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GRAND CHAMBER JUDGMENT
A. AND OTHERS v. THE UNITED KINGDOM

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment[1] in the case of ***A. and Others v. the United Kingdom*** (application no. 3455/05).

The case concerned the applicants' complaints that they were detained in high security conditions under a statutory scheme which permitted the indefinite detention of non-nationals certified by the Secretary of State as suspected of involvement in terrorism.

The Court held unanimously that there had been:

- **no violation of Article 3** (prohibition of torture and inhuman or degrading treatment) taken alone or in conjunction with **Article 13** (right to an effective remedy) of the European Convention on Human Rights in respect of all the applicants, except the Moroccan applicant whose complaints under these articles were declared inadmissible;

- a **violation of Article 5 § 1** (right to liberty and security) of the Convention in respect of all the applicants, except the Moroccan and French applicants who had elected to leave the United Kingdom, since it could not be said that the applicants were detained with a view to deportation and since, as the House of Lords had found, the derogating measures which permitted their indefinite detention on suspicion of terrorism discriminated unjustifiably between nationals and non-nationals;

- a **violation of Article 5 § 4** (right to have lawfulness of detention decided by a court) in respect of two of the Algerian applicants, the stateless and Tunisian applicants, because they had not been able effectively to challenge the allegations against them; and,

- a **violation of Article 5 § 5** in respect of all the applicants, except the Moroccan and French applicants, on account of the lack of an enforceable right to compensation for the above violations.

The Court made awards under Article 41 (just satisfaction) which were substantially lower than those which it had made in past cases of unlawful detention, in view of the fact that the detention scheme was devised in the face of a public emergency and as an attempt to reconcile the need to protect the United Kingdom public against terrorism with the obligation not to send the applicants back to countries where they faced a real risk of ill-treatment. The Court therefore awarded, to the six Algerian applicants 3,400 euros (EUR), EUR 3,900, EUR 3,800, EUR 3,400, EUR 2,500 and EUR 1,700, respectively; to the stateless and Tunisian applicants EUR 3,900, each; and to the Jordanian applicant, EUR 2,800. The applicants were jointly awarded EUR 60,000 for legal costs. (The judgment is available in English and French.)

1. Principal facts

The applicants are 11 individuals, six are of Algerian nationality; four are, respectively, of French, Jordanian, Moroccan and Tunisian nationality; and, one, born in a Palestinian refugee camp in Jordan, is stateless.

Following the al'Qaeda attacks of 11 September 2001 on the United States of America, the British Government considered that the United Kingdom was a particular target for terrorist attacks, such as to give rise to a "public emergency threatening the life of the nation" within the meaning of Article 15 of the European Convention on Human Rights (derogation in time of emergency). The Government believed that the threat came principally from a number of foreign nationals present in the United Kingdom, who were providing a support network for extremist Islamist terrorist operations linked to al'Qaeda. These individuals could not be deported because there was a risk that each would be ill-treated in his country of origin in breach of Article 3 of the Convention. The Government considered that it was necessary to create an extended power permitting the detention of foreign nationals, where the Secretary of State reasonably believed that the person's presence in the United Kingdom was a risk to national security and reasonably suspected that the person was an "international terrorist". Since the Government considered that this detention scheme might not be consistent with Article 5(1) of the Convention (right to liberty), on 11 November 2001 they issued a notice of derogation under Article 15 of the Convention to the Secretary

General of the Council of Europe. The notice set out the provisions of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"), including the power to detain foreign nationals certified as "suspected international terrorists" who could not "for the time being" be removed from the United Kingdom.

Part 4 of the 2001 Act came into force on 4 December 2001 and was repealed in March 2005. During the lifetime of the legislation 16 individuals, including the 11 applicants, were certified and detained. Six of the applicants were detained on 19 December 2001; the others were detained on various dates up until October 2003. They were initially detained at Belmarsh Prison in London. The Moroccan and French applicants were released as they elected to leave the United Kingdom in December 2001 and March 2002, respectively. Three of the applicants, following a deterioration in their mental health (including a suicide attempt), were transferred to Broadmoor Secure Mental Hospital. Another applicant was released on bail in April 2004, under conditions equal to house arrest, because of serious concerns over his mental health.

The decision to certify each applicant under the 2001 Act was subject to review every six months before the Special Immigration Appeals Commission (SIAC); each applicant appealed against the Secretary of State's decision to certify him. In determining whether the Secretary of State had had reasonable grounds for suspecting that each applicant was an "international terrorist" whose presence in the United Kingdom gave rise to a risk to national security, SIAC used a procedure which enabled it to consider both evidence which could be made public ("open material") and sensitive evidence which could not be disclosed for reasons of national security ("closed material"). The detainee and his legal representatives were given the open material and could comment on it in writing and at a hearing. The closed material was not disclosed to the detainee or his lawyers but to a "special advocate", appointed on behalf of each detainee by the Solicitor General. In addition to the open hearings, SIAC held closed hearings to examine the secret evidence, where the special advocate could make submissions on behalf of the detainee as regards procedural matters, such as the need for further disclosure, and as to the substance and reliability of the closed material. However, once the special advocate had seen the closed material he could not have any contact with the detainee or his lawyers, except with the leave of the court. On 30 July 2002 SIAC upheld the Secretary of State's decision to certify each of the applicants. However, it also found that, since the detention regime applied only to foreign nationals, it was discriminatory and in breach of the Convention.

The applicants also brought proceedings in which they challenged the fundamental legality of the November 2001 derogation. These proceedings were eventually determined by the House of Lords on 16 December 2004. It held that there was an emergency threatening the life of the nation but that the detention scheme did not rationally address the threat to security and was therefore disproportionate. The House of Lords found, in particular, that there was evidence that United Kingdom nationals were also involved in terrorist networks linked to al'Qaeda and that the detention scheme under Part 4 of the 2001 Act discriminated unjustifiably against foreign nationals. The House of Lords therefore made a declaration of incompatibility under the Human Rights Act and quashed the derogation order.

Part 4 of the 2001 Act remained in force, however, until it was repealed by Parliament in March 2005. As soon as the applicants still in detention were released, they were made subject to control orders under the Prevention of Terrorism Act 2005. Control orders impose various restrictions on those reasonably suspected of involvement in terrorism, regardless of nationality.

In August 2005, following negotiations commenced towards the end of 2003 to seek from the Algerian and Jordanian Governments assurances that the applicants would not be ill-treated if returned, the Government served Notices of Intention to Deport on the six Algerian applicants and Jordanian applicant. These applicants were taken into immigration custody pending removal to Algeria and Jordan. In April 2008 the Court of Appeal ruled that the Jordanian applicant could not lawfully be extradited to Jordan, because it was likely that evidence obtained by torture could be used against him there at trial. The case was decided by the House of Lords on 18 February 2009.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 21 January 2005. The Chamber to which the case was assigned decided to relinquish jurisdiction to the Grand Chamber[2] on 11 September 2007. The Grand Chamber held a public hearing in the case on 21 May 2008.

The President granted leave to two London-based non-governmental organisations, Liberty and Justice, to intervene in the proceedings as third parties.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jean-Paul **Costa** (France), ***President***,
Christos **Rozakis** (Greece),
Nicolas **Bratza** (the United Kingdom),
Françoise **Tulkens** (Belgium),
Josep **Casadevall** (Andorra),
Giovanni **Bonello** (Malta),
Ireneu **Cabral Barreto** (Portugal)
Elisabeth **Steiner** (Austria),
Lech **Garlicki** (Poland),
Khanlar **Hajiyev** (Azerbaijan),
Ljiljana **Mijović** (Bosnia and Herzegovina),
Egbert **Myjer** (the Netherlands),
David Thór **Björgvinsson** (Iceland),
George **Nicolaou** (Cyprus),
Ledi **Bianku** (Albania),
Nona **Tsotsoria** (Georgia),
Mihai **Poalelungi** (Moldova), ***judges***,

and also Michael **O'Boyle**, ***Deputy Registrar***.

3. Summary of the judgment[3]

Complaints

The applicants complained before the Court that their indefinite detention in high security conditions amounted to inhuman or degrading treatment. They also alleged that the detention scheme was unlawful and discriminatory and that the derogation was disproportionate. Furthermore, although their detention was declared to be in breach of domestic law, they were unable to bring any proceedings in the United Kingdom to claim compensation or bring about their release. Lastly, the applicants complained that during their appeals against certification before SIAC they had only limited knowledge of the case against them and a limited possibility to challenge it. The applicants relied on Articles 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial), 13 (right to an effective remedy) and 14 (prohibition of discrimination).

Decision of the Court

Article 3 taken alone or in conjunction with Article 13

The Court, while acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, stressed that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the European Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment.

The uncertainty and fear of indefinite detention had to have caused the remaining ten applicants anxiety and distress, as it would virtually any detainee in their position. Furthermore, it was probable that the stress had been sufficiently serious and enduring to affect the mental health of certain of the applicants.

It could not, however, be said that the applicants had been without any prospect or hope of release. In particular, they had been able to bring proceedings to challenge the legality of the detention scheme under the 2001 Act and had been successful before SIAC, on 30 July 2002, and the House of Lords on 16 December 2004. In addition, each applicant had been able to bring an individual challenge to the decision to certify him and SIAC had been required by statute to review the continuing case for detention every six months. The Court did not, therefore, consider that the applicants' situation had been comparable to an irreducible life sentence, which would have given rise to an issue under Article 3.

Each detained applicant had also had at his disposal the remedies available to all prisoners under administrative and civil law to challenge conditions of detention, including any alleged inadequacy of medical treatment. The applicants had not attempted to make use of those remedies and had not therefore complied with the requirement under Article 35 of the Convention to exhaust domestic remedies. It followed that the Court could not take the conditions of detention into account in forming an assessment of the

applicants' claims.

In those circumstances, the Court found that the applicants' detention had not reached the high threshold of inhuman and degrading treatment for which a violation of Article 3 could be found.

As concerned the applicants' complaint that they had not had effective domestic remedies for their Article 3 complaints, the Court recalled in particular that Article 13 did not guarantee a remedy allowing a challenge to primary legislation before a national authority on the ground of being contrary to the Convention.

In conclusion, therefore, the Court found that there had been no violation of Article 3, taken alone or in conjunction with Article 13.

It declared the Moroccan applicant's complaints under Articles 3 and 13 inadmissible because he had been detained for only a few days.

Articles 5 § 1 and 15

Whether the applicants had been lawfully detained in accordance with Article 5 § 1 (f)

The Court recalled that Article 5 enshrined a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty, and that that guarantee applied to "everyone", regardless of nationality.

Subparagraph (f) of Article 5 § 1 permits the State to control the liberty of aliens in an immigration context and the Government contended that the applicants had been lawfully detained as persons "against whom action is being taken with a view to deportation or extradition".

The Court found no violation in respect of the Moroccan and French applicants, who had been detained for only short periods before electing to leave the United Kingdom.

However, concerning the remaining nine applicants, the Court did not consider that the United Kingdom Government's policy of keeping the possibility of deporting the applicants "under active review" had been sufficiently certain or determinative to amount to "action ... being taken with a view to deportation". One of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants had been that they could not be removed or deported "for the time being". There was no evidence that, during the period of those nine applicants' detention, there had been any realistic prospect of their being expelled without them being put at real risk of ill-treatment. Indeed, the first applicant is stateless and the Government had not produced any evidence to suggest that there had been another state willing to accept him. Nor had the Government apparently entered into negotiations with Algeria or Jordan, with a view to seeking assurances that the applicants who were nationals of those States would not be ill-treated if returned, until the end of 2003. No such assurance was received until August 2005. Their detention had not, therefore, fallen within the exception to the right to liberty set out in paragraph 5 § 1(f). That conclusion had also been, expressly or impliedly, reached by a majority of the members of the House of Lords.

It was, instead, clear from the terms of the derogation notice and Part 4 of the 2001 Act that the applicants had been certified and detained because they had been suspected of being "international terrorists". Internment and preventive detention without charge are incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15. The Court therefore considered whether the United Kingdom's derogation had been valid.

Whether the United Kingdom had validly derogated from its obligations under Article 5 § 1

In the unusual circumstances of the case, where the House of Lords had examined the issues relating to the State's derogation and concluded that there had been a public emergency threatening the life of the nation but that the measures taken in response had not been strictly required by the exigencies of the situation, the Court considered that it would be justified in reaching a contrary conclusion only if it found that the House of Lords' decision was manifestly unreasonable.

Whether there had been a "public emergency threatening the life of the nation"

Before the domestic courts, the Secretary of State had provided evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence had been provided before SIAC. All the national judges had accepted that danger to have been credible. Although no al'Qaeda attack had taken place within the territory of the United Kingdom at the time when the derogation had been made, the Court did not consider that the national authorities could be criticised for having feared such an attack to be imminent. A State could not be expected to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack had, tragically, been shown by the bombings and attempted bombings in London in July 2005 to have been very real.

While it was striking that the United Kingdom had been the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, the Court accepted that it had been for each Government, as the guardian of their own people's safety, to make its own assessment on the basis of the facts known to it. Weight had, therefore, to be attached to the judgment of the United Kingdom's Government and Parliament, as well as the views of the national courts, who had been better placed to assess the evidence relating to the existence of an emergency.

Accordingly, the Court, like the majority of the House of Lords, held that there had been a public emergency threatening the life of the nation.

Whether the derogating measures had been strictly required by the exigencies of the situation

The question whether the measures were strictly required was ultimately a judicial decision, particularly in a case such as the present where the applicants had been deprived of their fundamental right to liberty over a long period of time. Having regard to the careful way in which the House of Lords had approached the issues, it could not be said that inadequate weight had been given to the views of the Government or Parliament on this question.

The Court considered that the House of Lords had been correct in holding that the extended powers of detention were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act had been designed to avert a real and imminent threat of terrorist attack which, on the evidence, had been posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what had essentially been a security issue had resulted in a failure adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords had found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.

The Government had argued before the Court that it had been legitimate to confine the detention scheme to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists. However, the Government had not provided the Court with any evidence to suggest that British Muslims had been significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al'Qaeda. The system of control orders, put in place by the Prevention of Terrorism Act 2005, did not discriminate between national and non-national suspects.

Similarly, as concerned the argument that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals, the Court had not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment had been unjustified. Indeed, the national courts, including SIAC, which saw both the open and the closed material, had not been convinced that the threat from non-nationals had been significantly more serious than that from nationals.

In conclusion, therefore, the Court, like the House of Lords, found that the derogating measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals. It followed that there had been a violation of Article 5 § 1 in respect of all but the Moroccan and French applicants.

Article 5 § 4

Since the Moroccan and French applicants were already at liberty, having elected to leave the United Kingdom, by the time the various proceedings to determine the lawfulness of the detention under the 2001

Act had commenced, the Court declared those two applicants' complaints under Article 5 § 4 inadmissible.

The remaining applicants complained that the procedure before SIAC was unfair because the evidence against them was not fully disclosed.

Where a person is detained on the basis of an allegedly reasonable suspicion of unlawful behaviour, the guarantee of procedural fairness under Article 5 § 4 requires him to be given an opportunity effectively to challenge the allegations. This generally requires disclosure of the evidence against him. However, in cases where there is a strong public interest in keeping some of the relevant evidence secret, for example to protect vulnerable witnesses or intelligence sources, it is possible to place restrictions on the right to disclosure, as long as the detainee still has the possibility effectively to challenge the allegations against him.

The Court's starting point in the present case was that, as the national courts found and it accepted, during the period of the applicants' detention the activities and aims of the al'Qaeda network had given rise to a "public emergency threatening the life of the nation". During the relevant time, therefore, there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information.

Balanced against these important public interests, however, was the applicants' rights under Article 5 § 4 to procedural fairness in their appeals to SIAC. It was, therefore, essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, the difficulties this caused had to be counterbalanced in such a way that each applicant still had the possibility effectively to challenge the case against him.

The Court considered that SIAC, which was a fully independent court and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. The special advocate provided an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court had no basis to find that excessive and unjustified secrecy had been employed in respect of any of the applicants' appeals or that there had not been compelling reasons for the lack of disclosure in each case.

Even where all or most of the underlying evidence had remained undisclosed, if the allegations contained in the open material had been sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, without his having to know the detail or sources of the evidence which formed the basis of the allegations. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention had been based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

The Court noted that the open material against four of the Algerian applicants and the Jordanian applicant had included detailed allegations about, for example, the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places. Those allegations had been sufficiently detailed to permit the applicants effectively to challenge them. Accordingly, there had been no violation of Article 5 § 4 in respect of those five applicants.

The principal allegations against the stateless applicant and one of the two remaining Algerian applicants had been that they had been involved in fund-raising for terrorist groups linked to al'Qaeda. These allegations were supported by open evidence, such as evidence of large sums of money moving through a bank account or of money raised through fraud. However, in each case the evidence which had allegedly provided the link between the money raised and terrorism had not been disclosed to either applicant. Those applicants had not therefore been in a position effectively to challenge the allegations against them, in violation of Article 5 § 4.

The open allegations in respect of the Tunisian and remaining Algerian applicant had been of a general nature, principally that they had been members of named extremist Islamist groups linked to al'Qaeda. SIAC observed in its judgments dismissing each of these applicants' appeals that the open evidence had been insubstantial and that the evidence on which it relied against them had largely to be found in the

closed material. Again, therefore, the Court found that those applicants had not been in a position to effectively challenge the allegations against them, in violation of Article 5 § 4.

Article 5 § 5

The Court noted that the above violations could not give rise to an enforceable claim for compensation by the applicants before the national courts. It followed that there had been a violation of Article 5 § 5 in respect of all but the Moroccan and French applicants.

Other complaints

Given the above findings, the Court held that it was not necessary to examine the applicants' complaints under Article 5 § 1 taken in conjunction with either Articles 13 or 14 or under Article 5 § 4 concerning the applicants' complaints that the House of Lords had been unable to make a binding order for their release. In addition, having already examined the issues relating to the use of special advocates, closed hearings and lack of full disclosure in the proceedings before SIAC, it also held that it was not necessary to examine the applicants' complaints under Article 6.