human Rights judgment in *Chahal* v. *UK*.[8] There was correspondingly not enough evidence to bring before a criminal court to offer the prospect of a successful prosecution for criminal offences. Forms of executive detention were therefore introduced in the UK under the Anti-terrorism, Crime and Security Act 2001 s.23.[9] It was in procedures leading to such detention before the Special Immigration Appeal Commission (SIAC) that the issue of admissibility of the evidence was called into question.

The present war on terrorism had therefore raised the question of detention and admissibility of evidence. However, the British government had a long history of involvement in counter terrorist activities and the strain that such involvement exerted on values of liberal democratic society and security. The conflict brought about by British involvement in Ireland has a long heritage. Internment (detention without trial) in Northern Ireland was re-introduced between 1971-75 and powers of detention without trial were introduced in 1975;[10] Diplock Courts (a criminal trial without a jury for 'scheduled' offences) operated for over thirty years until 2007.

7 [2002] 1 All ER 122 (HL).

8 (1996) 23 EHRR 413 – there was intervention by UK in July 2007 to overrule this decision in *Ramzy* v. *The Netherlands* Application No. 25424/05.

9 Detention followed certification by the Secretary of State under s. 21.

10 Removed by the Northern Ireland (Emergency Provisions) Act 1998 s. 3.

Although the question in *A(FC)* had not been squarely confronted by British courts, the use by British forces and officials of techniques for questioning interned suspects in Northern Ireland had attracted the attention of the European Commission and Court of Human Rights. In *Ireland* v. *UK*[11] five techniques of sensory deprivation practised on internees amounted to degrading and inhumane treatment but, by majority, they did not amount to torture. The former European Commission on Human Rights did establish unanimously that the combination of techniques amounted to torture.

B. Further Developments

Before examining how the operation of procedures introduced in 2001 precipitated the legal challenge in *A(FC)*, some other important developments have to be examined. The UK Security and Intelligence Services had been brought within the remit of statutes beginning in 1989 and continuing with legislation in 1994, 1996 and the Regulation of Investigatory Powers Act 2000. Some limited forms of Parliamentary oversight via the Security and Intelligence Committee were introduced in 1994. Until this legislation, the services operated clandestinely under the royal prerogative with only minimal statements concerning them made to Parliament. Information about operations and identities were strictly prohibited. Under the prerogative, the services as intelligence gathering bodies had no executive powers and the security service acted through the agency of domestic police forces where necessary. As well as allowing some more information to be published about the services, albeit very limited, the legislation was necessary to give the services powers to carry out what would otherwise be unlawful actions, both at home and abroad. In order not to allow the operations of the services to be exposed, evidence obtained by telephone or email intercepts cannot be admitted as evidence in a court of law. The Anti-terrorism, Crime and Security Act 2001 does allow evidence which is otherwise inadmissible to be used in proceedings before SIAC which hears appeals from suspected terrorists and this was seen as crucial in the Court of Appeal judgment in *A(FC)*. This special dispensation was given, as we shall see, a wider significance.

The further development was the decision in *Pinochet (No. 1)*.[12] The case involved the former dictator and president of Chile, Pinochet. As is widely known, a Spanish prosecutor sought his extradition from England to Spain to face various charges covering murder, torture and kidnapping of Spanish citizens resident in Chile during Pinochet's dictatorship. The case made three appearances in the House of Lords. The first case provided a wide ranging judgment to the effect that *ius cogens* (binding and generally accepted norms of international law) and customary in-

11 (1978) 2 EHRR 25: these involved 'wall-standing' under stress, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink.

12 *R* v. *Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No. 1)* [1998] 4 All ER 897 (HL).

ternational law determined that a former head of state could not be immune from prosecution for acts for which he was responsible and which did not form a part of his official functions – immunity only applied to acts performed by him in the exercise of his official functions as a Head of State – acts of torture and hostage taking could not be so regarded. The judgment imposed no limits in relation to the time of Pinochet's lack of immunity while in office. The judgment was nullified by a different panel of the appellate committee of the House of Lords because of the association of one of the judges with a body that had intervened in the case. This was unprecedented. In *Pinochet (No. 3)*,[13] the Law Lords ruled that the combined effect of s.134 Criminal Justice Act 1988[14] and the Convention against Torture meant that there would be no immunity from charges of torture for a former head of state of Chile after Chile signed the Convention in 1988. While many of the offences ruled extraditable in the first hearing were now inoperative, some were still 'live' and Pinochet's extradition was ordered for these offences.[15] Because of intervention by the Home Secretary, he was not, however, extradited to Spain.[16]

C. Special Immigration Appeals Commission (SIAC)

SIAC was introduced by legislation in 1997 as a response to the decision in *Chahal* by the Court of Human Rights (above).[17] That case centred on the inadequacy of the procedures adopted by the British authorities to determine whether a person whose presence in the UK was deemed not to be conducive to the public good on the grounds of national security should be deported. The procedure amounted to a breach of Art 5(4) ECHR[18] so that Chahal's detention was unlawful. He could not be deported because this would amount to a breach of Art 3 ECHR.[19] The SIAC was influenced to some extent by Canadian procedures. The rules of procedure of SIAC had the imprimatur of no less a figure than Lord Lester QC – a long standing champion of human rights protection. He described them in Parliamentary proceedings as 'a fair compromise' between the liberties of an individual and national security.[20] The Commission is chaired by a High Court judge and since 2001 is a superior court

13 *R* v. *Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No. 3)* [1999] 2 All ER 97 (HL).
14 S. 134 implemented the Convention against Torture in the UK.
15 [1999] 2 All ER 97 (HL) by virtue of s. 2 Extradition Act 1989.
16 *Pinochet (No. 3)* was distinguished in *Jones* v. *Kingdom of Saudi Arabia* [2006] UKHL 26 when the House of Lords refused to allow the Kingdom of Saudi Arabia and its officials from being sued in civil law in English courts for damages for alleged acts of torture inflicted on British citizens in Saudi Arabia. The court ruled this would be contrary to state immunity.
17 Special Immigration Appeals Commission Act 1997 and the procedural rules contained in SI 1034/2003 and SI 1285/2007.
18 The right to a 'speedy challenge' before a court.
19 T. Poole 'Courts and Conditions of Uncertainty in "Times of Crisis"' LSE Legal Studies Working Paper No. 7/2007.
20 HL Debs. vol 580 cols. 1437-38.

of record. SIAC had been criticized by the House of Lords in *Rehman* for taking too prescriptive an approach when reviewing decisions by the Secretary of State on questions of 'the interests of national security' lying behind a deportation or detention -- this was a matter of judgement peculiarly within the area of expertise of the Secretary of State and those who advised him although a decision could be reviewed on grounds of unfairness or perversity.[21] SIAC's task is to establish: were there reasonable grounds for the Secretary of State's belief or suspicion and *not* whether the latter had made a proper judgement call on what the interests of national security required and what amounted to terrorism? As we shall see below, the procedures in SIAC weigh heavily against the appellant and are heavily compromised because of national security implications. This is common throughout administrative decisions in the war on terror.[22]

The 1997 Act witnessed the introduction of 'special advocates' or counsel to deal with sensitive evidence that could not be disclosed to the suspected terrorist 'deportee'. Special counsel cannot meet or have contact with the 'client' after the special counsel has seen the closed evidence. Although such a meeting was stated to be theoretically possible it was not allowed as a practice. Examination and cross examination of witnesses may take place in the absence of the appellant. The appellant may receive a summary of evidence but this will not include items that should remain 'closed'. The limitations of special counsel procedure from the point of view of fairness were graphically illustrated by Lords Bingham and Steyn in *Roberts* v. *Parole Board*[23] although the two judges were in the minority in the decision. The security and intelligence parties involved in SIAC proceedings operate under internal guidance on what should be disclosed and material helpful to the appellant should be disclosed, but not to the appellant or his lawyers. This self-regulating ordinance operated under the control of one of the parties to the process.[24] SIAC can hear evidence which is not otherwise admissible in legal proceedings.[25] This would

21 [2001] 4 All ER 122 (HL).

22 *R (Gillan)* v. *Commissioner of Metropolitan Police* [2006] UKHL 12 where in making decisions in relation to security and individual liberties Lord Bingham said there are 'what appear to be considered and informed evaluations of the terrorist threat on one side and effectively nothing save a measure of scepticism on the other. There is no basis on which the respondents' (Government's) case can be rejected. This is not a question of deference but of "relative institutional competence"' (at para. 17).

23 [2005] UKHL 45. Lord Woolf ruled use of special counsel in Parole Board hearings was permissible, providing 'If a case arises where it is impossible for the Board both to make use of information that has not been disclosed to the prisoner and, at the same time, protect the prisoner from a denial of his fundamental right to a fair hearing then the rights of the prisoner have to take precedence, but we have not in my view reached the stage in this case where we can say this has happened' (paras. 78 and 62).

24 *A* v. *Secretary of State for the Home Department* [2004] EWCA Civ 1123 per Laws LJ paras. 278-280.

25 SIAC (Procedure) Rules 2003, SI 1034, r. 44(3).

be directed to the exclusion in English law of 'hearsay' evidence in criminal trials.[26] Some of this, however, was the evidence allegedly obtained by torture. An exception was made so that evidence obtained by intercepts was allowed to be heard.[27] The procedures represent an attempted balance between the requirements of justice and fairness and secrecy in the public interest. The names of witnesses or informers or agents or the latter's methods for instance could not be disclosed.

D. Detention and Control Orders

It should be noted that the proceedings in *A(FC)* had been preceded by a decision of the House of Lords concerning the same appellants in which the UK government's post 9/11 reaction to the shocking events in the United States, the Anti-terrorism, Crime and Security Act 2001 s.23 and indefinite detention without trial for being a suspected terrorist had been challenged.[28] This involved an appeal from the decision of SIAC which had allowed the appellants' appeal against detention. The House of Lords in the detention case reversed the Court of Appeal which had upheld the legality of the detentions.[29] The Law Lords declared that s.23 was incompatible with the Convention because it amounted to breaches of Articles 5 (unlawful detention) and 14 (discrimination in enjoyment of protection of rights) of the ECHR on the grounds of proportionality and that they were discriminatory. The orders derogating from Art 5 ECHR were quashed although apart from one judge the Law Lords upheld the Home Secretary's declaration of a state of emergency which was a necessary condition for derogation.

The government's eventual response to this adverse decision on detention was to introduce a regime of control orders (CO) under the Prevention of Terrorism Act 2005. These are subject to the Secretary of State having reasonable grounds for believing that an individual is or has been involved in terrorism related activity and the Secretary of State considers a CO necessary for purposes connected with protecting members of the public from a risk of terrorism. They involve confinement to one's home for a fixed period each day and other restrictions such as electronic tagging. In certain circumstances, the Court of Appeal ruled that they may amount to a breach of Article 5.[30] This ruling on control orders caused the then Home Secretary to suggest that protection of the ECHR should be removed in some areas. If there were a

26 Under special circumstances, hearsay may be admitted in criminal trials: ss. 114-118 Criminal Justice Act 2003.

27 RIPA s. 18(1)(e).

28 *A* v. *Secretary of State for the Home Department* [2004] UKHL 56. These powers were subject to annual renewal. They are now replaced by control orders as explained which are also subject to annual renewal. An independent reviewer is appointed under the Prevention of Terrorism Act to review the operation of the Act.

29 *A* v. *Secretary of State for the Home Department* [2002] EWCA Civ 1502.

30 *Secretary of State for the Home Department* v. *JJ* [2006] EWCA Civ 1141; see also *Secretary of State for the Home Department* v. *E* [2007] EWHC 233 (Admin)

derogation from the Convention, only the courts could make a control order. Otherwise they are made by the Secretary of State and challengeable in the Administrative Court of the High Court. The Court of Appeal, however, ruled separately that the procedures involved in making control orders, very similar to the SIAC procedures, which used closed evidence which was not shown to the subject of the order and the use of special counsel did not constitute a breach of Article 6 ECHR which provides a right to a fair trial in the determination of one's civil rights.[31] The Administrative Court originally ruled that there had been a breach of Article 6 but was overruled by the Court of Appeal.

The House of Lords subsequently upheld the decision of the Court of Appeal in holding that a non derogating control order of 18 hours did amount to detention and breached Article 5 ECHR.[32]

However, in relation to Article 6, the majority of Law Lords disagreed with the Court of Appeal and were not convinced that the prohibition on disclosing 'closed material' to the subject of a control order would allow a fair procedure to take place within the terms of Article 6 and the civil limb of justice. There may be cases where the use of special advocates and other devices could not overcome a basic lack of fairness.[33] Each case would have to be dealt with carefully to ensure existing procedures comply with fairness and with Article 6.[34] The Council of Europe Commissioner for Human Rights and UK Parliamentary Joint Committee on Human Rights 'had difficulty in accepting that a hearing could be fair if an adverse decision could be based on material that the controlled person had no effective opportunity to challenge or rebut.'[35] Para 4(3)(d) of the Schedule to the 2005 Prevention of Terrorism Act (which requires a court not to order disclosure of material which it would be against the public interest to disclose) should be read and given effect under s.3 HRA 1998[36] 'except where to do so would be incompatible with the right of the controlled person to a fair trial' said Baroness Hale.[37] She emphasized that evidence used against the subject of the order may be obtained by torture and as we shall see the burden is upon the challenger to prove that the evidence was obtained by torture. It is particularly difficult for a person subject to a CO to do this.[38] Intercept material may be used on CO proceedings and the features involved in SIAC proceedings will be present, ie secrecy. At para 66 of her judgment, she gave examples of how the judge and special advocate should stringently test the material and the advocate should be allowed to call witnesses to rebut the closed material noting the tendency

31 *Secretary of State for the Home Department* v. *MB* [2006] EWCA Civ 1140.
32 *Secretary of State for the Home Department* v. *JJ* [2007] UKHL 45.
33 See note 22 above.
34 *Secretary of State for the Home Department* v. *MB (FC)* [2007] UKHL 46. The procedures are in the Prevention of Terrorism Act 2005 Schedule para. 4 and Part 76 CPR.
35 Per Lord Bingham in *MB* at para. 41.
36 Which states that legislation shall be interpreted in so far as this is possible to be consistent with the ECHR.
37 Para. 72.
38 Para. 73.

to over emphasize the claim for secrecy in terrorist cases.[39] Some of these instructions seem to contradict the wording of Civil Procedure Rules 76.25 which govern CO procedures and the Secretary of State can object to the special advocate communicating with the subject of the CO. The case was remitted to the Administrative Court for reconsideration in the light of this guidance.

E. A(FC) *in SIAC and the Court of Appeal*

Having set the context of the *A(FC)* decision we come to the crucial point of law. Can evidence obtained by torture be admissible before SIAC? SIAC itself decided that torture only went to the 'weight' of evidence, i.e. its reliability, not its admissibility.[40] The Court of Appeal upheld this ruling.[41] The court ruled that there was no precedent against it; the authorities only covered confessions extracted from the defendant. International prohibitions (Art 15 Covenant against Torture (CAT)) concerning non admissibility of evidence extracted by torture) had not been implemented to that extent in domestic law and did not amount to *ius cogens*. SIAC was not in breach of Article 6 ECHR because of the nature of its task – it was not determining a fact: was the detainee a terrorist? It was asking: were there reasonable grounds for the Secretary of State's belief or suspicion that the detainee was a terrorist and his presence in the UK was against the interest of national security? How this can be interpreted as a non judicial act carried out by a judicial tribunal chaired by a High Court judge beggars belief although the criticism of the House of Lords in *Rehman* had emphasized the limits of the capability of SIAC in second guessing judgements about national security. This was noted above. The receipt of evidence by torture was not 'offensive' under Article 6 given the limited nature of the SIAC's review of the Secretary of State's belief or suspicion and its support by 'reasonable grounds'.[42] Article 6 ECHR was not subject to Article 15 CAT because 'a general requirement to interpret Article 6 in harmony with other rules of international law does not make compliance with those other rules a condition of compliance with Article 6.' That, said Laws LJ 'proves too much'.[43] There are objections to these points that were considered by the House of Lords on appeal, and some that were not (see below) but one of the most telling points was raised by Neuberger LJ, the dissenting judge, who saw disparities between the common law and the position under the European Convention in the judgment of the majority:

39 Citing S. Turner and S. Schulhofer *The Secrecy Problem in Terrorism Trials* (New York, Brennan Centre for Justice, NYU School of Law, 2005).
40 29 October 2003. SIAC gives open judgments and closed judgments.
41 *A* v. *Secretary of State for the Home Department* [2004] EWCA Civ 1123: a 2-1 majority decision. The decision was made after the Court of Appeal decision involving detention of the parties involved in A(FC) but before the House of Lords decision reversing the Court of Appeal ruling detention was unlawful.
42 Para. 260.
43 Para. 270.

> If my [dissenting] conclusions on the issue so far are correct, they may be said to be somewhat ironic: the common law of England, which has a particularly good record as to the vice of torture since 1640, does not exclude evidence obtained by torture, whereas the law of Europe, where the abolition of torture is rather more recent, would exclude such evidence.[44]

The judgment was met with disbelief, shock and even horror. There was certainly criticism of the majority judgments in the House of Lords but Lord Rodger did spring to the defence of the majority.

F. A (FC) *in the House of Lords.*[45]

The large part of the remainder of my chapter will focus on this immensely important case and the separate judgments of the Law Lords who decided unanimously that such evidence could not be admissible in a judicial forum in the UK.

The appeal was heard by a seven judge panel of the appellate committee (usually it is five) denoting the importance of the question at stake. Can a judicial body receive evidence obtained by torture administered by foreign agents or is it inadmissible under the common law or otherwise? Torture itself was outlawed in 1640 (by implication) and no known warrants had been issued in England by the Crown to extract torture since that date. Although, victims were sent to Scotland after that date to be tortured -- an early form of 'extraordinary rendition' – until cessation of this practice in 1708 after union with England.[46]

There was unqualified criticism by several of the Law Lords of the majority in the Court of Appeal where the matter had been approached as a technical point of evidence and where one might add the matter of substance was defeated by technicalities. 'This condemnation [of torture by the common law] is more aptly categorized as a constitutional principle than as a rule of law' declared Lord Bingham.[47] 'It trivialises the issue ... to treat it as an argument about the law of evidence. The issue is one of constitutional principle.'[48] For Lord Hoffmann: 'Rejection of torture has a constitutional resonance for English people which cannot be overestimated.'[49]

Before examining the arguments under the various heads of law presented to the Law Lords, Lord Bingham noted that since 2001 SIAC had been a superior court of record by virtue of amendments introduced by the Anti-terrorism etc Act. The fact

44 Para. 474

45 [2005] UKHL 71.

46 S. 5 Treason Act 1708 disallowed admission of confessions extracted by torture. The UK Joint Parliamentary Committee on Security and Intelligence has reported on *Rendition* Cm 7171 (2007) Government Response Cm 7172 and *The Handling of Detainees byUK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* Cm 6469 (2005) and Government Response Cm 6511.

47 Para. 12.

48 Lord Bingham at para. 52.

49 Para. 93.

that the majority of the Court of Appeal therefore ruled that SIAC was not a judicial body for the purposes of Article 6 ECHR is remarkable. The argument as to the inadmissibility of such evidence was made under three heads: common law, the ECHR and international law.

I. The Common Law

The common law had long established that statements by an accused are inadmissible if improperly obtained: the common law authority is *Ibrahim* v. *R*[50] although there are numerous examples and ss. 76 and 78 Police and Criminal Evidence Act 1984 have confirmed the route taken by the common law in legislation. The latter section does provide a *discretion* to exclude evidence where in all the circumstances its admission would have such an adverse effect on the fairness of proceedings that the court ought not to admit it.[51] But this would not apply to inadmissible evidence – the very question at issue in *A(FC)*. What the House of Lords noted, unlike the Court of Appeal, was that the question had not been tested in English courts (unlike confessions) because evidence of statements of others was hearsay and thereby inadmissible in any event. The rules of criminal evidence in English law prevented the issue from being discussed until SIAC was allowed to hear evidence which was otherwise inadmissible. How, asked Lord Bingham, could evidence obtained by torture be admissible when common lawyers regarded torture as 'totally repugnant to the fundamental principles of the common law' and as a creature of royal prerogative. It was a 'revolting brutality of the [erstwhile] continental criminal procedure'.[52] This sounds admirable, but punishment ordered by common law courts could have amounted to torture or at least inhumane and degrading treatment until comparatively recently even though the Bill of Rights 1688 prohibited 'cruel and unusual punishment'. Flogging may have been cruel but it was not unusual. For Lords Hope and Carswell, if the position re statements was not authoritatively stated as inadmissible, it was a 'small but certain step' and a 'modest but logical extension' of the rule against admitting confessions' obtained by torture.[53] The House of Lords is to be applauded for placing a prohibition on the reception of statements obtained by torture in judicial proceedings and for re-asserting the common law repugnance of torture. More widely still, courts have a discretion, which they must exercise, to prevent an abuse of their process brought about by a threat to basic human rights or the rule of law.[54] The judgment is a fitting tribute to the judicial development of the

50 [1914] AC 599 (PC).

51 D. Ormerod and D. Birch 'The Evolution of the Discretionary Exclusion of Evidence' *Criminal Law Review* (2004): 767-788.

52 Lord Bingham, para. 12 citing W. F. Holdsworth *History of English Law*, (3rd ed., 1945) vol. 5 pp. 194-195.

53 Paras. 110 and 152 respectively.

54 *R* v. *Horseferry Road Magistrates Court ex p Bennett* [1994] 1 AC 42 at 61-62. In *R (Ramda)* v. *Secretary of State for the Home Department* [2002] EWHC (Admin) 1278 extradition to

'common law of human rights'. However, the judgment leaves many holes in the common law as we shall see.

II. The European Convention on Human Rights

Several of the judgments presume that the Court of Human Rights (CHR) at Strasbourg which adjudicates on claims to breaches of the ECHR against member states of the Council of Europe would reject such evidence. Lord Bingham's judgment gives this subject the fullest analysis. In *Soering* v. *UK*[55] the CHR described Article 3 and its absolute prohibition of torture as 'one of the fundamental values of the democratic societies making up the Council of Europe.' But the issue was whether Article 6 would be breached by admitting such evidence. Would it be a denial of a fair hearing? The Convention against Torture is emphatic in its denunciation of torture as is the CHR; would the CHR be any less so in such a case as the present under Article 6, queried Lord Bingham? For the point is that the issue has not as of writing been dealt with directly by the CHR. 'Had the CHR found (in *Harutyunyan* v. *Armenia*[56]) that the complaints of coercion and torture appeared to be substantiated, a finding that Article 6(1) had been violated would .. have been inevitable'.[57] But there is no authority on the question. The Jalloh case[58] left the issue open, even if it seems clear that torture will more or less automatically invalidate the use of the information as evidence under the Convention. The issue is however squarely before the court in the *Gäfgen* case.[59] The Convention itself had to be interpreted under relevant rules of international law applicable in the relations of the parties (Vienna Convention Art 31(3)(c)). One of these would be the Convention against Torture. This was the very point rejected by the majority of the Court of Appeal.

III. Public International Law

The third ground of attack lay under public international law. Lord Bingham's judgment in particular is an articulate and glowing tribute to the universal condemnation of torture and again he dealt most extensively with the discussion on this point under international law. The other judges concentrated on the common law.

France was resisted where it was alleged that evidence to be admitted against R in France had been obtained by torture. The principle also covers prosecuting authorities: *R (CH Research & Campaign against Arms Trade)* v. *Director SFO and BAE Systems* [2008] EWHC 714 (Admin.).

55 (1989) 11 EHRR 439.

56 App. No. 36549/03 (5 July 2005).

57 Lord Bingham, para. 26.

58 *Jalloh* v. *Germany* App. No. 54810/00 (11 July 2006). See I. Cameron 'European Court of Human Rights: April 2006 – March 2007' *European Public Law* (2007) 533-568.

59 Application (pending); see decision for App. No. 22978/05 (10 April 2007).

The 'prohibition of torture enjoys the highest normative force recognised by international law.'[60] It is present in the UN Declaration on Human Rights, the International Covenant on Civil and Political Rights and the Convention Against Torture including Art 15 which requires the exclusion of statements made as a result of torture as evidence in *any* proceedings. The UN Resolution on Prohibition concerns evidence and not just confessions. The language of international law is not simply the prohibition of torture but the full implementation of legislative, judicial and administrative means to suppress it and any encouragement to it. 'States must act positively to suppress torture'.

Lord Bingham accepted that outlawing torture was *ius cogens* – peremptory norms of behaviour deemed to be worthy of a special status because of their importance.[61] Even the Court of Appeal decision acknowledged such a status[62] but that court would not hear an argument about Article 15 CAT being a principle of customary international law and therefore applicable in domestic proceedings because it had not been raised as an argument before SIAC or in the appeal. But Bingham also accepted that the *ius cogens* nature of the norm also forbade the use of evidence obtained by torture.

In assessing the impact of these international developments on English law and on the European Convention, Bingham was at his most creative and helped in drawing new inspiration from international legal principles for the development of the common law in particular. Both the common law and ECHR should and would be developed and influenced under international law. English law has traditionally been firmly based on a dualist tradition in relation to international law and municipal law. They operate in different spheres affecting parties in different ways. International norms cannot be binding in municipal law unless implemented by municipal law or have effect unless they are accepted as principles of customary international law or as part of *ius cogens*.[63] There was a very important practical consequence of this duality when it came to interpreting domestic statutes in England. The orthodox position could be summed up by saying that a treaty could be examined in order to interpret an implementing statute that was unclear or ambiguous and where the treaty might confer that clarity or assist in establishing it.[64] The more recent approach, one would not refer to it as apostasy but it is certainly not conventional, is that a judge should not interpret a statute in a manner inconsistent with treaty obligations where such an interpretation was possible. If more than one interpretation is possible, adopt that which fulfils international obligations.

In *A(FC)* the appellants 'rely on the well established principle that the words of a UK statute, passed after the date of a Treaty and dealing with the same subject mat-

60 Para. 28.
61 Vienna Convention Art 53: *Prosecutor* v. *Furundzija* [1998] ICTY 3 (International Criminal Tribunal for the former Yugoslavia).
62 Paras. 112 and 267.
63 The precise scope of customary international law is subject to qualifications.
64 *J. Buchanan & Co. Ltd* v. *Babco etc Ltd* [1978] AC 141 (HL). The case law also discussed *travaux préparatoires*.

ter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it'.[65] This is not confined to implementing measures and nor to provisions that are unclear or ambiguous but where more than one interpretation is possible – a frequent occurrence in legislation. The universal condemnation of torture and the use of evidence obtained by torture enshrined in these international norms set the context in which the domestic legislation had to be interpreted.

> I am startled, even a little dismayed, at the suggestion (and acceptance by CA majority) that this deeply rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all.[66]

For Lord Hoffmann, a power to admit evidence obtained by torture would have to be given *expressly* in primary legislation so that Parliament could be notified and debate the point.[67] Were Parliament to authorize such a development in flagrant breach of international law it would doubtless put the doctrine of Parliamentary sovereignty under the severest of scrutiny. But in reality that would seem to be an event for a class-room discussion and not a prospect that we would face. It has come close to occurring in the USA where the President vetoed a bill outlawing use of waterboarding and other practices. In setting up SIAC to act 'like a court' and to review the Secretary of State's decision Parliament expected it to act like a court, said Lord Hoffmann.[68] For him, it had become a general rule that evidence obtained by torture was inadmissible.[69]

All the judges therefore condemned torture and the use of statements obtained by torture although Lord Rodger said he found the case very difficult because of the nature of decision-making by the Secretary of State and SIAC and not because he did not share the revulsion of torture.[70]

The judgments nonetheless leave many questions unresolved and which are examined below.

G. Problems?

There are several difficulties resulting from *A(FC)*.

65 Para. 27 citing *Garland* v. *British Rail Engineering Ltd* [1983] 2 AC 751, 771.
66 Lord Bingham, para. 51.
67 Para. 96, and see Lord Rodger, para. 137.
68 Para. 95.
69 Para. 97.
70 Para. 129.

I. The use of statements obtained by torture by the executive in non judicial processes, or to defend itself against an allegation of unlawful action.

Such statements may not be used to establish guilt or innocence but, Lord Nicholls believed, they could be used to defend officials against an allegation of unlawful action (for example, if the police were sured for wrongful arrest and some of the information on which they had acted had been obtained by torture) although public interest immunity may require the information be kept secret.[71] Information obtained by torture can still be used providing it is not led or used directly in evidence before a judicial tribunal. But using such evidence to defend actions one took would be direct use. Could such evidence be used by the executive to issue a control order, or to make an order for deportation such as *Rehman* above? Lord Hope believed the answer to this is for another day – it was not ruled out. Lord Hoffmann said:

> It is not the function of the courts to place limits upon the information available to the Secretary of State, particularly when he is concerned with national security. Provided that he acts lawfully, he may read whatever he likes. In his dealings with foreign governments, the type of information that he is willing to receive and the questions that he asks or refrains from asking are his own affair.[72]

The answer seems to be 'Yes' and Lord Rodger answers this point affirmatively[73] pointing out that a Secretary of State's certificate of suspected terrorism under s.21 of the Anti-terrorism etc Act 2001 may last for six months if no appeal is made and until SIAC reviews the certificate under s.26(1). In other words Parliament allowed a significant period of detention in the absence of an appeal. Lord Brown also answers the question affirmatively.[74] But they would not be admissible before a judicial body. Nothing seems to prevent them being used by lawyers in a way that intercept intelligence is used: the intelligence cannot be admitted but it will be used to formulate the argument and assist the case. Foreign intercepts incidentally are not inadmissible.[75] Indeed, Lord Brown was at pains to point out that the decision would not undermine the fight against terrorism.

> Your Lordships' decision on these appeals should not be seen as a significant setback to the [executive's] necessary efforts to combat terrorism. Rather it confirms the right of the executive to act on whatever information it may receive from around the world, while at the same time preserving the integrity of the judicial process and vindicating the good name of British justice.[76]

This brings into focus the role of the intelligence and security services which I address below.

71 Para. 72
72 Para. 93
73 Paras. 132-133.
74 Para. 169.
75 *R* v. *P* [2001] 2 All ER 58 (HL).
76 Para. 171.

II. Could evidence obtained as a result of the torture apart from statements and confessions be used in judicial proceedings?

This is graphically known as the fruits of the poisoned tree doctrine. In the USA the fourth amendment to the constitution has been used to exclude such evidence. In England, the approach has not been as restrained and evidence illegally obtained may be admitted if it is relevant.[77] English law places ultimate reliance upon the probative quality of the evidence. Here we have the topic so beloved by supporters of torture; finding the ticking bomb after a statement by a third party or accused extracted by torture? Finding finger prints upon the bomb and using that evidence. How independent is the evidence of the torture? How tainted is it by the 'corruption and stench of torture'? How far removed is it from the core evidence which is inadmissible – the confession or statements of a third party? There is a reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law, said Bingham.[78] So his powerful judgment acknowledges exceptions.[79] Could the police implead such evidence to make an arrest and defend an allegation of false arrest in a court? Lord Brown (a former treasury counsel ie advocate for government) was clear that the 'forbidden fruits' may be used, as were Lords Hope and Hoffmann.

III. The burden of proving torture.

This is absolutely crucial. The procedures involving control orders as well as proceedings before SIAC which use closed material and special advocates should be recalled and the difficulty in which the appellant is placed. Given the circumstances it is not a procedure in which all the cards are face up. Much of the evidence would not be seen by the appellant or his lawyers. Nonetheless, the majority decided that the burden of proving torture lies on the appellant. The judges concluded differently on the reliance to be placed on two cases in which this question was relevant. One came from Germany[80] where evidence was admitted even although the United States officials refused to give evidence of interrogation practices conducted by them. The other was a decision of the Strasbourg Court of Human Rights *Mamatkulov and Asharav* v. *Turkey* which dealt with related themes where a breach of Article 3 ECHR was not found when a receiving state made assurances about treatment despite widely recorded evidence of torture.[81] The court could not make a finding of

77 *R* v. *Sargent* [2001] UKHL 54.
78 At para. 34. And paras. 46, 47.
79 S. 76 Police and Criminal Evidence Act 1984 provides that evidence may be admitted under s. 76(4) where a confession is excluded.
80 *El Motassadeq* NSW 2005 2326 (Hamburg).
81 CHR App. Nos. 46827/99 and 46591/99 (4 February 2005).

fact but placed its emphasis on Uzbekistan's assurances. One finds it difficult not to side with Bingham in his criticism of the reliance of the majority on these cases both of which he felt to be of 'questionable value' at best.[82]

The minority (and incidentally the three most senior judges) Bingham, Nicholls and Hoffmann – agreed that the Secretary of State must show that once it is alleged that evidence was obtained by torture, he must establish that it was not. It would be absurd to require the appellant to prove that evidence was obtained by torture when he knows little of the evidence against him.[83] 'If SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence.'[84] Lord Hope's test is said Bingham, a test which in the real world can never be satisfied.[85] Hope's test runs as follows: 'Is it *established,* by means of such diligent unquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State *was* obtained under torture?'[86] The court should not set up 'insuperable barrier[s]' to the use of information from foreign regimes. To trigger the exclusion, it must be shown that the statement in question was obtained by torture – I repeat on a balance of probabilities. For Lord Rodger the statement must be shown (by the appellant) to have been obtained by torture.[87] Lord Carswell said: 'If SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence.'[88] The onus of proving torture was on the appellant and the quantum appears to be 'a balance of probabilities'.

SIAC should make its own inquiries where the appellant raised plausible reason for thinking that a statement was obtained by torture. This was a crucial point in *Othman* v. *Secretary of State*[89] where the Court of Appeal discussed what 'diligent enquiries' by SIAC entailed. The Court of Appeal held that this duty of inquiry had not been properly discharged by SIAC in a situation where the appellant would have faced so many barriers to establishing the test.[90]

The Court of Appeal ruled that a Jordanian, Mr Othman, could not be deported to Jordan where he would face terrorist charges on the grounds that his presence in the UK represented a threat to national security. The court accepted that it was open to SIAC to find that the appellant would not be ill-treated in Jordan, based on a memorandum of understanding between the Kingdom of Jordan and the UK that Jordan would desist from such treatment.[91] Nor was he likely to be tried by a court – the

82 Paras. 54-60.
83 Lord Hoffmann, para. 98.
84 Lord Bingham, para. 56
85 Para. 59.
86 Para. 121, but see paras. 116-122.
87 Para. 138.
88 Para. 156.
89 [2008] EWCA Civ 290.
90 *Othman,* para. 61; and see para. 439 of SIAC's decision.
91 Such agreements had passed judicial scrutiny in the case of Algeria but had been ruled invalid in relation to Libya.

Jordanian State Security Court (SSC) – that was not independent and impartial.[92] But the Court of Appeal differed from SIAC in its finding that SIAC applied an 'insufficiently demanding test to determine the issue of whether Article 6 rights would be breached' by the SSC hearing evidence obtained by torture.[93] The SIAC had misunderstood and misinterpreted the speeches of the law lords in *A(FC)* and had placed mistaken reliance upon the case. SIAC had not satisfied itself by proper enquiry that evidence obtained in breach of a fundamental principle of the Convention would not be acted upon by the SSC. The outcome of such admission would 'constitute a total denial of justice in *Soering* terms'.[94] In short, the SIAC had not paid sufficient regard to the *constitutional* and *fundamental* nature of the ruling in *A(FC).* The test set by the Court of Appeal is very high and given the tone of the majority decision on this point is surprising. They seem to have placed the threshold higher than the majority in *A(FC).*

However expressed, the burden is on the person alleging torture. We shall have to see whether the higher courts adopt as strict a test on the nature of SIAC's inquiries as the Court of Appeal.

IV What amounts to torture?

The question of what amounts to torture was addressed by the judgment. There is not the immediacy of the red hot poker and the pliers but there are well documented practices which are barbaric. A major plank in America's war on terror involved clear breaches of the prohibition of inhuman and degrading treatment and even torture. George Bush's has famously called for 'unprecedented severity' in the methods of interrogation. There was a statutory redefinition of torture and authorized techniques.[95] The President in 2008 vetoed an Interrogation Authorization Bill outlawing 'specialized techniques' and which would have restricted interrogation to those in the Army Field Manual. The legal justification and argument from officials supporting such practices as legal within existing restraints were farcical were it not so desperately serious an issue. It had the stench of perversion and lickspittle.

Does inhuman and degrading treatment automatically exclude statements in the way torture would? Bingham said there is a difference in quality but lesser may become the greater over time and would thereby become excluded. Otherwise such evidence is subject to ss 76 and 78 Police and Criminal Evidence Act. Hoffmann believed the interrogation techniques in *Ireland* v. *UK* (above) would meet the defini-

92 See *Soering* v. *UK,* (1989) 11 EHRR 439.
93 *Othman,* para. 46.
94 Ibid., para. 41.
95 P. Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (London, Penguin, 2008); P. Gourevitch and E. Morris *Standard Operating Procedure: A War Story* (London, Pan Macmillan, 2008). M. Lazreg, *Torture and the Twilight of Empire* (Princeton, Princeton University Press, 2008).

tion of torture set out in s.134 Criminal Justice Act: severe pain and suffering administered by officials in the exercise of their duties or purported duties and these would be unlawful and inadmissible. But not *all* conduct ruled against Article 3 in *Ireland* would be caught by s.134, he believed.

Lord Hope saw the distinction as 'fluid' but 'we should apply the standards that we wish to apply to our own citizens and not accept a foreign definition'. US practices, he exclaimed 'shock the conscience'.[96]

V.. Intelligence and the secret services.

This is the most important dimension to the war on terror. The Crown accepted that any British agents using torture would be acting unlawfully and the evidence would be inadmissible before judicial hearings. The question was to what extent this prohibition affected foreign security and intelligence services. The security and intelligence communities are networked like ground elder. And as Lord Hope observed: 'Information – the gathering of intelligence – is a crucial weapon in the battle by democracies against international terrorism.'[97]

It was noted above that secret intelligence services in the UK had been placed under a legislative framework since the late 1980s. There is oversight by the Intelligence and Security Committee established under the Intelligence Services Act 1994 which is a joint committee of both houses of Parliament (members are 'notified' under the Official Secrets Act 1989 (OSA) s.1 so they are subject to the absolute duty of secrecy under that Act (below)). Information may be refused by service chiefs if it is deemed 'sensitive' (Sch 3(4)), or it may be refused on the determination of the Secretary of State. Sensitive includes that which is about operations, which might lead to the identity of the provider or is provided by foreign government or its agency and it does not consent although the Secretary of State may override this if 'desirable in the public interest'. The Prime Minister may exclude matters from being published in annual reports published by the committee under s.10(7) after consulting the committee.

The OSA s.1 places an absolute prohibition on disclosure by security and intelligence officers and others who are 'notified' by a Minister of information from their work and about the special investigation powers in s.4(3) – intercepts, entering property etc. The House of Lords ruled in Shayler[98] that s.1 OSA did not constitute a breach of Art 10 ECHR – the free speech provision. Secrecy for intelligence gatherers was necessary and not disproportionate and there were a variety of internal and external mechanisms through which a security or intelligence officer could raise

96 *A (FC),* para. 126.

97 Ibid., para. 105.

98 [2002] 2 All ER 477 (HL). The courts have ruled that under civil law, security and intelligence officers are under a 'life-long' duty of confidence: *Attorney General* v. *Blake* [2001] 1 AC 268.

their concerns. 'Whistleblowing' is not necessary and the members of the services are not protected by the legislation that introduced whistleblowing into UK law, the Public Interest Disclosure Act 1998. Ultimately, a refusal to allow publication by the authorities of the disclosure of an officer may be challenged by judicial review.

Finally, under Freedom of Information Act 2000 in the UK, the security and intelligence services and GCHQ are *excluded* from the statutory provisions on access to information held by public authorities. An absolute exemption protects their information from disclosure when it is held by another public body. In other words, neither officials nor the Information Commissioner can order disclosure in 'the public interest'.

As one imagines the position is cocooned in secrecy without any effective outlet for an officer troubled by what he or she knows about the provenance of intelligence and how it was extracted.

The Butler Report on the use of intelligence and weapons of mass destruction in Iraq was not dealing with the problem of torture but the manipulation and malleability of intelligence for political purposes.[99] If intelligence is to be used more widely by governments in public debate, its uses and limitations must be carefully explained and there must be clearer division between assessment and advocacy.[100] Nonetheless, there were some compelling conclusions on the uses of intelligence. There were world-wide networks of intelligence communities but procedures are 'still not sufficiently aligned to match the threat'.[101]

> These limitations [in intelligence transforming mysteries into knowable secrets] are best offset by ensuring that the ultimate users of intelligence, decision makers at all levels, properly understand its strengths and limitations and have the opportunity to acquire experience in handling it. It is not easy to do this while preserving the security of sensitive sources and methods. But unless intelligence is properly handled at this final stage, all preceding effort and expenditure is wasted.[102]

Does the 'proper handling' of intelligence include use of that by the UK executive which has been procured by torture, no matter how unreliable? The answer from *A(FC)* appears to be 'yes'.

H. Some comparisons between the UK and USA courts in the war on terror

There is a self congratulatory tone in some of the judgments in *A(FC)* about the virtues of British justice but the general condemnation of torture by the law lords was

99 Lord Butler (Chair), *Review of Intelligence on Weapons of Mass Destruction* (HC 898, London, The Stationery Office, 2004).
100 Ibid., para. 468.
101 Ibid., para. 136
102 Ibid., para. 52.

nonetheless invigorating. The case also has to be seen in company with its predecessor *A etc* in which detentions under s.23 Anti-terrorism etc Act were declared unlawful and the more recent control order case in which the law lords ruled very strictly on the fairness of control order procedures.[103] It has displayed the appellate committee of the House of Lords as a robust tribunal defending human rights and civil liberties. The Human Rights Act has been a central feature in that defence. This deserves applause.

Until the judgment in *Boumediene* by the Supreme Court (below) the position compared very favourably to the role of US courts and their relationship to oversight of executive powers in the war on terror and the President's promotion of legislation to enhance the executive primacy, to exclude the role of the ordinary courts in oversight of executive detentions and to have cases heard before military commissions. I can only make fleeting references to this widely reported saga. Although *Hamdi* v. *Rumsfeld*[104] and *Rasul et al* v. *Bush*[105] supported the application of habeas corpus following executive detentions, the justifications required by the courts from the executive were criticized for requiring only the thinnest of evidence.[106]

The Military Commissions Act 2006 provides for military commissions to try 'enemy unlawful combatants' and prohibits challenge in ordinary courts of matters before military commissions and any use of the Geneva Conventions before a court proceeding seeking habeas corpus. The MCA makes clear that statements procured by torture are inadmissible. Statements produced by treatment 'short of torture' can be admitted if a military judge finds that 'the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and the interests of justice would best be served by admission of the statement into evidence.'[107]

After an initial refusal to hear the case challenging the constitutionality of the Act, the Supreme Court ruled that an appeal concerning this legislation would be heard. Commentators were sanguine that the court would rule that a constitutional right to habeas corpus applies in such cases but the procedure before the Commissions and the right of appeal to the 'DC circuit' may satisfy those requirements. Furthermore, the view has been expressed that the MCA will have successfully excluded the operation of the Geneva Convention in Commission hearings.[108] The Supreme Court, however, ruled that the MCA had not removed the right of those detained in Guantanamo to seek habeas corpus before the federal courts and the inadequate and ineffective procedures in use before the Commissions meant the MCA op-

103 See n. 34 above.
104 542 US 507 (2004).
105 542 U. S. 466 (2004).
106 There was greater sophistication shown in *Hamdan* v. *Rumsfeld* 126 S. Ct. 2749 (2006) where the Supreme Court held that the Geneva Convention was not removed in hearings before military commissions and the federal courts' jurisdiction was not removed by the Detainee Treatment Act 2005.
107 S. 948r.
108 C. Bradley 'The Military Commissions Act, Habeas Corpus, and the Geneva Conventions' Duke Law School Working Paper No. 96/2007.