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65 號文件
Paper No. 65

本司檔號 Our Ref.: LP 934/00C
來函檔號 Your Ref.:
電話號碼 Tel. No.: 2867 4479

2 June 2003

URGENT BY FAX

Clerk to Bills Committee
Legislative Council Secretariat
3/F, Citibank Tower
3 Garden Road
HONG Kong
(Attn: Mr Raymond Lam)

Dear Mr Lam,

Bills Committee on
National Security (Legislative Provisions) Bill

Special Procedures for Appeals against Proscription

Further to our paper on the Special Procedures for Appeals against Proscription (Paper No. 53) I enclose copies of cases which were requested by members on 31 May 2003 :

(i) Chahal v United Kingdom 1996 23 EHHR 413
(see p. 418 at para 5(e))

(ii) Secretary of State for the Home Department v Rehman (HL)[2001] 3 WLR 877

(iii) A, X and others v Secretary of State for the Home Department (CA) [2003] 2WLR 564

(iv) Chiarelli v Canada (Minister of Employment and Education) 1992 90 DLR (4th) 289

(v) Ruby v Solicitor General of Canada 2002 219 DLR (4th) 385

Yours sincerely,

James O'Neil

(James O'Neil)
Deputy Solicitor General
(Constitutional)

c.c. S for S (Attn: Mr Johann Wong)
D of J (Attn: SG
Miss Adeline Wan)

#67494

CHAHAL *v.* UNITED KINGDOM

(Order for deportation to India of Sikh separatist for national security reasons; detention pending deportation)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Ryssdal; *Judges* Bernhardt, Gölcüklü, Matscher, Pettiti, Spielman, De Meyer, Valticos, Martens, Palm, Morenilla, Freeland, Baka, Mifsud Bonnici, Makarczyk, Gotchev, Jambrek, Lohmus, Levits)

Application No. 22414/93
15 November 1996

The first applicant, a Sikh separatist leader, had been detained in custody for deportation purposes since August 1990, the Home Secretary having decided that he was a threat to national security. His application for asylum was refused. That refusal was quashed by the High Court but the Home Secretary decided to maintain the refusal of asylum and to proceed with deportation. Further legal challenges were unsuccessful. Relying on Articles 3, 5 and 13 of the Convention, Mr Chahal complained that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment, that his detention pending deportation had been too long and that he had no effective domestic remedy for his Convention claims because of the national security elements in his case. He and the other three applicants (his wife and children) also complained that his deportation would breach their right to respect for family life under Article 8, for which there was similarly no effective domestic remedy. In addition, they claimed just satisfaction under Article 50.

Held:

(1) by 12 votes to 7 that, in the event of the Secretary of State's decision to deport the first applicant to India being implemented, there would be a violation of Article 3 of the Convention;

(2) by 13 votes to 6 that there had been no violation of Article 5(1) of the Convention;

(3) *unanimously* that there had been a violation of Article 5(4) of the Convention;

(4) by seventeen votes to two that, having regard to the conclusion with regard to Article 3, it was not necessary to consider the applicants' complaint under Article 8 of the Convention;

(5) *unanimously* that there had been a violation of Article 13 in conjunction with Article 3 of the Convention;

(6) *unanimously* that the above findings of violation constituted sufficient just satisfaction as regards the claim for compensation for non-pecuniary damage;

(7) *unanimously*

(a) that the respondent State should pay the applicants, within three months, in respect of costs and expenses, £45,000 less 21,141 FF to be converted into pounds sterling at the rate applicable on the date of delivery to the present judgment;

(b) that simple interest at an annual rate of 8 per cent should be payable from the expiry of the above-mentioned three months until settlement;

(8) *unanimously* that the remainder of the claim for just satisfaction be dismissed.

1. Prohibition of torture and of inhuman or degrading treatment or punishment: applicability in expulsion cases (Art. 3).

Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its protocols. However, it is well-established in the case law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country. [73]–[74]

2. Prohibition of torture and of inhuman or degrading treatment or punishment: expulsion cases involving alleged danger to national security (Art. 3).

(a) Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. [79]

(b) The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the UN Convention on the Status of Refugees. [80]

(c) Paragraph 88 of the SOERING judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged. It follows from the above that it is not necessary for the Court to enter into a consideration of the

Government's untested, but no doubt *bona fide* allegations about the first applicant's terrorist activities and the threat posed by him to national security. [81]–[82]

3. Prohibition of torture and of inhuman or degrading treatment or punishment in expulsion cases: the point of time for the assessment of the risk; assessment of the risk of ill-treatment (Art. 3).

(a) As far as the applicant's complaint under Article 3 is concerned, the crucial question is whether it has been substantiated that there is a real risk that Mr Chahal, if expelled, would be subjected to treatment prohibited by that Article. Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it might shed light on the current situation and its likely evolution, it is the present conditions which are decisive. [86]

(b) Under the Convention system, the establishment and verification of the facts is primarily a matter for the Commission. Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area. However, the Court is not bound by the Commission's findings of fact and is free to make its assessment. Indeed, in cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe. [95]–[96]

(c) In determining whether it has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to Article 3, the Court will assess all the material placed before it and, if necessary, material obtained of its own motion. Furthermore, since the material point in time for the assessment of risk is the date of the Court's consideration of the case, it will be necessary to take account of evidence which has come to light since the Commission's review. [97]

(d) In view of the Government's proposal to return Mr Chahal to the airport of his choice in India, it is necessary for the Court to evaluate the risk of his being ill-treated with reference to the conditions throughout India rather than in Punjab alone. However, it must be borne in mind that the first applicant is a well-known supporter of Sikh separatism. Therefore evidence relating to the fate of Sikh militants at the hands of the security forces outside the state of Punjab is of particular relevance. [98]

(e) The Court has taken note of the Government's comments relating to the material contained in the reports of Amnesty International. Nonetheless, it attaches weight to some of the most striking allegations contained in those reports, particularly with regard to extra-judicial killings allegedly perpetrated by the Punjab police outside their home state and the action taken by the Indian Supreme Court, the West Bengal State Government and the Union Home Government in response. Moreover, similar assertions were accepted by the United Kingdom Immigration Appeal Tribunal and were included in the 1995 US State Department report on India. The 1994 National Human Rights Commission's report on Punjab substantiated the impression of a police force completely beyond control of lawful authority. [99]

(f) The Court is persuaded by this evidence, which has been

corroborated by material from a number of different objective sources, that elements in the Punjab police were accustomed to act without regard to human rights of suspected Sikh militants and were fully capable of pursuing their targets into areas of India far away from Punjab. Although there has been an improvement in the protection of human rights in India, especially in Punjab, the evidence demonstrates that problems still persist in connection with the observance of human rights by the security forces in Punjab. Moreover, it is most significant that no concrete evidence has been produced of any fundamental reform or reorganisation of the Punjab police in recent years. The Court cannot entirely discount the applicant's claims that any recent reduction in abusive activity stems from the fact that key figures in the campaign for Sikh separatism have either been killed, forced abroad or rendered inactive by torture or the fear of torture. Furthermore, it would appear from press reports that evidence of the full extent of past abuses is only now coming to light. [100]–[103]

(g) Although the Court considers that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside state boundaries, it also attaches significance to the fact that attested allegations of serious human rights violations have been levelled at the police elsewhere in India. Although the Court does not doubt the good faith of the Indian Government in providing assurances about Mr Chahal's safety, it would appear that the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety. It further considers that the applicant's high profile and alleged involvement in terrorism would be more likely to increase the risk to him of harm than otherwise. [104]–[106]

(h) For all the reasons outlined above, in particular the attested involvement of the Punjab police in killings and abductions outside their state and the allegations of serious human rights violations which continue to be levelled at members of the Indian security forces elsewhere, the Court finds it substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he is returned to India. Accordingly, the order for his deportation to India would, if executed, give rise to a violation of Article 3. [107]

4. Right to liberty and security: "lawful detention with a view to deportation" (Art. 5(1)).

(a) It is not in dispute that Mr Chahal has been detained "with a view to deportation" within the meaning of Article 5(1)(f). That provision does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent him committing an offence or fleeing; in this respect Article 5(1)(f) povides a different level of protection from Article 5(1)(c). Indeed, all that is required is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law. [112]

(b) The Court recalls, however, that any deprivation of liberty under

Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f). It is thus necessary to determine whether the duration of the deportation proceedings was excessive. [113]

(c) The period under consideration commenced on 16 August 1990 when Mr Chahal was first detained with a view to deportation. It terminated on 3 March 1994, when the domestic proceedings came to an end with a refusal of the House of Lords to allow leave to appeal. Although he has remained in custody until the present day, this latter period must be distinguished because during this time the Government have refrained from deporting him in compliance with the request made by the Commission under Rule 36 of its Rules of Procedure. [114]

(d) The Court has had regard to the length of time taken for the various decisions in the domestic proceedings. As regards the Secretary of State's decisions to refuse asylum, the periods were not excessive, bearing in mind the detailed and careful consideration required for the applicant's request for political asylum and the opportunities afforded to him to make representations and submit information. As the Court has observed in the context of Article 3, Mr Chahal's case involves considerations of an extremely serious and weighty nature. It is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence. Against this background, and bearing in mind what was at stake for the applicant and the interest that he had in his claims being thoroughly examined by the courts, none of the periods complained of can be regarded as excessive, taken either individually or in combination. Accordingly, there has been no violation of Article 5(1) of the Convention on account of the diligence, or lack of it, with which the domestic procedures were conducted. [115]–[117]

(e) It also falls to the Court to examine whether Mr Chahal's detention was "lawful" for the purposes of Article 5(1)(f), with particular reference to the safeguards provided by the national system. Where "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness. [118]

(f) There is no doubt that Mr Chahal's detention was lawful under national law and was effected "in accordance with a procedure prescribed by law". However, in view of the extremely long period during which he has been detained, it is also necessary to consider whether there existed sufficient guarantees against arbitrariness. In this context the Court observes that the applicant has been detained since 16 August 1990 on the ground, essentially, that in view of the threat to national security he could not safely be released. However, the applicant has consistently denied that he posed any threat to national security and has given reasons in support of this denial. The Court also notes that, since the Secretaries of State asserted that national security was involved, the domestic courts were not in a position effectively to control whether the decisions to keep Mr Chahal in detention were justified, because the full material on

which these decisions were based was not made available to them. [119]–[121]

(g) However, in the context of Article 5(1)(f) of the Convention, the immigration advisory panel procedure provided an important safeguard against arbitrariness. This panel, which included experienced judicial figures, was able fully to review the evidence relating to the national security threat represented by the applicant. Although its report has never been disclosed, at the hearing before the Court the Government indicated that the panel had agreed with the Home Secretary that Mr Chahal ought to be deported on national security grounds. The Court considers that this procedure provided an adequate guarantee that there were at least *prima facie* grounds for believing that if Mr Chahal were at liberty, national security would be put at risk and thus, that the executive had not acted arbitrarily when it ordered him to be kept in detention. [122]

(h) In conclusion, the Court recalls that Mr Chahal has undoubtedly been detained for a length of time which is bound to give rise to serious concern. However, in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5(1)(f). It follows that there has been no violation of Article 5(1). [123]

5. Right to liberty and security: judicial review of lawfulness of detention (Art. 5(4)).

(a) Article 5(4) provides a *lex specialis* in relation to the more general requirements of Article 13. It follows that, irrespective of the method chosen by Mr Chahal to argue his complaint that he was denied the opportunity to have the lawfulness of his detention reviewed, the Court must first examine it in connection with Article 5(4). [126]

(b) The notion of "lawfulness" under Article 5(4) has the same meaning as in paragraph 1, so that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5(1). The scope of the obligations under Article 5(4) is not identical for every kind of deprivation of liberty; this applies notably to the extent of the judicial review afforded. Nonetheless, it is clear that Article 5(4) does not guarantee a right to judicial review of such breadth as to empower the Court, on all aspects of the case including the qustions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5(1). [127]

(c) It follows from the requirements of Article 5(1) in cases of detention with a view to deportation that Article 5(4) does not demand that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law. [128]

(d) The notion of "lawfulness" in Article 5(1)(f) does not refer solely to the obligation to conform to the substantive and procedural rules of national law; it requires in addition that any deprivation of liberty

should be in keeping with the purpose of Article 5. The question therefore arises whether the available proceedings to challenge the lawfulness of Mr Chahal's detention and to seek bail provided an adequate control by the domestic courts. [129]

(e) The Court recollects that, because national security was involved, the domestic courts were not in a position to review whether the decisions to detain Mr Chahal and to keep him in detention were justified on national security grounds. Furthermore, although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed, the panel could not be considered as a "court" within the meaning of Article 5(4). The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that in Canada a more effective form of judicial control has been developed in cases of this type. This illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice. It follows that neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5(4). This shortcoming is all the more significant given that Mr Chahal had undoubtedly been deprived of his liberty for a length of time which is bound to give rise to serious concern. In conclusion, there has been a violation of Article 5(4) of the Convention. [130]–[133]

6. Right to respect for private and family life: deportation (Art. 8(1)).

The Court recalls its finding that the deportation of the first applicant to India would constitute a violation of Article 3 of the Convention. Having no reason to doubt that the respondent Government will comply with the present judgment, it considers it unnecessary to decide the hypothetical question whether, in the event of expulsion to India, there would also be a violation of the applicants' rights under Article 8 of the Convention. [139]

7. Right to an effective remedy: adequacy of judicial review and the advisory panel procedure (Art. 13).

(a) Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. Moreover, in certain circumstances the aggregate of remedies provided by national law must satisfy the requirements of Article 13. [145]

(b) The Court does not have to examine the allegation of a breach of Article 13 taken in conjunction with Article 5(1), in view of its finding of a violation of Article 5(4). Nor is it necessary to examine the complaint under Article 13 in conjunction with Article 8, in view of its finding concerning the hypothetical nature of the complaint under the latter provision. This leaves only the first applicant's claim under Article 3 combined with Article 13. It was not disputed that the Article 3 complaint was arguable on the merits and the Court accordingly finds that Article 13 is applicable. [146]–[147]

(c) The Court recalls that in its VILVARAJAH judgment it found judicial review proceedings to be an effective remedy in relation to the applicants' complaints under Article 3. It was satisfied that the English courts could review a decision by the Secretary of State to refuse asylum and could rule it unlawful on the grounds that it was tainted with illegality, irrationality or procedural impropriety. In particular, it was accepted that a court would have jurisdiction to quash a decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Home Secretary could take. [148]

(d) The Court also recalls that in assessing whether there exists a real risk of treatment in breach of Article 3 in expulsion cases such as the present, the fact that that person is perceived as a danger to the national security of the respondent State is not a material consideration. [149]

(e) It is true that in KLASS and LEANDER the Court held that Article 13 only required a remedy that was "as effective as can be" in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it must be borne in mind that those cases concerned complaints under Articles 8 and 10 of the Convention and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective. [150]–[152]

(f) In the present case, neither the advisory panel nor the courts could review the Home Secretary's decision to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security. It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 complaint for the purposes of Article 13 of the Convention. Moreover, the Court notes that in the proceedings before the advisory panel the applicant was not entitled, *inter alia*, to legal representation, that he was only given an outline of the grounds for the notice to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed. In these circumstances, the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13. [153]–[154]

(g) Having regard to the extent of the deficiencies of both judicial review proceedings and the advisory panel, the Court cannot consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3. Accordingly, there has been a violation of Article 13. [155]

8. Just satisfaction: damage; costs and expenses; default interest (Art. 50).

(a) In view of its decision that there has been no violation of Article 5(1), the Court makes no award of non-pecuniary damages in respect of the period of time Mr Chahal has spent in detention. As to the other complaints, the Court considers that the findings that his deportation, if carried out, would constitute a violation of Article 3 and that there have been breaches of Articles 5(4) and 13 constitute sufficient just satisfaction. [158]

(b) The Court considers the legal costs claimed by the applicants to be excessive. [160]

(c) According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8 per cent per annum. [161]

Mr *I. Christie*, Foreign and Commonwealth Office (Agent), *Sir Nicholas Lyell, Q.C., M.P.*, Attorney General, Mr *J. Eadie* (Counsel), Mr *C. Whomersley*, Legal Secretariat to the Law Officers, Mr *D. Nissen*, Home Office, Mr *C. Osborne*, Home Office, Mr *D. Cooke*, Home Office, Mr *J. Crump*, Home Office, Mr *J. Marshall*, Foreign and Commonwealth Office (Advisers) for the Government.

Mr *N. Bratza* (Delegate) for the Commission.

Mr *N. Blake, Q.C.*, (Counsel), Mr *D. Burgess* (Solicitor) for the applicant.

Amicus briefs were submitted by:

Amnesty International, assisted by Mr *R. Plender, Q.C.* and Mr *P. Duffy* (Counsel).

JCWI Justice, assisted by Mr *T. Eicke* and Mr *P. Bowen* (Counsel).

Liberty and The A.I.R.E. Centre, assisted by Mr *A. Nicol, Q.C.* (Counsel).

The following cases are referred to in the judgment:

1. BOUAMAR *v.* BELGIUM (A/129): (1989) 11 E.H.R.R. 1.
2. CRUZ VARAS *v.* SWEDEN (A/201): (1992) 14 E.H.R.R. 1.
3. DE JONG, BALJET AND VAN DEN BRINK *v.* NETHERLANDS (A/77): (1986) 8 E.H.R.R. 20.
4. E. *v.* NORWAY (A/181–A): (1994) 17 E.H.R.R. 30.
5. FOX, CAMPBELL AND HARTLEY *v.* UNITED KINGDOM (A/182): (1991) 13 E.H.R.R. 157.

6. IRELAND *v.* UNITED KINGDOM (A/25): (1979) 2 E.H.R.R. 25.
7. KLASS *v.* GERMANY (A/28): (1979) 2 E.H.R.R. 214.
8. KOLOMPAR *v.* BELGIUM (A/235–C): (1993) 16 E.H.R.R. 197.
9. LEANDER *v.* SWEDEN (A/116): (1987) 9 E.H.R.R. 433.
10. MURRAY *v.* UNITED KINGDOM (A/300–A): (1995) 19 E.H.R.R. 193.
11. QUINN *v.* FRANCE (A/311): (1996) 21 E.H.R.R. 529.
12. SOERING *v.* UNITED KINGDOM (A/161): (1989) 11 E.H.R.R. 439.
13. TOMASI *v.* FRANCE (A/241–A): (1993) 15 E.H.R.R. 1.
14. VILVARAJAH AND OTHERS *v.* UNITED KINGDOM (A/215): (1992) 14 E.H.R.R. 248.
15. X. *v.* UNITED KINGDOM (A/46): 4 E.H.R.R. 188.
16. ASSOCIATED PROVINCIAL PICTURE HOUSES LTD *v.* WEDNESBURY CORPORATION [1948] 1 K.B. 223.
17. CHARAN SINGH GILL *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT: 14 November 1994.
18. COUNCIL OF CIVIL SERVICE UNIONS *v.* MINISTER FOR THE CIVIL SERVICE [1985] A.C. 374.
19. R. *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT, *ex parte* CHAHAL [1994] Imm. A.R. 107.
20. R. *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT, *ex parte* CHAHAL: 10 November 1995.
21. R. *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT, *ex parte* CHEBLAK [1991] 2 All E.R. 9.

The following additional case is referred to in the partly dissenting, partly concurring opinion of Judge De Meyer:

22. GOLDER *v.* UNITED KINGDOM (A/18): 1 E.H.R.R. 524.

The following additional cases are referred to in the partly dissenting opinion of Judge Pettiti:

23. AMUUR *v.* FRANCE: (1996) 22 E.H.R.R. 533.
24. BOZANO *v.* FRANCE (A/111): (1987) 9 E.H.R.R. 297.
25. GUZZARDI *v.* ITALY (A/39): 3 E.H.R.R. 333.
26. LAWLESS *v.* IRELAND (No. 3) (A/3): 1 E.H.R.R. 15.
27. WINTERWERP *v.* THE NETHERLANDS (A/33): (1979) 2 E.H.R.R. 387.
28. Application No. 7317/75, LYNAS *v.* SWITZERLAND, Dec. 6.10.76, D.R. 6, p. 141.

The following additional case is referred to in the Report of the Commission:

29. BELDJOUDI *v.* FRANCE (A/234–A): (1992) 14 E.H.R.R. 801.

The Facts

I. *The circumstances of the case*

A. *The applicants*

12. The four applicants are members of the same family and are Sikhs.

The first applicant, Karamjit Singh Chahal, is an Indian citizen who was born in 1948. He entered the United Kingdom illegally in 1971 in search of employment. In 1974 he applied to the Home Office to

regularise his stay and on 10 December 1974 was granted indefinite leave to remain under the terms of an amnesty for illegal entrants who arrived before 1 January 1973. Since 16 August 1990 he has been detained for the purpose of deportation in Bedford prison.

The second applicant, Darshan Kaur Chahal, is also an Indian citizen who was born in 1956. She came to England on 12 September 1975 following her marriage to the first applicant in India, and currently lives in Luton with the two children of the family, Kiranpreet Kaur Chahal (born in 1977) and Bikaramjit Singh Chahal (born in 1978), who are the third and fourth applicants. By virtue of their birth in the United Kingdom the two children have British nationality.

13. The first and second applicants applied for British citizenship in December 1987. Mr Chahal's request was refused on 4 April 1989 but that of Mrs Chahal is yet to be determined.

B. *Background: the conflict in Punjab*

14. Since the partition of India in 1947 many Sikhs have been engaged in a political campaign for an independent homeland, Khalistan, which would approximate to the Indian province of Punjab. In the late 1970s, a prominent group emerged under the leadership of Sant Jarnail Bhindranwale, based in the Golden Temple in Amritsar, the holiest Sikh shrine. The Government submit that Sant Bhindranwale, as well as preaching the tenets of orthodox Sikhism, used the Golden Temple for the accumulation of arms and advocated the use of violence for the establishment of an independent Khalistan.

15. The situation in Punjab deteriorated following the killing of a senior police officer in the Golden Temple in 1983. On 6 June 1984 the Indian army stormed the temple during a religious festival, killing Sant Bhindranwale and approximately 1,000 other Sikhs. Four months later the Indian Prime Minister, Mrs Indira Gandhi, was shot dead by two Sikh members of her bodyguard. The ensuing Hindu backlash included the killing of over 2,000 Sikhs in riots in Delhi.

16. Since 1984, the conflict in Punjab has reportedly claimed over 20,000 lives, peaking in 1992 when, according to Indian press reports collated by the United Kingdom Foreign and Commonwealth Office, approximately 4,000 people were killed in related incidents in Punjab and elsewhere. There is evidence of violence and human rights abuses perpetrated by both Sikh separatists and the security forces.[1]

C. *Mr Chahal's visit to India in 1984*

17. On 1 January 1984 Mr Chahal travelled to Punjab with his wife and children to visit relatives. He submits that during this visit he

[1] See paras. 45–56 below.

attended at the Golden Temple on many occasions, and saw Sant Bhindranwale preach there approximately 10 times. On one occasion he, his wife and son were afforded a personal audience with him. At around this time Mr Chahal was baptised and began to adhere to the tenets of orthodox Sikhism. He also became involved in organising passive resistance in support of autonomy for Punjab.

18. On 30 March 1984 he was arrested by the Punjab police. He was taken into detention and held for 21 days, during which time he was, he contended, kept handcuffed in insanitary conditions, beaten to unconsciousness, electrocuted on various parts of his body and subjected to a mock execution. He was subsequently released without charge.

He was able to return to the United Kingdom on 27 May 1984, and has not visited India since.

D. *Mr Chahal's political and religious activities in the United Kingdom*

19. On his return to the United Kingdom, Mr Chahal became a leading figure in the Sikh community, which reacted with horror to the storming of the Golden Temple. He helped organise a demonstration in London to protest at the Indian Government's actions, became a full-time member of the committee of the "gurdwara" (temple) in Belvedere (Erith, Kent) and travelled around London persuading young Sikhs to be baptised.

20. In August 1984 Mr Jasbir Singh Rode entered the United Kingdom. He was Sant Bhindranwale's nephew, and recognised by Sikhs as his successor as spiritual leader. Mr Chahal contacted him on his arrival and toured the United Kingdom with him, assisting at baptisms performed by him. Mr Rode was instrumental in setting up branches of the International Sikh Youth Federation ("ISYF") in the United Kindom, and the applicant played an important organisational role in this endeavour. The ISYF was established to be the overseas branch of the All India Sikh Students' Federation. This latter organisation was proscribed by the Indian Government until mid-1985, and is reportedly still perceived as militant by the Indian authorities.

21. In December 1984 Mr Rode was excluded from the United Kingdom on the ground that he publicly advocated violent methods in pursuance of the separatist campaign. On his return to India he was imprisoned without trial until late 1988. Shortly after his release it became apparent that he had changed his political views; he now argued that Sikhs should pursue their cause using constitutional methods, a view which, according to the applicants, was unacceptable to many Sikhs. The fomer followers of Mr Rode therefore became divided.

22. In the United Kingdom, according to the Government, this led to a split in the ISYF along broadly north/south lines. In the north of England most branches followed Mr Rode, whereas in the south the ISYF became linked with another Punjab political activist, Dr Sohan Singh, who continued to support the campaign for an independent homeland. Mr Chahal and, according to him, all major figures of spiritual and intellectual standing within the United Kingdom Sikh community, were in the southern faction.

E. *Mr Chahal's alleged criminal activities*

23. In October 1985 Mr Chahal was detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 ("PTA") on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister, Mr Rajiv Gandhi, during an official visit to the United Kingdom. He was released for lack of evidence.

In 1986 he was arrested and questioned twice (once under the PTA), because he was believed to be involved in an ISYF conspiracy to murder moderate Sikhs in the United Kingdom. On both occasions he was released without charge.

Mr Chahal denied involvement in any of these conspiracies.

24. In March 1986 he was charged with assault and affray following disturbances at the East Ham gurdwara in London. During the course of his trial on these charges in May 1987 there was a disturbance at the Belvedere gurdwara, which was widely reported in the national press. Mr Chahal was arrested in connection with this incident, and was brought to court in handcuffs on the final day of his trial. He was convicted of both charges arising out of the East Ham incident, and served concurrent sentences of six and nine months.

He was subsequently acquitted of charges arising out of the Belvedere disturbance.

On 27 July 1992 the Court of Appeal quashed the two convictions on the grounds that Mr Chahal's appearance in court in handcuffs had been seriously prejudicial to him.

F. *The deportation and asylum proceedings*

1. *The notice of intention to deport*

25. On 14 August 1990 the Home Secretary (Mr Hurd) decided that Mr Chahal ought to be deported because his continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism.

A notice of intention to deport was served on the latter on 16 August 1990. He was then detained for deportation purposes pursuant to paragraph 2(2) of Schedule III to the Immigration Act 1971[2] and has remained in custody ever since.

[2] See para. 64 below.

2. *Mr Chahal's application for asylum*

26. Mr Chahal claimed that if returned to India he had a well-founded fear of persecution within the terms of the United Nations 1951 Convention on the Status of Refugees[3] and applied for political asylum on 16 August 1990. He was interviewed by officials from the Asylum Division of the Home Office on 11 September 1990 and his solicitors submitted written representations on his behalf.

He claimed that he would be subjected to torture and persecution if returned to India, and relied upon the following matters, *inter alia*:

(a) his detention and torture in Punjab in 1984[4];
(b) his political activities in the United Kingdom and his identification with the regeneration of the Sikh religion and the campaign for a separate Sikh state[5];
(c) his links with Sant Bhindranwale and Jasbir Singh Rode[6];
(d) evidence that his parents, other relatives and contacts had been detained, tortured and questioned in October 1989 about Mr Chahal's activities in the United Kingdom and that others connected to him had died in police custody;
(e) the interest shown by the Indian national press in his alleged Sikh militancy and proposed expulsion from the United Kingdom;
(f) consistent evidence, including that contained in the reports of Amnesty International, of the torture and murder of those perceived to be Sikh militants by the Indian authorities, particularly the Punjab police.[7]

27. On 27 March 1991 the Home Secretary refused the request for asylum.

In a letter to the applicant, he expressed the view that the latter's known support of Sikh separatism would be unlikely to attract the interest of the Indian authorities unless that support were to include acts of violence against India. He continued that he was:

> not aware of any outstanding charges either in India or elsewhere against [Mr Chahal] and on the account [Mr Chahal] has given of his political activities, the Secretary of State does not accept that there is a reasonable likelihood that he would be persecuted if he were to return to India. The media interest in his case may be known by the Indian authorities and, given his admitted involvement in an extremist faction of the ISYF, it is accepted that the Indian government may have some current and legitimate interest in his activities.

[3] "The 1951 Convention": see para. 61 below.
[4] See para. 18 above.
[5] See paras. 19–22 above.
[6] See paras. 17 and 20 above.
[7] See paras. 55–56 below.

The Home Secretary did not consider that Mr Chahal's experiences in India in 1984 had any continued relevance, since that had been a time of particularly high tension in Punjab.

28. Mr Chahal's solicitors informed the Home Secretary that he intended to make an application for judicial review of the refusal of asylum, but would wait until the advisory panel had considered the national security case against him.

3. *The advisory panel*

29. Because of the national security elements of the case, there was no right of appeal against the deportation order.[8] However, on 10 June 1991, the matter was considered by an advisory panel, chaired by a Court of Appeal judge, Lloyd L.J., and including a former President of the Immigration Appeal Tribunal.

30. The Home Office had prepared statements on 5 April and 23 May 1991 containing an outline of the grounds for the notice of intention to deport, which were sent to the applicant. The principal points were as follows:

(a) Mr Chahal had been the central figure in directing the support for terrorism organised by the London based faction of the ISYF which had close links with Sikh terrorists in the Punjab;
(b) he had played a leading role in the faction's programme of intimidation directed against the members of other groups within the United Kingdom Sikh community;
(c) he had been involved in supplying funds and equipment to terrorists in Punjab since 1985;
(d) he had a public history of violent involvement in Sikh terrorism, as evidenced by his 1986 convictions and involvement in disturbances at the Belvedere gurdwara.[9] These disturbances were related to the aim of gaining control of gurdwara funds in order to finance support and assistance for terrorist activity in Punjab;
(e) he had been involved in planning and directing terrorist attacks in India, the United Kingdom and elsewhere.

Mr Chahal was not informed of the sources of and the evidence for these views, which were put to the advisory panel.

31. In a letter dated 7 June 1991, Mr Chahal's solicitors set out a written case to be put before the advisory panel, including the following points:

(a) the southern branch of the ISYF had a membership of less than 200 and was non-violent both in terms of its aims and history;
(b) the ISYF did not attempt to gain control of gurdwaras in order

[8] See paras. 58 and 60 below.
[9] See para. 24 above.

to channel funds into terrorism; this was a purely ideological struggle on the part of young Sikhs to have gurdwaras run according to Sikh religious values;

(c) Mr Chahal denied any involvement in the disturbances at the East Ham and Belvedere gurdwaras[10] or in any other violent or terrorist activity in the United Kingdom or elsewhere.

32. He appeared before the panel in person, and was allowed to call witnesses on his behalf, but was not allowed to be represented by a lawyer or to be informed of the advice which the panel gave to the Home Secretary.[11]

33. On 25 July 1991 the Home Secretary (Mr Baker) signed an order for Mr Chahal's deportation, which was served on 29 July.

4. *Judicial review*

34. On 9 August 1991 Mr Chahal applied for judicial review of the Home Secretaries' decisions to refuse asylum and to make the deportation order. Leave was granted by the High Court on 2 September 1991.

The asylum refusal was quashed on 2 December 1991 and referred back to the Home Secretary. The court found that the reasoning behind it was inadequate, principally because the Home Secretary had neglected to explain whether he believed the evidence of Amnesty International relating to the situation in Punjab and, if not, the reasons for such disbelief. The court did not decide on the validity of the deportation order. Popplewell J. expressed "enormous anxiety" about the case.

35. After further consideration, on 1 June 1992 the Home Secretary (Mr Clarke) took a fresh decision to refuse asylum. He considered that the breakdown of law and order in Punjab was due to the activities of Sikh terrorists and was not evidence of persecution within the terms of the 1951 Convention. Furthermore, relying upon Articles 32 and 33 of that Convention,[12] he expressed the view that, even if Mr Chahal were at risk of persecution, he would not be entitled to the protection of the 1951 Convention because of the threat he posed to national security.

36. Mr Chahal applied for judicial review of this decision, but then requested a postponement on 4 June 1992, which was granted.

37. In a letter dated 2 July 1992, the Home Secretary informed the applicant that he declined to withdraw the deportation proceedings, that Mr Chahal could be deported to any international airport of his choice within India and that the Home Secretary had sought and received an assurance from the Indian Government (which was subsequently repeated in December 1995) in the following terms:

[10] See para. 24 above.
[11] See para. 60 below.
[12] See para. 61 below.

> We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.
>
> I have the honour to confirm the above.

38. On 16 July 1992 the High Court granted leave to apply for judicial review of the decisions of 1 June 1992 to maintain the refusal of asylum and of 2 July 1992 to proceed with the deportation. An application for bail was rejected on 23 July (the European Court of Human Rights was not provided with details of this ruling).

39. The Court of Appeal (Criminal Division) quashed Mr Chahal's 1987 convictions on 27 July 1992.[13] The Home Secretary reviewed the case in the light of this development, but concluded that it was right to proceed with the deportation.

40. The hearing of the application for judicial review took place between 18 and 21 January 1993. It was refused on 12 February 1993 by Potts J. in the High Court, as was a further application for bail (the European Court of Human Rights was not provided with details of this ruling either).

41. Mr Chahal appealed to the Court of Appeal. The appeal was heard on 28 July 1993 and dismissed on 22 October 1993.[14]

The court held that the combined effect of the 1951 Convention and the Immigration Rules[15] was to require the Home Secretary to weigh the threat to Mr Chahal's life or freedom if he were deported against the danger to national security if he were permitted to stay. In the words of Nolan L.J.:

> The proposition that, in deciding whether the deportation of an individual would be in the public good, the Secretary of State should wholly ignore the fact that the individual has established a well founded fear of persecution in the country to which he is to be sent seems to me to be surprising and unacceptable. Of course there may very well be occasions when the individual poses such a threat to this country and its inhabitants that considerations of his personal safety and well being become virtually irrelevant. Nonetheless one would expect that the Secretary of State would balance the risks to this country against the risks to the individual, albeit that the scales might properly be weighted in favour of the former.

The Home Secretary appeared to have taken into account the evidence that the applicant might be persecuted and it was not possible for the court to judge whether his decision to deport was irrational or perverse because it did not have access to the evidence relating to the national security risk posed by Mr Chahal. As Neill L.J. remarked:

> The court has the right to scrutinise a claim that a person should be deported in the interests of national security but in practice this scrutiny

[13] See para. 24 above.
[14] R. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *ex parte* CHAHAL [1994] Imm. A.R. 107.
[15] See paras. 61–62 below.

may be defective or incomplete if all the relevant facts are not before the court.

In the absence of evidence of irrationality or perversity, it was impossible under English law to set aside the Home Secretary's decision.[16]

42. The Court of Appeal refused leave to appeal to the House of Lords, and this was also refused by the House of Lords on 3 March 1994.

43. Following the report of the Commission, the applicant applied for temporary release pending the decision of the European Court of Human Rights, by way of habeas corpus and judicial review proceedings in the Divisional Court.[17] The Secretary of State opposed the application on the following grounds:

> The applicant was detained in August 1990 and served with notice of intention to deport because the then Secretary of State was satisfied that he represented a substantial threat to national security. The Secretary of State remains satisfied that such a threat persists. ... Given the reasons for the applicant's deportation, the Secretary of State remains satisfied that his temporary release from detention would not be justified. He has concluded the applicant could not be safely released, subject to restrictions, in view of the nature of the threat posed by him.

Judgment was given on 10 November 1995.[18] MacPherson J. in the Divisional Court rejected the application for habeas corpus, on the ground that "the detention *per se* was plainly lawful because the Secretary of State [had] the power to detain an individual who [was] the subject of a decision to make a deportation order". In connection with the application for judicial review of the Secretary of State's decision to detain Mr Chahal, the Judge remarked:

> I have to look at the decision of the Secretary of State and judge whether, in all the circumstances, upon the information available, he has acted unlawfully, or with procedural impropriety, or perversely to the point of irrationality. I am wholly unable to say that there is a case for such a decision, particularly bearing in mind that I do not know the full material on which the decisions have been made. ... [I]t is obvious and right that in certain circumstances the Executive must be able to keep secret matters which they deem to be necessary to keep secret. ... There are no grounds, in my judgment, for saying or even suspecting that there are not matters which are present in the Secretary of State's mind of that kind upon which he was entitled to act...

G. *Current conditions in India and in Punjab*

44. The current position with regard to the protection of human rights in India generally and in Punjab more specifically was a matter of

[16] See para. 66 below.
[17] See para. 65 below.
[18] R. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *ex parte* CHAHAL, unreported.

dispute between the parties. A substantial amount of evidence was presented to the Court on this issue, some of which is summarised below.

1. *Material submitted by the Government*

45. The Government submitted that it appeared from Indian press reports collated by the Foreign and Commonwealth Office that the number of lives lost in Punjab from terrorism had decreased dramatically. In 1992 the figure was 4,000, in 1993 it was 394, and in 1994 it was 51. The former Chief Minister of Punjab, Mr Beant Singh, was assassinated in August 1995; that aside, there was little terrorist activity and there were only four terrorist-related deaths in the region in 1995.

46. Furthermore, democracy had returned to the state: almost all factions of the Akali Dal, the main Sikh political party, had united and were set to contest the next general election as one entity and the Gidderbaha by-election passed off peacefully, with a turn-out of 88 per cent.

47. The United Kingdom High Commission continued to receive complaints about the Punjab police. However, in recent months these had related mainly to extortion rather than to politically-motivated abuses and they were consistently told that there was now little or no politically-motivated police action in Punjab.

48. Steps had been taken by the Indian authorities to deal with the remaining corruption and misuse of power in Punjab; for example, there had been a number of court judgments against police officers, a "Lok Pal" (ombudsman) had been appointed and the new Chief Minister had promised to "ensure transparency and accountability". The Indian National Human Rights Commission ("NHRC"), which had reported on Punjab[19] continued to strengthen and develop.

2. *The Indian National Human Rights Commission reports*

49. The NHRC visited Punjab in April 1994 and reported as follows:

> The complaints of human rights violations made to the Commission fall broadly into three categories. Firstly, there were complaints against the police, of arbitrary arrests, disappearances, custodial deaths and fake encounters resulting in killings...
> There was near unanimity in the views expressed by the public at large that terrorism has been contained. ... [A] feeling was now growing that it was time for the police to cease operating under the cover of special laws. There were very strong demands for normalising the role and functioning of the police and for re-establishing the authority of the District Magistrates over the police. The impression that the Commission has gathered is that ... the Magistracy at District level is not at present in a position to inquire into complaints of human rights violations by the police. In the public mind there is a prevailing feeling of the police being

[19] See below.

above the law, working under its own steam and answerable to none. ... The Commission recommends that the Government examine this matter seriously and ensure that normalcy is restored ...

50. In addition, in its Annual Report for 1994/1995, the NHRC recommended, as a matter of priority, a systematic reform, retraining and reorganisation of the police throughout India, having commented:

> The issue of custodial death and rape, already high in the priorities of the Commission, was set in the wider context of the widespread mistreatment of prisoners resulting from practices that can only be described as cruel, inhuman or degrading.

3. *Reports to the United Nations*

51. The reports to the United Nations in 1994 and 1995 of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment and in 1994 of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Working Group on enforced and involuntary disappearances, recounted that human rights violations on the part of the security forces were widespread in India.

For example, in his 1995 report, the Special Rapporteur on torture commented on the practice of torture in police custody:

> It is apparent that few incidents, in what is credibly alleged to be a widespread, if not endemic, phenomenon are prosecuted and even fewer lead to conviction of the perpetrators. It is to be noted that very many cases that come to the attention of the Special Rapporteur are those that result in death, in other words, those where torture may have been applied with the most extreme results. This must be a minority of cases of torture in the country [India].

4. *The United States' Department of State reports*

52. The 1995 United States' Department of State Report on India told of human rights abuses perpetrated by the Punjab police acting outside their home state:

> Punjab police hit teams again in 1994 pursued Sikh militants into other parts of India. On June 24, Punjab police shot and killed Karnail Singh Kaili, a man they identified as a Sikh terrorist ... in West Bengal. The government of West Bengal claimed that it had not been informed of the presence of Punjab police in West Bengal, seized Kaili's body and weapons and barred the departure of the police team until the Punjab Chief Minister apologized.

53. In contrast, the most recent Department of State Report (March 1996) declared that insurgent violence had largely disappeared in Punjab and that there was visible progress in correcting patterns of abuse by the police. It continued,

> Killings of Sikh militants by police in armed encounters appear to be virtually at an end. During the first 8 months of [1995], only two persons were killed in police encounters. Attention was focused on past abuses in Punjab by press reports that hundreds of bodies, many allegedly those of persons who died in unacknowledged police custody, were cremated as 'unclaimed' during 1991–1993 or discovered at the bottom of recently drained canals.

5. *The Immigration Appeal Tribunal*

54. The United Kingdom Immigration Appeal Tribunal took account of allegations of the extra-territorial activities of the Punjab police in the case of CHARAN SINGH GILL *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT,[20] which related to an appeal by a politically-active Sikh against the Secretary of State's refusal to grant him political asylum. The appellant drew the attention of the Tribunal to a story in the Punjab Times of 10 May 1994, which reported the killing by the Punjab police of two Sikh fighters in West Bengal. The Chairman of the Tribunal remarked:

> We should say that we do not accept [the representative of the Home Office's] view of this document, that it was more probably based on imaginative journalism than on fact. In our view, it affords valuable retrospective corroboration of the material set out above, demonstrating that the Punjab police are very much a law unto themselves, and are ready to track down anyone they regard as subversive, as and when the mood takes them, anywhere in India.

6. *The reports of Amnesty International*

55. In its report of May 1995, "Punjab police: beyond the bounds of the law", Amnesty International similarly alleged that the Punjab police were known to have carried out abductions and executions of suspected Sikh militants in other Indian states outside their jurisdiction. The Supreme Court in New Delhi had reportedly taken serious note of the illegal conduct of the Punjab police, publicly accusing them of "highhandedness and tyranny" and had on several occasions between 1993 and 1994 ordered investigations into their activities. Following the killing of a Sikh in Calcutta in May 1994, which provoked an angry reaction from the West Bengal State Government, the Union Home Secretary had convened a meeting of all Director Generals of Police on 5 July 1994 to discuss concerns expressed by certain states following the intrusion by the Punjab police into their territories. One of the stated aims of the meeting was to try to work out a formula whereby the Punjab police would conduct their operations in co-operation with the respective state governments.

56. In its October 1995 report, "India: Determining the fate of the 'disappeared' in Punjab", Amnesty International claimed that high-profile individuals continued to "disappear" in police custody. Among the examples cited were the General Secretary of the Human Rights Wing of the Sikh political party, the Akali Dal, who was reportedly arrested on 6 September 1995 and had not been seen since.

[20] 14 November 1994, unreported.

II. *Relevant domestic and international law and practice*

A. *Deportation*

57. By section 3(5)(b) of the Immigration Act 1971 ("the 1971 Act"), a person who is not a British citizen is liable to deportation *inter alia* if the Secreary of State deems this to be "conducive to the public good".

B. *Appeal against deportation and the advisory panel procedure*

58. There is a right of appeal to an adjudicator, and ultimately to an appeal tribunal, against a decision to make a deportation order[21] except in cases where the ground of the decision to deport was that the deportation would be conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature.[22]

59. This exception was maintained in the Asylum and Immigration Appeals Act 1993, which came into force in July 1993.

60. Cases in which a deportation order has been made on national security or political grounds are subject to a non-statutory advisory procedure, set out in paragraph 157 of the Statement of Changes in Immigration Rules.[23]

The person concerned is given an opportunity to make written and/or oral representations to an advisory panel, to call witnesses on his behalf, and to be assisted by a friend, but he is not permitted to have legal representation before the panel. The Home Secretary decides how much information about the case against him may be communicated to the person concerned. The panel's advice to the Home Secretary is not disclosed, and the latter is not obliged to follow it.

C. *The United Nations 1951 Convention on the Status of Refugees*

61. The United Kingdom is a party to the United Nations 1951 Convention on the Status of Refugees ("the 1951 Convention"). A "refugee" is defined by Article 1 of the Convention as a person who is outside the country of his nationality due to "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".

Article 32 of the Convention provides:

> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
> 2. The expulsion of such a refugee shall only be in pursuance of a decision reached in accordance with the due process of law.
> ...

[21] s.15(1) of the 1971 Act.
[22] s.15(3) of the 1971 Act.
[23] House of Commons Paper 251 of 1990.

Article 33 provides:

> 1. No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

62. Rule 161 of the Immigration Rules[24] provides that: "Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees. ..."

63. In a case where a person to be deported for national security reasons claims asylum, the Secretary of State must balance the interest of the individual as a refugee against the risk to national security.[25]

D. *Detention pending deportation*

64. A person may be detained under the authority of the Secretary of State after the service upon him of a notice of intention to deport and pending the making of a deportation order, and also after the making of an order, pending his removal or departure from the country.[26]

65. Any person in detention is entitled to challenge the lawfulness of his detention by way of a writ of habeas corpus. This is issued by the High Court to procure the production of a person in order that the circumstances of his detention may be inquired into. The detainee must be released if unlawfully detained.[27] Only one application for habeas corpus on the same grounds may be made by an individual in detention, unless fresh evidence is adduced in support.[28]

In addition, a detainee may apply for judicial review of the decision to detain him.[29]

In conjunction with either an application for habeas corpus or judicial review, it is possible to apply for bail (that is, temporary release) pending the decision of the court.

E. *Judicial review*

66. Decisions of the Home Secretary to refuse asylum, to make a deportation order or to detain pending deportation are liable to

[24] House of Commons Paper 251 of 1990.
[25] R. *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT, *ex parte* CHAHAL [1994] Imm. A.R. 107: see para. 41 above.
[26] Paras. 2(2) and (3) of Schedule III to the 1971 Act.
[27] Habeas Corpus Act 1679 and Habeas Corpus Act 1816, s.1.
[28] Administration of Justice Act 1960, s. 14(2).
[29] See paras. 43 above and 66-67 below.

challenge by way of judicial review and may be quashed by reference to the ordinary principles of English public law.

These principles do not permit the court to make findings of fact on matters within the province of the Secretary of State or to substitute its discretion for the Minister's. The court may quash his decision only if he failed to interpret or apply English law correctly, if he failed to take account of issues which he was required by law to address, or if his decision was so irrational or perverse that no reasonable Secretary of State could have made it.[30]

67. Where national security issues are involved, the courts retain a power of review, but it is a limited one because:

> the decision on whether the requirements of national security outweigh the duty of fairness in a particular case is a matter for the Government to decide, not for the courts; the Government alone has access to the necessary information and in any event the judicial process is unsuitable for reaching decisions on national security.[31]

See also R. *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT, *ex parte* CHEBLAK[32] where a similar approach was taken by the Court of Appeal.

PROCEEDINGS BEFORE THE COMMISSION

68. In the application of 27 July 1993[33] to the Commission (as declared admissible), the first applicant complained that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment in violation of Article 3 of the Convention; that his detention had been too long and that the judicial control thereof had been ineffective and slow in breach of Article 5(1) and (4); and that, contrary to Article 13, he had had no effective domestic remedy for his Convention claims because of the national security elements in his case. All the applicants also complained that the deportation of the first applicant would breach their right to respect for family life under Article 8, for which Convention claim they had no effective domestic remedy, contrary to Article 13.

69. On 1 September 1994 the Commission declared the application admissible. In its report of 27 June 1995[34] it expressed the unanimous opinions that there would be violations of Articles 3 and 8 if the first applicant were deported to India; that there had been a violation of Article 5(1) by reason of the length of his detention; and that there had been a violation of Article 13. The Commission also concluded[35] that it

[30] ASSOCIATED PROVINCIAL PICTURE HOUSES LTD *v.* WEDNESBURY CORPORATION [1948] 1 K.B. 223.
[31] COUNCIL OF CIVIL SERVICE UNIONS *v.* MINISTER FOR THE CIVIL SERVICE [1985] A.C. 374 at 402.
[32] [1991] 2 All E.R. 9.
[33] App. No. 22414/93.
[34] Made under Art. 31.
[35] By 16 votes to 1.

was not necessary to examine the complaints under Article 5(4) of the Convention.

The full text of the Commission's opinion and of the partially dissenting opinion contained in the report follows.

Opinion

A. *Complaints declared admissible*

79.* The Commission has declared admissible the first applicant's complaints that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment, that his detention pending deportation has been too long, that the judicial control thereof has been ineffective and slow, and that he has no effective domestic remedy for his Convention claims because of the national security elements in his case.

80. The Commission has also declared admissible the complaint of all the applicants that the deportation of the first applicant would breach their right to respect for family life, for which Convention claim they have no effective domestic remedy.

B. *Points at issue*

81. The points at issue in the present case are as follows:

- whether there would be a violation of Article 3 of the Convention in the first applicant's case if he were to be deported to India;
- whether there has been a violation of Article 5(1) of the Convention in the first applicant's case as regards the lawfulness and length of his detention;
- whether there has been a violation of Article 5(4) of the Convention in the first applicant's case, both as regards the nature of the judicial controls in his case and their speed;
- whether there would be a violation of Article 8 of the Convention for all the applicants if the first applicant were to be deported to India; and, finally,
- whether there has been a violation of Article 13 of the Convention.

C. *As regards Article 3 of the Convention*

82. Article 3 of the Convention provides as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

* The paragraph numbering from here to paragraph 158 in bold is the original numbering of the Commission's Opinion. Then we revert to the numbering of the Court's judgment.—Ed.

83. The first applicant contends that he has adequately shown that he runs a real risk of death or torture in custody if returned to India, contrary to Article 3 of the Convention. He refers to the elements listed above. He submits that he cannot be expected to prove such a prediction.

84. It seems likely that the first applicant would be arrested if he returned to India. Whilst the assurances of the Indian Government are to be taken into account, they are, according to the first applicant, of little value. The fact is that the Indian Government have been and continue to be unable to keep in check abuses by their security forces in the Punjab and elsewhere. No special precautionary measures or protection have been proposed for him.

85. Neither the Indian legal system nor the Indian Constitution, given the emergency legislation in force, can offer sufficient protection against death and torture in custody in cases of terrorist suspects. For example, the Terrorist and Disruptive Activities (Prevention) Act 1985, permits police custody without access to family members or lawyers for up to 60 days, during which time human rights abuses are rife. The Armed Forces (Special Powers) Act[36] provides broadly defined powers to shoot to kill, with virtual immunity from prosecution. The National Security Act 1980 permits indefinite detention without trial for preventive purposes on loosely defined grounds of national security. The first applicant underlines that, unlike the applicants in the VILVARAJAH case, he does not fear persecution from random terrorist violence in India, but from the State security forces.[37] The situation is unlikely to improve, given the absence of enduring political initiatives in India.

86. The Home Secretary appears to accept the broad picture of deaths in custody and torture disclosed by Amnesty International reports on India. However he concluded that such security force abuses had been provoked by terrorists. The first applicant disputes this reasoning and contends that the motives of the torturers are irrelevant to the Article 3 issue. Moreover he was unable to challenge this reasoning before the domestic courts, despite the concerns expressed by the judges dealing with the case. These concerns were not assuaged by a mere finding that the United Kingdom Government was not acting illegally overall in deciding to deport the first applicant.

87. The first applicant contends that it is almost cynical to suggest that the situation in the Punjab has now greatly improved, when the decision to deport him was taken, and was to be enforced, at a time which the Government now concede was highly dangerous. Thousands of people were killed annually and there were notorious human rights abuses, including torture and disappearances, perpetrated by the security forces and the police especially, towards people whose

[36] In force since 1958.

[37] *cf.* VILVARAJAH AND OTHERS *v.* UNITED KINGDOM (A/215): (1992) 14 E.H.R.R. 248.

custody was frequently not even recorded. If it had not been for the judicial review and Strasbourg proceedings, the first applicant would have been sent back to a similar fate. He asserts that the relevant date for the assessment of the risk he would suffer under Article 3 of the Convention was 1 June 1992, the date of the renewed decision to refuse asylum and to deport him to India, irrespective of the merits of his asylum claim. This was the period upon which the domestic courts focused during the judicial review proceedings.

88. If the Commission considers that it should examine present day conditions, the first applicant submits that it is too early to say that the situation in the Punjab is without risk for him, and far too early to write off the past years of intense violence as if they have no implications for the present. The creation of the National Human Rights Commission is to be welcomed, but its effects are not yet felt. It is noteworthy that in 1994 it was investigating hundreds of complaints against the Punjab police, and that it had expressed serious reservations about the unaccountability of the police and the arbitrary operation of the emergency laws. That Commission's powers are also severely limited and its membership apparently lacks objective independence. It cannot replace an independent, impartial, adequately resourced and accessible judiciary. However, there is no evidence that the judiciary are yet in a position to control the police and end the impunity of their operations. As an example of the latter, it is alleged that certain Sikhs, who have been recently returned by Canada to India, have been arrested and have either disappeared or have been detained without charge or trial.

89. Not only does the first applicant assert that he faces a real risk of treatment contrary to Article 3 of the Convention, but he also asserts that the disputed national security question is irrelevant to the Article 3 issue. In his view Article 3 of the Convention, unlike the 1951 United Nations Convention on the Status of Refugees examined by the domestic courts in the present case, provides absolute protection against being sent to a country where such a real risk exists. This absolute protection is not subject to a qualification of proportionality.

90. Reliance for these propositions is placed, *inter alia*, on a comparison with Article 3 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the absence of reciprocal obligations in asylum matters and the fact that the first applicant is not an alien in the United Kingdom but a Commonwealth citizen with strong ties to that country and, who, prior to 1971, would have had a right of abode there.

91. If there is a proportionality issue, the first applicant states that he has not violated English rules or regulations. He categorically denies the Government's allegations of terrorist activity. The first applicant points out that he has not been offered an opportunity to clear his name and there is evidence that he has been the victim of misinformation. He contends that none of the elements raised by the

Government constitute a threat to the national security of the United Kingdom. Certain allegations, such as that involving a ceremonial sword or misappropriation of funds, are matters which could have been dealt with by the criminal process. The Government have been unduly influenced by their reciprocal relations with India and the general desire to discourage Sikh militancy in the United Kingdom. Such matters have no relevance to the latter's national security and cannot justify exposing the first applicant to severe ill-treatment and separation from his family.

92. The Government deny that the first applicant could be a victim of a violation of Article 3 of the Convention. They contend that, contrary to the view of the Court in the SOERING and VILVARAJAH cases, Article 3 of the Convention has no extra-territorial effect, but should be construed as a prohibition on a Member State exposing persons within its own jurisdiction to torture or to inhuman or degrading treatment.[38]

93. Alternatively, the Government contend that, even if Article 3 of the Convention has extra-territorial effect, the first applicant's return to India would not involve a breach of the Article. They place particular reliance on the assurances provided by the Indian High Commission and on the view of one Court of Appeal judge that much of the evidence of persecution and torture in the past provided by the applicant was second-hand or even more remote, and could in part be said to be evidence of impression rather than fact. They assert that the Sikh troubles have considerably declined and that this applicant could avoid involvement in possible future incidents by living outside the Punjab.

94. The Government stress that the first applicant's case has been considered at the highest level and with extreme care. The Home Secretary personally took the decision to deport him after considering the opinion of a panel of qualified advisers, which included a senior judge. That panel had before it sensitive material which could not be disclosed to the applicants. Furthermore, there have been two series of judicial review proceedings following the decision to deport. The Government refute the applicants' claim that they have been unduly influenced by false, defamatory reports in the Indian press. This did not form any part of the Government's information. For the Government, the first applicant is not merely a threat to public order, but a terrorist, whose deportation is fully justified on grounds of national security.

95. The revocation of the deportation order and the release of the first applicant back into the community would seriously undermine national security, with the revitalisation of the southern faction of the ISYF, the recurrence of intimidation of moderate Sikhs in the United Kingdom, the commission of further terrorist acts there, the increase in the financing, direction and control of terrorist operations outside the

[38] *cf.* SOERING *v.* UNITED KINGDOM (A/161): (1989) 11 E.H.R.R. 439 paras. 81–91, and VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, paras. 102–103.

United Kingdom, especially in India, and the encouragement of Sikh terrorists to regard the United Kingdom as a safe haven from which they can continue their terrorist activities. Moreover, the negative effect on the general fight against terrorism cannot be ignored.

96. On the basis of the test laid down in the VILVARAJAH judgment,[39] the Government contend that the first applicant does not face a real risk of torture or persecution in the Punjab or elsewhere in India for the following reasons:

(a) Sikhs are not a persecuted group per se; India has a secular constitution which guarantees freedom of religious belief and practice to all, as well as an independent judiciary;
(b) the principal events upon which the first applicant based his claim for asylum occurred in India before 1985;
(c) the events of early 1984 should be viewed in the context of a significant increase of terrorist activity in the Punjab in 1984, heightened tension in that region and ill-discipline on the part of the members of the Indian security forces;
(d) whilst the Amnesty International reports were substantially accurate in demonstrating that serious human rights violations had been committed by individual members and groups within the Indian security forces in the Punjab, it was not accepted that each and every aspect of those reports was true; the majority of the alleged incidents were not capable of independent or objective verification;
(e) furthermore, the Amnesty International reports failed to recognise what, in the Government's view, was the principal reason for the presence of the Indian security forces in the Punjab, namely the combating of serious terrorist activity and the maintenance of law and order;
(f) the situation in the Punjab has been positively transformed over the last 18 months, the number of reported deaths in terrorist related incidents having been reduced to a minimum and the democratic processes having been restored; therefore, the material relied on by the applicants, including Amnesty reports, is out of date and no conclusions can be drawn, in relation to the first applicant's present position, from uncorroborated details of cases of individual abuse which occurred before the situation improved;
(g) the international criticism of the abuse of detainees and other human rights abuses by law enforcement authorities is now being taken seriously by the Indian Government, which has demonstrated a clear change in attitude, with the creation, for example, of the National Human Rights Commission;
(h) the Canadian High Commission have followed up recent cases

[39] VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, paras. 102–103.

of people returned to India who claimed terrorist involvement and likely ill-treatment as a result, but in no case have such claims been borne out;

(i) if the first applicant were returned to India, there is a prospect that he would be arrested and charged with terrorist offences according to Indian law;

(j) if so charged, the first applicant would receive full protection by the Indian Government from mistreatment while held in custody; given his profile, there is bound to be considerable press and public interest in him, which reduces the risk of abuse;

(k) if the first applicant were not arrested by the Indian authorities on his return to India, but remained at liberty, then he faces a risk (as does any other person in the Punjab) of violence from terrorist outrage;

(l) in so far as the first applicant faces a risk from the activities of members of the security forces acting outside the law, such violations of Indian law have not been condoned by the Indian or State Governments, and the first applicant will benefit from the High Commissioner's assurance.

97. An alien on British territory enjoys absolute protection from ill-treatment contrary to Article 3 of the Convention. However it is argued that Article 3 is subject to implied limitations, qualifications or derogations, where it is proposed to deport an alien outside the jurisdiction of the Convention for reasons of national security.

98. The Government contend that it has been a constant theme in international jurisprudence over the centuries that the right of an alien to refuge is subject to necessary qualifications. Asylum is to be enjoyed by people "who suffer from undeserved enmity, not those who have done something that is injurious to human society or to other men".[40] This is reflected in Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees.

99. The Government submit that Article 3 was never intended to cover cases of the present kind. Contracting Parties have a right and duty to weigh the risk of torture against the harm caused to national security by the continued presence of an alien on its territory. However this balancing exercise is non-justiciable. It cannot be the role of the national courts or the Convention organs to make any searching judicial scrutiny of national security matters, once raised by the Member State in good faith. It is not possible to evaluate the evidence on which the executive bases its decisions on national security.

100. The Government aver that their decision on national security in relation to the first applicant has been made in good faith and possesses substance. It has been weighed against his personal circumstances.

[40] Hugo Grotius, *De Jure Belli ac Pacis* (1623).

101. The Commission rejects the Government's challenge to the constant case law of the Convention organs under Article 3 of the Convention and reaffirms the following principles:

> 103. ...(the) expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned. ...
> 107. ...(2) Further, since the nature of the Contracting State's responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the [Convention organs are] not precluded, however, from having regard to information which comes to light subsequent to the expulsion. ...
> ...(3) Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case.
> 108. The [Convention organs'] examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.[41]

102. The Commission is further unable to accept the Government's submission that Article 3 of the Convention may have implied limitations entitling the State to expel a person because of the requirements of national security, notwithstanding the existence of a real risk that the person concerned would be subjected to torture or to inhuman or degrading treatment in the receiving State. As appears from the above passage in the VILVARAJAH AND OTHERS judgment, the guarantees of Article 3 of the Convention are of an absolute character, permitting no exception.

103. For the same reason, the Commission cannot accept the Government's submission that under Article 3 of the Convention the risk of ill-treatment, if the person is to be returned, is to be weighed against the threat to national security if he remains in the deporting State. It is true that in its SOERING judgment,[42] the Court observed that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". The Court moreover noted that the danger for a State obliged to harbour a fugitive was a consideration which must "be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases".

[41] VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, para. 103, and paras. 107–108.
[42] *Loc. cit.*, para. 89.

104. Nevertheless, once the risk to the individual of being subjected to such treatment has been established, it is not the case, in the Commission's view, that the individual's background, or the threat posed by him to the national security of the deporting State, can be weighed in the balance so as to reduce the level of protection afforded by the Convention. To this extent the Convention provides wider guarantees than Articles 32 and 33 of the 1951 United Nations Convention Relating to the Status of Refugees. While it is accepted that this may result in undesirable individuals finding a safe haven in a Contracting State, the Commission observes that the State is not without means of dealing with any threats posed thereby, the individual being subject to the ordinary criminal laws of the country concerned.

105. Accordingly, even if the Commission were in a position to assess for itself the strength of the Government's untested allegations about the first applicant's terrorist activities and the threat posed by him to national security, this could not affect the central question which requires determination under Article 3 of the Convention, namely whether the first applicant has shown substantial grounds for believing that he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment if returned to India.

106. A further issue is raised as to the point of time at which this risk is to be assessed. It is submitted by the first applicant that his complaint under Article 3 of the Convention must principally focus on the foreseeable consequences of his deportation to India in June 1992, when the Home Secretary expressed his renewed determination to proceed with the deportation measure. It is pointed out that it was this period which was under scrutiny before the domestic courts. Reliance is placed in this regard on the observations of the Court in the VILVARAJAH AND OTHERS judgment that the existence of the risk must be assessed primarily with reference to those facts which were known, or ought to have been known, to the Contracting State at the time of the expulsion, even though regard may also be had to information which comes to light thereafter.[43]

107. The Commission cannot accept this argument. The Convention organs are required to determine whether, if returned, an applicant faces a real risk of treatment contrary to Article 3 of the Convention. It follows that this assessment must be made at the time, and on the basis of information available, when the deportation is to take place. In this respect the case of VILVARAJAH AND OTHERS is to be distinguished from the present case since the expulsion had already occurred when the Court was considering those applications. In the present case, although it was the intention to deport the first applicant in June 1992, the deportation did not take place and he continues to remain in custody awaiting deportation. In these circumstances, the Commission must

[43] Para. 101 above.

consider whether, on the information currently available, there are substantial grounds to believe that, if deported, the first applicant would face a real risk of being subjected to treatment contrary to Article 3. In making this assessment, the Commission has nevertheless had regard to all the information made available to it by the parties as to the conditions prevailing in India, and as to the gravity of the risk posed to the first applicant, throughout the period in which he has been threatened with deportation.

108. The Commission notes that the Government now concede that 1992 was a particularly violent year in India, with 4,000 deaths having been recorded in terrorist related incidents, mainly in the Punjab. They have also implicitly recognised that human rights abuses by the Indian police were widespread, and that the police were relatively unaccountable for their unlawful acts, a fact which was not helped by the broad powers conferred by the Terrorist and Disruptive Activities (Prevention) Act 1985. This view is strongly reinforced by Amnesty International reports, which are both detailed and specific in their evidence of serious human rights violations against Sikhs by individual members and groups within the Indian security forces. As a prominent Sikh militant, the risk to the first applicant was likely to be more serious than that posed to other members of the Sikh community, a view confirmed by the representations made by Amnesty International to the Home Secretary to the effect that, if sent to India against his will, the first applicant would be at risk of torture, "disappearance" or extrajudicial execution.

109. The Government argue that, whatever the risk posed to the first applicant in 1991 and 1992 when the reports relied on by him were prepared, conditions in the Punjab have improved considerably and the security situation has been transformed, thereby substantially reducing the risk of ill-treatment if the first applicant were now to be returned to India. In particular, reliance is placed on the fact that the number of terrorist related deaths in the Punjab has fallen from 4,000 in 1992 to 394 in 1993, and to 51 by the autumn of 1994. Reliance is also placed on what is said to be a definitive change in the Indian Government's attitude towards human rights and to the creation of the National Human Rights Commission ("NHRC"), which had reported positively on the improvement of the situation in the Punjab in 1994.

110. As regards the particular position of the first applicant, the Government submit that, given his high profile, there is bound to be considerable press and public interest in him should he be deported to India, and that this may, in itself, serve to limit any risk of custodial abuse. This is reinforced by the specific undertaking of the Indian Government of June 1992 and by the agreement of the United Kingdom Government to return the first applicant to any international airport of his choice in India.

111. On the basis of the material before it, the Commission accepts that there has been an improvement in the conditions prevailing in

India and, more especially, in the Punjab. The establishment of the NHRC represents, in the view of the Commission, a particularly significant development for the proper protection of human rights. Nevertheless, the Commission is unable to find in the recent material provided by the Government any solid evidence that the police are now under democratic control or that the judiciary has been able fully to reassert its own independent authority in the Punjab. In this connection, the Commission recalls the complaints recorded in 1994 by the NHRC against the police of arbitrary arrests, disappearances, custodial deaths, fake encounters resulting in killings and the continuing unaccountability of the police, reinforced by their powers under the Terrorist and Disruptive Activities (Prevention) Act 1985.

112. As to the specific position of the first applicant, the Commission notes the uncontested claims made by him as to his past experiences in India and the grounds for believing that his return to India in 1992 would have been likely to expose him to serious ill-treatment. The Commission sees no reason to doubt the continuing validity of those grounds. Further, the Commission is unable to accept the Government's argument that the first applicant's high public profile would be likely to reduce the risk, particularly if he were to return to a part of India other than the Pubjab. As a leading Sikh militant, who is suspected of involvement in acts of terrorism, and who is to be deported because of the threat he poses to the security of the United Kingdom, the first applicant is likely to be a person of special interest to the security forces, irrespective of the part of India to which he is returned.

113. As to the express assurance given by the Indian Government that the first applicant would enjoy the same legal protection as any other Indian citizen and would have no reason to expect to suffer ill-treatment of any kind at the hands of the Indian authorities, the Commission is impressed by the good faith shown by the Indian Government in providing such an assurance. Nevertheless, having regard to the current conditions referred to above, the Commission is not satisfied that the assurance provides an effective guarantee for the safety of the first applicant if returned to India.

114. In the light of these considerations, the Commission is of the opinion that substantial grounds have been established for believing that the first applicant would be exposed to a real risk of ill-treatment, contrary to Article 3 of the Convention, if deported to India.

Conclusion

115. The Commission unanimously concludes that there would be a violation of Article 3 of the Convention if the first applicant were to be deported to India.

D. *As regards Article 5(1) of the Convention*

116. Article 5(1) of the Convention, as far as relevant, provides as follows:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> f. the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation ... .

117. The first applicant submits that he has suffered a breach of this provision because for much of the period since 14 August 1990 his detention has not been "with a view to deportation". Instead the proceedings have involved consideration of his asylum applications and judicial review. These proceedings have been ineffective because of the Government's tactics of minimum disclosure. The first applicant also claims that the proceedings were not determined speedily since he has been detained now for nearly five years, a period which is the equivalent of a substantial sentence for a serious crime. He states that it has never been alleged that he would abscond or not answer his bail if released from detention. His substantial family ties in the United Kingdom indicate that he would have no interest in doing so.

118. The Government contend that the first applicant has been lawfully detained since 14 August 1990 under Article 5(1)(f) of the Convention pending the deportation proceedings. In the light of the national security considerations in the case, his release on bail was inappropriate. The Government maintain that the case received speedy judicial determination at the domestic level, the judicial review proceedings being dealt with faster than usual.

119. As to the former complaint, the Commission considers that, in principle, the first applicant has been lawfully detained under Article 5(1)(f) of the Convention as a "person against whom action is being taken with a view to deportation". It would be unduly narrow to interpret Article 5(1)(f) as confined to cases where the person is detained solely to enable the deportation order to be implemented. The words of the provision are broad enough to cover the case where the person is originally detained with a view to deportation, but challenges that decision or claims asylum, and continues to be detained pending determination of that challenge or claim. The first applicant was detained with a view to deportation in August 1990. The deportation order was made in July 1991. The applicant continues to be detained for the purpose of giving effect to that order. The fact that implementation of the decision to deport was suspended while the Secretary of State considered the asylum request and reconsidered the request after the judicial review proceedings, does not affect the purpose or lawfulness of the detention.

120. The complaint concerning the length of the first applicant's

detention was originally made under Article 5(4) of the Conven but the Commission considers it appropriate to examine it first u Article 5(1). The issue which arises is whether the first applic detention has ceased to be justified because the proceedings hav been pursued with the requisite speed.[44] The first applicant has detained now for nearly five years, albeit partly awaiting the outc of the Strasbourg proceedings. Nevertheless, an examination o domestic proceedings does not demonstrate particular diligence: months elapsed between the grant of leave and the first judicial re proceedings; six months elapsed between the quashing of the deportation decision and the taking of the second decision; s months elapsed between the second grant of leave and the se judicial review proceedings, and eight months elapsed betwee second judicial review proceedings and the determination of the applicant's appeal. Therefore the judicial review proceedings resulted in a delay of some 18 months, during the whole of v period the first applicant remained in detention.

121. The Government's submission that, by comparison witl norm, the case was dealt with expeditiously is unconvincing whe person is detained pending deportation, unconvicted and without charge. It is important that proceedings to challenge the decision to deport should be handled with the utmost expedition. It is true that in one sense the first applicant profited from the delay in returning him to India, in the same way as any person profits who is facing deportation or extradition. However, the Commission notes that his complaint is not that he was not sent back more quickly, but rather that he was kept in detention pending the decision being taken as to whether he should or should not be deported. Moreover, it cannot be said that there was any abuse of the judicial review process by the first applicant in order to delay his deportation.

122. In these circumstances, the Commission is of the opinion that the proceedings in the present case were not pursued with the requisite speed and that, therefore, the first applicant's detention ceased to be justified.

Conclusion

123. The Commission unanimously concludes that there has been a violation of Article 5(1) of the Convention by reason of the length of the first applicant's detention.

E. *As regards Article 5(4) of the Convention*

124. Article 5(4) of the Convention reads as follows:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[44] *cf.* KOLOMPAR v. BELGIUM (A/235–C): (1993) 16 E.H.R.R. 197, para. 36.

125. The first applicant claims under Article 5(4) of the Convention to have been denied an opportunity effectively to contest the lawfulness of his detention before the domestic courts, because of the broad effect of the untested national security allegations against him. This is confirmed by the change in the evidential basis of the case, only put to the Commission in December 1994 and previously not known to the applicants. Hence it could not be challenged and tested by the domestic courts. The first applicant also claims that the judicial review proceedings were not determined speedily.

126. The Government contend that the first applicant had adequate judicial control of the lawfulness of his detention in his two bail applications, which were dealt with by the High Court, and that the proceedings were handled speedily.

127. As to the former complaint, the Commission notes that the issue of the adequacy of the remedies at the disposal of the first applicant was principally addressed by the parties under Article 13 of the Convention and generally limited to argument about the remedy of judicial review. The Commission is of the opinion that it is more appropriate to consider this issue under Article 13 of the Convention.[45]

128. As to the complaint concerning the speediness of the proceedings, the Commission considers that in view of its conclusion that the duration of the first applicant's detention gave rise to a violation of Article 5(1) of the Convention, it is not necessary to examine this complaint separately under Article 5(4).

Conclusion

129. The Commission concludes, by 16 votes to 1, that it is not necessary to examine the complaints under Article 5(4) of the Convention.

F. *As regards Article 8 of the Convention*

130. Article 8 of the Convention, as far as relevant, provides as follows:

> 1. Everyone has the right to respect for his private and family life ....
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security ....

131. The applicants allege that the deportation of the first applicant would breach their right to respect for private and family life. They underline the fact that, if there was any cogent evidence against the first applicant of terrorist activities in the United Kingdom, a criminal

[45] See paras. 141–151 below.

prosecution could have been instituted against him. The absence of such a prosecution casts grave doubts on the allegations and the material upon which the Home Secretary has based his decisions. This shows that the national security reasons are not serious or compelling. The first applicant is a victim of a sophisticated distortion of information perpetrated by or on behalf of the Indian Government and by untrue Indian newspaper reports. Information which is short of admissible evidence in a criminal case should not form the basis of a decision to expose someone to a risk of torture.

132. The applicants deny that the first applicant's deportation is justified on national security grounds. They rely on the same reasons as those put forward by the first applicant in refuting the national security allegations under Article 3 of the Convention. The applicants point out that the first applicant has strong, settled ties in the United Kingdom, having lived there for 19 years and founded a family. He should therefore not be treated differently from other Commonwealth citizens who, not so long ago, had a common law right of abode in that country. Reliance is placed on the BELJOUDI judgment.[46]

133. The Government accept that the deportation of the first applicant would constitute an interference with the applicants' rights to respect for family life. However, the Government submit that the interference is necessary in the interests of national security, within the meaning of the second paragraph of Article 8. The Government consider that the Commission is not in a position to evaluate the extreme seriousness of the national security risk posed by the first applicant in the present case. It is further submitted that the strength of the national security case is by no means undermined by the absence of any successful criminal prosecution against the first applicant: much of the material upon which the Home Secretary has been acting is of a confidential nature and could not be deployed in criminal proceedings.

134. The Commission notes that the interference with the applicants' right to respect for private and family life was in accordance with the law and pursued the legitimate aim of protecting the interests of national security. The only remaining issue, therefore, is whether the deportation of the first applicant would be proportionate to that aim and, therefore, "necessary in a democratic society" within the meaning of Article 8(2) of the Convention.

135. The Commission considers that the interference with the Article 8 rights of the applicants is a serious one. The first applicant has lived lawfully in the United Kingdom for some 19 and a half years and his wife 19 years; their two children were born and brought up in the United Kingdom and are United Kingdom's citizens. Both are still teenagers. The deportation of the first applicant would almost certainly lead to a permanent break up of the family. While the first applicant clearly still has close family links in India, there is a strong

[46] BELJOUDI *v.* FRANCE (A/234–A): (1992) 14 E.H.R.R. 801.

risk that if returned he would be arrested and detained, quite possibly for a substantial period without charge or trial and, on any view, with some risk that he would be ill-treated.

136. Whilst the Commission acknowledges that States enjoy a wide margin of appreciation under the Convention where matters of national security are concerned, with possibly lower standards of proof being required under Article 8 compared to Article 3, it remains ultimately for the Government to satisfy the Commission that the grave recourse of deportation is in all the circumstances both necessary and proportionate.

137. The Commission is struck by the fact that the first applicant has no criminal record. He has not been convicted of any terrorist crime or indeed of any serious crime, even though it is clear that the allegations made against him would, if proved, constitute serious offences in both the United Kingdom and India. It may be true that terrorist offences are difficult to prove because of the problems of obtaining admissible and usable evidence. Nevertheless, it is apparent from the experience in the United Kingdom that successful prosecutions for terrorist offences are possible.

138. Further, the Commission observes that the matters which are now relied on by the Government, in support of their claim that the first applicant poses a threat to national security, were not placed before the domestic courts, and that the allegations against him remain untested.

139. Having regard to these various considerations, the Commission is of the opinion that, even allowing for the wide margin of appreciation afforded to the Government, the decision to deport the first applicant, if put into effect, would not be proportionate to the legitimate aim pursued, and would not therefore be necessary within the meaning of Article 8(2) of the Convention.

Conclusion

140. The Commission unanimously concludes that there would be a violation of Article 8 of the Convention if the first applicant is deported to India.

G. *As regards Article 13 of the Convention*

141. Article 13 of the Convention reads as follows:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

142. The applicants maintain that they had no effective remedy for

their Convention claims. They contend that the evaluation by the European Court of Human Rights of the efficacy of judicial review in the VILVARAJAH case is flawed, but that anyway their application is distinguishable.

143. It is contended that English courts have no jurisdiction to establish the existence of a risk of torture in the receiving State. The courts may not go beyond the terms of the immigration rules which make no reference to the Convention or the UN Convention against Torture. The national security allegations reduce even further the review which could be made by the domestic courts. Significantly, since the VILVARAJAH case, a right of appeal to an independent adjudicator has been created by the Asylum and Immigration Appeals Act 1993 for those refused asylum, except in national security cases of the present kind.

144. The amplified national security case presented to the Commission by the Government in their observations on 23 December 1994, demonstrates even further the need for a fair and effective hearing at which allegations are made and substantiated, and an opportunity given to rebut them. In the United Kingdom where the "public good" in removal is relied on, the whole process of investigating and determining asylum claims under any humanitarian obligation, and determining the existence of reasons of national security and other reasons of public good, is dealt with as a matter of unchallengeable executive discretion.

145. The Commission has been given data which was not before the national courts. In the applicants' submission, it cannot be said that the Members of the Commission could be trusted with material not suitable for disclosure to such courts. The nature of the material disproves any overriding question of confidentiality. The national courts and the applicants appear to have been misled as to the limits of disclosure and deprived of material which could have been considered domestically.

146. The Government rely on the Court's jurisprudence in the cases of SOERING and VILVARAJAH for the proposition that judical review provides an adequate remedy in cases of the present kind.[47]

147. The Commission is required to consider whether the applicants had an effective remedy, by way of judicial review; in respect of their claims under the Convention, that is, the first applicant's claims under Articles 3 and 5 of the Convention, and all the applicants' claims under Article 8.

148. The Commission notes that in its VILVARAJAH AND OTHERS judgment, the Court held that the scope of the domestic courts' review of the Home Secretary's refusal to grant asylum was sufficiently wide to satisfy the requirements of Article 13 of the Convention.[48]

[47] SOERING *v.* UNITED KINGDOM, *loc. cit.*, and VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*

[48] VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, paras. 123–127.

149. However, the present case is distinguishable from that of VILVARAJAH AND OTHERS, having regard to the national security claim. As appears from the Court of Appeal's judgment[48a], where national security considerations are invoked as a ground for the deportation decision, the powers of review of domestic courts are limited to determining, first, whether the decision of the Home Secretary that the deportation was required for reasons of national security was irrational, perverse or based on a misdirection and, secondly, whether there was sufficient evidence that the Home Secretary balanced the gravity of the national security risk against all other circumstances, including the likely risk of persecution if the person were deported.

150. As the Court of Appeal pointed out, the scrutiny of the claim that a person should be deported in the interests of national security may in practice be defective or incomplete if all the relevant facts are not before the courts. This deficiency is illustrated by the facts of the present case, in that the domestic courts did not even have available to them the further information which has been put before the Commission concerning the perceived threat posed by the first applicant to the national security of the United Kingdom.

151. Furthermore, even when the relevant facts are before the courts, they are not empowered to carry out their own assessment of the respective risks, but are confined to reviewing whether there is sufficient evidence that the necessary balancing exercise has been carried out by the Home Secretary. Provided there is such evidence, the courts are powerless to interfere, however strong a risk there is of the applicant facing treatment contrary to Article 3 of the Convention if returned to the country in question.

152. In the Commission's opinion, the power of review by United Kingdom courts when national security is invoked is too restrictive to satisfy the requirements of Article 13 of the Convention.

Conclusion

153. The Commission unanimously concludes that there has been a violation of Article 13 of the Convention.

H. *Recapitulation*

154. The Commission unanimously concludes that there would be a violation of Article 3 of the Convention if the first applicant is deported to India.[49]

155. The Commission unanimously concludes that there has been a violation of Article 5(1) of the Convention by reason of the length of the first applicant's detention.[50]

156. The Commission concludes, by 16 votes to 1, that it is not

[48a] See paras. 43–46 above.

[49] Para. 115 above.

[50] Para. 123 above.

necessary to examine the complaints under Article 5(4) of the Convention.[51]

157. The Commission unanimously concludes that there would be a violation of Article 8 of the Convention if the first applicant is deported to India.[52]

158. The Commission unanimously concludes that there has been a violation of Article 13 of the Convention.[53]

Partially Dissenting Opinion of Mr Trechsel

While I am generally in agreement with the majority of the Commission, I voted against the conclusion set out in para. 129, according to which it was not necessary to examine the complaints under Article 5(4) of the Convention.

In my view the finding that the first applicant's detention was not in conformity with the requirements of Article 5(1) of the Convention does not cover the issue of *habeas corpus* proceedings. The need for such a control is particularly acute whenever problems arise under the first paragraph of Article 5.

I also note that the opinion expressed by the majority is hardly in conformity with the Court's case law. In this respect I refer to the BOUAMAR judgment[54] where violations both of Article 5(1) and (4) of the Convention were found.

Having regard to the facts of the present case, it must be that Article 5(4) was violated for the same reasons as those put forward in this Report with regard to the violation of Article 13 of the Convention.

JUDGMENT

I. *Alleged Violation of Article 3 of the Convention*

72. The first applicant complained that his deportation to India would constitute a violation of Article 3 of the Convention, which states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission upheld this complaint, which the Government contested.

A. *Applicability of Article 3 in expulsion cases*

73. As the Court has observed in the past, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. Moreover, it must be noted

[51] Para. 129 above.
[52] Para. 140 above.
[53] Para. 151 above.
[54] BOUAMAR *v.* BELGIUM (A/129): (1989) 11 E.H.R.R. 1.

that the right to political asylum is not contained in either the Convention or its Protocols.[55]

74. However, it is well established in the case law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.[56]

The Government contested this principle before the Commission but accepted it in their pleadings before the Court.

B. *Expulsion cases involving an alleged danger to national security*

75. The Court notes that the deportation order against the first applicant was made on the ground that his continued presence in the United Kingdom was unconducive to the public good for reasons of national security, including the fight against terrorism.[57] The parties differed as to whether, and if so to what extent, the fact that the applicant might represent a danger to the security of the United Kingdom affected that State's obligations under Article 3.

76. Although the Government's primary contention was that no real risk of ill-treatment had been established,[58] they also emphasised that the reason for the intended deportation was national security. In this connection they submitted, first, that the guarantees afforded by Article 3 were not absolute in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases, which required an uncertain prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there was an implied limitation to Article 3 entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. The Government based this submission in the first place on the possibility of implied limitations as recognised in the Court's case law, particularly paragraphs 88 and 89 of its above-mentioned SOERING judgment. In support, they furthermore referred to the principle under international law that the right of an alien to asylum is subject to qualifications, as is provided for, *inter alia*,

[55] See VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, para. 102.
[56] See SOERING *v.* UNITED KINGDOM, *loc. cit.*, paras. 90–91, CRUZ VARAS *v.* SWEDEN (A/201): (1992) 14 E.H.R.R. 1, paras. 69–70, and VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, para. 103.
[57] See para. 25 above.
[58] See paras. 88 and 92 below.

by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[59]

In the alternative, the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3. This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community. This was the case here: it was at least open to substantial doubt whether the alleged risk of ill-treatment would materialise; consequently, the fact that Mr Chahal constituted a serious threat to the security of the United Kingdom justified his deportation.

77. The applicant denied that he represented any threat to the national security of the United Kingdom, and contended that, in any case, national security considerations could not justify exposing an individual to the risk of ill-treatment abroad any more than they could justify administering torture to him directly.

78. The Commission, with whom the intervenors[60] agreed, rejected the Government's arguments. It referred to the Court's VILVARAJAH AND OTHERS judgment[61] and expressed the opinion that the guarantees afforded by Article 3 were absolute in character, admitting of no exception.

At the hearing before the Court, the Commission's Delegate suggested that the passages in the Court's SOERING judgment upon which the Government relied[62] might be taken as authority for the view that, in a case where there were serious doubts as to the likelihood of a person being subjected to treatment or punishment contrary to Article 3, the benefit of that doubt could be given to the deporting State whose national interests were threatened by his continued presence. However, the national interests of the State could not be invoked to override the interests of the individual where substantial grounds had been shown for believing that he would be subjected to ill-treatment if expelled.

79. Article 3 enshrines one of the most fundamental values of democratic society.[63] The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or

[59] See para. 61 above.
[60] See para. 6 above.
[61] *Loc. cit.*, para. 108.
[62] See para. 76 above.
[63] See SOERING *v.* UNITED KINGDOM, *loc. cit.*, para. 88.

inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.[64]

80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.[65] In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[66]

81. Paragraph 88 of the Court's above-mentioned SOERING judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.

82. It follows from the above that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt *bona fide*, allegations about the first applicant's terrorist activities and the threat posed by him to national security.

C. *Application of Article 3 in the circumstances of the case*

1. *The point of time for the assessment of the risk*

83. Although there were differing views on the situation in India and in Punjab,[67] it was agreed that the violence and instability in that region reached a peak in 1992 and had been abating ever since. For this reason, the date taken by the Court for its assessment of the risk to Mr Chahal if expelled to India is of importance.

84. The applicant argued that the Court should consider the position in June 1992, at the time when the decision to deport him was made final.[68] The purpose of the stay on removal requested by the

[64] See IRELAND *v.* UNITED KINGDOM (A/25): 2 E.H.R.R. 25, para. 163, and TOMASI *v.* FRANCE (A/241–A): (1993) 15 E.H.R.R. 1, para. 115.
[65] VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, para. 103.
[66] See para. 61 above.
[67] See paras. 87–91 below.
[68] See para. 35 above.

Commission[69] was to prevent irremediable damage and not to afford the High Contracting Party with an opportunity to improve its case. Moreover, it was not appropriate that the Strasbourg organs should be involved in a continual fact-finding operation.

85. The Government, with whom the Commission agreed, submitted that because the responsibility of the State under Article 3 of the Convention in expulsion cases lies in the act of exposing an individual to a real risk of ill-treatment, the material date for the assessment of risk was the time of the proposed deportation. Since Mr Chahal had not yet been expelled, the relevant time was that of the proceedings before the Court.

86. It follows from the considerations in paragraph 74 above that, as far as the applicant's complaint under Article 3 is concerned, the crucial question is whether it has been substantiated that there is a real risk that Mr Chahal, if expelled, would be subjected to treatment prohibited by that Article. Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.

2. *The assessment of the risk of ill-treatment*

(a) *The arguments*

i. *General conditions*

87. It was the applicant's case that the Government's assessment of conditions in India and Punjab had been profoundly mistaken throughout the domestic and Strasbourg proceedings. He referred to a number of reports by governmental bodies and by inter-governmental and non-governmental organisations on the situation in India generally and in Punjab in particular, with emphasis on those reports concerning 1994 and 1995[70] and argued that this material established the contention that human rights abuse in India by the security forces, especially the police, remained endemic.

In response to the Government's offer to return him to the part of India of his choice, he asserted that the Punjab police had abducted and killed militant Sikhs outside their home state in the past.

Although he accepted that there had been some improvements in Punjab since the peak of unrest in 1992, he insisted that there had been no fundamental change of regime. On the contrary, what emerged from the above reports was the continuity of the practices of the security agencies. In this respect he pointed to the fact that the

[69] See para. 4 above.
[70] See paras. 49–56 above.

Director General of the Punjab Police, who had been responsible for many human rights abuses during his term of office between 1992 and 1995, had been replaced upon his retirement by his former deputy and intelligence chief.

88. The Government contended that there would be no real risk of Mr Chahal being ill-treated if the deportation order were to be implemented and emphasised that the latter was to be returned to whichever part of India he chose, and not necessarily to Punjab. In this context they pointed out that they regularly monitored the situation in India through the United Kingdom High Commission in New Delhi. It appeared from this information that positive concrete steps had been taken and continued to be taken to deal with human rights abuses. Specific legislation had been introduced in this regard; the National Human Rights Commission, which performed an important function, continued to strengthen and develop; and steps had been taken by both the executive and judicial authorities to deal with the remaining misuse of power. The situation in India generally was therefore such as to support their above contention.

Furthermore, with reference to the matters set out in paragraphs 45–48 above, they contended that the situation in Punjab had improved substantially in recent years. They stressed that there was now little or no terrorist activity in that state. An ombudsman had been established to look into complaints of misuse of power and the new Chief Minister had publicly declared the government's intentions to stamp out human rights abuses. Legal proceedings had been brought against police officers alleged to have been involved in unlawful activity.

89. Amnesty International in its written submissions informed the Court that prominent Sikh separatists still faced a serious risk of "disappearance", detention without charge or trial, torture and extrajudicial execution, frequently at the hands of the Punjab police. It referred to its 1995 report which documented a pattern of human rights violations committed by officers of the Punjab police acting in under-cover operations outside their home state.[71]

90. The Government, however, urged the Court to proceed with caution in relation to the material prepared by Amnesty International, since it was not possible to verify the facts of the cases referred to. Furthermore, when studying these reports it was tempting to lose sight of the broader picture of improvement by concentrating too much on individual cases of alleged serious human rights abuses. Finally, since the situation in Punjab had changed considerably in recent years, earlier reports prepared by Amnesty and other organisations were now of limited use.

91. On the basis of the material before it, the Commission accepted that there had been an improvement in the conditions prevailing in

[71] See para. 55 above.

India and, more specifically, in Punjab. However, it was unable to find in the recent material provided by the Government any solid evidence that the Punjab police were now under democratic control or that the judiciary had been able fully to reassert its own independent authority in the region.

ii. *Factors specific to Mr Chahal*

92. Those appearing before the Court also differed in their assessment of the effect which Mr Chahal's notoriety would have on his security in India.

In the Government's view, the Indian Government was likely to be astute enough to ensure that no ill-treatment befell Mr Chahal, knowing that the eyes of the world would be upon him. Furthermore, in June 1992 and December 1995 they had sought and received assurances from the Indian Government.[72]

93. The applicant asserted that his high profile would increase the danger of persecution. By taking the decision to deport him on national security grounds the Government had, as was noted by Popplewell J. in the first judicial review hearing,[73] in effect publicly branded him a terrorist. Articles in the Indian press since 1990 indicated that he was regarded as such in India, and a number of his relatives and acquaintances had been detained and ill-treated in Punjab because of their connection to him. The assurances of the Indian Government were of little value since that Government had shown itself unable to control the security forces in Punjab and elsewhere. The applicant also referred to examples of well-known personalities who had recently "disappeared".

94. For the Commission, Mr Chahal, as a leading Sikh militant suspected of involvement in acts of terrorism, was likely to be of special interest to the security forces, irrespective of the part of India to which he was returned.

(b) *The Court's approach*

95. Under the Convention system, the establishment and verification of the facts is primarily a matter for the Commission.[74] Accordingly, it is only in exceptional circumstances that the Court will use its power in this area.[75]

96. However, the Court is not bound by the Commission's findings of fact and is free to make its own assessment. Indeed, in cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 and the fact that it enshrines one of the

[72] See para. 37 above.
[73] See para. 34 above.
[74] Arts. 28(1) and 31.
[75] See CRUZ VARAS *v.* SWEDEN, *loc. cit.*, para. 74.

fundamental values of the democratic societies making up the Council of Europe.[76]

97. In determining whether it has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to Article 3, the Court will assess all the material placed before it and, if necessary, material obtained of its own motion.[77] Furthermore, since the material point in time for the assessment of risk is the date of the Court's consideration of the case,[78] it will be necessary to take account of evidence which has come to light since the Commission's review.

98. In view of the Government's proposal to return Mr Chahal to the airport of his choice in India, it is necessary for the Court to evaluate the risk of his being ill-treated with reference to conditions throughout India rather than in Punjab alone. However, it must be borne in mind that the first applicant is a well-known supporter of Sikh separatism. It follows from these observations that evidence relating to the fate of Sikh militants at the hands of the security forces outside the state of Punjab is of particular relevance.

99. The Court has taken note of the Government's comments relating to the material contained in the reports of Amnesty International.[79] Nonetheless, it attaches weight to some of the most striking allegations contained in those reports, particularly with regard to extrajudicial killings allegedly perpetrated by the Punjab police outside their home state and the action taken by the Indian Supreme Court, the West Bengal State Government and the Union Home Government in response.[80] Moreover, similar assertions were accepted by the United Kingdom Immigration Appeal Tribunal in CHARAN SINGH GILL *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT[81] and were included in the 1995 United States' State Department report on India.[82] The 1994 National Human Rights Commission's report on Punjab substantiated the impression of a police force completely beyond the control of lawful authority.[83]

100. The Court is persuaded by this evidence, which has been corroborated by material from a number of different objective sources, that until mid-1994 at least, elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were fully capable of pursuing their targets into areas of India far away from Punjab.

101. The Commission found in paragraph 111 of its report that there had in recent years been an improvement in the protection of human

[76] See VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, para. 108.
[77] *ibid.*, para. 107.
[78] See para. 86 above.
[79] See para. 90 above.
[80] See para. 55 above.
[81] See para. 54 above.
[82] See para. 52 above.
[83] See para. 49 above.

rights in India, especially in Punjab, and evidence produced subsequent to the Commission's consideration of the case indicates that matters continue to advance.

In particular, it would appear that the insurgent violence in Punjab had abated; the Court notes the very substantial reduction in terrorist-related deaths in the region as indicated by the respondent Government.[84] Furthermore, other encouraging events have reportedly taken place in Punjab in recent years, such as the return of democratic elections, a number of court judgments against police officers, the appointment of an ombudsman to investigate abuses of power and the promise of the new Chief Minister to "ensure transparency and accountability".[85] In addition, the 1996 United States' State Department report asserts that during 1995 "there was visible progress in correcting patterns of abuse by the [Punjab] police".[86]

102. Nonetheless, the evidence demonstrates that problems still persist in connection with the observance of human rights by the security forces in Punjab. As the respondent Government themselves recounted, the United Kingdom High Commission in India continues to receive complaints about the Punjab police, although in recent months these have related mainly to extortion rather than to politically-motivated abuses.[87] Amnesty International alleged that "disappearances" of notable Sikhs at the hands of the Punjab police continued sporadically throughout 1995[88] and the 1996 State Department report referred to the killing of two Sikh militants that year.[89]

103. Moreover, the Court finds it most significant that no concrete evidence has been produced of any fundamental reform or reorganisation of the Punjab police in recent years. The evidence referred to above[90] would indicate that such a process was urgently required, and indeed this was the recommendation of the NHRC.[91] Although there was a change in the leadership of the Punjab police in 1995, the Director General who presided over some of the worst abuses this decade has only been replaced by his former deputy and intelligence chief.[92]

Less than two years ago this same police force was carrying out well-documented raids into other Indian states[93] and the Court cannot entirely discount the applicant's claims that any recent reduction in

[84] See para. 45 above.
[85] See paras. 46 and 48 above.
[86] See para. 53 above.
[87] See para. 47 above.
[88] See para. 56 above.
[89] See para. 53 above.
[90] See paras. 49–56 above.
[91] See para. 49 above.
[92] See para. 87 above.
[93] See para. 100 above.

activity stems from the fact that key figures in the campaign for Sikh separatism have all either been killed, forced abroad or rendered inactive by torture or the fear of torture. Furthermore, it would appear from press reports that evidence of the full extent of past abuses is only now coming to light.[94]

104. Although the Court is of the opinion that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside state boundaries, it also attaches significance to the fact that attested allegations of serious human rights violations have been levelled at the police elsewhere in India. In this respect, the Court notes that the United Nations' Special Rapporteur on torture has described the practice of torture upon those in police custody as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice.[95] The NHRC has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India.[96]

105. Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above,[97] it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem.[98]

Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.

106. The Court further considers that the applicant's high profile would be more likely to increase the risk to him of harm than otherwise. It is not disputed that Mr Chahal is well known in India to support the cause of Sikh separatism and to have had close links with other leading figures in that struggle.[99] The respondent Government has made serious, albeit untested, allegations of his involvement in terrorism which are undoubtedly known to the Indian authorities. The Court is of the view that these factors would be likely to make him a target of interest for hard-line elements in the security forces who have relentlessly pursued suspected Sikh militants in the past.[1]

107. For all the reasons outlined above, in particular the attested involvement of the Punjab police in killings and abductions outside their state and the allegations of serious human rights violations which continue to be levelled at members of the Indian security forces

[94] See para. 53 above.
[95] See para. 51 above.
[96] See para. 50 above.
[97] Para. 92.
[98] See para. 104 above.
[99] See paras. 17 and 20 above.
[1] See paras. 49–56 above.

elsewhere, the Court finds it substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he is returned to India.

Accordingly, the order for his deportation to India would, if executed, give rise to a violation of Article 3.

II. *Alleged Violation of Article 5 of the Convention*

A. *Article 5(1)*

108. The first applicant complained that his detention pending deportation constituted a violation of Article 5(1) of the Convention, which provides (so far as is relevant):

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
> (f) the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation ...

109. Mr Chahal has been held in Bedford Prison since 16 August 1990.[2] It was not disputed that he had been detained "with a view to deportation" within the meaning of Article 5(1)(f). However, he maintained that his detention had ceased to be "in accordance with a procedure prescribed by law" for the purposes of Article 5(1) because of its excessive duration.

In particular, the applicant complained about the length of time[3] taken to consider and reject his application for refugee status; the period[4] between his application for judicial review of the decision to refuse asylum and the national court's decision; and the time required[5] for the fresh decision refusing asylum.

110. The Commission agreed, finding that the above proceedings were not pursued with the requisite speed and that the detention therefore ceased to be justified.

111. The Government, however, asserted that the various proceedings brought by Mr Chahal were dealt with as expeditiously as possible.

112. The Court recalls that it is not in dispute that Mr Chahal has been detained "with a view to deportation" within the meaning of Article 5(1)(f).[6] Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his

[2] See para. 25 above.
[3] 16 August 1990–27 March 1991.
[4] 9 August 1991–2 December 1991.
[5] 2 December 1991–1 June 1992.
[6] See para. 109 above.

committing an offence or fleeing; in this respect Article 5(1)(f) provides a different level of protection from Article 5(1)(c).

Indeed, all that is required under this provision is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law.

113. The Court recalls, however, that any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f).[7]

It is thus necessary to determine whether the duration of the deportation proceedings was excessive.

114. The period under consideration commenced on 16 August 1990, when Mr Chahal was first detained with a view to deportation. It terminated on 3 March 1994, when the domestic proceedings came to an end with the refusal of the House of Lords to allow leave to appeal.[8] Although he has remained in custody until the present day, this latter period must be distinguished because during this time the Government have refrained from deporting him in compliance with the request made by the Commission under Rule 36 of its Rules of Procedure.[9]

115. The Court has had regard to the length of time taken for the various decisions in the domestic proceedings.

As regards the decisions taken by the Secretary of State to refuse asylum, it does not consider that the periods[10] were excessive, bearing in mind the detailed and careful consideration required for the applicant's request for political asylum and the opportunities afforded to the latter to make representations and submit information.[11]

116. In connection with the judicial review proceedings before the national courts, it is noted that Mr Chahal's first application was made on 9 August 1991 and that a decision was reached on it by Popplewell J. on 2 December 1991. He made a second application on 16 July 1992, which was heard between 18 and 21 December 1992, judgment being given on 12 February 1993. The Court of Appeal dismissed the appeal against this decision on 22 October 1993 and refused him leave to appeal to the House of Lords. The House of Lords similarly refused leave to appeal on 3 March 1994.[12]

117. As the Court has observed in the context of Article 3, Mr Chahal's case involves considerations of an extremely serious and weighty nature. It is neither in the interests of the individual applicant

[7] See QUINN v. FRANCE (A/311): (1996) 21 E.H.R.R. 529, para. 48, and KOLOMPAR v. BELGIUM, *loc. cit.*, para. 36.
[8] See paras. 25 and 42 above.
[9] See para. 4 above.
[10] That is, 16 August 1990–27 March 1991 and 2 December 1991–1 June 1992.
[11] See paras. 25–27 and 34–35 above.
[12] See paras. 34, 38 and 40–42 above.

nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence.

Against this background, and bearing in mind what was at stake for the applicant and the interest that he had in his claims being thoroughly examined by the courts, none of the periods complained of can be regarded as excessive, taken either individually or in combination. Accordingly, there has been no violation of Article 5(1) of the Convention on account of the diligence, or lack of it, with which the domestic procedures were conducted.

118. It also falls to the Court to examine whether Mr Chahal's detention was "lawful" for the purposes of Article 5(1)(f), with particular reference to the safeguards provided by the national system.

Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.

119. There is no doubt that Mr Chahal's detention was lawful under national law and was effected "in accordance with a procedure prescribed by law".[13] However, in view of the extremely long period during which Mr Chahal has been detained, it is also necessary to consider whether there existed sufficient guarantees against arbitrariness.

120. In this context, the Court observes that the applicant has been detained since 16 August 1990 on the ground, essentially, that successive Secretaries of State have maintained that, in view of the threat to national security represented by him, he could not safely be released.[14] The applicant has, however, consistently denied that he posed any threat whatsoever to national security, and has given reasons in support of this denial.[15]

121. The Court further notes that, since the Secretaries of State asserted that national security was involved, the domestic courts were not in a position effectively to control whether the decisions to keep Mr Chahal in detention were justified, because the full material on which these decisions were based was not made available to them.[16]

122. However, in the context of Article 5(1) of the Convention, the advisory panel procedure[17] provided an important safeguard against arbitrariness. This panel, which included experienced judicial figures[18]

[13] See paras. 43 and 64 above.
[14] See para. 43 above.
[15] See paras. 31 and 77 above.
[16] See para. 43 above.
[17] See paras. 29–32 and 60 above.
[18] See para. 29 above.

was able fully to review the evidence relating to the national security threat represented by the applicant. Although its report has never been disclosed, at the hearing before the Court the Government indicated that the panel had agreed with the Home Secretary that Mr Chahal ought to be deported on national security grounds. The Court considers that this procedure provided an adequate guarantee that there were at least *prima facie* grounds for believing that if Mr Chahal were at liberty, national security would be put at risk and thus, that the executive had not acted arbitrarily when it ordered him to be kept in detention.

123. In conclusion, the Court recalls that Mr Chahal has undoubtedly been detained for a length of time which is bound to give rise to serious concern. However, in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5(1)(f).

It follows that there has been no violation of Article 5(1).

B. *Article 5(4)*

124. The first applicant alleged that he was denied the opportunity to have the lawfulness of his detention decided by a national court, in breach of Article 5(4) of the Convention, which provides:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

He submitted that the reliance placed on national security grounds as justification for his detention pending deportation prevented the domestic courts from considering whether it was lawful and appropriate. However, he developed this argument more thoroughly in connection with his complaint under Article 13 of the Convention.[19]

125. The Commission was of the opinion that it was more appropriate to consider this complaint under Article 13 and the Government also followed this approach.[20]

126. The Court recalls, in the first place, that Article 5(4) provides a *lex specialis* in relation to the more general requirements of Article 13.[21] It follows that, irrespective of the method chosen by Mr Chahal to argue his complaint that he was denied the opportunity to have the

[19] See paras. 140–141 below.
[20] See paras. 142–143 below.
[21] See DE JONG, BALJET AND VAN DEN BRINK v. NETHERLANDS (A/177): (1986) 8 E.H.R.R. 20, para. 60.

lawfulness of his detention reviewed, the Court must first examine it in connection with Article 5(4).

127. The Court further recalls that the notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5(1).[22]

The scope of the obligations under Article 5(4) is not identical for every kind of deprivation of liberty[23]; this applies notably to the extent of the judicial review afforded. Nonetheless, it is clear that Article 5(4) does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5(1).[24]

128. The Court refers again to the requirements of Article 5(1) in cases of detention with a view to deportation.[25] It follows from these requirements that Article 5(4) does not demand that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law.

129. The notion of "lawfulness" in Article 5(1)(f) does not refer solely to the obligation to conform to the substantive and procedural rules of national law; it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5.[26] The question therefore arises whether the available proceedings to challenge the lawfulness of Mr Chahal's detention and to seek bail provided an adequate control by the domestic courts.

130. The Court recollects that, because national security was involved, the domestic courts were not in a position to review whether the decisions to detain Mr Chahal and to keep him in detention were justified on national security grounds.[27] Furthermore, although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed,[28] the panel could not be considered as a "court" within the meaning of Article 5(4).[29]

[22] See E. v. NORWAY (A/181-A): (1994) 17 E.H.R.R. 30, para. 49.
[23] See, *inter alia*, BOUAMAR v. BELGIUM, *loc. cit.*, para. 60.
[24] See E. v. NORWAY, *loc. cit.*, para. 50.
[25] See para. 112 above.
[26] See para. 118 above.
[27] See para. 121 above.
[28] See paras. 30, 32 and 60 above.
[29] See, *mutatis mutandis*, X. v. UNITED KINGDOM (A/46): 4 E.H.R.R. 188, para. 61.

131. The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.[30] The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13,[31] in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.

132. It follows that the Court considers that neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5(4). This shortcoming is all the more significant given that Mr Chahal has undoubtedly been deprived of his liberty for a length of time which is bound to give rise to serious concern.[32]

133. In conclusion, there has been a violation of Article 5(4) of the Convention.

III. *Alleged Violation of Article 8 of the Convention*

134. All four of the applicants complained that if Mr Chahal were deported to India this would amount to a violation of Article 8, which states (so far as is relevant):

> 1. Everyone has the right to respect for his private and family life, his home and correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security ...

135. It was not contested by the Government that the deportation would constitute an interference with the Article 8(1) rights of the applicants to respect for their family life.

The applicants, for their part, conceded that the interference would be "in accordance with the law" and would pursue a legitimate aim for the purposes of Article 8(2).

The only material question in this connection was, therefore, whether the interference (that is, the deportation) would be

[30] See, *mutatis mutandis*, FOX, CAMPBELL AND HARTLEY v. UNITED KINGDOM (A/182): (1991) 13 E.H.R.R. 157, para. 34, and MURRAY v. UNITED KINGDOM (A/300-A): (1995) 19 E.H.R.R. 193, para. 58.
[31] See para. 144 below.
[32] See para. 123 above.

"necessary in a democratic society in the interests of national security", within the meaning of Article 8(2).

136. The Government asserted that Mr Chahal's deportation would be necessary and proportionate in view of the threat he represented to the national security of the United Kingdom and the wide margin of appreciation afforded to States in this type of case.

137. The applicants denied that Mr Chahal's deportation could be justified on national security grounds and emphasised that, if there were cogent evidence that he had been involved in terrorist activity, a criminal prosecution could have been brought against him in the United Kingdom.

138. The Commission acknowledged that States enjoy a wide margin of appreciation under the Convention where matters of national security are in issue, but was not satisfied that the grave recourse of deportation was in all the circumstances necessary and proportionate.

139. The Court recalls its finding that the deportation of the first applicant to India would constitute a violation of Article 3 of the Convention.[33] Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to India, there would also be a violation of the applicants' rights under Article 8 of the Convention.

IV. *Alleged Violation of Article 13 of the Convention*

140. In addition, the applicants alleged that they were not provided with effective remedies before the national courts, in breach of Article 13 of the Convention, which reads:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

141. The applicants maintained that the only remedy available to them in respect of their claims under Articles 3, 5 and 8 of the Convention was judicial review, the advisory panel procedure[34] being neither a "remedy" nor "effective".

They submitted, first, that the powers of the English courts to put aside an executive decision were inadequate in all Article 3 asylum cases, since the courts could not scrutinise the facts to determine whether substantial grounds had been shown for belief in the existence of a real risk of ill-treatment in the receiving State, but could only determine whether the Secretary of State's decision as to the existence of such a risk was reasonable according to the *Wednesbury* principles.[35]

This contention had particular weight in cases where the executive relied upon arguments of national security. In the instant case, the assertion that Mr Chahal's deportation was necessary in the interests of national security entailed that there could be no effective judicial evaluation of the risk to him of ill-treatment in India or of the issues under Article 8. That assertion likewise prevented any effective judicial control on the question whether the applicant's continued detention was justified.

142. The Government accepted that the scope of judicial review was more limited where deportation was ordered on national security grounds. However, the Court had held in the past that, where questions of national security were in issue, an "effective remedy" under Article 13 must mean "a remedy that is effective as can be", given the necessity of relying upon secret sources of information.[36]

Furthermore, it had to be borne in mind that all the relevant material, including the sensitive material, was examined by the advisory panel whose members included two senior judicial figures—a Court of Appeal judge and a former President of the Immigration Appeal Tribunal.[37] The procedure before the panel was designed, on the one hand, to satisfy the need for an independent review of the totality of the material on which the perceived threat to national security was based and, on the other hand, to ensure that secret information would not be publicly disclosed. It thus provided a form of independent, quasi-judicial scrutiny.

143. For the Commission, the present case could be distinguished from that of VILVARAJAH AND OTHERS[38] where the Court held that judicial review in the English courts amounted to an effective remedy in respect of the applicants' Article 3 claims. Because the Secretary of State invoked national security considerations as grounds for his decisions to deport Mr Chahal and to detain him pending deportation, the English courts' powers of review were limited. They could not themselves consider the evidence on which the Secretary of State had based his decision that the applicant constituted a danger to national security or undertake any evaluation of the Article 3 risks. Instead, they had to confine themselves to examining whether the evidence showed that the Secretary of State had carried out the balancing exercise required by the domestic law.[39]

144. The intervenors[40] were all of the view that judicial review did not constitute an effective remedy in cases involving national security. Article 13 required at least that some independent body should be appraised of all the facts and evidence and entitled to reach a decision which would be binding on the Secretary of State.

[33] See para. 107 above.
[34] See paras. 29 and 60 above.
[35] See para. 66 above.
[36] See KLASS AND OTHERS *v.* GERMANY (A/28): 2 E.H.R.R. 214, para. 69, and LEANDER *v.* SWEDEN (A/116): (1987) 9 E.H.R.R. 433, para. 84.
[37] See para. 29 above.
[38] *Loc. cit.*, paras. 122–126.
[39] See para. 41 above.
[40] See para. 6 above.

In this connection, Amnesty International, Liberty, the Aire Centre and the JCWI[41] drew the Court's attention to the procedure applied in such cases in Canada. Under the Canadian Immigration Act 1976,[42] a Federal Court judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.

145. The Court observes that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.[43]

Moreover, it is recalled that in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13.[44]

146. The Court does not have to examine the allegation of a breach of Article 13 taken in conjunction with Article 5(1), in view of its finding of a violation of Article 5(4).[45] Nor is it necessary for it to examine the complaint under Article 13 in conjunction with Article 8, in view of its finding concerning the hypothetical nature of the complaint under the latter provision.[46]

147. This leaves only the first applicant's claim under Article 3 combined with Article 13. It was not disputed that the Article 3 complaint was arguable on the merits and the Court accordingly finds that Article 13 is applicable.[47]

148. The Court recalls that in its VILVARAJAH judgment,[48] it found judicial review proceedings to be an effective remedy in relation to the applicants' complaints under Article 3. It was satisfied that the English courts could review a decision by the Secretary of State to refuse

[41] *Ibid.*
[42] As amended by the Immigration Act 1988.
[43] See VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, para. 22.
[44] See, *inter alia*, LEANDER *v.* SWEDEN, *loc. cit.*, para. 77.
[45] See para. 133 above.
[46] See para. 139 above.
[47] See VILVARAJAH AND OTHERS *v.* UNITED KINGDOM, *loc. cit.*, para. 121.
[48] *Loc. cit.*, paras. 122–126.

asylum and could rule it unlawful on the grounds that it was tainted with illegality, irrationality or procedural impropriety.[49] In particular, it was accepted that a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.[50]

149. The Court further recalls that in assessing whether there exists a real risk of treatment in breach of Article 3 in expulsion cases such as the present, the fact that the person is perceived as a danger to the national security of the respondent State is not a material consideration.[51]

150. It is true, as the Government have pointed out, that in the cases of KLASS AND OTHERS *v.* GERMANY and LEANDER *v.* SWEDEN,[52] the Court held that Article 13 only required a remedy that was "as effective as can be" in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial.

151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.

152. Such scrutiny needed not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective.[53]

153. In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national

[49] See para. 66 above.
[50] *Loc. cit.*, para. 123.
[51] See para. 80 above.
[52] Both cited in para. 142 above.
[53] See LEANDER *v.* SWEDEN, *loc. cit.*, para. 77.

security.[54] It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 complaint for the purposes of Article 13 of the Convention.

154. Moreover, the Court notes that in the proceedings before the advisory panel the applicant was not entitled, *inter alia*, to legal representation, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed.[55] In these circumstances, the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13.

155. Having regard to the extent of the deficiencies of both judicial review proceedings and the advisory panel, the Court cannot consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3.

Accordingly, there has been a violation of Article 13.

V. *Application of Article 50 of the Convention*

156. The applicants asked the Court to grant them just satisfaction under Article 50, which provides as follows:

> If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

A. *Non-pecuniary loss*

157. The applicants claimed compensation for non-pecuniary damage for the period of detention suffered by Mr Chahal at a rate of £30,000–£50,000 per annum.

The Government submitted that a finding of violation would be sufficient just satisfaction in respect of the claim for non-pecuniary damages.

158. In view of its decision that there has been no violation of Article 5(1),[56] the Court makes no award of non-pecuniary damages in respect of the period of time Mr Chahal has spent in detention. As to the other complaints, the Court considers that the findings that his deportation, if carried out, would constitute a violation of Article 3 and that there have been breaches of Articles 5(4) and 13 constitute sufficient just satisfaction.

[54] See para. 41 above.
[55] See paras. 30, 32 and 60 above.
[56] See para. 123 above.

B. *Legal costs and expenses*

159. In addition, the applicants claimed the reimbursement of the legal costs of the Strasbourg proceedings, totalling £77,755.97 (inclusive of value added tax, "VAT").

With regard to the legal costs claimed, the Government observed that a substantial proportion of these were not necessarily incurred because the applicants had produced a large amount of peripheral material before the Court. They proposed instead a sum of £20,000, less legal aid.

160. The Court considers the legal costs claimed by the applicants to be excessive and decides to award £45,000 (inclusive of VAT) less the 21,141 French francs already paid in legal aid by the Council of Europe.

C. *Default interest*

161. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8 per cent per annum.

For these reasons THE COURT

1. *Holds* by 12 votes to 7 that, in the event of the Secretary of State's decision to deport the first applicant to India being implemented, there would be a violation of Article 3 of the Convention;
2. *Holds* by 13 votes to 6 that there has been no violation of Article 5(1) of the Convention;
3. *Holds* unanimously that there has been a violation of Article 5(4) of the Convention;
4. *Holds* by 17 votes to 2 that, having regard to its conclusion with regard to Article 3, it is not necessary to consider the applicants' complaint under Article 8 of the Convention;
5. *Holds* unanimously that there has been a violation of Article 13 in conjunction with Article 3 of the Convention;
6. *Holds* unanimously that the above findings of violation constitute sufficient just satisfaction as regards the claim for compensation for non-pecuniary damage;
7. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months, in respect of costs and expenses, £45,000 (forty-five thousand pounds sterling) less 21,141 (twenty-one thousand, one hundred and forty-one) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
   (b) that simple interest at an annual rate of 8 per cent shall be payable from the expiry of the above-mentioned three months until settlement;

8. *Dismisses* unanimously the remainder of the claim for just satisfaction.

In accordance with Article 51(2) of the Convention and Rule 53(2) of Rules of Court A, the concurring opinion of Mr Valticos, the concurring opinion of Mr Jambrek, the partly dissenting, partly concurring opinion of Mr De Meyer, the partly dissenting opinion of Mr Gölcüklü, the joint partly dissenting opinion of Mr Gölcüklü, Mr Matscher, Sir John Freeland, Mr Baka, Mr Gotchev, Mr Mifsud Bonnici and Mr Levits, the joint partly dissenting opinion of Mr Martens and Mrs Palm, and the partly dissenting opinion of Mr Pettiti are annexed to this judgment.

Concurring Opinion of Judge Valticos

This opinion refers to the wording used in paragraph 123 of the CHAHAL *v.* THE UNITED KINGDOM judgment, which concerns Article 5(1).

While sharing the opinion of the majority of the Grand Chamber and concurring in their conclusion that there has been no violation of that provision, I am unable to agree with the statement in the first sub-paragraph of paragraph 123 that Mr Chahal's detention "complied with the requirements of Article 5(1)(f)".

Article 5(1)(f) provides that "... No one shall be deprived of his liberty save [in the case of] ... the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation ...". That provision must be interpreted in good faith and with common sense, as indeed must any legal provision. I would have qualms about holding here, that a period of four or five years could really be regarded as "[complying] with the requirements" of that Article and as being "lawful" detention for a transitional and, in principle, limited period. Admittedly, there were particular reasons in the present case which prevented the applicant being deported promptly (consideration of his application for judicial review and, above all, the problem of whether it was appropriate to deport him to India). But to go from that to saying that the situation "complied with the requirements" of Article 5 of the Convention seems to me excessive. However, one cannot go to the opposite extreme of holding that there has been a violation of the Convention for the Government were able to point to reasons of some weight. In my view, it would have been preferable to say merely that Mr Chahal's detention "was not contrary" to the requirements of Article 5. That is the reason for my objection to the wording of paragraph 123.

On the other hand, I agree that, as set out in the Court's final decision,[57] there has been no violation of Article 5(1).

[57] Point 2 of the operative provisions.

1. Once more in this case, the Court has had to consider the issue of the use of confidential material in the domestic courts where national security is at stake. I agree with the Court's finding that the domestic proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal did not satisfy the requirements of Article 5(4).

I also agree with the Court's reasoning as to the relevant principles and their application, that is:

> (a) that the use of confidential material may be unavoidable where national security is at stake;
> (b) that the national authorities, however, are not free in this respect from effective control by the domestic courts; and
> (c) that there are techniques which can be employed which both accommodate legitimate security concerns and yet accord the individual a substantial measure of procedural justice.

This last point, (c), represents a new development in the Court's case law and therefore, in my view, deserves special attention.

2. In FOX, CAMPBELL AND HARTLEY *v.* UNITED KINGDOM[58] the Court pointed to the responsibility of the Government to furnish *at least some facts or information* capable of satisfying it that the arrested person was reasonably suspected of having committed the alleged offence. The fact that Mr Fox and Ms Campbell both had previous convictions for acts of terrorism did not convince the Court that there was "reasonable suspicion", and it therefore held that there had been a breach of Article 5(1).[59]

In the MURRAY judgment of 28 October 1994, the Court reiterated its FOX, CAMPBELL AND HARTLEY standard, but found that the conviction in the United States of America of two of Mrs Murray's brothers of offences connected with the purchase of arms for the Provisional IRA and her visits to the United States and contacts with her brothers represented sufficient facts or information to meet the above standard, in other words, that they provided a plausible and objective basis for a "reasonable suspicion".[60]

3. I dissented from the majority's view in the MURRAY judgment as regards the violation of Article 5(1), (2) and (5). In my partly dissenting opinion, I held in relation to the issue of "reasonable suspicion" that the condition of reasonableness was not fulfilled, as the Government had not succeeded in furnishing "at least some facts or information", which would satisfy an objective observer that the person concerned might have committed the offence.

In my opinion in MURRAY I also anticipated the issue which has

[58] *Loc. cit.*
[59] Paras. 34 and 35.
[60] *Loc. cit.*, paras. 58–63, *passim*.

arisen in the present case, to which I refer under 1(c) *supra*, when I posed the question whether "it was possible for the Court to set some modified standards for 'reasonable suspicion' in the context of emergency laws enacted to combat terrorist crime?" By way of a general reply, I advocated treating evidence in different ways depending on the degree of its confidentiality.

4. The Court also referred in the FOX, CAMPBELL AND HARTLEY case to "information which ... cannot ... be revealed to the suspect or produced in court to support the charge".[61] This distinction in my view raises two relevant questions: first, is it justifiable to distinguish between revealing information to the suspect and producing it in court? And secondly, is there a difference between information made available to the court and information produced in court which is revealed to the suspect?[62]

In the present case of CHAHAL, in discussing the alleged violation of Article 13 of the Convention, the Court refers to the technique under the Canadian Immigration Act 1976, to which the intervenors drew attention. There, a Federal Court judge holds an *in camera* hearing of all the evidence, while the confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court. A summary of the evidence, with necessary deletions, is given to the applicant.

5. In my dissenting opinion in the MURRAY case, I suggested the following similar approach, couched (partly due to the absence of information about the Canadian technique) in more general terms, as representing a compromise between the wish to preserve the FOX, CAMPBELL AND HARTLEY standard, and the need to expand the Court's reasoning in order to adapt it better to other similar cases.

Thus, I questioned

> whether otherwise confidential information could not be rephrased, reshaped or tailored in order to protect its source and then be revealed. In this respect the domestic court could seek an alternative, independent expert opinion, without relying solely on the assertions of the arresting authority.

6. The purpose of the present concurring opinion is, therefore, to put this part of the Court's judgment into the context of its evolving case law.

The Court may indeed be satisfied, in a future similar case, that some sensitive information may be produced in the domestic court, or even during the Strasbourg proceedings, which was and will not be revealed—at least not in its entirety, and in an unmodified form—to the suspect or to the detainee.

[61] *Loc. cit.*, para. 32.
[62] See also my dissenting opinion in the MURRAY case.

It will then remain the task of the Court to reconcile the demands of the adversarial principle with the need to protect confidentiality of information derived from secret sources pertaining to national security.

Partly Dissenting, Partly Concurring Opinion of Judge De Meyer

I. *The deportation order*

A. *Article 3 and Article 13 in conjunction with Article 3.*

I entirely agree with the judgment in this respect.

B. *Article 8 and Article 13 in conjunction with Article 8*

The Court, having found that the question whether there had been a violation of the rights set forth in Article 8 of the Convention was "hypothetical"[63] did not consider it necessary to rule on the Article 8 complaint or on the alleged violation of that provision in conjunction with Article 13.

I wish to point out that in the instant case the question of the violation of the rights set forth in Article 8 is no more "hypothetical" than that concerning those under Article 3. Both arise equally "in the event of the Secretary of State's decision to deport the first applicant to India being implemented". Consequently, if we consider one, we must also consider the other.

I agree in substance with the arguments unanimously adopted by the Commission in paragraphs 134 to 139 of its report and share its opinion that if the deportation order were enforced, there would be a violation of the applicants' right to respect for their private and family life.

I likewise consider that, in the instant case, there would also be a violation of the right to an effective remedy under Article 13 in respect of their Article 8 rights. The Court's observations concerning the violation of Article 13 in conjunction with Article 3 are equally valid as regards the alleged violation of Article 13 in conjunction with Article 8.

In the instant case these two violations are closely connected and virtually inseparable. Deporting the first applicant would constitute a violation of both his personal right not to be subjected to the practices referred to in Article 3 and all the applicants' right to respect for their private and family life. The lack of remedies for challenging the deportation order thus simultaneously affects each of these rights.

II. *The first applicant's detention*

A. *Article 5(1)*

It is true that the first applicant was deprived of his liberty as part of the deportation proceedings and that initially, in August 1990, his detention could be considered lawful on this ground.

[63] See paras. 139 and 146 of the judgment.

However, he has been held in prison ever since and it is now the end of October 1996.

That is clearly excessive.

The "considerations of an extremely serious and weighty nature" referred to in paragraph 117 of the judgment may be enough to explain the length of the deportation proceedings. They cannot, however, justify the length of the detention, any more than the complexity of criminal proceedings is enough to justify the length of pre-trial detention.

Moreover, what is in issue here is not, as in the KOLOMPAR *v.* BELGIUM case,[64] an instance of extradition requested by another State with respect to a prison sentence of several years, but rather an order made by the respondent State for the deportation of a person who, as is stated in paragraphs 23 and 24 of the judgment, had been convicted there of only two minor offences, convictions that had since been quashed.

B. *Article 5(4) and Article 13 in conjunction with Article 5*

Unlike the Commission, which chose to examine the first applicant's complaint concerning the lack of sufficient remedies for challenging his detention from the point of view of Article 13, the Court considered it in the light of Article 5(4).

The Court's reasoning is certainly more consistent with both the letter and the spirit of those provisions.

It should be reiterated first of all that Article 5(4) provides that "everyone who is deprived of his liberty by arrest or detention" is entitled to take proceedings, whereas Article 13 confers this right upon "everyone whose rights and freedoms as set forth in [the] Convention are violated". This suggests that in order to be able to rely on the first provision, deprivation of liberty on its own is enough, whereas for the second to be applicable there must have been a violation of a right or freedom.

It is also necessary to point out that Article 5(4) states that the proceedings must be before a "court", whereas Article 13 requires more vaguely "an effective remedy before a national authority".

Lastly, it is of interest to note that except for the right of access to a court, which, as the Court has acknowledged since the GOLDER *v.* THE UNITED KINGDOM,[65] is guaranteed by Article 6 of the Convention, Article 5 is the only one of the Convention's substantive provisions that specifically provides for a right to bring court proceedings in addition to the right to a trial provided for in paragraph 3 of the same Article in the cases referred to in paragraph 1(c).

The foregoing is a good illustration of how well those who drafted the Convention understood the need to provide, particularly for those

[64] *Loc. cit.*
[65] (A/18): 1 E.H.R.R. 524.

deprived of their liberty, judicial protection that goes well beyond the "effective remedy" guaranteed more generally under Article 13. It must follow that in cases concerning deprivation of liberty it is only necessary to examine whether there has been a violation of Article 5(4).

That is not all.

Article 13, which guarantees a remedy before a "national authority", must be taken in conjunction with Article 26, which requires "all domestic remedies [to have been] exhausted" before the Commission may deal with the matter. These two provisions complement each other and demonstrate that it is first and foremost for the States themselves to punish violations of the rights and freedoms provided for, the protection afforded by the Convention institutions being merely secondary.

It is from this point of view that the question whether or not there is an "effective remedy" as required by Article 13 is relevant. In the view of the Commission and the Court, the question is of no importance inasmuch as it relates to "rights and freedoms" which they consider were not "violated"; that is indeed what is indicated by the actual wording of the Article.

This is certainly not true of the right to a remedy secured by Article 5(4) to thos deprived of their liberty, who must always be able to "take proceedings by which the lawfulness of [their] detention shall be decided speedily by a court and [their] release ordered if the detention is not lawful". Even if we find their detention as such to be lawful under Article 5(1), we are not thereby absolved from the obligation to consider whether the individual concerned was able to avail himself of a remedy that satisfied the requirements of Article 5(4).

Partly Dissenting Opinion of Judge Gölcüklü

I agree with the dissenting opinion of Judge De Meyer as regards Article 5(1).[66]

Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Freeland, Baka, Gotchev, Bonnici and Levits

1. We agree with the majority that national security considerations could not be invoked to justify ill-treatment at the hands of a Contracting State within its own jurisdiction, and that in that sense the protection afforded by Article 3 is absolute in character. But in our view the situation is different where, as in the present case, only the extra-territorial (or indirect) application of the Article is at stake. There, a Contracting State which is contemplating the removal of

[66] Part II A.

someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter State would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat.

2. As to the circumstances of the present case, we differ from the conclusion of the majority on the question whether it has been substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he were to be returned to India. We accordingly disagree (even on the reasoning of the majority as to the point dealt with in paragraph 1 above) with the finding that, in the event of the decision to deport him to that country being implemented, there would be a violation of the Article.

3. In the SOERING case, the Court was also concerned with the prospective removal of an applicant to another country. In its judgment in that case,[67] the Court stated[68] that it

> is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article ...

4. In that case, the extradition of the applicant was sought by the requesting State to meet a criminal charge carrying the death penalty, in circumstances which led the Court to conclude that the likelihood of his being exposed to the "death row phenomenon" was such as to bring Article 3 into play. The Court went on to conclude, after an analysis of what in practice the "death row phenomenon" would involve in the applicant's case, that his extradition would expose him to "a real risk of treatment going beyond the threshold set by Article 3".

5. The applicant in the SOERING case (which also differed on the facts in that there was no national security issue to be taken into consideration) was, therefore, in the grip of a legal process involving risks to him which were significantly easier to predict and assess than those which would be run by the first applicant in the present case if he were now to be returned to India. The consequences of the implementation of the deportation order against the latter are of a quite different, and much lower, order of foreseeability.

[67] *Loc. cit.*
[68] Para. 90.

1996
—
Chahal
v.
United Kingdom
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European Court of Human Rights
—
Joint Partly Dissenting Opinion (Judges Gölcüklü, Matscher, Freeland, Baka, Gotchev, Bonnici and Levits)

6. In the present case, the Court has had before it a mass of material about the situation in India and, more specifically, Punjab from 1990 onwards.[69] The Court concludes in paragraph 86 (and we agree) that "... although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive".

7. As regards present conditions, it seems clear that there have in recent years been improvements in the protection of human rights in India, especially in Punjab, where violence reached a peak in 1992, and that progress has continued since the Commission's consideration of the case.[70] On the other hand, allegations persist of serious acts of misconduct by some members of the Punjab security forces, acting either within or outside the boundaries of that State, and by some members of other security forces acting elsewhere in India.[71] Although the probative value of some of the material before the Court may be open to question, we are satisfied that there is enough there to make it impossible to conclude that there would be no risk to Mr Chahal if he were to be deported to India, even to a destination outside the Punjab if he were to choose one.

8. The essential difficulty lies in quantifying the risk. In reaching their assessment, the majority of the Court say that they are not persuaded that the assurances given by the Indian Government would provide Mr Chahal with an adequate guarantee of safety and consider that his high profile would be more likely to increase the risk to him than otherwise.[72] It is, however, arguable with equal, if not greater, force that his high profile would afford him additional protection. In the light of the Indian Government's assurances and the clear prospect of a domestic and international outcry if harm were to come to him, there would be cogent grounds for expecting that, as a law-abiding citizen in India, he would be treated as none other than that. It could well be that the existence or extent of any potential threat to him would largely depend on his own future conduct.

9. Our overall conclusion is that the assessment of the majority leaves too much room for doubt and that it has not been "substantiated that there is a real risk" of the first applicant's being subjected to treatment contrary to Article 3 if he were now to be deported to India. A higher degree of foreseeability of such treatment than exists in this case should be required to justify the Court in finding a potential violation of that Article.

10. Otherwise, and given its conclusions on the Article 3 issue, we agree with the findings of the Court, except Mr Gölcüklü, as appears from his preceding separate opinion.

[69] Although, we would note, none more recent than the U.S. Department of State report on India of March 1996—see para. 53 of the judgment.
[70] See para. 101 of the judgment.
[71] Paras. 102–104.
[72] Paras. 105 and 106.

Joint Partly Dissenting Opinion of Judges Martens and Palm

1. We fully agree with the Court's findings in respect of Articles 3, 5(4), 8 and 13. As to its findings in respect of Article 5(1)(f) we agree with paragraphs 112 to 121 of the judgment.

We cannot accept, however, the Court's findings:

(a) that the procedure before the advisory panel constituted a sufficient guarantee against arbitrariness; and
(b) that, consequently, the first applicant's detention in this respect too complied with the requirements of Article 5(1)(f).[73]

2. As the Court rightly remarks in paragraph 112 of its judgment, Article 5(1)(f) does not explicitly demand that the detention under this provision be reasonably considered necessary. This enhances, for this kind of detention, the importance of the object and purpose of Article 5(1) in general, which is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion.

3. In this context we first note that the domestic courts were not in a position effectively to control whether the decisions to detain and to keep detained Mr Chahal were justified.[74] Consequently, the only possible safeguard against arbitrariness under domestic law was the advisory panel procedure.

4. Having analysed the status of and the proceedings before this panel the Court finds that this procedure does not meet the requirements of Article 5(4) and of Article 13[75] of the Convention. We find it difficult to understand why it did not draw the same conclusion in the context of Article 5(1)(f).

5. However that may be, we note:

(a) that it has not been claimed that the members of the panel are, as such, independent from the Government;
(b) that the proceedings before the panel are not public, nor are its findings, which are not even disclosed to the addressee of the notice of intent to deport;
(c) that in the proceedings before the panel the position of the addressee of the notice of intent to deport is severely restricted: he is not entitled to legal representation, he is only given an outline of the grounds for the notice of intention to deport, he is not informed of the sources of and the evidence for those grounds;
(d) that the panel has no power of decision and that its advice is not binding upon the Home Secretary.

6. Taking into account the importance of guarantees against arbitrariness especially in respect of detention under Article 5(1)(f)[76]

[73] Paras. 122 and 123 of the judgment.
[74] See paras. 41, 43, 121 and 130 of the judgment.
[75] Paras. 130, 132, 152 and 153 of the judgment.
[76] See para. 2 of our opinion.

as well as the necessity of uniform standards being applied in this respect to all Member States, we cannot but conclude that, in view of its features indicated in paragraph 5 above, the panel does not constitute an adequate guarantee against arbitrariness. The fact that it includes "experienced judicial figures"[77] cannot change this conclusion.

7. In sum: the applicant has been deprived of his liberty for more than six years whilst there were not sufficient guarantees against arbitrariness. Article 5(1) has therefore been violated.

Partly Dissenting Opinion of Judge Pettiti

I voted in favour of finding a violation of Article 3, Article 5(4) and Article 13. However, I strongly disagree with the majority in respect of Article 5(1) and consider that there has been a clear and serious violation of that provision.

Some weeks earlier, the Court correctly identified the problem of administrative detention in the case of proceedings covered by the Geneva Convention of 1951, and within the province of the office of the United Nations High Commissioner for Refugees ("the HCR"). The Court held that there had been a violation by France on account of the rules then in force on administrative detention for a period of approximately 20 days without access to lawyers or any effective judicial review.[78] The second period of detention in the CHAHAL case gives rise to the same types of problem.

With respect to the decision taken under the general law to deport Mr Chahal, it was not disputed that his detention began on 16 August 1990 and that he applied for judicial review.

After his application for asylum as a political refugee had been refused, a deportation order was made on 25 July 1991 on the basis of the Geneva Convention. Mr Chahal's detention fell to be considered by the Court from that angle. There was therefore a confrontation between the Geneva Convention and the European Convention on Human Rights, which concern the same Member States. States may expel persons who are denied political refugee status. If difficulties are encountered (with respect to travel, dangers that might be encountered on returning, or the search for a safe State or third State), the person must be placed in administrative detention and not held in an ordinary prison under a prison regime. In addition, the detention must be reviewed promptly by the courts.[79]

Mr Chahal was not detained as a result of any conviction.

Where an application is made for review, it must be heard

[77] See para. 122 of the judgment.
[78] See AMUUR v. FRANCE: (1996) 22 E.H.R.R. 533.
[79] *ibid.*

expeditiously, as a matter of urgency. The organisation of review procedures is governed by the Geneva Convention and HCR resolutions. It is possible to petition the Commission on Human Rights of the United Nations in that regard. The European Court cannot review the procedures, but it can consider them under Articles 3 and 5 when a violation is alleged.

It is almost perverse of the majority to argue, as it does, that since it was the applicant who sought a review, his detention was justified if the proceedings became protracted. Were this reasoning to be transposed, an accused who applied for release from custody pending trial would be told that his detention was justified by the fact that he had made an application that necessitated proceedings. Yet liberty of the person is a fundamental right guaranteed by Article 5. The fact that an application for release is pending cannot be a ground for detention being prolonged where the detention is contrary to the provisions of Article 5.

Five years' detention in prison after the deportation order following the refusal of refugee status: such has been Mr Chahal's lot.

It is obvious that in international law under the Geneva Convention administrative detention differs from detention under the general law and must be enforced by measures such as an order for compulsory residence on administrative premises or in a hotel[80] or house arrest. The United Nations Covenants and the recommendations of the United Nations Sub-Committee on questions of human rights of all persons subjected to any form of detention or imprisonment must be heeded.

Where a State is faced with a difficulty arising out of the danger that would be entailed by a return to the country of origin, it may, if it does not wish to continue to detain the person on its territory, negotiate the choice of a third country.

In sensitive political cases such as that of Mr Chahal—for example, those concerning the expulsion of imams and religious leaders whether fundamentalists or not—European States have found alternatives by expelling to certain African countries. The United Kingdom itself has had recourse to such expedients.

The European Convention does not allow States to disregard their obligations under the Geneva Convention. The Court must be attentive to problems of potential conflicts between international inter-State instruments binding the Member States of the Council of Europe.

My opinion on this subject is based on the work of the HCR and on the European Commission's and Court's own decisions.

In the HCR publication "*Detention and Asylum*"[81] it is stated:

[80] *ibid.*
[81] European Series, Vol. 1, No. 4, October 1995.

> Article 5 further provides guarantees against undue prolongation of the detention. Neither the Geneva Convention, nor the Committee of Ministers Guidelines provide for a maximum duration of the detention of persons seeking asylum. In its Conclusion No. 44 the UNHCR Executive Committee recognises the importance of expeditious procedures in protecting asylum-seekers from unduly prolonged detention. Article 5, para. 1(f), as interpreted by the Court, should be understood as containing a safeguard as to the duration of the detention authorised, since the purpose of Article 5 as a whole is to protect the individual from arbitrariness. In its Bozano judgment,[82] the Court considered that this principle was of particular importance with respect to Article 5, para. 1(f) of the Convention. This provision certainly implies—though it is not made explicit—that detention of an alien which is justified by the fact that proceedings concerning him are in progress can cease to be justified if the proceedings concerned are not conducted with due diligence.
>
> ...
>
> [And, with reference to paragraph III.10 of Recommendation No. R(94)5 of the Committee of Ministers on Guidelines to inspire practices of the Member States of the Council of Europe concerning the arrival of asylum seekers at European airports:]
> "10. The asylum-seeker can be held in [an appropriate] place only under the conditions and for the maximum duration provided for by law".
>
> Under Article 5, a measure amounting to a deprivation of liberty will only comply with the requirements of the Convention if it is legal in domestic law. Article 5(1) lays down that any arrest or detention must be carried out "in accordance with a procedure prescribed by law". On this point the Convention first and foremost requires that any deprivation of liberty must have a legal basis in domestic law. Deprivation of liberty cannot occur in the absence of a domestic legal provision expressly authorising it. It further refers back to this national law and lays down the obligation to conform to both the substantive and procedural rules thereof.

As regards decisions on Article 5 of the European Convention on Human Rights, in the case of KOLOMPAR *v.* BELGIUM the Commission delivered the following opinion on an extradition problem, which can be transposed to deportation cases:

> However, the Commission considers that there is also, in the present case, a problem of State inactivity. The Commission recalls that Article 5(1) of the Convention states that there is a "right to liberty", and that the exceptions to this right, listed in sub-paragraphs (a) to (f) of this provision, have to be narrowly interpreted.[83] The Commission takes the view that the State from which extradition is requested must ensure that there is a fair balance between deprivation of liberty and the purpose of that measure. Being responsible for the detention of the individual whose extradition has been requested, this State must take particular care to ensure that the prolongation of the extradition procedure does not culminate in a lack of proportionality between the restriction imposed on the right to individual liberty protected by Article 5 and its international obligations in respect of extradition. The Commission therefore considers that, even assuming total inactivity by the applicant in the said

[82] BOZANO *v.* FRANCE (A/111): (1987) 9 E.H.R.R. 297, para. 54.
[83] WINTERWERP *v.* THE NETHERLANDS (A/33): 2 E.H.R.R. 387, para. 37; GUZZARDI *v.* ITALY (A/39): 3 E.H.R.R. 333, para. 98.

proceedings, it was the Government's duty to take particular care to limit the applicant's detention pending extradition.

The Court held in the KOLOMPAR case that there had been no violation, but that was because of the applicant's prolonged inactivity and conduct and not because it did not fall within the scope of Article 5(1).

It is only in cases where persons who have been refused asylum commit an offence (for instance, by returning illegally) that they may be detained in prison.

It is clear from past cases that if proceedings are not conducted with the requisite diligence, or if detention results from some misuse of authority, detention ceases to be justifiable under Article 5(1)(f).[84]

The European Court's judgment of 1 July 1961 in the case of LAWLESS *v.* IRELAND also sheds much light on its case law concerning the scope of Article 5(1)—a major Article of the Convention as it secures the liberty of the person.

Admittedly, the LAWLESS case had as its background a state of emergency, but that does not alter the philosophy and principles expressed by the Court.

In particular, the Court said in its judgment on the merits.[85]

> *Whereas* in the first place, the Court must point out that the rules set forth in Article 5(1)(b), and Article 6 respectively are irrelevant to the present proceedings, the former because G. R. Lawless was not detained "for non-compliance with the ... order of a court" or "in order to secure the fulfilment of [an] obligation prescribed by law" and the latter because there was no criminal charge against him; whereas, on this point, the Court is required to consider whether or not the detention of G. R. Lawless from 13th July to 11th December 1957 under the 1940 Amendment Act conflicted with the provisions of Article 5(1)(c) and (3);
> *Whereas*, in this connection, the question referred to the judgment of the Court is whether or not the provisions of Article 5(1)(c) and (3), prescribe that a person arrested or detained "when it is reasonably considered necessary to prevent him committing an offence" shall be brought before a judge, in other words whether, in Article 5(1)(c), the expression "effected for the purpose of bringing him before the competent judicial authority" qualifies only the words "on reasonable suspicion of having committed an offence" or also the words "when it is reasonably considered necessary to prevent him committing an offence";
> *Whereas* the wording of Article 5(1)(c), is sufficiently clear to give an answer to this question; whereas it is evident that the expression "effected for the purpose of bringing him before the competent legal authority" qualifies every category of cases of arrest or detention referred to in that sub-paragraph; whereas it follows that the said clause permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from absconding after having committed an offence;
> ...
> Whereas the meaning thus arrived at by grammatical analysis is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest; whereas it must be pointed out in this connection that, if the construction placed by the Court on the aforementioned provisions were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention.

[84] Application No. 7317/75, LYNAS *v.* SWITZERLAND, Dec. 6.10.76, D.R. 6, p. 141, at p. 167; Z. Nedjati, *Human Rights under the European Convention* (1978), p. 91.
[85] (A/3); 1 E.H.R.R. 15, paras. 12–14.

Under the Geneva Convention, it is for each State to organise its appeal procedures in respect of matters arising under the Convention.

The effectiveness of those procedures is reviewable by the UNHCR and, if necessary, in the event of any shortcomings, may be the subject of the applications mentioned above.

Among the major west European States, Germany provides a right of appeal to the ordinary courts. Other States have a special court or a committee. Such an institution was set up in Belgium only in 1989[86] and in Sweden in January 1992.[87] In the United Kingdom it was only with the coming into force of the Asylum and Immigration Appeals Act 1993 that applicants whose appeals for asylum had been refused were given a right of appeal.[88] In France there is the French Office for the Protection of Refugees and Stateless Persons (the *OFPRA*") and the Appeals Committee "*commission de recours*".[89]

States are not legally bound to grant asylum, but merely not to send a person to a country where he faces persecution or to one from which he risks being sent to such a country. This has prompted most European nations to adopt the practice of returning asylum seekers either to a country through which they have transited in order to travel to the country where they are seeking asylum or else to a "safe third country".

The Court has firmly found violations of Article 3 and Article 5(4). In my opinion, it was equally necessary for it to find a violation of Article 5(1), in line with its case law.

As implemented by the British authorities, Mr Chahal's detention can be likened to an indefinite sentence. In other words, he is being treated more severely than a criminal sentenced to a term of imprisonment in that the authorities have clearly refused to seek a means of expelling him to a third country. The principle contained in Article 5 of immediately bringing a detained person before a court is intended to protect liberty and not to serve as "cover" for detention which has not been justified by a criminal court. Administrative

[86] Standing Committee for Refugee Appeals.
[87] Aliens Appeal Committee.
[88] To the Immigration Appeals Authority.
[89] *cf. Bulletin luxembourgeois des Droits de l'Homme*, Vol. 5, 1996.

detention under the Geneva Convention cannot be extended beyond a reasonable—brief—period necessary for arranging deportation. The general line taken by the Court in the AMUUR *v.* FRANCE case can, in my view, be adopted in the CHAHAL case. For this reason, I have concluded that there has been a violation of Article 5(1).

MIALHE *v.* FRANCE (No. 2)

(Taxpayer's access to documents held by the Revenue in order to defend himself during tax assessment and evasion proceedings)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Bernhardt; *Judges* Pettiti, Russo, Valticos, Palm, Pekkanen, Loizou, Jambrek, Kuris)

Application No. 18978/91
26 September 1996

The applicant, formerly honorary consul of the Philippines in Bordeaux, was convicted of tax evasion. Relying on Article 6 of the Convention, he complained that his conviction was unfair because it was based on documents seized in violation of Article 8 (see MIALHE (No. 1)) to which he was denied access.

Held unanimously:

(1) that the objection of incompatibility *ratione materiae* with the Convention and the objection that domestic remedies had not been exhausted, in so far as the latter related to the administrative supplementary tax assessment proceedings, were devoid of purpose;

(2) that the objection that domestic remedies had not been exhausted as to the procedure of consulting the Tax Offences Board be dismissed;

(3) that the objection that the applicant was not a victim be joined to the merits and dismissed;

(4) that there had been no breach of Article 6(1) of the Convention.

1. Preliminary objections: incompatibility ratione materiae with the Convention; non-exhaustion of domestic remedies; "victim" (Arts. 26 and 25).

(a) The administrative supplementary tax assessment proceedings are currently pending before the *Conseil d'Etat* as the court which hears appeals on points of law. To that extent, the objection of incompatibility *ratione materiae* and, in so far as it relates to those proceedings, the objection that domestic remedies have not been exhausted are devoid of purpose. [37]

(b) The second objection, that domestic remedies have not been exhausted as regards the procedure of consulting the Tax Offences Board (*CIF*), has already been considered and dismissed by the Commission. The Court sees no reason to depart from the Commission's analysis and dismisses it likewise. [37]

(c) The third objection, that the applicant was not a victim in respect of the complaint that the documents seized by the customs had not been produced, goes to the merits of the case and the Court therefore joins it to them. [37]

stronger argument that the Crown should not rely on evidence of his admission, but that is the reverse of what actually occurred.

36 Accordingly, I would dismiss the appellant's appeal.

LORD SCOTT OF FOSCOTE

37 My Lords, one of the grounds of appeal argued on behalf of the appellant was that under section 739(2) of the Income and Corporation Taxes Act 1988 the income of the offshore companies (referred to in the judgment of the Court of Appeal [2000] QB 744, 755) was deemed to be the income of the appellant and that the income must therefore be deemed not to be the income of the companies (see paragraph 8 of my noble and learned friend Lord Hutton's opinion).

38 As Lord Hutton has explained in paragraph 10 of his opinion, counsel for the appellant, Mr Newman, dealt with the section 739(2) point before your Lordships by adopting the argument on that point advanced before your Lordships by counsel for Dimsey. In a separate opinion which I have prepared for the purposes of Dimsey's appeal, I have set out my reasons for rejecting his ground of appeal based on section 739(2). For the same reasons I would reject Allen's section 739(2) ground of appeal.

39 Accordingly, for those reasons and for the reasons given by my noble and learned friend, with which I am in full agreement, I too would dismiss this appeal.

Orders of Court of Appeal of 7 July 1999 affirmed.
Appeals dismissed.

Solicitors: Saunders & Co; Gouldens; Solicitor of Inland Revenue.

DECP

House of Lords

Secretary of State for the Home Department *v* Rehman

(Consolidated Appeals)

[2001] UKHL 47

2001 May 2, 3; Oct 11

Lord Slynn of Hadley, Lord Steyn, Lord Hoffmann, Lord Clyde and Lord Hutton

Immigration — Deportation — Conducive to public good — Pakistani national allegedly having links with group involved in terrorism in Indian subcontinent — Secretary of State deciding that deportation conducive to public good in interests of national security — Whether promotion of terrorism abroad threatening national security — Whether cumulative effect of allegations establishing threat — Standard of proof — Immigration Act 1971 (c 77) (as amended by British Nationality Act 1981 (c 61), s 39(6), Sch 4), ss 3(5)(b), 15(3) — Special Immigration Appeals Commission Act 1997 (c 68), s 2(1)(c)

The applicant, a Pakistani national, arrived in the United Kingdom in 1993 after being granted entry clearance to work as a minister of religion. In December 1998 the Secretary of State refused his application for indefinite leave to remain in the United Kingdom and gave notice that, because of his association with an organisation involved in terrorist activities in the Indian subcontinent, he had decided to make a deportation order under section 3(5)(b) of the Immigration Act 1971[1] on the ground that it would be conducive to the public good in the interests of national security. On the applicant's appeal to the Special Immigration Appeals Commission against the notice of intention to deport pursuant to section 2(1)(c) of the Special Immigration Appeals Commission Act 1997[2] the Commission held that to threaten national security a person had to engage in, promote or encourage violent activity targeted at the United Kingdom, its system of government or its people. It concluded that the Secretary of State had not established to a high degree of probability that the applicant had been, was or was likely to be a threat to national security. The Court of Appeal allowed an appeal by the Secretary of State.

On appeal by the applicant—

Held, dismissing the appeal, that what was "conducive to the public good" within section 3(5)(b) of the 1971 Act was prima facie a matter for the executive discretion of the Secretary of State; that the three grounds in section 15(3) on which deportation might be conducive to the public good did not have to be considered disjunctively and the Secretary of State was entitled to take an overall view; that the interests of national security could be threatened not only directly by action against the United Kingdom, its system of government or its people but also indirectly by activities directed against other states; and that, while any specific facts on which the Secretary of State relied should be proved on the ordinary civil balance of probability, no particular standard of proof was appropriate to the formation of his executive judgment or assessment as to whether it was conducive to the public good that a person should be deported, which was simply a matter of a reasonable and proportionate judgment on the material before him (post, pp 883H–884A, D–G, 885A–E, 886A–D, 887A–B, C–888C, 893A–F, 896B, 897G, H–898C).

Decision of the Court of Appeal [2000] 3 WLR 1240; [2000] 3 All ER 778 affirmed.

[1] Immigration Act 1971, as amended, s 3(5)(b): see post, p 882A.
S 15(3): see post, p 882B–C.
[2] Special Immigration Appeals Commission Act 1997, s 2(1)(c): see post, p 882D–E.

The following cases are referred to in their Lordships' opinions:

Chahal v United Kingdom (1996) 23 EHRR 413
Chandler v Director of Public Prosecutions [1964] AC 763; [1962] 3 WLR 694; [1962] 3 All ER 142, HL(E)
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1984] 3 All ER 935, HL(E)
H (Minors) (Sexual Abuse: Standard of Proof), In re [1996] AC 563; [1996] 2 WLR 8; [1996] 1 All ER 1, HL(E)
Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] QB 129; [1986] 3 WLR 1038; [1986] 3 All ER 135, ECJ
Ministry of Defence's Application, In re [1994] NI 279, CA(NI)
R v Ministry of Defence, Ex p Smith [1996] QB 517; [1996] 2 WLR 305; [1996] 1 All ER 257, CA
R v Secretary of State for the Home Department, Ex p McQuillan [1995] 4 All ER 400
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
Smith and Grady v United Kingdom (1999) 29 EHRR 493
Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249

The following additional cases were cited in argument:

R v Secretary of State for Home Affairs, Ex p Hosenball [1977] 1 WLR 766; [1977] 3 All ER 452, CA
R v Secretary of State for the Home Department, Ex p Chahal [1995] 1 WLR 526; [1995] 1 All ER 658, CA
R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74; [1983] 2 WLR 321; [1983] 1 All ER 765, HL(E)
R v Secretary of State for the Home Department, Ex p Launder [1997] 1 WLR 839; [1997] 3 All ER 961, HL(E)
Singh (Raghbir) v Secretary of State for the Home Department [1996] Imm AR 507, CA
Tahir (Nadeem) v Immigration Appeal Tribunal [1989] Imm AR 98, CA

CONSOLIDATED APPEALS from the Court of Appeal

These were two consolidated appeals by the applicant, Shafiq Ur Rehman, brought respectively by leave of the Court of Appeal (Lord Woolf MR, Laws LJ and Harrison J) given on 23 May 2000 in respect of the issue of the ambit of national security and by leave of the House of Lords (Lord Steyn, Lord Hope of Craighead and Lord Millett) given on 4 October 2000 in respect of the issue of standard of proof, from the judgment of the Court of Appeal on 23 May 2000 allowing an appeal by the respondent, the Secretary of State for the Home Department, from a decision of the Special Immigration Appeals Commission allowing an appeal by the applicant against the decision of the Secretary of State to refuse his application for indefinite leave to remain in the United Kingdom and to make a deportation order against him. The appeals were consolidated by order of the House of Lords dated 6 November 2000.

The facts are stated in the opinion of Lord Slynn of Hadley.

Sibghat Kadri QC, Arthur Blake and *Adrian Berry* for the applicant.
Philip Sales and *Robin Tam* for the Secretary of State.

Their Lordships took time for consideration.

11 October. LORD SLYNN OF HADLEY

1 My Lords, Mr Rehman, the appellant, is a Pakistani national, born in June 1971 in Pakistan. He was educated and subsequently, after obtaining a master's degree in Islamic studies, taught at Jamiah Salfiah in Islamabad until January 1993. On 17 January 1993 he was given an entry clearance to enable him to work as a minister of religion with the Jamait Ahle-e-Hadith in Oldham. His father is such a minister in Halifax and both his parents are British citizens. He arrived here on 9 February 1993 and was subsequently given leave to stay until 9 February 1997 to allow him to complete four years as a minister. He married and has two children born in the United Kingdom. In October 1997 he was given leave to stay until 7 January 1998 to enable him to take his family to Pakistan from which he returned on 4 December 1997. He applied for indefinite leave to remain in the United Kingdom but that was refused on 9 December 1998. In his letter of refusal the Secretary of State said:

> "the Secretary of State is satisfied, on the basis of the information he has received from confidential sources, that you are involved with an Islamic terrorist organisation Markaz Dawa Al Irshad (MDI). He is satisfied that in the light of your association with the MDI it is undesirable to permit you to remain and that your continued presence in this country represents a danger to national security. In these circumstances, the Secretary of State has decided to refuse your application for indefinite leave to remain in accordance with paragraph 322(5) of the Immigration Rules (HC 395).
>
> "By virtue of section 2(1)(b) of the Special Immigration Appeals Commission Act 1997 you are entitled to appeal against the Secretary of State's decision as he has personally certified that [sic] your departure from the United Kingdom to be conducive to the public good in the interests of national security."

The Secretary of State added that his deportation from the United Kingdom would be conducive to the public good "in the interests of national security because of your association with Islamic terrorist groups". Mr Rehman was told that he was entitled to appeal, which he did, to the Special Immigration Appeals Commission by virtue of section 2(1)(c) of the Special Immigration Appeals Commission Act 1997. The Special Immigration Appeals Commission (Procedure) Rules 1998 (SI 1998/1881) allowed the Secretary of State to make both an open statement and a closed statement, only the former being disclosed to Mr Rehman. The Secretary of State in his open statement said:

> "The Security Service assesses that while Ur Rehman and his United Kingdom-based followers are unlikely to carry out any acts of violence in this country, his activities directly support terrorism in the Indian subcontinent and are likely to continue unless he is deported. Ur Rehman has also been partly responsible for an increase in the number of Muslims in the United Kingdom who have undergone some form of militant training, including indoctrination into extremist beliefs and at least some basic weapons training. The Security Service is concerned that the presence of returned jihad trainees in the United Kingdom may encourage the radicalisation of the British Muslim community. His activities in the

United Kingdom are intended to further the cause of a terrorist organisation abroad. For this reason, the Secretary of State considers both that Ur Rehman poses a threat to national security and that he should be deported from the United Kingdom on [the] grounds that his presence here is not conducive to the public good for reasons of national security."

2 The appeal was heard both in open and in closed sessions. The Commission in its decision of 20 August 1999 held:

"That the expression 'national security' should be construed narrowly, rather than in the wider sense contended for by the Secretary of State and identified in the passages from Mr Sales's written submissions cited above. We recognise that there is no statutory definition of the term or legal authority directly on the point. However, we derive assistance from the passages in the authorities cited to us by Mr Kadri, namely *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410A–C, per Lord Diplock and *R v Secretary of State for Home Affairs Ex p Hosenball* [1977] 1 WLR 766, 778D–H, 783F–H, per Lord Denning MR, and note the doubts expressed by Staughton LJ in *R v Secretary of State for the Home Department, Ex p Chahal* [1995] 1 WLR 526, 531. Moreover, whilst we recognise the terms of the Security Service Act 1989 are in no way decisive in the issue, we have derived assistance from the general approach contended for by Mr Nicholas Blake QC [special advocate before the Commission]. We have found the passage cited by him from Professor Grahl-Madsen's book [*The Status of Refugees in International Law* (1966)] to be particularly helpful. In the circumstances, and for the purposes of this case, we adopt the position that a person may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals. National security extends also to situations where United Kingdom citizens are targeted, wherever they may be. This is the definition of national security which should be applied to the issues of fact raised by this appeal".

3 They then considered the allegations of fact and they said:

"we have asked ourselves whether the Secretary of State has satisfied us to a high civil balance of probabilities that the deportation of this appellant, a lawful resident of the United Kingdom, is made out on public good grounds because he has engaged in conduct that endangers the national security of the United Kingdom and, unless deported, is likely to continue to do so. In answering this question we have to consider the material, open, closed, and restricted, the oral evidence of witnesses called by the respondent, and the evidence of the appellant produced before us. We are satisfied that this material and evidence enables us properly to reach a decision in this appeal (rule 3 of the 1998 Rules)."

4 The Commission declined to set out in detail their analysis of the "open", "restricted" and "closed" evidence on the basis that this would be capable of creating a serious injustice and they confined themselves to stating their conclusions, namely:

"1. Recruitment. We are not satisfied that the appellant has been shown to have recruited British Muslims to undergo militant training as alleged.

"2. We are not satisfied that the appellant has been shown to have engaged in fund-raising for the LT [Lashkar Tayyaba] as alleged.

"3. We are not satisfied that the appellant has been shown to have knowingly sponsored individuals for militant training camps as alleged.

"4. We are not satisfied that the evidence demonstrates the existence in the United Kingdom of returnees, originally recruited by the appellant, who during the course of that training overseas have been indoctrinated with extremist beliefs or given weapons training, and who as a result allow them to create a threat to the United Kingdom's national security in the future"

They added:

"We have reached all these conclusions while recognising that it is not disputed that the appellant has provided sponsorship, information and advice to persons going to Pakistan for the forms of training which may have included militant or extremist training. Whether the appellant knew of the militant content of such training has not, in our opinion, been satisfactorily established to the required standard by the evidence. Nor have we overlooked the appellant's statement that he sympathised with the aims of LT in so far as that organisation confronted what he regarded as illegal violence in Kashmir. But, in our opinion, these sentiments do not justify the conclusion contended for by the respondent. It follows, from these conclusions of fact, that the respondent has not established that the appellant was, is, and is likely to be a threat to national security. In our view, that would be the case whether the wider or narrower definition of that term, as identified above, is taken as the test. Accordingly we consider that the respondent's decisions in question were not in accordance with the law or the Immigration Rules (paragraph 364 of HC 395) and thus we allow these appeals".

6 The Secretary of State appealed. The Court of Appeal [2000] 3 WLR 1240 considered that the Commission had taken too narrow a view of what could constitute a threat to national security in so far as it required the conduct relied on by the Secretary of State to be targeted at this country or its citizens. The Court of Appeal also considered, at p 1254, that the test was not whether it had been shown "to a high degree of probability" that the individual was a danger to national security but that a global approach should be adopted "taking into account the executive's policy with regard to national security". Accordingly they allowed the appeal and remitted the matter to the Commission for redetermination applying the approach indicated in their judgment.

7 The Court of Appeal in its judgment has fully analysed in detail the provisions of the Immigration Act 1971, the 1997 Act and the 1998 Rules. I adopt what the court has said and can accordingly confine my references to

the legislation which is directly in issue on this appeal to your Lordships' House.

8 The 1971 Act contemplates first a decision by the Secretary of State to make a deportation order under section 3(5) of that Act, in the present case in respect of a person who is not a British citizen "(b) if the Secretary of State deems his deportation to be conducive to the public good". There is no definition or limitation of what can be "conducive to the public good" and the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State. The decision of the Secretary of State to make a deportation order is subject to appeal by section 15(1)(a) of the 1971 Act save that by virtue of section 15(3):

> "A person shall not be entitled to appeal against a decision to make a deportation order against him if the ground of the decision was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature."

9 Despite this prohibition there was set up an advisory procedure to promote a consideration of the Secretary of State's decision under that Act. This however was held by the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413 not to provide an effective remedy within section 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmnd 8969). Accordingly the Commission was set up by the 1997 Act and by section 2(1)(c) a person was given a right to appeal to the Commission against

> "any matter in relation to which he would be entitled to appeal under subsection 1(a) of section 15 of [the 1971 Act] (appeal to an adjudicator or the Appeal Tribunal against a decision to make a deportation order), but for subsection (3) of that section (deportation conducive to public good) . . ."

The exclusion of the right of appeal if the decision to deport was on the ground that deportation was conducive to the public good on the basis that it was in the interests of national security or of the relations between the United Kingdom and any other country or for any other reasons of a political nature was thus removed.

10 Section 4 of the 1997 Act provides that the Commission:

> "(a) shall allow the appeal if it considers—(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, and (b) in any other case, shall dismiss the appeal."

11 It seems to me that on this language and in accordance with the purpose of the legislation to ensure an "effective remedy", within the meaning of article 13 of the European Convention, that the Commission was empowered to review the Secretary of State's decision on the law and also to review his findings of fact. It was also given the power to review the question whether the discretion should have been exercised differently. Whether the discretion should have been exercised differently will normally depend on

whether on the facts found the steps taken by the Secretary of State were disproportionate to the need to protect national security.

12 From the Commission's decision there is a further appeal to the Court of Appeal on "any question of law material to" the Commission's determination: section 7(1).

13 The two main points of law which arose before the Court of Appeal are now for consideration by your Lordships' House. Mr Kadri has forcefully argued that the Court of Appeal was wrong on both points.

14 As to the meaning of "national security" he contends that the interests of national security do not include matters which have no direct bearing on the United Kingdom, its people or its system of government. "National security" has the same scope as "defence of the realm". For that he relies on what was said by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410B–C, and on the use of the phrases in a number of international conventions. Moreover he says that since the Secretary of State based his decision on a recommendation of the Security Service it can only be on matters within their purview and that their function, by section 1(2) of the Security Service Act 1989, was:

> "the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means."

He relies moreover on statements by groups of experts in international law, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, as approved on 1 October 1995 in Johannesburg which stressed as:

> "*Principle 2. Legitimate national security interests*
>
> "(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
>
> "(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."

15 It seems to me that the appellant is entitled to say that "the interests of national security" cannot be used to justify any reason the Secretary of State has for wishing to deport an individual from the United Kingdom. There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported. But I do not accept that

this risk has to be the result of "a direct threat" to the United Kingdom as Mr Kadri has argued. Nor do I accept that the interests of national security are limited to action by an individual which can be said to be "targeted at" the United Kingdom, its system of government or its people as the Commission considered. The Commission agreed that this limitation is not to be taken literally since they accepted that such targeting:

> "includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals."

16 I accept as far as it goes a statement by Professor Grahl-Madsen in *The Status of Refugees in International Law* (1966):

> "A person may be said to offend against national security if he engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned or in activities which are directed against a foreign government which as a result threaten the former government with intervention of a serious nature."

That was adopted by the Commission but I for my part do not accept that these are the only examples of action which makes it in the interests of national security to deport a person. It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate. Whether there is such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made.

17 In his written case Mr Kadri appears to accept (contrary it seems to me to his argument in the Court of Appeal that they were mutually exclusive and to be read disjunctively) that the three matters referred to in section 15(3) of the 1971 Act, namely "national security", "the relations between the United Kingdom and any other country" or "for other reasons of a political nature" may overlap but only if action which falls in one or more categories amounts to a direct threat. I do not consider that these three categories are to be kept wholly distinct even if they are expressed as

alternatives. As the Commission itself accepted, reprisals by a foreign state due to action by the United Kingdom may lead to a threat to national security even though this is action such as to affect "relations between the United Kingdom and any other country" or to be "of a political nature". The Secretary of State does not have to pin his colours to one mast and be bound by his choice. At the end of the day the question is whether the deportation is conducive to the public good. I would accept the Secretary of State's submission that the reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security, and that such co-operation itself is capable of fostering such security "by, inter alia, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states". There is a very large element of policy in this which is, as I have said, primarily for the Secretary of State. This is an area where it seems to me particularly that the Secretary of State can claim that a preventative or precautionary action is justified. If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom.

18 National security and defence of the realm may cover the same ground though I tend to think that the latter is capable of a wider meaning. But if they are the same then I would accept that defence of the realm may justify action to prevent indirect and subsequent threats to the safety of the realm.

19 The United Kingdom is not obliged to harbour a terrorist who is currently taking action against some other state (or even in relation to a contested area of land claimed by another state) if that other state could realistically be seen by the Secretary of State as likely to take action against the United Kingdom and its citizens.

20 I therefore agree with the Court of Appeal that the interests of national security are not to be confined in the way which the Commission accepted.

21 Mr Kadri's second main point is that the Court of Appeal were in error when rejecting the Commission's ruling that the Secretary of State had to satisfy them, "to a high civil balance of probabilities", that the deportation of this appellant, a lawful resident of the United Kingdom, was made out on public good grounds because he had engaged in conduct that endangered the national security of the United Kingdom and, unless deported, was likely to continue to do so. The Court of Appeal [2000] 3 WLR 1240, 1254, para 44 said:

> "However, in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect

may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion."

22 Here the liberty of the person and the practice of his family to remain in this country is at stake and when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof. But that is not the whole exercise. The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a "high civil degree of probability". Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good.

23 Contrary to Mr Kadri's argument this approach is not confusing proof of facts with the exercise of discretion—specific acts must be proved, **and an assessment made of the whole picture and then the discretion exercised as to whether there should be a decision to deport and a deportation order made.**

24 If of course it is said that the decision to deport was not based on **grounds of national security and there is an issue as to that matter then "the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security"**: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 402. That however is not the issue in the present case.

25 On the second point I am wholly in agreement with the decision of the Court of Appeal.

26 In conclusion even though the Commission has powers of review both of fact and of the exercise of the discretion, the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him. On an appeal the Court of Appeal and your Lordships' House no doubt will give due weight to the conclusions of the Commission, constituted as it is of distinguished and experienced members, and knowing as it did, and as usually the court will not know, of the contents of the "closed" evidence and hearing. If any of the reasoning of the Commission shows errors in its approach to the principles to be followed, then the courts can intervene. In the present case I consider that the Court of Appeal was right in its decision on both of the points which arose and in its decision to

remit the matters to the Commission for redetermination in accordance with the principles which the Court of Appeal and now your Lordships have laid down. I would accordingly dismiss the appeals.

LORD STEYN

27 My Lords, I am in agreement with the reasons given by Lord Slynn of Hadley in his opinion and I would also dismiss the appeals. I can therefore deal with the matter quite shortly.

28 Section 15(3) of the Immigration Act 1971 contemplated deportation of a person in three situations, viz where "his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature". The Commission thought that section 15(3) should be interpreted disjunctively. In the Court of Appeal [2000] 3 WLR 1240 Lord Woolf MR explained, at p 1253, para 40 that while it is correct that these situations are alternatives "there is clearly room for there to be an overlap". I agree. Addressing directly the issue whether the conduct must be targeted against the security of this country, Lord Woolf MR observed, at p 1251, para 34:

> "Whatever may have been the position in the past, increasingly the security of one country is dependent upon the security of other countries. That is why this country has entered into numerous alliances. They acknowledge the extent to which this country's security is dependent **upon the security of other countries. The establishment of NATO is but a reflection of this reality. An attack on an ally can undermine the security** of this country."

Later in his judgment, at pp 1253–1254, para 40, Lord Woolf MR said that the Government "is perfectly entitled to treat any undermining of its policy to protect this country from international terrorism as being contrary to the security interests of this country". I respectfully agree. Even democracies are entitled to protect themselves, *and* the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies. This broader context is the backcloth of the Secretary of State's statutory power of deportation in the interests of national security.

29 That brings me to the next issue. Counsel for the appellant submitted that the civil standard of proof is applicable to the Secretary of State and to the Commission. This argument necessarily involves the proposition that even if the Secretary of State is fully entitled to be satisfied on the materials before him that the person concerned *may* be a real threat to national security, the Secretary of State may not deport him. That cannot be right. The task of the Secretary of State is to evaluate risks in respect of the interests of national security. Lord Woolf MR expressed the point with precision as follows, at p 1254, para 44:

> "in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is

also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion. Here it is important to remember that the individual is still subject to immigration control. He is not in the same position as a British citizen. He has not been charged with a specific criminal offence. It is the danger which he constitutes to national security which is to be balanced against his own personal interests."

The dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security, irresistibly supports this analysis. While I came to this conclusion by the end of the hearing of the appeal, the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.

30 The interpretation of section 4 of the Special Immigration Appeals Commission Act 1997 was not explored in any depth on the appeal to the House. Section 4 so far as relevant reads:

"(1) The Special Immigration Appeals Commission on an appeal to it under this Act—(a) shall allow the appeal if it considers—(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, and (b) in any other case, shall dismiss the appeal.

"(2) Where an appeal is allowed, the Commission shall give such directions for giving effect to the determination as it thinks requisite, and may also make recommendations with respect to any other action which it considers should be taken in the case under the Immigration Act 1971; and it shall be the duty of the Secretary of State and of any officer to whom directions are given under this subsection to comply with them."

In the light of the observations of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413 Parliament has provided for a high-powered Commission, consisting of a member who holds or has held high judicial office, an immigration judge, and a third member, who will apparently be someone with experience of national security matters: see section 1 of and Schedule 1 to the 1997 Act and per Lord Woolf MR [2000] 3 WLR 1240, 1245, 1246, paras 11 and 17. Lord Woolf MR observed, at p 1254, para 42, that the Commission were correct to regard it as their responsibility to determine questions of fact and law. He added:

"The fact that Parliament has given SIAC responsibility of reviewing the manner in which the Secretary of State has exercised his discretion, inevitably leads to this conclusion. Without statutory intervention, this is not a role which a court readily adopts. But SIAC's membership meant that it was more appropriate for SIAC to perform this role."

I respectfully agree. Not only the make-up of the Commission but also the procedures of the Commission serve to protect the interests of national security: Special Immigration Appeals Commission (Procedure) Rules 1998; see also the discussion of the new procedure in (1998) 12 INLP 67–70.

31 Moreover the expression "in accordance with the law" in section 4 of the 1997 Act comprehends also since 2 October 2000 Convention rights under the Human Rights Act 1998. Thus article 8 (right of respect for family life), article 10 (freedom of expression) and article 11 (freedom of assembly and association) all permit such derogations as are prescribed by law and are necessary in a democratic society in the interests of national security. While a national court must accord appropriate deference to the executive, it may have to address the questions: Does the interference serve a legitimate objective? Is it necessary in a democratic society? In *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249 the European Court of Human Rights had to consider public interest immunity certificates involving national security considerations issued by the Secretary of State in discrimination proceedings. The court observed, at p 290, para 77:

"the conclusive nature of the section 42 [Fair Employment (Northern Ireland) Act 1976] certificates had the effect of preventing a judicial determination on the merits of the applicants' complaints that they were victims of unlawful discrimination. The court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under article 6(1) of the Convention to submit a dispute to a court or tribunal in order to have a determination on questions of both fact and law cannot be displaced by the ipse dixit of the executive."

It is well established in the case law that issues of national security do not fall beyond the competence of the courts: see, for example, *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] QB 129; *R v Secretary of State for the Home Department, Ex p McQuillan* [1995] 4 All ER 400; *R v Ministry of Defence, Ex p Smith* [1996] QB 517 and *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; compare also the extensive review of the jurisprudence on expulsion and deportation in *van Dijk and van Hoof, Theory and Practice of the European Convention on Human Rights*, 3rd ed (1998), pp 515–521. It is, however, self-evidently right that national courts must give great weight to the views of the executive on matters of national security. But not all the observations in *Chandler v Director of Public Prosecutions* [1964] AC 763 can be regarded as authoritative in respect of the new statutory system.

32 For the reasons given by Lord Woolf MR, the reasons given by Lord Slynn of Hadley, and my brief reasons, I would dismiss the appeals.

LORD HOFFMANN

The decision to deport

33 My Lords, Mr Shafiq Ur Rehman is a Pakistani national. He came to this country in 1993 and was given limited leave to enter and to work as a

minister of religion. In 1997 he applied for indefinite leave to remain. On 9 December 1998 the Home Secretary refused the application. His letter said that he was satisfied, on the basis of information from confidential sources, that Mr Rehman was involved with an Islamic terrorist organisation called Markaz Dawa Al Irshad ("MDI") and that his continued presence in this country was a danger to national security. The Home Secretary also gave notice of his intention to make a deportation order under section 3(5)(b) of the Immigration Act 1971 on the ground that for the same reasons his deportation would be conducive to the public good.

The right of appeal

34 Until 1998 Mr Rehman would have had no right of appeal against the Home Secretary's decision to deport him. Ordinarily there is a right of appeal to an immigration adjudicator against a decision of the Secretary of State to make a deportation order under section 3(5): see section 15(1). The adjudicator hearing the appeal is required by section 19(1) to allow the appeal if he considers that the decision was "not in accordance with the law or with any immigration rules applicable to the case" or, where the decision involved the exercise of a discretion by the Secretary of State, "that the discretion should have been exercised differently". Otherwise, the appeals must be dismissed.

35 But this general right of appeal is excluded by section 15(3) if the ground of the decision to make the deportation order

> "was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature."

Parliament took the view that the need to preserve the confidentiality of the material taken into account by the Home Secretary in making a deportation order on one or other of these grounds made it impossible to allow an effective right of appeal. All that could be permitted was the right to make representations to an extra-statutory panel appointed by the Home Secretary to advise him.

36 In *Chahal v United Kingdom* (1996) 23 EHRR 413 the European Court of Human Rights decided that this procedure was inadequate to safeguard two of the deportee's Convention rights. First, he was entitled under article 13 to an effective remedy from an independent tribunal to protect his right under article 3 not to be deported to a country where there was a serious risk that he would suffer torture or inhuman or degrading treatment. Secondly, if he was detained pending deportation, he was entitled under article 5(4) to the determination of an independent tribunal as to whether his detention was lawful. The European Court rejected the United Kingdom Government's argument that considerations of national security or international relations made it impossible to accord such a right of appeal. The court, at p 469, para 131, commended the procedure established by the Canadian Immigration Act 1976, under which the confidentiality of secret sources could be maintained by disclosing it only to a special security-cleared advocate appointed to represent the deportee who could cross-examine witnesses in the absence of the appellant (p 472, para 144).

37 The European Court also considered the argument that decisions on national security were essentially a matter for the executive and that it would be contrary to principle to allow an independent tribunal to substitute its own decision on such matters for that of the responsible minister. It acknowledged, at p 468, para 127, that article 5(4):

> "does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to article 5(1)."

The term "question of expediency" is regularly used by the European Court to describe what English lawyers would call a question of policy: see the discussion of the European cases in the recent case of *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

38 This was the background to the passing of the Special Immigration Appeals Commission Act 1997, under which Mr Rehman was able to appeal. The Act was intended to enable the United Kingdom to comply with the European Convention as interpreted by the court in *Chahal's* case. It established a Special Immigration Appeals Commission ("the Commission") with jurisdiction to hear various categories of appeals, including (under section 2(1)(c)) those excluded from the jurisdiction of the adjudicator by section 15(3) of the 1971 Act. Section 4(1) gave the Commission power to deal with such appeals in the same terms as the power conferred upon the adjudicator by section 19(1) of the 1971 Act. The 1997 Act enabled the Lord Chancellor to make procedural rules for the Commission and pursuant to this power he made the Special Immigration Appeals Commission (Procedure) Rules 1998. This follows the Canadian model in allowing part of the proceedings to be conducted at a private hearing from which the appellant may be excluded but represented by a special advocate.

The Home Secretary's reasons

39 Pursuant to rule 10(1)(a), the Home Secretary provided the Commission with a summary of the facts relating to his decision and the reasons for the decision. It said that Mr Rehman was the United Kingdom point of contact for MDI, an "extremist organisation" whose mujahidin fighters were known as Lashkar Tayyaba ("LT"). Mr Rehman was said to have been involved on MDI's behalf in the recruitment of British Muslims to undergo military training and in fund raising for LT. He was a personal contact of Mohammed Saeed, the worldwide leader of MDI and LT. The Security Service assessed that his activities directly supported a terrorist organisation.

40 The grounds upon which these activities were seen as a threat to national security was that, while Mr Rehman and his followers were unlikely to carry out acts of violence in the United Kingdom, his activities directly supported terrorism in the Indian subcontinent. Mr Peter Wrench, head of the Home Office Terrorism and Protection Unit, told the Commission that the defence of United Kingdom national security against terrorist groups depended upon international reciprocity and co-operation.

It was therefore in the security interests of the United Kingdom to co-operate with other nations, including India, to repress terrorism anywhere in the world.

41 An additional reason was that Mr Rehman had been responsible for an increase in the number of Muslims in the United Kingdom who had undergone some form of militant training and that the presence of returned trainees in the United Kingdom might encourage the radicalisation of the British Muslim community.

The Commission's decision

42 The Commission said that the appeal raised two issues. The first was whether Mr Rehman was engaged in the activities alleged by the Home Secretary. The second was whether his activities, so far as the Commission found them proved, were against the interests of the security of the United Kingdom. The view taken by the Commission was that the Home Secretary's allegations had to be established "to a high civil balance of probabilities". The Commission went through each of the principal allegations: (1) involvement in recruitment of British Muslims to go to Pakistan for terrorist training; (2) fund raising for LT; (3) sponsorship of individuals for militant training camps; and (4) creation of a group of returnees who had been given weapons training or been indoctrinated with extremist beliefs so as to create a threat to the security of the United Kingdom. In each case it said that it was not satisfied to the necessary standard of proof that the allegation had been made out.

43 On the question of whether Mr Rehman's activities, so far as proved, constituted a threat to national security, the Commission rejected the argument that the question of what could constitute a threat to national security was a matter for the Home Secretary to decide. It said that the definition of national security was a question of law which it had jurisdiction to decide. It examined various authorities and came to the conclusion that a person "may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people". It included within this definition activities against a foreign government "if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals".

44 Finally, the Commission said that the various grounds of decision which section 15(3) of the 1971 Act excluded from the jurisdiction of the adjudicator (and which consequently fell within the jurisdiction of the Commission) were to be read disjunctively: "Once the Secretary of State identified 'the public good' as being 'the interests of national security' as the basis of his decision, he cannot broaden his grounds to avoid difficulties which he may encounter in proving his case."

The Court of Appeal's decision

45 The Secretary of State appealed to the Court of Appeal [2000] 2 WLR 1240 under section 7 of the 1997 Act on the ground that the Commission had erred in law. The court (Lord Woolf MR, Laws LJ and Harrison J) allowed the appeal and remitted the appeal to the Commission

for reconsideration in accordance with its judgment. Against that decision Mr Rehman appeals to your Lordships' House.

46 The Court of Appeal identified three errors of law. First, it considered that the Commission had given too narrow an interpretation to the concept of national security. It did not think that a threat to national security had to be "targeted" against this country and it accepted Mr Wrench's evidence of the need for international co-operation against terrorism as a legitimate point of view. It was sufficient that there was a real possibility of adverse repercussions on the security of the United Kingdom, its system of government or its people.

47 Secondly, the Commission should not have treated national security, international relations and other political reasons as separate compartments. Conduct which adversely affected international relations, for example, could thereby have adverse repercussions on security.

48 Thirdly, it was wrong to treat the Home Secretary's reasons as counts in an indictment and to ask whether each had been established to an appropriate standard of proof. The question was not simply what the appellant had done but whether the Home Secretary was entitled to consider, on the basis of the case against him as a whole, that his presence in the United Kingdom was a danger to national security. When one is concerned simply with a fact-finding exercise concerning past conduct such as might be undertaken by a jury, the notion of a standard of proof is appropriate. But the Home Secretary and the Commission do not only have to form a view about what the appellant has been doing. The final decision is evaluative, looking at the evidence as a whole, and predictive, looking to future danger. As Lord Woolf MR said, at p 1254, para 44:

> "the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion."

49 My Lords, I will say at once that I think that on each of these points the Court of Appeal were right. In my opinion the fundamental flaw in the reasoning of the Commission was that although they correctly said that section 4(1) gave them full jurisdiction to decide questions of fact and law, they did not make sufficient allowance for certain inherent limitations, first, in the powers of the judicial branch of government and secondly, within the judicial function, in the appellate process. First, the limitations on the judicial power. These arise from the principle of the separation of powers. The Commission is a court, a member of the judicial branch of government. It was created as such to comply with article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). However broad the jurisdiction of a court or tribunal, whether at first instance or on appeal, it is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power. Secondly, the limitations on the appellate process. They arise from the need, in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker.

The separation of powers

50 I shall deal first with the separation of powers. Section 15(3) of the 1971 Act specifies "the interests of national security" as a ground on which the Home Secretary may consider a deportation conducive to the public good. What is meant by "national security" is a question of construction and therefore a question of law within the jurisdiction of the Commission, subject to appeal. But there is no difficulty about what "national security" means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.

51 In *Chandler v Director of Public Prosecutions* [1964] AC 763 the appellants, campaigners for nuclear disarmament, had been convicted of conspiring to commit an offence under section 1 of the Official Secrets Act 1911, namely, for a purpose prejudicial to the safety or interests of the state to have entered a RAF station at Wethersfield. They claimed that their purpose was to prevent nuclear bombers from taking off and wanted the judge or jury to decide that stopping the bombers was not at all prejudicial to the safety or interests of the state. They said that, on the contrary, the state would be much safer without them. But the House ruled that whether having nuclear bombers was conducive to the safety of the state was a matter for the decision of the executive. A court could not question it.

52 Mr Kadri, who appeared for Mr Rehman, emphasised that section 4(1) of the 1997 Act gave the Commission the same full appellate jurisdiction as adjudicators had under the 1971 Act. But the question is not the extent of the Commission's appellate jurisdiction. It is whether the particular issue can properly be decided by a judicial tribunal at all. The criminal and appellate courts in *Chandler v Director of Public Prosecutions* had full jurisdiction over questions of fact and law in the same way as the Commission. The refusal of the House to re-examine the executive's decision that having nuclear bombers was conducive to the safety of the state was based purely upon the separation of powers. Viscount Radcliffe said, at p 798:

> "we are dealing with a matter of the defence of the realm and with an Act designed to protect state secrets and the instruments of the state's defence. If the methods of arming the defence forces and the disposition of those forces are at the decision of Her Majesty's ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different."

53 Accordingly it seems to me that the Commission is not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security. Mr Kadri rightly said that one man's terrorist was another man's freedom fighter. The decision as to whether support for a particular movement in a foreign country would be prejudicial to our national security may involve delicate questions of foreign policy. And, as I shall later explain, I agree with

the Court of Appeal that it is artificial to try to segregate national security from foreign policy. They are all within the competence of responsible ministers and not the courts. The Commission was intended to act judicially and not, as the European Court recognised in *Chahal v United Kingdom* 23 EHRR 413, to substitute its own opinion for that of the decision-maker on "questions of pure expediency".

54 This does not mean that the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary, so as to "defeat the purpose for which the Commission was set up": see the Commission's decision. It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive. The precise boundaries were analysed by Lord Scarman, by reference to *Chandler v Director of Public Prosecutions* [1964] AC 763 in his speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 406. His analysis shows that the Commission serves at least three important functions which were shown to be necessary by the decision in *Chahal*. First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It is therefore open to the Commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir. In this respect the Commission's ability to differ from the Home Secretary's evaluation may be limited, as I shall explain, by considerations inherent in an appellate process but not by the principle of the separation of powers. The effect of the latter principle is only, subject to the next point, to prevent the Commission from saying that although the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it does not accept that this was contrary to the interests of national security. Secondly, the Commission may reject the Home Secretary's opinion on the ground that it was "one which no reasonable minister advising the Crown could in the circumstances reasonably have held". Thirdly, an appeal to the Commission may turn upon issues which at no point lie within the exclusive province of the executive. A good example is the question, which arose in *Chahal* itself, as to whether deporting someone would infringe his rights under article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.

The standard of proof

55 I turn next to the Commission's views on the standard of proof. By way of preliminary I feel bound to say that I think that a "high civil balance of probabilities" is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, some things are inherently more

likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

56 In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.

Limitations of the appellate process

57 This brings me to the limitations inherent in the appellate process. First, the Commission is not the primary decision-maker. Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission, despite its specialist membership, cannot match. Secondly, as I have just been saying, the question at issue in this case does not involve a yes or no answer as to whether it is more likely than not that someone has done something but an evaluation of risk. In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained. Such restraint may not be necessary in relation to every issue which the Commission has to decide. As I have mentioned, the approach to whether the rights of an appellant under article 3 are likely to be infringed may be very different. But I think it is required in relation to the question of whether a deportation is in the interests of national security.

58 I emphasise that the need for restraint is not based upon any limit to the Commission's appellate jurisdiction. The amplitude of that jurisdiction is emphasised by the express power to reverse the exercise of a discretion. The need for restraint flows from a common-sense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and the Commission.

Section 15(3) of the 1971 Act

59 Finally I come to the construction of section 15(3) of the 1971 Act, which excludes certain cases from the jurisdiction of the adjudicator and by

the same definition brings them within the jurisdiction of the Commission under section 2(1)(c) of the 1997 Act. For the purpose of deciding whether an appeal is excluded by section 15(3), it is necessary only to decide that the Home Secretary's reasons fall into one or more of the specified categories. If his reasons could be said to relate to national security or foreign relations or possibly both, it is unnecessary to allocate them to one class or the other. The categories, with their sweeping-up words "or for other reasons of a political nature", do not create separate classes of reasons but a single composite class. In my opinion the other side of the coin, conferring jurisdiction on the Commission, operates in the same way. The Home Secretary does not have to commit himself to whether his reasons can be described as relating to national security, foreign relations or some other political category. The Commission has jurisdiction if they come under any head of the composite class.

60 In my view, therefore, the Commission was wrong to say that section 15(3) should be "read disjunctively". All that is necessary is that the appellant should be given fair notice of the case which he has to meet, in accordance with rule 10(1) of the Special Immigration Appeals Commission (Procedure) Rules 1998. It is unnecessary to engage in what may be a barren dispute over whether those reasons can be said to concern national security or foreign relations or be otherwise political, provided that they fall within the composite class of reasons which gives the Commission jurisdiction. What matters is not how the reasons are categorised but the reasons themselves and the facts relied upon to support them.

61 I would therefore dismiss the appeals. The case should be remitted to the Commission to hear and determine in accordance with the principles stated by the House.

62 *Postscript*. I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

LORD CLYDE

63 My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend, Lord Hoffmann. For the reasons he has given I too would dismiss these appeals.

LORD HUTTON

64 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Slynn of Hadley, Lord Steyn and Lord Hoffmann. I agree with them that the appeals should be dismissed on two grounds. The first is that the Commission fell into error in holding that for a

person to constitute a threat against national security he must engage in, promote, or encourage violent activity

> "which is targeted at the United Kingdom, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals."

In my opinion the Court of Appeal was right to hold that the promotion of terrorism against any state is capable of being a threat to the security of the United Kingdom, and that there can be an overlap between the three situations referred to in section 15(3) of the Immigration Act 1971.

65 Secondly, I agree with my noble and learned friends that the Court of Appeal was right to hold that the Secretary of State was concerned to assess the extent of future risk and that he was entitled to make a decision to deport on the ground that an individual is a danger to national security, viewing the case against him as a whole, although it cannot be proved to a high degree of probability that he has carried out any individual act which would justify the conclusion that he is a danger.

66 I would dismiss the appeals.

Appeals dismissed.
No order as to costs.

Solicitors: Bhatti Solicitors, Manchester; Treasury Solicitor.

M G

House of Lords

Farley *v* Skinner

[2001] UKHL 49

2001 June 18, 19, 21; Oct 11

Lord Steyn, Lord Browne-Wilkinson, Lord Clyde, Lord Hutton and Lord Scott of Foscote

Damages — Contract — Breach — Plaintiff instructing surveyor to report whether property affected by aircraft noise — Surveyor negligently reporting that property unlikely to be affected — Plaintiff purchasing property — Property substantially affected by aircraft noise — Plaintiff deciding not to move — Provision of amenity not sole object of contract and not subject of guarantee by surveyor — Whether plaintiff entitled to damages against surveyor for loss of amenity

The plaintiff, who was considering buying a house in Sussex some 15 miles from an airport, engaged the defendant as his surveyor. He specifically asked the defendant to investigate, in addition to the usual matters, whether the property would be affected by aircraft noise, telling him that he did not want to be on a flight path. The surveyor reported that he thought it unlikely that the property would suffer greatly from aircraft noise. The plaintiff bought the property. Before moving in he spent a considerable sum on modernisation and refurbishment. After moving in, he discovered that the property was substantially affected by aircraft noise. He decided, however, not to sell. On his action against the defendant for damages, the judge found that the defendant had been negligent and that if he had carried out his instructions properly the plaintiff would not have bought the property. He found that the purchase price paid by the plaintiff coincided with the market value of the property taking the aircraft noise into account so that the plaintiff's claim for diminution of value failed. As to non-pecuniary damage, he found that the plaintiff was not a man of excessive susceptibilities but found the noise a "confounded nuisance". He had been entitled not to move and should not be penalised for not having done so. The judge awarded him £10,000 for discomfort. The Court of Appeal by a majority allowed the defendant's appeal.

On appeal by the plaintiff—

Held, allowing the appeal, that although general damages could not in principle be awarded in respect of a plaintiff's state of mind caused by the mere fact of a contract being broken they could be awarded in respect of his disappointment at loss of a pleasurable amenity that was of no economic value but was of importance to him in ensuring his pleasure, relaxation or peace of mind, and the principle was not confined to physical inconvenience or discomfort; that it was sufficient if the provision of the amenity had been a major or important part of the contract rather than its sole object and it was immaterial that the defendant had not guaranteed achievement of a result but merely undertaken to exercise reasonable care in achieving it; that the defendant's obligation to investigate aircraft noise had been a major or important part of his contract with the plaintiff and the judge had been entitled to award the plaintiff damages for the significant interference with his enjoyment of the property caused by the noise and consequent on the defendant's breach of contract; and that the plaintiff had not forfeited his right to damages by not moving house (post, pp 910A–B, 911A–C, 912C, 914C–D, 915A, D–E, 916C–E, F–H, 920A–D, 921C, 922C–E, 926F–G, 928C–E, 931A–B, E–932D, F).

Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344, HL(E) and *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111 applied.

Watts v Morrow [1991] 1 WLR 1421, CA considered.

Knott v Bolton (1995) 11 Const LJ 375, CA overruled.

Decision of the Court of Appeal [2000] Lloyd's Rep PN 516 reversed.

(iii)

Court of Appeal

A and others *v* Secretary of State for the Home Department

X and another *v* Secretary of State for the Home Department

[2002] EWCA Civ 1502

2002 Oct 7, 8, 9; 25 Lord Woolf CJ, Brooke and Chadwick LJJ

Human rights — Right to liberty — Suspected international terrorists — Derogation from human rights obligations allowing detention of non-national suspected terrorists who could not be deported — Whether derogation justified — Whether public emergency threatening life of nation — Whether measures strictly required by exigencies of situation — Whether unjustifiable discrimination against non-nationals — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 5, 14 — Anti-terrorism, Crime and Security Act 2001 (c 24), s 23 — Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644) — Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), art 15

On 11 September 2001 large scale terrorist attacks took place in the United States. As a result, the United Kingdom Government concluded that there was a public emergency threatening the life of the nation within article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1]. Accordingly, it made the Human Rights Act 1998 (Designated Derogation) Order 2001[2], designating the United Kingdom's proposed derogation, pursuant to article 15, from the right to liberty under article 5(1) of the Convention, as scheduled to the Human Rights Act 1998[3], in section 23 of the Anti-terrorism, Crime and Security Act 2001[4]. Section 23 provided for the detention of non-nationals if the Home Secretary believed that their presence in the United Kingdom was a risk to national security and he suspected that they were terrorists and, for the time being, they could not be deported because of fears for their safety or other practical considerations. Eleven people who were detained under the Act appealed to the Special Immigration Appeals Commission. The Commission held that a public emergency threatening the life of the nation could exist even if there was no imminent threat of a terrorist attack but there was an intention and a capacity to carry out serious terrorist violence. The Commission concluded that there was such a public emergency and that, therefore, the Government had been entitled, under article 15, to derogate from its obligations under the Convention to the extent strictly required by the exigencies of the situation, which it had done. However, it quashed the 2001 Order, and granted a declaration that section 23 of the 2001 Act was incompatible with articles 5 and 14 of the Convention in so far as it permitted the detention of suspected terrorists in a way that discriminated against them on the ground of nationality, since there were British suspected terrorists who could not be detained under those provisions.

On the Secretary of State's appeal and the detainees' cross-appeals—

Held, allowing the appeal and dismissing the cross-appeals, that the Commission had correctly approached the issue of whether there existed a public emergency threatening the life of the nation within article 15 of the Convention and it had been

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, art 15: see post, para 32.

[2] Human Rights Act 1998 (Designated Derogation) Order 2001: see post, paras 20–22.

[3] Human Rights Act 1998, Sch 1, Pt I, art 5(1): see post, para 17.
Art 14: see post, para 8.

[4] Anti-terrorism, Crime and Security Act 2001, s 23: see post, para 26.

A entitled to conclude that there was such an emergency; that the court had to accord considerable deference to, and was unable to differ from, the Home Secretary's conclusion that the action that was necessary in the interests of national security was limited to removing or detaining suspected terrorists who had no right to remain in the United Kingdom but who could not be deported; that article 15 restricted the extent of any derogation from the Convention to what was strictly necessary and, therefore, the Home Secretary could not have taken action to detain nationals as well B as non-nationals since, on his assessment of the situation, that was not strictly necessary; that there were objective, justifiable and relevant grounds for selecting only non-national suspected terrorists as the subject of the 2001 Order and Act which did not involve impermissible discrimination, since non-nationals who could not be deported had no right to remain, but only a right not to be removed, which meant that legally they came into a different class from those who had a right of abode; that the approach adopted, which involved detaining the suspected terrorists for no C longer than was necessary before they could be deported, or until the emergency was resolved, or they ceased to be a threat to national security, was one which could be objectively justified; that, by limiting the number of those who were subject to such measures, the Home Secretary was ensuring that his actions were proportionate to what was necessary; that, accordingly, section 23 of the 2001 Act was not incompatible with articles 5 and 14 of the Convention; and that, further, the proceedings before the Commission did not contravene article 6 and the scheme of D detention adopted by the 2001 Act did not contravene article 3 (post, paras 34, 40, 44–45, 47, 52–53, 57–58, 64, 85, 90–91, 99, 132–134, 144, 152–153).

The following cases are referred to in the judgments:

Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471

Aksoy v Turkey (1996) 23 EHRR 553

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; E [1947] 2 All ER 680, CA

Attorney General for the Dominion of Canada v Cain [1906] AC 542, PC

Belgian Linguistic Case (No 2) (1968) 1 EHRR 252

Brannigan and McBride v United Kingdom (1993) 17 EHRR 539

Brown v Stott [2001] 2 WLR 817; [2001] 2 All ER 97, PC

Chahal v United Kingdom (1996) 23 EHRR 413

Fernandez v Wilkinson (1980) 505 F Supp 787

F *Fernandez-Roque v Smith* (1983) 567 F Supp 1115

Gaygusuz v Austria (1996) 23 EHRR 364

Greece v United Kingdom (1958) 18 HRLJ 348

Greek Case, The (1969) 12 YB 1

International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158; [2002] 3 WLR 344, CA

Ireland v United Kingdom (1978) 2 EHRR 25

G *Lawless v Ireland (No 3)* (1961) 1 EHRR 15

Libman v Attorney General of Quebec (1997) 3 BHRC 269

Marshall v United Kingdom (Application No 41571/98) (unreported) 10 July 2001, ECHR

Nishimura Ekiu v United States (1892) 142 US 651

R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)

H *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704; [1984] 1 All ER 983

R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74; [1983] 2 WLR 321; [1983] 1 All ER 765, HL(E)

R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)

R (Farrakhan) v Secretary of State for the Home Department [2002] EWCA Civ 606; [2002] QB 1391; [2002] 3 WLR 481; [2002] 4 All ER 289, CA
R (Saadi) v Secretary of State for the Home Department [2001] EWCA Civ 1512; [2002] 1 WLR 356; [2001] 4 All ER 961, CA
Railway Express Agency Inc v New York (1949) 336 US 106
RJR-MacDonald Inc v Attorney General of Canada [1995] 3 SCR 199
Secretary of State for the Home Department v Rehman [2003] 1 AC 153; [2000] 3 WLR 1240; [2000] 3 All ER 778, CA; [2001] UKHL 47; [2003] 1 AC 153; [2001] 3 WLR 877; [2002] 1 All ER 122, HL(E)
Shaughnessy v United States ex rel Mezei (1953) 345 US 206
Wandsworth London Borough Council v Michalak [2002] EWCA Civ 271; [2003] 1 WLR 617; [2002] 4 All ER 1136, CA

The following additional cases were cited in argument:

Adoui v Belgian State (Joined Cases 115 and 116/81) [1982] ECR 1665, ECJ
Aerts v Belgium (1998) 29 EHRR 50
Agee v United Kingdom (1976) 7 DR 164
Al-Adsani v United Kingdom (2001) 34 EHRR 273
Al-Nashif v Bulgaria (2001) 35 EHRR CD 76
Aygün v Sweden (1989) 63 DR 195
Benham v United Kingdom (1996) 22 EHRR 293
Boultif v Switzerland (2001) 33 EHRR 1179
Brind v United Kingdom (1994) 18 EHRR CD 76
Engel v The Netherlands (No 1) (1976) 1 EHRR 647
Fitt v United Kingdom (2000) 30 EHRR 480
Holy Monasteries v Greece (1994) 20 EHRR 1
James v United Kingdom (1986) 8 EHRR 123
Jasper v United Kingdom (2000) 30 EHRR 441
Klass v Federal Republic of Germany (1978) 2 EHRR 214
Kurt v Turkey (1998) 27 EHRR 373
Leander v Sweden (1987) 9 EHRR 433
Maaouia v France (2000) 33 EHRR 1037
Moustaquim v Belgium (1991) 13 EHRR 802
Petrovic v Austria (1998) 33 EHRR 307
R v Ministry of Defence, Ex p Smith [1996] QB 517; [1996] 2 WLR 305; [1996] 1 All ER 257, CA
R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants [1997] 1 WLR 275; [1996] 4 All ER 385, CA
R (Kariharan) v Secretary of State for the Home Department [2002] EWCA Civ 1102; [2002] 3 WLR 1783, CA
R (SR) v Nottingham Magistrates' Court [2001] EWHC Admin 802, DC
Rasmussen v Denmark (1984) 7 EHRR 371
Segi v Germany (unreported) 23 May 2002, ECHR
Sommersett's Case (1772) 20 State Tr 1
Stubbings v United Kingdom (1996) 23 EHRR 213
Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249
V v United Kingdom (1999) 30 EHRR 121
Van de Hurk v The Netherlands (1994) 18 EHRR 481
Welch v United Kingdom (1995) 20 EHRR 247

The following additional cases, although not cited, were referred to in the skeleton arguments:

Amuur v France (1996) 22 EHRR 533
Bankovic v Belgium (2001) 11 BHRC 435
Baranowski v Poland (Application No 28358/95) (unreported) 28 March 2000, ECHR
Barthold v Germany (1985) 7 EHRR 383

A *Bensaid v United Kingdom* (2001) 33 EHRR 205
Botta v Italy (1998) 26 EHRR 241
Brogan v United Kingdom (1988) 11 EHRR 117
Bryan v United Kingdom (1995) 21 EHRR 342
Bulut v Austria (1996) 24 EHRR 84
Campbell and Fell v United Kingdom (1984) 7 EHRR 165
Chassagnou v France (1999) 29 EHRR 615
B *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; [1998] 3 WLR 675, PC
De Wilde, Ooms and Versyp v Belgium (No 1) (1971) 1 EHRR 373
Demir v Turkey (1998) 33 EHRR 1056
Doorson v The Netherlands (1996) 22 EHRR 330
Ealing London Borough Council v Race Relations Board [1972] AC 342; [1972] 2 WLR 71; [1972] 1 All ER 105, HL(E)
C *East African Asians v United Kingdom* (1973) 3 EHRR 76
Eckle v Federal Republic of Germany (1982) 5 EHRR 1
Elfbrandt v Russell (1966) 384 US 11
Fayed v United Kingdom (1994) 18 EHRR 393
15 Foreign Students v United Kingdom (1977) 9 DR 185
Foti v Italy (1982) 5 EHRR 313
Funke v France (1993) 16 EHRR 297
G v Federal Republic of Germany (1989) 60 DR 256
D *Garyfallou AEBE v Greece* (1997) 28 EHRR 344
Golder v United Kingdom (1975) 1 EHRR 524
Grayned v City of Rockford (1972) 408 US 104
Hall (Arthur J S) & Co v Simons [2002] 1 AC 615; [2000] 3 WLR 543; [2000] 3 All ER 673, HL(E)
Handyside v United Kingdom (1976) 1 EHRR 737
Hazar v Turkey (1991) 72 DR 200
E *Helmers v Sweden* (1991) 15 EHRR 285
Hussain v United Kingdom (1996) 22 EHRR 1
Kanda v Government of Malaya [1962] AC 322; [1962] 2 WLR 1153, PC
Kemmache v France (No 3) (1994) 19 EHRR 349
Keyishian v Board of Regents of the University of the State of New York (1967) 385 US 589
Kudla v Poland (2000) 35 EHRR 198
F *Lauko v Slovakia* (1998) 33 EHRR 994
Lehideux and Isorni v France (1998) 30 EHRR 665
Lutz v Germany (1987) 10 EHRR 182
McIntosh v Lord Advocate [2001] UKPC D1; [2001] 3 WLR 107; [2001] 2 All ER 638, PC
Mahmod (Wasfi Suleman), In re [1995] Imm AR 311
Malone v United Kingdom (1984) 7 EHRR 14
G *Matadeen v Pointu* [1999] 1 AC 98; [1998] 3 WLR 18, PC
Murray v United Kingdom (1994) 19 EHRR 193
National and Provincial Building Society v United Kingdom (1997) 25 EHRR 127
Noto v United States (1961) 367 US 290
Öztürk v Germany (1984) 6 EHRR 409
Pfarrmeier v Austria (1995) 22 EHRR 175
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001]
H EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA
Powell and Rayner v United Kingdom (1990) 12 EHRR 355
R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97, HL(E)

R v Inhabitants of Eastbourne (1803) 4 East 103
R v Secretary of State for the Home Department, Ex p Adan [2001] 2 AC 477; [1999] 3 WLR 1274; [1999] 4 All ER 774, CA
R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514; [1987] 2 WLR 606; [1987] 1 All ER 940, HL(E)
R v Secretary of State for the Home Department, Ex p Launder [1997] 1 WLR 839; [1997] 3 All ER 961, HL(E)
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
R v Shayler [2002] UKHL 11; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)
R v Smith (Joe) [2001] 1 WLR 1031, CA
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
R (Hwez) v Secretary of State for the Home Department [2002] EWHC 1597 (Admin)
R (Kurdistan Workers' Party) v Secretary of State for the Home Department [2002] EWHC 644 (Admin)
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA
R (Secretary of State for the Home Department) v Immigration Appeal Tribunal [2001] EWHC Admin 1067; [2002] INLR 116, DC
RM v United Kingdom (1994) 77-A DR 98
Reno v American Civil Liberties Union (1997) 521 US 844
Rowe and Davis v United Kingdom (2000) 30 EHRR 1
Sakik v Turkey (1997) 26 EHRR 662
Scales v United States (1961) 367 US 203
Schmautzer v Austria (1995) 21 EHRR 511
Silver v United Kingdom (1983) 5 EHRR 347
Smith and Grady v United Kingdom (1999) 29 EHRR 493
Soering v United Kingdom (1989) 11 EHRR 439
Steel v United Kingdom (1998) 28 EHRR 603
Sunday Times v United Kingdom (1979) 2 EHRR 245
Sunday Times v United Kingdom (No 2) (1991) 14 EHRR 229
T v Secretary of State for the Home Department [1996] AC 742; [1996] 2 WLR 766; [1996] 2 All ER 865, HL(E)
Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97; [1996] 2 WLR 863; [1996] 4 All ER 256, PC
Tre Traktörer AB v Sweden (1989) 13 EHRR 309
United States v Robel (1967) 389 US 258
Van Mechelen v The Netherlands (1997) 25 EHRR 647
Vogt v Germany (1995) 21 EHRR 205
Wemhoff v Federal Republic of Germany (1968) 1 EHRR 55
West Virginia State Board of Education v Barnette (1943) 319 US 624
Willis v United Kingdom (2002) 35 EHRR 547
Wingrove v United Kingdom (1996) 24 EHRR 1
Winterwerp v The Netherlands (1979) 2 EHRR 387
X v United Kingdom (1979) 17 DR 122
Young, James and Webster v United Kingdom (1981) 4 EHRR 38

APPEAL from the Special Immigration Appeals Commission

Eleven people detained under section 23 of the Anti-terrorism, Crime and Security Act 2001 appealed to the Special Immigration Appeals Commission. On 30 July 2002 the Commission (Collins J, Chairman, Kennedy LJ and Mr Mark Ockelton) quashed the Human Rights Act 1998 (Designated Derogation) Order 2001 and granted a declaration under section 4 of the Human Rights Act 1998 that section 23 of the 2001 Act was

A incompatible with articles 5 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms in so far as it permitted detention of suspected international terrorists in a way that discriminated against them on the ground of nationality.

By notice of appeal filed on 12 August 2002, and with the permission of the Commission, the Secretary of State for the Home Department appealed B on the grounds that (1) the Commission erred in holding that the 2001 Order was unlawful on the basis that (a) the measures to which it referred were unlawfully discriminatory in breach of article 14 of the Convention; and (b) there was not a reasonable relationship between the means employed under the 2001 Act and the aims sought to be pursued, as required under article 15; (2) the Commission should have held that the Order was lawful and compatible with articles 14 and 15 on the grounds, inter alia, that (a) it C was legitimate for the Secretary of State and the United Kingdom to differentiate between foreign nationals and United Kingdom nationals on grounds of their different rights with respect to continuing to remain in the United Kingdom; (b) it was and remained the intention of the Secretary of State to remove from the United Kingdom any persons detained pursuant to section 23 of the 2001 Act when it was possible to do so; and (c) the relevant D threat was assessed to derive predominantly (albeit not exclusively) and more immediately from the category of foreign nationals present in the United Kingdom, and in light of the need to limit the measures taken under article 15 to those strictly required by the exigencies of the situation; and (3) in any event, the terms of the derogation measures sufficiently identified and covered the distinction being drawn between United Kingdom and E foreign nationals and thus any relevant discrimination.

By respondents' notices filed on 28 and 29 August 2001 the detainees contended that the decision should be affirmed on the additional grounds, inter alia, that (1) the Commission erred in concluding that it was entitled to have regard to closed material since the United Kingdom would be required, before the European Court of Human Rights, to justify the derogation on the F basis of open material alone; and (2) on the open material it was not open to the Commission to conclude (a) that it was reasonable for the Secretary of State to have concluded that there existed a public emergency threatening the life of the nation; (b) that the measures adopted were strictly required by the exigencies of the situation; or (c) that the measures adopted were compatible with the United Kingdom's other international obligations under articles 3 and 6 of the Convention and/or articles 7 and 14 of the G International Covenant on Civil and Political Rights.

The facts are stated in the judgment of Lord Woolf CJ.

Lord Goldsmith QC, A-G, Ian Burnett QC, Philip Sales and *James Eadie* for the Secretary of State.

Ben Emmerson QC and *Raza Husain* for nine of the detainees.

H *Manjit Gill QC, Stephanie Harrison* and *Adrian Berry* for two of the detainees.

David Pannick QC, Rabinder Singh QC and *Murray Hunt* for Liberty, intervening.

Cur adv vult

25 October. The following judgments were handed down.

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A LORD WOOLF CJ

1. Introduction

1 This is an appeal from a decision of the Special Immigration Appeals Commission of 30 July 2002. The Commission (Collins J, Chairman, Kennedy LJ and Mr Mark Ockelton) quashed the Human Rights Act 1998 (Designated Derogation) Order 2001 and granted a declaration under B section 4 of the Human Rights Act 1998 that section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with articles 5 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") in so far as it permits detention of suspected international terrorists in a way that discriminates against them on the ground of nationality.

C 2 The appeal arises out of the steps which this country decided to take in the interests of national security as a consequence of the attacks which took place in the United States on 11 September 2001. Among these steps were the making of the Order and the passing of the 2001 Act. They gave the Secretary of State new powers to detain non-nationals who resided in this country if the Secretary of State suspected that they were terrorists. After the D legislation had been passed 11 people were detained. Two have left the country but have not dropped out of the picture because the Commission has allowed them to continue their appeals. So all have appealed. The other nine ("the detainees"), as they were entitled to, appealed to the Commission after they had been detained.

3 In order to achieve their detention the Secretary of State was required to issue a certificate under section 21 of Part 4 of the 2001 Act. An appeal E against detention is brought under section 25 of the 2001 Act. That section provides:

> "(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.
>
> "(2) On an appeal the Commission must cancel the certificate if—(a) it F considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or (b) it considers that for some other reason the certificate should not have been issued."

4 The Commission is required to carry out a first review after six months of the issue of a certificate or the final determination of an appeal against a certificate and thereafter at three-monthly intervals. Decisions of G the Commission are subject to a further appeal to this court, but only on a point of law under section 27 of the 2001 Act. The present appeal is brought under that section. Section 30 prevents the detention of persons in the position of the detainees being questioned in any legal proceedings except on an appeal to the Commission. Section 35 of the 2001 Act constitutes the Commission a superior court of record.

H 5 On the appeal to the Commission the detainees challenged the lawfulness of every aspect of the action taken by the Secretary of State which resulted in their being detained. The challenge included the question of whether the Secretary of State, in the case of each respondent, could have reasonably believed that his presence in the United Kingdom is a risk to national security or could have reasonably suspected that he was an

international terrorist. This aspect of their appeals turns on their individual circumstances and so has not yet been considered by the Commission, but has been adjourned until the outcome of their remaining grounds of appeal are known.

6 The detainees' appeal succeeded on the grounds which were based on discrimination. The other grounds were unsuccessful but they are the subject of a cross-appeal and the cross-appeal has been fully argued before this court both orally and in writing. However, David Pannick, who appears on behalf of Liberty, who intervened in the proceedings before the Commission and before us, is undoubtedly correct in submitting that it is the issue of discrimination which goes to the heart of this appeal.

7 The alleged discrimination is based on the fact that the 2001 Order and Act allow only suspected terrorists who are non-nationals to be detained when there are equally dangerous British nationals who are in exactly the same position who cannot be detained. The right not to be discriminated against is one of the most significant requirements of the protection provided by the rule of law. It is now enshrined in article 14 of the Convention, but long before the Human Rights Act 1998 came into force the common law recognised the importance of not discriminating. The importance of not discriminating explains why every judge on taking office makes a vow to "do right to all manner of people . . . without fear or favour, affection or ill will". The vice involved in discrimination was well identified by Jackson J of the United States Supreme Court in 1949:

> "equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency Inc v New York* (1949) 336 US 106, 112–113.

8 In the case of the Convention, it is article 14 which prohibits discrimination. Article 14 is in these terms:

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

It is to be observed that article 14 does not create a free-standing right. It requires the rights and freedoms which are secured by the Convention to be enjoyed without discrimination. The fact that the right not to be discriminated against is not a free-standing right does not diminish its importance. The principle of non-discrimination applying as it does, to all free-standing rights, is fundamental to the values that the Convention and the Human Rights Act 1998 are intended to protect.

A 9 The danger of unjustified discrimination is acute at times when national security is threatened and it is important that the courts take particularly seriously any allegation of unlawful discrimination as a result of an action which is said to have been taken in the interests of national security. This is especially the case if, as here, non-nationals are being detained based on conduct which has not been proved but is only suspected. The mistakes which have been made in the past, in relation to internment of B aliens at the outbreak of war, should not be forgotten.

10 The same importance was attached by the European Court of Human Rights to the protection provided by article 5 (the right not to be unjustifiably detained) in *Aksoy v Turkey* (1996) 23 EHRR 553, 588, para 76:

> C "The court would stress the importance of article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the state with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law."

D On this appeal both articles 14 and 5 are in play.

2. *The background to the Secretary of State's case*

11 In order to understand the arguments made on behalf of the Secretary of State by Lord Goldsmith for stating that there has been no unlawful discrimination in confining the 2001 Order and Act to non-E nationals, it is first necessary to take into account the history and development of the rights of states to detain and exclude aliens under international law. This aspect of the appeal has been fully considered by Brooke LJ in his judgment and I gratefully adopt his account.

12 It is also necessary to set out the position in domestic law prior to the Order and Act of 2001. This is contained in the Immigration Act 1971 as amended. The significant point here is that the powers of detention and F deportation contained in the 1971 Act are accepted not to involve discrimination and to be in accordance with well-established principles of international law, although they do not apply to those who have the right of abode in this country. It follows that there are well-identified circumstances where there is justification for treating those who can be broadly described as non-nationals differently from nationals.

G 13 Section 1 of the 1971 Act establishes the general principle that British citizens and certain Commonwealth citizens have the right of abode in the United Kingdom. That is the right "to live in, and to come and go into and from, the United Kingdom without let or hindrance". Others, that is non-nationals, require permission to "live, work and settle" here, and their entry into and stay in this country is subject to regulation and control.

H 14 The 1971 Act contains powers of deportation which do not apply to those who have the right of abode. One ground on which an order to deport can be made is that the Secretary of State is of the opinion that the deportation will be conducive to the public good. The public good includes the interests of national security. This was originally a prerogative power of the Crown without any right of appeal, but it is now contained in the 1971

Act (section 3(5), as substituted by section 169(1) of and paragraph 44(2) of Schedule 14 to the Immigration and Asylum Act 1999). Criminal courts also have powers to make recommendations for deportation after an alien has been convicted. A recommendation for deportation may result in the Secretary of State delaying making a deportation order until many years later because he has to wait until the defendant has served his sentence. Again this is not suggested to be discriminatory, even though there is no similar power in the case of those who commit exactly the same criminal offence but have the right of abode.

15 When a deportation order or a decision to deport has been made, the person who is the subject of the order or the decision may be detained pending his deportation: Schedule 3, paragraph 2. Not infrequently there can be a situation where the Secretary of State is empowered to make a deportation order under the 1971 Act, but there is no country to which it is possible to send the individual concerned without risking his life, or subjecting him to the possibility of torture, or where no country can be identified which is prepared to accept him.

16 In this situation the question arises both under domestic law and the Convention as to how long it is appropriate to detain the individual whom it is proposed to deport. The position in domestic law was considered in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704. It was held that the power to detain is limited as a matter of construction of the legislation to such time as is reasonable to enable the process of deportation to be carried out, and that deportation should follow promptly upon the making of a deportation order. It followed that the power of detention should not be exercised unless the person subject to a deportation order could be deported within a reasonable time. A consequence of this decision, which has been generally accepted as correctly setting out the legal position, is that under the 1971 Act it is not possible to detain someone pending deportation if it is known that a deportation is not possible.

17 In *Chahal v United Kingdom* (1996) 23 EHRR 413 the European Court of Human Rights held that to deport someone who, if the order for deportation was executed, could suffer torture, would constitute a violation of article 3 of the Convention. Furthermore the court made it clear that detention for an excessive duration would contravene article 5(1). Article 5(1) provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . . (f) the lawful arrest or detention . . . of a person against whom action is being taken with a view to deportation . . ."

The legal position after *Chahal* is not in dispute. The Secretary of State could, when national security required, detain pending deportation a person who did not have the right of abode in this country if he was in the position to carry out the deportation in a reasonable time but not otherwise. It was this position that the 2001 Order and Act purported to address. For this purpose article 15(1), together with sections 1(2) and 14 of the Human Rights Act 1998, were relied upon.

A 18 Section 1(2) states that the articles of the Convention are "to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15)".

19 Section 14(1) contains a definition of a "designated derogation". It includes (b): "any derogation by the United Kingdom from an article of the Convention . . . which is designated for the purposes of this Act in an order B made by the Secretary of State." It is not necessary to deal with section 15 as it is concerned with reservations.

3. The Derogation Order

20 The Order was made on 11 November 2001, and it came into force on 13 November 2001. It stated, in article 2:

C "The proposed derogation by the United Kingdom from article 5(1) of the Convention, set out in the Schedule to this Order, is hereby designated for the purposes of the 1998 Act in anticipation of the making by the United Kingdom of the proposed derogation."

The Schedule referred to the events of 11 September 2001. It stated that the threat from international terrorism is continuing, and mentioned resolution D 1373 (2001) of the United Nations Security Council requiring "all states to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks".

21 The Order also refers to the fact that there was a terrorist threat to this country from persons suspected of involvement in international E terrorism. In addition, the Order refers to the fact that as a result of the public emergency the 2001 Act contains an extended power to arrest and detain a foreign national

"where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful F under existing domestic law powers."

22 The Order goes on to give further details of the provisions of the 2001 Act and refers to the existing powers to detain pending deportation on the ground that a person's presence is not conducive to the public good on national security grounds. Reference is also made to the position in relation to article 5(1)(f). The explanatory note to the Order refers in particular to G the problem which can exist where it is not possible to deport a non-national because the deportation would result in treatment contrary to article 3.

23 In view of the way that the Order is framed, it is self-evident that if it is necessarily discriminatory to treat alien suspected international terrorists differently from those who are suspected to be in exactly the same position but have the right of abode, then the objective of the Order was to permit H discrimination.

4. The 2001 Act

24 In the 2001 Act the relevant statutory provisions are contained in Part 4. Part 4 is entitled "Immigration and Asylum". The commencement

date for Part 4 was 14 December 2001. The power of the Secretary of State to certify is contained in section 21 and is in these terms:

> "21. *Suspected international terrorist: certification.* (1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably—(a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist."

A person who is so certified is referred to as a suspected international terrorist and terrorism has the meaning given by section 1 of the Terrorism Act 2000 (see section 21(5)). Section 1 of the 2000 Act reads:

> "1. *Terrorism: interpretation.* (1) In this Act 'terrorism' means the use or threat of action where—(a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause."

The provisions of section 1(4) show that it can extend to acts which may be aimed at or will affect countries other than the United Kingdom. Section 1 continues, so far as material:

> "(2) Action falls within this subsection if it—(a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> "(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
>
> "(4) In this section—(a) 'action' includes action outside the United Kingdom, (b) a reference to any person or to property is a reference to any person, or to property, wherever situated, (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and (d) 'the government' means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom."

25 Subsection (2) of section 22 of the 2001 Act identifies a series of actions which can be taken in relation to immigrants, from refusing leave to enter or remain to taking a decision to make a deportation order and making a deportation order under section 5(1) of the 1971 Act. Section 22(1) of the 2001 Act sets out when these actions can be taken in respect of a suspected terrorist. The subsection is in these terms:

> "An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of—(a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration."

26 The detention of a suspected international terrorist (in respect of whom the Secretary of State has certified) is provided for in section 23. Section 23 provides:

> "(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by . . ."—There are then set out precisely the same two circumstances as are contained in section 22(1)(a) and (b) (see above).
>
> "(2) The provisions mentioned in subsection (1) are—(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c 77) (detention of persons liable to examination or removal), and (b) paragraph 2 of Schedule 3 to that Act (detention pending deportation)."

27 The statutory provisions referred to in section 23(2) are the ordinary powers of detention contained in the Immigration Act 1971. This draws attention to the fact that the provisions of Part 4 purport to do no more than reverse the legal position which existed subsequent to the decision in *Chahal* 23 EHRR 413. In other words they allow a suspected international terrorist who does not have a right of abode, alone, to be detained even though for the time being it is not possible to deport him. In relation to those who are not suspected international terrorists who are liable to be deported, but cannot be deported, the position remains as it was prior to the 2001 Act. As with the Order, if to treat suspected terrorists who do not have a right of abode differently in this way is discriminatory, then it is not argued that the Commission was wrong to make a declaration of incompatibility.

5. The Secretary of State's case

28 Lord Goldsmith submits that the action taken to, in effect, reverse *Chahal* in the case of suspected international terrorists is no more than an immigration measure which is permissible because of the derogation from article 5(1) of the Convention. He submits that detention and deportation of aliens has always been governed by immigration legislation which has not been regarded as unlawfully discriminating against aliens. Detention, although it may be for an extended period, under the 2001 Act should be treated in the same way. It enables the Government to take the action which is necessary and proportionate to deal with the emergency. He submits that this approach is in accordance with international law. The relevant comparator for aliens who represent a threat to national security but cannot be removed, remain other aliens who represent a threat to national security but can be expelled in the ordinary way. The detention of aliens who cannot be expelled is the best available alternative for dealing with the threat to national security, whilst protecting the aliens' rights under article 3.

29 Lord Goldsmith adds that it remains as legitimate for a state to treat the aliens in this category differentially from its nationals as it is legitimate for a state to treat aliens differentially who represent the same threat to national security but happen in to be in a position where the state's preferred solution (expulsion) is available. Lord Goldsmith contends that the derogation is, in substance, no more than an adjustment to article 5(1)(f) that enables a subset of aliens whom the United Kingdom wishes to deport, but cannot for the moment, to be detained during a national emergency.

30 Before the Commission, Lord Goldsmith argued that in addition to the derogation from article 5(1) there had been an implied derogation in relation to article 14. This argument was rejected by the Commission (paragraph 66) and is not relied on in this court. The Commission also rejected an argument which depended upon the fact that article 14 was a parasitic provision which did not create a free-standing right not to be the subject of discrimination. It was submitted that the result of this was that: first, there had to be discrimination in relation to an article which created positive rights, here article 5, and secondly, because of the derogation from article 5(1), it was not possible to have discrimination in relation to detention that, otherwise, would undoubtedly have contravened article 5(1). The Commission rejected this argument as well. The Commission relied on *Ireland v United Kingdom* (1978) 2 EHRR 25 and *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

31 I can also reject this argument straight away. Quite apart from the authorities on which the Commission rely I agree with the Commission that, notwithstanding the derogation, there can still be discrimination in relation to article 5 read with article 14. The derogation is limited to extending the period of time during which the detention can continue; that is the *Chahal* point. Article 5 is still capable of being applied together with article 14 in relation to conduct which is not the subject of the derogation. Therefore if there has been discrimination contrary to article 14 when read with article 5, which is not dependent on the inability to deport a detainee, this still can constitute a breach of article 5. This is precisely the nature of the discrimination upon which the detainees rely. The detainees contend that the fact that they cannot be deported is irrelevant when considering whether their detention contravenes article 14. This is because there are others in the same position who are not capable of being detained because they are nationals. If there has been discrimination, as the Commission held, I accept both the Order and the 2001 Act are flawed and the order made by the Commission was justified and the Commission was right to reject this argument.

6. Article 15 and is there a state of emergency?

32 Before proceeding further it is convenient to consider whether there has been compliance with the threshold requirements for derogation. They are set out in article 15 of the Convention and are in these terms:

> "*Derogation in time of emergency*
>
> "1. In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> "2. No derogation from article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> "3. Any high contracting party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such

A measures have ceased to operate and the provisions of the Convention are again being fully executed."

33 There are three issues in relation to article 15. The first is whether there is an "emergency threatening the life of the nation". The detainees point to the fact that no other European country has found it necessary to derogate. However, the Commission considered that the United Kingdom B could be distinguished from its neighbours. It is regarded as a prime target. Furthermore there is ample evidence that if a strike were to be made against the United Kingdom the results would be devastating. In addition, quite apart from the possibility of an attack similar to that which took place on 11 September 2001 there are other possibilities. No other European nation is threatened in quite the same way. Having fully examined the evidence, the C Commission expressed its conclusions on the subject in these terms:

> "35. We have also scrutinised all the material put before us with care. We recognise that much is at stake for those such as the detainees who are affected by the decisions of the Secretary of State but we recognise too that much is at stake for [the citizens] of the United Kingdom. We are satisfied that what has been put before us in the open generic statements D and the other material in the bundles which are available to the parties does justify the conclusion that there does exist a public emergency threatening the life of the nation within the terms of article 15. That the risk has been heightened since 11 September 2001 is clear, but we do not regard that description as in any way inconsistent with the existence of an emergency within the meaning of article 15. The United Kingdom is a prime target, second only to the United States of America, and the history E of events both before and after 11 September 2001, as well as on that fateful day, does show that if one attack were to take place it could well occur without warning and be on such a scale as to threaten the life of the nation."

34 Before the Commission the evidence fell into two parts, the open evidence and the closed evidence. We have not seen the closed evidence. We F were not invited to do so and it was not necessary for us to see the closed evidence, as this is an appeal only on law. However, it is obvious that the Commission on this first issue were entitled to come to the conclusion which they did. The Commission made no error of law.

35 The second issue is as to whether the derogation was "strictly required". Again there is a finding of fact in the Secretary of State's favour G on this issue. In these circumstances it is not necessary for me to do more than refer to paragraphs 42 and 45 below and observe that there is a paradoxical feature to this case. It is the detainees' and Liberty's submissions, to which I will have to return, that the Secretary of State should have dealt with the discrimination problem by extending the right to detain to both nationals and non-nationals. However, it is the Secretary of State's case that to do this would be to take more steps than were, in the words of H article 15, "strictly required by the exigencies of the situation".

36 The third issue, apart from the position in international law which is dealt with in Brooke LJ's judgment, raises the question whether the reference in article 15 to "other obligations under international law", includes obligations contained in the Convention itself which are not the subject of

the derogation, for example, article 14. I regard this issue as being academic in this case and possibly in all cases. If, despite the derogation, there is still a contravention of the Convention this can be relied upon by a complainant as the detainees seek to do here under article 14 read with article 5 without the need to rely on the terms of article 15. In my judgment there is nothing in international law, as is explained by Brooke LJ, which would result in an infringement of this country's obligations under international law if there is no contravention of article 14 read with article 5.

7. Discrimination

37 I now turn to the critical issue as to whether the Convention permits the United Kingdom to detain only those who are non-nationals who are suspected of being international terrorists. The conclusions of the Commission on this issue are as follows:

> "93. We reject the Attorney General's submission that the 2001 Act does no more than extend article 5(1)(f) of the Convention without changing its nature in any fundamental respect. Critically underlying any normal and lawful action within article 5(1)(f) is the prospect within a reasonable time of the detainee being transferred to a place where he or she will be at liberty. In *Chahal* 23 EHRR 413, 465, para 113, the European Court of Human Rights said: 'any deprivation of liberty under article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under article 5(1)(f).'
>
> "94. That brings us to the Attorney General's submission that aliens have no general right to be here—at large among the population—even when they face persecution abroad. That seems to us to be an over simplification. The effect of the decision in *Chahal*, as we understand it, is that if the alien cannot be deported he must be allowed to remain. Indeed, that appears also to be the effect of the decision of the Court of Appeal in *R (Kariharan) v Secretary of State for the Home Department* [2002] 3 WLR 1783, handed down on 25 July 2002, of which we have seen a copy and to which our attention was drawn by the parties. A person who is irremovable cannot be detained or kept in detention simply because he lacks British nationality. In order to detain him there must be some other justification, such as that he is suspected of having committed a criminal offence. If there is to be an effective derogation from the right to liberty enshrined in article 5 in respect of suspected international terrorists—and we can see powerful arguments in favour of such a derogation—the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as the Attorney General contends, the threat stems exclusively or almost exclusively from that alien section.
>
> "95. But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified—mostly in detention abroad—who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the Secretary of State there are others at liberty in the United Kingdom who could be similarly defined. In those

circumstances we fail to see how the derogation can be regarded as other than discriminatory on the grounds of national origin.

"*Conclusions*

"96. Two consequences follow. The first is that, for the reasons we have given at paragraph 66, the detention of the detainee breaches their 'Convention rights' under the Human Rights Act 1998, for the detention is discriminatory and there is no scheduled derogation from article 14. Merely scheduling such a derogation would not assist, however, for in our judgment in any event there is not a reasonable relationship between the means employed and the aims sought to be pursued, and accordingly we must make the declaration of incompatibility which has been sought. We recognise, of course, that such a declaration may be of little if any assistance to the detainee should Parliament decide to deal with the discrimination which we perceive to exist by extending the power of detention to nationals."

8. The detainees' submissions

38 In support of his contentions as to the correctness of the decision of the Commission Mr Emmerson identified eight core submissions and, as they encapsulate the principal arguments of all the detainees at this stage, it is convenient to set out all eight submissions, whilst recognising that to an extent the submissions overlap:

"1. The central issue on this appeal is whether the Secretary of State is entitled to say that because he chose immigration control as the means to respond to the claimed public emergency it follows that it is legitimate to treat nationals and aliens differently, or whether—as the detainees contend, and as the Commission concluded—it is necessary to look behind that choice and ask why, in response to a threat that was posed by British nationals as well as aliens, the Secretary of State chose to focus on the alien population alone.

"2. Both the purpose of Part 4 of the 2001 Act, and its terms, are directed to a different and wider target than the claimed national emergency emanating from the risk of a terrorist attack against the United Kingdom by the Al Qa'eda network. They are at the same time both over-inclusive and under-inclusive (and in this latter respect discriminatory).

"3. Part 4 was directed towards reversing the effect of the decisions in *Chahal v United Kingdom* 23 EHRR 413 and *Hardial Singh* [1984] 1 WLR 704. As such, it is necessarily inconsistent with the requirement that the derogating measures be carefully tailored to meet the exigencies of a threat of terrorist attack on the United Kingdom or its population. This is first because it encompasses those, like Chahal himself, who pose no direct threat to the United Kingdom (since their threatened actions are directed only against foreign states); and secondly because it simultaneously excludes British nationals whose presence *does pose* a direct and immediate threat of terrorist attack in the United Kingdom. There is thus an obvious mismatch between the claimed public emergency and the scope and purpose of the legislation.

"4. Since the condition for a lawful derogation under article 15 depends upon the measures being strictly required by a public emergency threatening the life of *the nation*—that is, the United Kingdom—the

broad formulation of national security adopted in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 is inapplicable to the test for derogation under article 15.

"5. It is clear from the evidence before the Commission (and from the terms of the legislation itself) that Part 4 of the 2001 Act was intended to encompass foreign nationals, such as Chahal, Singh and Rehman, whose activities posed no direct threat to this country. This is apparent from Mr Whalley's first witness statement and from the evidence given by the Secretary of State to the Joint Human Rights Committee, (where the Secretary of State said in terms that the justification for the legislation 'rests' on the need to detain suspected terrorists who may be using the United Kingdom as a base for planning attacks on other states). A measure which is intentionally framed so as to authorise the detention of foreign nationals who pose no direct threat to the United Kingdom, but who pose a threat to friendly foreign states, as a central objective that extends beyond the strict exigencies of the claimed national emergency.

"6. The evidence before the Commission established 'beyond argument' that the existing threat to the United Kingdom was posed by British nationals as well as foreign nationals. Judged by reference to the threat on which the claimed public emergency rests, a British suspected terrorist who poses a threat to the United Kingdom is in an analogous position to a suspected terrorist who is a foreign national but who cannot be removed or detained due to the decisions in *Chahal* 23 EHRR 413 and *Hardial Singh* [1984] 1 WLR 704. For the purposes of article 14 analysis: (a) There must, by definition, be a rational connection between the purpose of the measure complained of, and the essential characteristics on which it is based. (b) In order to be in an analogous position, the selected comparator has to share the same defining characteristics as the complainant, *judged in relation to the purpose of the measure complained of*. (c) The essential characteristics justifying detention under Part 4 of the 2001 Act are (i) the fact that the individual is a suspected international terrorist and (ii) the fact that he cannot be removed from the United Kingdom. (d) It is undeniable that a significant number of British nationals qualify as suspected international terrorists. (e) It is artificial to say that British nationals are not in an analogous position because they have an unqualified right to remain whilst foreign nationals detained under Part 4 have only a contingent right not to be removed. Since *Chahal*, foreign nationals who cannot be removed because their removal would expose them to a risk of treatment in breach of article 3 have a legally enforceable (Convention) right to remain. That is a right recognised in the national legal order through the Human Rights Act 1998. The suggested contingency (that the individual cannot for the time being be removed) is the very premise of Part 4 detention. Any person who may be detained under Part 4 has, by definition, a Convention right not to be removed. (f) The essence of the Secretary of State's case thus rests on a distinction between those who have a right to remain and those who have a right not to be removed. Whilst there is a difference between the legal status of the two groups, it is not a relevant or sufficient distinction, as the basis for justifying difference of treatment in relation to a power of detention which is intended to protect the United Kingdom against a threat that is posed by British nationals and aliens alike. Given

that the threat is neutral as to nationality (or immigration status) the legal distinction between the status of the two groups bears no connection to the justification for detention. (g) Alternatively, even if it is a relevant distinction, it does not account for the *extent* of the difference in treatment and is for that reason disproportionate. The position would be otherwise if the power of detention was neutral on its face and the complaint was that it had been *applied* primarily against foreign nationals. There, it would be a justification to say that the threat stemmed predominantly and more immediately from foreign nationals. But in order to justify a power of detention which can *only* be applied to foreign nationals, it would be necessary to show that the threat stemmed exclusively or almost exclusively from that group. (h) By choosing an immigration measure which seeks to reverse the effect of *Chahal* and *Hardial Singh* the Secretary of State adopted an unjustified difference in treatment between the two classes. Not only does the legislation aim at a wider target than is justified by the public emergency, but it misses a significant part of the target at which it is intentionally directed. Moreover, as a discriminatory derogating measure it is, by definition, disproportionate.

"7. The purpose of the legislation in reversing *Chahal* and *Hardial Singh* is, in this sense, in harmony with its terms. The detainees point to three key features of Part 4 which reflect this: (a) the legislation permits the detention of foreign nationals who pose no threat to the United Kingdom; (b) it does not permit the detention of British nationals who do pose a direct threat to the United Kingdom or are active members of Al Qa'eda; and (c) it permits a suspected international terrorist who has been detained under its provisions to leave the country and resume his activities from abroad, even though these may involve terrorist activities directed towards the United Kingdom, its citizens or interests. Each of these three features is a direct result of the Secretary of State's choice of immigration control as the means by which to respond to the threat which Al Qa'eda network is said to pose to the United Kingdom. There is thus a fracture, or fault line, which separates the purpose and form of the legislation from (a) the stated purpose of the derogation and (b) the form which the legislation would have taken if it were properly tailored to meet the claimed national emergency.

"8. If the 2001 Act were rationally connected to [a] need to protect the United Kingdom from a threat of terrorist attack it would; (i) permit only the detention of those who posed a direct threat to the United Kingdom through association with the Al Qa'eda network; (ii) permit the detention of such persons regardless of their nationality or immigration status; (iii) permit their detention for the duration of the national emergency without permitting them to leave the country if they chose to do so in order to resume their activities from abroad."

9. Conclusions on the detainees' contentions

First submission

39 As to Mr Emmerson's first submission, I accept that a court is not necessarily confined by the language of the Order and 2001 Act when deciding the discrimination issue. The court is concerned with the reality.

However, there is no suggestion that the Secretary of State was not perfectly bona fide in coming to the conclusion, which he says he did, that the action that was necessary was limited to removing or detaining suspected aliens who are not nationals who had unconditional rights of abode in this country. Clearly there can be situations when this action will achieve all that is required. If this is the position, then it is sensible and appropriate to use immigration legislation to achieve this objective, because it will (a) result in those who can be deported being dealt with under the ordinary immigration procedures, and (b) confine to a minimum the need to use special powers of detention. In addition, the situation can change so that those who originally had to be detained under the special powers can be deported under the ordinary powers. This is of course subject to the action which has been taken not contravening article 14.

40 Whether the Secretary of State was entitled to come to the conclusion that action was only necessary in relation to non-national suspected terrorists, who could not be deported, is an issue on which it is impossible for this court in this case to differ from the Secretary of State. Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference to the Secretary of State because he is better qualified to make an assessment as to what action is called for. If authority is required for this proposition, then it is provided by *Brown v Stott* [2001] 2 WLR 817, 834–835, *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 195, *Ireland v United Kingdom* (1978) 2 EHRR 25, 91, para 206, *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391 and *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344, 372–378, paras 77, 80–87; dealing with the parallel situation as to whether there was a "public emergency" and *Chahal* 23 EHRR 413, 470, para 138. However, as the European Court of Human Rights pointed out, the court retains its supervisory role.

41 In addition, it is wrong to suggest, as this submission does, that it is on the choice of immigration control that the Secretary of State's case is based. His case is based on his decision that, in order to meet the present situation, he need only take action against suspected terrorists who have no right to remain in this country but cannot be deported.

Second submission

42 I turn to the second core submission that Part 4 of the 2001 Act is both over-inclusive and under-inclusive. The over-inclusive contention arises because the terrorist activities, to which Part 4 of the 2001 Act applies, go beyond those required by the emergency in relation to which the derogation was made. This is an issue on which Mr Manjit Gill has provided additional written submissions which I found helpful. I accept that on the language of Part 4 it is over-inclusive. But in practice this is not a point of substance. Lord Goldsmith gave the Commission on behalf of the government an undertaking that Part 4 would be only used for the emergency which was the subject of the derogation. I agree with Mr Manjit Gill that the court should not allow an undertaking on behalf of the government "ameliorating the potential effect of the legislation to shift the concept of legal certainty and rights away from the solid bedrock to sandy

A foundations". However, here the powers contained in Part 4 could only be used to the extent that they were covered by the Order, otherwise they would fall foul of article 5. The Secretary of State is required to give reasons for his decision and those reasons can be inquired into by the Commission so there is no real risk of anyone being prejudiced by Lord Goldsmith's undertaking not being complied with. This was the view of the Commission, B who also referred to section 3 of the Human Rights Act 1998 which could be used, if necessary, to restrict the use of Part 4 of the 2001 Act. However, I do not consider this would be necessary because of the other reasons I have given.

43 As to under-inclusion, it is necessary to consider at least two candidates. First, there are the suspected terrorists who are nationals. Then there are the suspected terrorists who are not nationals, who once they leave C the country will be free to engage in activities hostile to this country. Mr Whalley, who has made a statement on behalf of the Secretary of State covering this point, contends that irrespective of whether non-national suspect terrorists are detained or leave this country, the terrorist organisation in the United Kingdom will be disrupted. He also relies on the fact that the detention or deporting of non-national suspected terrorists will D indicate that this country is not a safe haven for terrorists. Placing on one side the issue of discrimination, these are points which depend on the evidence before the Commission and do not call for resolution on this appeal.

Third to fifth submissions

E 44 The third, fourth and fifth core submissions cover very much the same ground and so are covered by what I have already stated. The exception is Mr Emmerson's submissions about *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. That case is important for the clear statements contained in the speeches of the House of Lords as to the deference which should be extended to the executive on matters of national security (see in particular the speeches of Lord Steyn and Lord Hoffmann). F It is also important because it recognises that conduct which is directed at a foreign state can have direct implications for the national security of this country. The extent of the threat, required as a precondition to derogation, is more extensive than that required by the interests of national security. It is a public emergency threatening the life of the nation. It is the broader formulation of national security which was considered in *Rehman*. Despite G this the same general approach is clearly appropriate. Where international terrorists are operating globally and committing acts designed to terrorise the population in one country, that can have implications which threaten the life of another. This is why a collective approach to international terrorism is important. As the Order recognises, we are concerned here with a threat identified by the United Nations Security Council as "a threat to H international peace and security", a threat which required all states to take measures "to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks". While the courts must carefully scrutinise the explanations given by the executive for its actions, the courts must extend the appropriate degree of deference when it comes to judging those actions.

Submissions six to eight: discrimination

45 The remaining core submissions, while in part also covering the same ground as the earlier submissions, go to what is the main issue, namely, discrimination. Was the United Kingdom Government entitled to single out non-nationals who could not be deported in the foreseeable future as the subject of the Order and the 2001 Act? Here I differ from the Commission, largely because of the tension between article 15 and article 14. Article 15 restricts the extent of the derogation to what is strictly necessary. That is what the Secretary of State has done on his evidence. Of course, he did so for national security reasons. No doubt, by taking action against nationals as well as non-nationals the action from a security point of view would have been more effective. Equally, if the non-nationals were detained notwithstanding the fact that they wanted to leave this country, the action would be more effective. However, on his assessment of the situation, the Secretary of State was debarred from taking more effective action because it was not strictly necessary.

46 The Commission came to the conclusion, at paragraph 94, that if an "alien cannot be deported he must be allowed to remain". That is correct, but as already stated that does not create a right to remain, only a right not to be removed. For example, if later the alien can be deported, he can be removed and pending removal detained. Because of this difference alone, aliens can be objectively distinguished from non-aliens.

47 The Commission go on to say that the threat is not confined to aliens (and that is agreed), but the Commission then wrongly conclude that this means there must be discrimination on the grounds of nationality as aliens are not nationals. This is an over-simplification. It was eloquently urged on behalf of the detainees, and particularly by Mr Pannick. It is an over-simplification because the position here is that the Secretary of State has come to the conclusion that he can achieve what is necessary by either detaining or deporting only the terrorists who are aliens. If the Secretary of State has come to that conclusion, then the critical question is: are there objective, justifiable and relevant grounds for selecting only the alien terrorists, or is the discrimination on the grounds of nationality? As to this critical question, I have come to the conclusion that there are objectively justifiable and relevant grounds which do not involve impermissible discrimination. The grounds are the fact that the aliens who cannot be deported have, unlike nationals, no more right to remain, only a right not to be removed, which means legally that they come into a different class from those who have a right of abode.

48 The class of aliens is in a different situation because when they can be deported to a country that will not torture them this can happen. It is only the need to protect them from torture that means that for the time being they cannot be removed.

49 In these circumstances it would be surprising indeed if article 14, or any international requirement not to discriminate, prevented the Secretary of State taking the restricted action which he thought was necessary. As the detainees accept, the consequences of their approach is that because of the requirement not to discriminate, the Secretary of State would, presumably, have to decide on more extensive action, which applied both to nationals and non-nationals, than he would otherwise have thought necessary. Such a result would not promote human rights, it would achieve the opposite result.

There would be an additional intrusion into the rights of the nationals so that their position would be the same as non-nationals.

50 The Convention is essentially a pragmatic document. In its application it is intended to achieve practical benefits for those who are entitled to its protection. The Secretary of State is not entitled to adopt an irrational approach, either under the Convention or at common law. He is required to point to an objective justification for adopting the distinction which he is making. This he does here, in my judgment, on solid ground because of the distinction between aliens and nationals which is part of domestic and international law. As I have stressed, an alien's right to reside in this country is not unconditional. True it is that the detainees cannot be deported, but that does not mean that they are in the same position as nationals. They are still liable to be deported, subject to the decision of the Commission on their personal circumstances, when and if this is practical.

51 It is to be hoped that although there is no time limit which at present can be imposed upon their detention, the regular review of their positions, which the legislation requires, will result in their detention being of limited duration.

52 However, contrary to the view of the Commission, I consider the approach adopted by the Secretary of State, which involves detaining the detainees for no longer than is necessary before they can be deported, or until the emergency resolves, or they cease to be a threat to the safety of this country, is one which can be objectively justified. The individuals subject to the policy are an identifiable class. There is a rational connection between their detention and the purpose which the Secretary of State wishes to achieve. It is a purpose which cannot be applied to nationals, namely detention pending deportation, irrespective of when that deportation will take place.

53 The fact that deportation cannot take place immediately does not mean that it ceases to be part of the objective. This is confirmed by the fact that two of the detainees were able to leave this country. It is suggested that the action is not proportionate. However, I disagree. By limiting the number of those who are subject to the special measures, the Secretary of State is ensuring that his actions are proportionate to what is necessary. There is no alternative which the detainees can point to which is remotely practical. It is wrong to regard *Chahal* 23 EHRR 413 as establishing that those who cannot be removed have a legally enforceable right to remain. They have a right not to be removed so as to protect their right not to be subject to treatment in breach of article 3, but that is not the same thing as having "a legally enforceable (Convention) right to remain".

54 In *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20 Brooke LJ helpfully summarised the questions that may be asked where discrimination arises, while stressing that he was only providing a framework and indicating that there is a potential overlap between the considerations. He also warned against treating the questions as a series of hurdles. However, the questions were:

> "(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions (for the relevant Convention rights see section 1(1) of the Human Rights Act 1998)? (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other

persons put forward for comparison ('the chosen comparators') on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?"

55 Brooke LJ added that the third test addresses the question whether the chosen comparators were in a sufficiently analogous situation to the complainant's situation for the different treatment to be relevant to the question whether the complainant's enjoyment of his Convention right has been free from article 14 discrimination.

56 I will shortly answer each of those questions. As to the first question, the answer is yes. As to the second question, the answer is also yes, the chosen comparators here being aliens and nationals who are suspected terrorists. As to the third question, I say those comparators were not in an analogous situation because the nationals have a right of abode in this jurisdiction but the aliens only have a right not to be removed. Finally, as to the fourth question, as I set out above, I consider the distinction between the position as to removal of nationals and non-nationals, together with the fact that the non-nationals but for the problem of torture could be removed, means that the difference in treatment does have an objective and reasonable justification.

10. Article 6

57 It remains for me to deal with certain other subsidiary points which are advanced. The first is linked to the position in relation to the procedure adopted by the Commission. It is submitted that the proceedings relate to a criminal charge within the meaning of article 6, giving rise to the application of the presumption of innocence, the right to disclosure of the case against them, and the material upon which it is based, to the fullest possible extent. As to this, I agree with the Commission that the proceedings are not criminal. I would, however, accept the fact that the proceedings are civil proceedings within article 6. The proceedings before the Commission involve departures from some of the requirements of article 6. However, having regard to the issues to be inquired into, the proceedings are as fair as could reasonably be achieved. It is true that the detainees and their lawyers do not have the opportunity of examining the closed material. However, the use of separate counsel to act on their behalf in relation to the closed evidence provides a substantial degree of protection. In addition, in deciding upon whether there has been compliance with article 6 it is necessary to look at the proceedings as a whole (including the appeal before this court). When this is done and the exception in relation to national security, referred to in article 6, is given due weight, I am satisfied there is no contravention of that article.

11. Article 3

58 The detainees also argued before the Commission and this court that the scheme of detention adopted by the 2001 Act contravened the principle in article 3 of the Convention that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". I agree with the

Commission that this argument must fail. The class of detainees with which we are concerned could not be deported by the Government, and this is because of *respect* for their article 3 rights. It was for precisely this reason that the scheme being challenged was adopted. It has not been shown that there is something in the manner of their detention which places it in the class of "inhuman or degrading treatment or punishment", to which article 3 is directed. On the assumption that the detainees' detention is lawful there is no evidence that their detention, which is not intended to be punishment, is inhuman or degrading.

12. Did the Commission misunderstand its role?

59 In paragraph 21 of its decision the Commission states:

> "We are satisfied that our proper function in the context of this case is to decide whether the decision that there was such an emergency as justified derogation was one which was reasonable on all the material or, to put it another way, was one which he (the Secretary of State) was entitled to reach."

Taken in isolation it is suggested this indicates the Commission were adopting the wrong approach of treating their role as the same as that on judicial review—the *Wednesbury* approach (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). When the passage concerned is read in context, it is clear that the Commission well understood its role and in the passage which is the subject of objection were merely giving effect to the need to allow a reasonably wide margin of discretion. For example, at the beginning of paragraph 21 the Commission states: "We must, as the detainee have submitted, consider the material for ourselves and decide whether the decision that there exists a public emergency threatening the life of the nation can be supported."

13. The opinion of the Commissioner for Human Rights

60 After the decision of the Commission the Commissioner for Human Rights, Mr Alvaro Gil-Robles, gave a carefully reasoned opinion on aspects of the United Kingdom's derogation from article 5. He made certain critical comments. These comments deserve greatest attention, not only because of the distinguished status of the Commissioner but because to an extent they are supported by the report of the Joint Committee of Parliament on Human Rights. It is right that this court should take them into account if they assist the detainees' case. First, in relation to the inadequacy of the United Kingdom procedure with respect to derogations, he was concerned about the sequence of events which meant that the Order was made before the first draft of the proposed Bill was laid before Parliament. He suggested that the consequence was that "two small parliamentary hurdles are substituted for one large one". This is not a matter with which the court can deal, but is a matter for Parliament to deal with. However, on the material which is before us, it is difficult to accept that Parliament was unaware of what was intended at all material times. Certainly the important matter was that the position was clear beyond peradventure before the Act was passed. As the Order is of no value without the 2001 Act, there does seem to be, with respect, little in this point. In addition, on inquiry of the Attorney General,

we were told, as we expected, that the practice of information being made available "on Privy Council terms" to the opposition was followed in this case.

61 The Commissioner was also unhappy about the frequency of the review procedure of the legislation, in particular, the sunset clause of five years. However, the legislation does require regular supervision by the Commission at the times I have already indicated; so that means that the present detainees will not suffer as a result of the five-year period. The same applies to the reservation (the ground for which is neither specified or understood) which the Commissioner had as to the independence of the person appointed under section 28(1) of the 2001 Act to review its operation.

62 Finally, the Commissioner raises a number of points as to the appropriateness, the proportionality and the necessity of the action of which the United Kingdom Government has taken. These are points which not surprisingly the detainees are also taking, and in the course of this judgment I hope I have expressed my views upon them. I agree, however, with the Commissioner that action of the sort which the United Kingdom Government has taken "can be justified only under the most limited of circumstances".

14. Parliament's Joint Committee on Human Rights

63 I have also considered the second and fifth reports of the United Kingdom Parliament Joint Committee on Human Rights HL 37; HC 372 and HL 51; HC 420 (2001–02). The Committee examined the Bill which became the 2001 Act. Both reports expressed concerns about the Bill which the Committee had to examine at great speed. In the fifth report the Committee acknowledged that there had been improvements to the Bill as a result of the second report. However, the Committee still had a number of concerns. The first concern related to the power of detention. This should only be used where it is impossible or inappropriate to prosecute the detained person and the Secretary of State is searching diligently for a safe country. There is nothing to suggest at this stage that this concern is not being met. The second and third concern, which relates to the jurisdiction of the Commission and the ability of the Secretary of State to rectify, also do not apply to the detainees at the present time. The fourth and final concern relates to special advocates being available to this court. At the beginning of the hearing such advocates were available but we released them, as they would not be required. The reports, while valuable, do not therefore affect these appeals.

64 What I have set out above means that I would allow this appeal. In those circumstances, the question does arise as to what added protection the Human Rights Act 1998 has provided for the detainees. I believe that additional protection is substantial. Before the Commission, two of whose members were senior judges, and before this court, the issues raised by the detainees were examined in a way which would not have been possible before the 1998 Act came into force. Before both tribunals the standards that the Convention requires were applied by the Commission and this court, but this court has concluded that applying those standards the action which has been taken by the Secretary of State is lawful and complies with the Convention. While the detainees are detained the same scrutiny can be

repeated if the circumstances change sufficiently to justify this. This is a very considerable protection which would not have been available either to nationals or non-nationals prior to the 1998 Act coming into force. The unfortunate fact is that the emergency which the Government believes to exist justifies the taking of action which would not otherwise be acceptable. The Convention recognises that there can be circumstances where action of this sort is fully justified. It is my conclusion here, as a matter of law, and that is what we are concerned with, that action is justified. The important point is that the courts are able to protect the rule of law.

BROOKE LJ

1. Introductory: the four main issues

65 It is convenient to deal with the issues that arise on the cross-appeals first. The language of article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (cited by Lord Woolf CJ in paragraph 32 of his judgment), threw up three main issues for the Commission's consideration. (1) Was there a public emergency threatening the life of the nation on each occasion when the Secretary of State considered this question? (2) If so, were the measures this country took limited to those strictly required by the exigencies of the situation? (3) If so, were they consistent with this country's other obligations under international law? Before one can sensibly address these issues there is another question which must be addressed first. (4) What is the role of the judiciary when issues of this kind fall under judicial scrutiny?

2. The proper standard of judicial scrutiny: the Commission's approach

66 The Commission directed themselves that they must not adopt the approach that just because the Secretary of State has said there is such a public emergency therefore there is one. They must consider the material for themselves and decide for themselves whether this decision can be supported. In this context they reminded themselves of the guidance given by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547–548, paras 27–28, and by Lord Hoffmann, with particular reference to questions of national security, in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 194–195, paras 57–58.

67 Lord Woolf CJ has referred at paragraph 59 of his judgment to the way in which the Commission said in paragraph 21 of their determination that:

> "We are satisfied that our proper function in the context of this case is to decide whether the decision that there was such an emergency as justified derogation was one which was reasonable on all the material or, to put it another way, was one which [the Secretary of State] was entitled to reach. We do not accept that we should make the decision for ourselves."

68 They then reminded themselves that the right to liberty enshrined in article 5 of the Convention was one of the rights of fundamental importance. After citing *Aksoy v Turkey* (1996) 23 EHRR 553, 588, para 76 (for which see the judgment of Lord Woolf CJ at paragraph 10), they said:

"It is to be noted that judicial control through the Commission is to be maintained and that in carrying out the exercise of balancing the need for derogation against its impact on personal liberty consideration must be given to the human rights of probably thousands, including in particular the even more important right to life, which may be gravely affected if the risk materialises."

69 After referring to the Strasbourg case law which relates to the meaning of a "public emergency threatening the life of the nation" (for which see paragraphs 72–80 below) the Commission devoted 12 long paragraphs of their determination to answering the question "Is there a state of emergency?" In paragraph 35 they gave an affirmative answer to this question in the terms set out by Lord Woolf CJ in paragraph 33 of his judgment.

70 We have been shown the open material which led the Security Service to assess that a risk of this dimension existed. Most of this material was before the Secretary of State when he made his original assessment in October 2001. On 18 June 2002 he reassessed the situation on the basis of all the information which was now to hand and reached the same conclusion. He noted that his assessment of the seriousness of the risk coincided with that of the United States Government in their domestic context.

71 On the appeal to this court nobody suggested that the Commission was not addressing the right question in paragraph 35 of their determination There was strong criticism, however, of paragraph 21. It was suggested that the Commission was adopting an old-fashioned *Wednesbury* approach (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) when they suggested that they should ask themselves whether the decision of the Secretary of State was "reasonable on all the material", or alternatively one which he was entitled to reach.

3. Article 15 of the Convention and judicial supervision: the Convention case law

72 As the Commission noted, the language of article 15 of the Convention has been considered on a number of occasions at Strasbourg. Earliest in time is *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, where the applicant was complaining that the Irish Government had detained him without trial for five months under legislation directed against the IRA. The European Court of Human Rights directed itself, at p 31, para 28, that:

"the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed."

73 It went on to determine whether the facts and circumstances which led to the making of the relevant proclamation by the Irish Government came within this concept, and it found that the existence of such an emergency *was reasonably deduced* by the Irish Government from a combination of several factors: (i) the existence in its territory of a secret army engaged in unconstitutional activities and using violence to attain its

purposes; (ii) the fact that this army was also operating outside the territory of the state, thus seriously jeopardising its relations with its neighbour; and (iii) the steady and alarming increase in terrorist activities for nine months, culminating in a homicidal ambush in the territory of Northern Ireland near the border which brought to light the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland.

74 I have referred to the facts of this case because we received submissions to the effect that the language of article 15 should be narrowly construed. This case shows the Strasbourg court more than willing to consider the effect on the life of a nation of terrorists whose activities outside its territory were seriously jeopardising its relations with a neighbouring state.

75 In its report on *The Greek Case* (1969) 12 YB 1, 72, para 153, the European Commission of Human Rights suggested that a public emergency should have the following characteristics if it was to qualify under article 15:

> "(1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate."

76 The Commission derived the notion of an imminent danger from the French text of the Convention, and it went on to suggest that when the Court of Human Rights in *Lawless v Ireland (No 3)* 1 EHRR 15 said that the Irish Government reasonably deduced that the requisite state of affairs existed it was using the language of a margin of appreciation. In *Greece v United Kingdom* (the *First Cyprus* case) (1958) 18 HRLJ 348, 387, para 136 the Commission had spoken of "discretion in appreciating the threat to the life of the nation".

77 In *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, 569–570, para 43 the European Court of Human Rights returned to this topic. From this important passage the following principles can be derived. (1) Each contracting state has a responsibility for the life of its nation, so that it falls to the state to determine both whether the relevant emergency exists and how far it is necessary to go in attempting to overcome it. (2) The state is in a better position than an international judge to decide such questions, and a wide margin of appreciation must therefore be left to the national authorities in this matter. (3) This domestic margin of appreciation must be accompanied by a European supervision, but in exercising its supervision the court must give appropriate weight to all relevant factors.

78 When it came to apply this approach and make *its own assessment*, at p 570, para 47, the Court of Human Rights considered in the light of all the material before it that there could be no doubt that a relevant public emergency existed at the relevant time.

79 In its recent decision on admissibility in *Marshall v United Kingdom* (Application No 41571/98) (unreported) 10 July 2001) the European Court of Human Rights revisited this topic and applied the same tests. The following matters emerge from this decision. (i) The proper function of the European supervising court on the second main issue (see paragraph 65(2)

above) is to decide whether the derogation was a genuine response to an emergency situation and whether the absence of judicial control of extended detention was justified. (ii) In making this assessment the supervising court should have regard to the authorities' margin of appreciation and the nature of the safeguards which existed to prevent abuse. (iii) Nothing had happened in the nine years since Brannigan and McBride were detained such as to lead the court to controvert the authorities' assessment of the situation in Northern Ireland. (iv) As to the measures the authorities took in the present case it was not the role of the supervising court to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government, which had direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand and respecting individual rights on the other.

80 As between the national authorities and the Strasbourg court, therefore, it is for the national authorities to decide the answers to the first two main issues I have identified in paragraph 65 above, and for the Strasbourg court to be willing to afford them a wide margin of appreciation, bearing in mind their direct responsibility for the safety of their state, when it assesses whether their answers were correct in law, or whether it should controvert them or substitute its own view.

4. Judicial supervision in human rights cases, and issues of deference

81 In all the cases concerned with Northern Ireland prior to October 2000, however, there was no mechanism for judicial supervision of the relevant decisions of the government or the legislature of this country at national level. A number of recent decisions of the courts, however, have pegged out the course a national court should adopt, particularly in a matter affecting national security. They are now well known, and like Lord Woolf CJ, I will content myself with giving the leading references: *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 380–381, *Brown v Stott* [2001] 2 WLR 817, 834, *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344, 372–378, paras 77, 80–87 and *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. It is convenient only to set out certain principles which I derive from Lord Hoffmann's speech in *Rehman*, at pp 194–195, paras 57–58 and 62. (1) When there is an appeal to the Commission it is the Home Secretary, not the Commission, who is the principal decision-maker. (2) It must be remembered that the Home Secretary has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission cannot match. (3) Because what is at issue is an evaluation of risk, an appellate body traditionally allows a considerable margin to the original decision-maker. It should not ordinarily interfere with a case in which the Home Secretary's view is one which could reasonably be entertained. (4) Even though a very different approach may be needed when determining whether an appellant's article 3 rights are likely to be infringed, this deferential approach is certainly required in relation to the question whether a deportation is in the interests of national security. (5) Although the Commission has the express power to reverse the exercise of a discretion, they should exercise restraint by reason of a common-sense recognition of the nature of the issue and of the differences in the decision-

making processes and responsibilities of the Home Secretary and the Commission. (6) The events of 11 September are a reminder that in matters of national security the cost of failure can be high. Decisions by ministers on such questions, with serious potential rights for the community, therefore require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.

5. The meaning of "public emergency" in article 15 of the Convention

82 Any judicial assessment of the quality of the Home Secretary's decision-making process in the present case is inevitably made more complicated by the fact that he told a parliamentary committee in October 2001 that there was no immediate intelligence pointing to a specific threat to this country. There is, however, as I understand it, no direct challenge to his good faith. It appears to me that the answer to the conundrum posed by the language he used must be found in identifying the proper meaning of the word "imminent" as it appears in the French text of article 15. This is a necessary part of the process of determining what the expression "public emergency threatening the life of the nation" really means.

83 The Commission considered this issue in paragraph 24 of their determination. They made the following points. (1) It is not the imminence of a threat which is required, but the actuality or imminence of an emergency. This distinction is by no means an unreal one. (2) The measures which involve the need to derogate are required to try to prevent the outrages which would have a disastrous effect if they occurred. It would be absurd to require the authorities to wait until they were aware of an imminent attack before taking the necessary steps to avoid such an attack. (3) What is required is a real risk that an attack will take place unless the necessary measures are taken to prevent it. (4) An emergency can exist and can certainly be imminent if there is an intention and a capacity to carry out serious terrorist violence even if nothing has yet been done, and even if plans have not reached the stage when an attack is actually about to happen.

84 I have not found this issue of interpretation an easy one. The importance the Convention attaches to personal liberty and the rule of law is underlined by the fact that it requires an actual or imminent emergency of the type described in article 15 before a contracting state may lawfully derogate from the protections afforded by article 5(1). While considering the issues in this anxious case I have constantly reminded myself of the powerful dissenting opinion of Jackson J, with whom Frankfurter J joined, in *Shaughnessy v United States ex rel Mezei* (1953) 345 US 206, 218–228. I quote just two passages:

> "Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land." (p 218.)
>
> "Quite unconsciously, I am sure, the Government's theory of custody for 'safekeeping' without disclosure to the victim of charges, evidence, informers or reasons, even in an administrative proceeding, has

unmistakable overtones of the 'protective custody' of the Nazis more than of any detaining procedure known to the common law." (p 226.)

85 After a good deal of hesitation I have concluded that it would be wrong to give an over-literal interpretation to the word "imminent" in the present context. Absent such an interpretation, there was ample material on which the Home Secretary could conclude that an emergency of the requisite quality existed. And if it did, even Jackson J accepted, at p 223, that "due process of law will tolerate some impounding of an alien where it is deemed essential to the safety of the state". Although the rights of the detainees to liberty and due process are potent considerations, so, too, as the Commission observed, are the rights of very many other people which the Home Secretary judged to be threatened if the detainees remain at large, including the right to life itself. I would therefore endorse the Commission's approach to this issue.

6. Reliance on intelligence material

86 Turning to another point, I have read with great care the witness statements of the detainees' solicitors and the other matters of factual detail which have been brought together conveniently in an appendix to Mr Gill's skeleton argument. The Security Service has made a fairly brief reply to some of the points that have been made. Nobody who has read in any depth the history of miscarriages of justice in this country over the last 50 years, or who knows anything about the difficult problems that confront the intelligence community when they try to assess the quality and reliability of the information they receive, could approach the issues in this case with anything other than great anxiety. The difficulties which face the intelligence community, and those who have to decide how much reliance they can place on their advice, are compounded in a case like the present. Differences in language, differences in culture, and often very subtle differences in political or religious ideology abound. All these differences present formidable problems for the dispassionate assessor. Mistakes may well be made. That anxiety is heightened when one reads and rereads the evidence of Gareth Peirce, a solicitor who has great experience in these matters, and of Natalia Garcia, the solicitors for X and Y.

87 But unless one is willing to adopt a purist approach, saying that it is better that this country should be destroyed, together with the ideals it stands for, than that a single suspected terrorist should be detained without due process, it seems to me inevitable that the judiciary must be willing, as the Commission was, to put an appropriate degree of trust in the willingness and capacity of ministers and Parliament, who are publicly accountable for their decisions, to satisfy themselves about the integrity and professionalism of the Security Service. If the security of the nation may be at risk from terrorist violence, and if the lives of informers may be at risk, or the flow of valuable information they represent may dry up if sources of intelligence have to be revealed, there comes a stage when judicial scrutiny can go no further.

88 In this context two passages in the Security Service evidence are of particular importance. The first is when its witness, whose credentials are impressive, speaks of the care the Service takes in determining whether it is safe to rely on intelligence information. The second is when he says that it is

for practical reasons impossible to prosecute some of those the Service believes to be foreign terrorists because to attempt to do so would itself imperil national security.

89 On this appeal we are concerned not only with matters of personal liberty but with matters of life and death for possibly thousands of people. In these circumstances it appears to me that the arrangements that have been made for judicial supervision of the decision of Parliament, imperfect as they are, are the best that can be devised for a situation like this. Although the point did not really arise for decision on the appeal, since the Commission was able to reach their conclusion on the open material, it appears to me to be desirable that they should also have access to the closed material, and that the special advocate procedure is a better way of dealing with this than any procedure devised in this country in the past. Contrast, for example, section 4 of the Prevention of Terrorism (Temporary Provisions) Act 1974, whereby the Home Secretary received advice in private from an independent adviser in relation to challenges against an exclusion order and was not obliged to disclose the content of the advice, or to say whether he accepted it or not.

7. My conclusion on the first and fourth main issues

90 Like Lord Woolf CJ, I do not consider that the Commission misunderstood their function or misdirected themselves as to the nature of the job they were to do. I interpret the passage in paragraph 21 of their determination as applying in their own words the third principle suggested by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 (see paragraph 81(3) above). For these reasons I am unable to hold that the Commission was wrong (see CPR r 52.11(3)(a)) to refuse to controvert the Home Secretary's judgment on the question whether an emergency of the requisite seriousness existed. I would therefore dismiss the detainees' appeal on the first main issue.

8. Did Parliament go further than was strictly required?

91 I turn to consider whether the Commission was wrong on the second main issue. Did Parliament go further than was strictly required by the exigencies of the situation when it enacted Part 4 of the 2001 Act? On this issue the Commission made a finding of fact against which in itself there can be no appeal, and I agree with what Lord Woolf CJ has said in paragraphs 42 to 44 of his judgment about the questions of law that relate to this issue. I wish, however, to add some comments of my own on some of the submissions we received.

92 Mr Emmerson maintained that Part 4 of the 2001 Act was directed to a different and wider target than the national emergency (from the risk of a terrorist attack against this country by members of the Al Qa'eda network) which for the purposes of this analysis must be assumed to exist. The Government made no secret of the fact that one purpose of the measure was to reverse the effect of the decisions of Woolf J in *R v Governor of Durham Prison, Hardial Singh* [1984] 1 WLR 704 and of the Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413. In these circumstances Mr Emmerson submitted that it was necessarily inconsistent with the

requirement that a derogating measure must be carefully tailored to meet the exigencies of the situation created by the emergency.

93 He drew the concept of "careful tailoring" from the judgment of McLachlin J in the Supreme Court of Canada in *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199. That case was concerned with the question whether legislative control of tobacco advertising infringed the Canadian Charter of Rights and Freedoms, and at pp 342–343, para 160, in a section headed "Minimal Impairment", McLachlin J said:

> "As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."

94 The language of section 1 of the Canadian Charter requires the party defending a law which violates any of the Charter's rights and freedoms to show that the infringement is both reasonable and demonstrably justified in a free and democratic society: see McLachlin J, at pp 327–329, paras 126–129. I mention this because it is always dangerous to refer to an interpretation of a different human rights charter, however distinguished the source of that interpretation, without taking into account any significant differences in the language of that charter. Canadian judges have the power, which we do not, to strike down any non-compliant law. In these circumstances it is much safer to rely on the jurisprudence surrounding the convention we are currently interpreting, if there is any significant difference in the language being construed.

95 Before leaving Canadian jurisprudence, however, it is instructive to see a similar approach there to the approach of our courts to the difficult issues that arise out of their duty to give deference to decisions made by another arm of government. In *Libman v Attorney General of Quebec* (1997) 3 BHRC 269, the court quoted the passage from *RJR-MacDonald Inc* I have cited and went on to say, at p 289, para 59:

> "This court has already pointed out on a number of occasions that in the social, economic and political spheres, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, the courts must accord great deference to the legislature's choice because it is in the best position to make such a choice."

96 A fortiori in the field of national security, and particularly when, as happened in this case, senior opposition parliamentarians were provided on Privy Council terms on several occasions with background details of the intelligence that informed the Home Secretary's decision-making in connection with the derogation. It must not be forgotten, either, that Part 4

of the 2001 Act was just one of the measures introduced to combat the emergency. It should not be looked at in isolation.

97 Mr Emmerson argued that the scope of Part 4 of the 2001 Act was unnecessarily wide because section 21 would permit the Secretary of State to issue a certificate in respect of somebody who satisfied the criteria set out in that section even though he had nothing to do with Al Qa'eda or its networks and the risk they posed to this country. We are not, however, concerned on this appeal with a general challenge to the vires of Part 4 of the 2001 Act, but only with the issues legitimately raised on the section 25 appeals of these particular detainees when they complain about the way the Secretary of State's actions, under powers afforded to him under the Act, have affected them.

98 I agree with Lord Woolf CJ that the Secretary of State may not lawfully issue a certificate under section 21 unless he is empowered to do so under the terms of the derogation. This refers in terms to the threat to international peace and security identified by the terrorist attacks on 11 September. In other words it identifies the threat posed by Al Qa'eda and its associated networks (and no one else), and the Secretary of State has put the matter beyond doubt by the way his authorised witness explained to the Commission the factors that led him to identify a public emergency threatening the life of the nation.

9. My conclusion on the second main issue

99 For all these reasons I do not consider that in the context of these appeals it is possible to hold that Part 4 of the 2001 Act went wider than was strictly required, or that the Commission was wrong in law in the way it approached this question.

10. Differential treatment of non-nationals: the facts of the present case.

100 Mr Emmerson then argued that if the 2001 Act was rationally connected with the need to protect this country from the threat of terrorist attack that is identified in the derogation, it would permit the detention of those who posed a direct threat to this country through association with the Al Qa'eda network regardless of their nationality or immigration status. This argument was linked with the article 14 argument, and I will consider them together. In the latter context I bear in mind the view of the Court of Human Rights, expressed in *Gaygusuz v Austria* (1996) 23 EHRR 364, 381, para 42, to the effect that differences in treatment on the grounds of nationality require very weighty justification.

101 By way of illustrating his submissions Mr Emmerson invited us to look up all the references in the papers to British nationals who were in some way connected with Al Qa'eda and its networks. A trawl through the papers identified (1) upwards of a thousand people from this country who have attended the training camps in Afghanistan in the last five years; in this context there is also a reference to young British Muslims; (2) particular British citizens allegedly involved in terrorist activities of the kind in question, and the nine who were detained as a consequence of Coalition action in Afghanistan (and Pakistan); (3) a preacher who was responsible for recruiting one of those detainees at a London mosque.

102 In his second statement Mr Whalley, who was authorised to give evidence on behalf of the Home Secretary, identified three considerations which had led the Home Secretary to introduce these measures only in relation to foreign nationals: (1) his belief that the serious threats to the nation emanated predominantly (albeit not exclusively) and more immediately from the category of foreign nationals; (2) the fact that foreign nationals generally have no right to be in this country and are subject to immigration control; (3) his belief that there were adverse effects for this country, in meeting the emergency, arising from the continuing and unrestricted presence in the United Kingdom of suspected terrorists who could not be removed to third countries.

103 Although the detainees' solicitors provide grounds for querying the cogency of much of the Security Service's materials, it appears to me that there was evidence available to the Secretary of State, if he chose to accept it, to justify the first of these beliefs. I do not consider that in paragraph 95 of their determination the Commission made a finding of fact to contrary effect when they said that "there are many British nationals already identified—mostly in detention abroad—who fall within the definition of 'suspected international terrorists' ". In that passage the Commission was concerned to rebut an argument that the derogation would properly be confined to the alien section of the population only if the threat stemmed exclusively or almost exclusively from that alien section. In other words, they were concerned only with numbers, not with the scale or immediacy of the threat created by the presence in this country of particular terrorists. For instance, five generals and their chiefs of staff may pose a more serious and immediate threat than 5,000 foot-soldiers.

104 The second of Mr Whalley's considerations, though legally accurate, would not, if it stood alone, justify the identification of foreign nationals as being appropriate for discriminatory treatment of the type contemplated by the derogation and by Part 4 of the 2001 Act: but see paragraphs 112–130 below.

105 The third, "safe haven", consideration deserves slightly more attention. The open material suggests that foreign terrorists based in this country may have been actively engaged in planning terrorist attacks in friendly foreign countries. In some cases their extradition is being actively sought. In others it is impossible, on human rights grounds, to send them to countries where the authorities wish to prosecute them.

106 *Lawless v Ireland (No 3)* 1 EHRR 15 (see paragraphs 72–74 above) shows that the fact that terrorists based in one country are committing their terrorist attacks in a neighbouring country does not prevent the first country from empowering itself, by an article 15 derogation, to restrict their liberty. The underlying reason for this is the same as that which appealed to the Court of Appeal and the House of Lords in *Rehman* [2003] 1 AC 153.

107 In that case the Secretary of State had decided to deport Mr Rehman on national security grounds because he was associated with an organisation involved in terrorist activities in the Indian sub-continent. In those circumstances the Commission considered that the words "the interests of national security" in section 15(3) of the Immigration Act 1971 should be interpreted as meaning that the activities of the person in question offended against national security if "he was involved in any way with violent activity

which was targeted at this country directly or indirectly, or where United Kingdom citizens were targeted, wherever they might be".

108 The Court of Appeal rejected this narrow interpretation (see p 165), and the House of Lords upheld the Court of Appeal. Lord Slynn of Hadley, at pp 181–183, paras 15–17, Lord Steyn, at p 195, para 28, and Lord Hoffmann, at pp 191–192, paras 46 and 49, all expressed in different language their reasons for preferring a broad interpretation of the words "national security". It is sufficient merely to cite Lord Slynn, at p 182, para 16:

> "It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected."

109 Mr Emmerson and Mr Gill sought to persuade us that this immigration case raised different issues because of the wider language of section 15(3) of the 1971 Act. In the present context, so far as these detainees are concerned, I am not sure that this is so. The present emergency, in which Al Qa'eda and its networks are said to be willing to contemplate acts of terrorism on a worldwide scale, is one in which international co-operation is urgently required in combatting the threat, and it appears to me to be legitimate for Parliament to restrict the activities of foreign terrorists who are engaged in causing terror abroad (or in training others to do so) as one means of meeting the emergency threatening the life of this nation.

110 Mr Whalley has described the problem facing the Government in these terms:

> "the Secretary of State . . . considered that there were adverse effects for the United Kingdom, in meeting the emergency, arising from the continuing and unrestricted presence in the United Kingdom of suspected terrorists who could not be removed to third countries. In this regard, the assessment of the Government, at the highest level, was that there would be an adverse impact on the ability of the United Kingdom to build and maintain an effective international coalition in the fight against terrorism. That was because of a perception in other countries, including Muslim countries, that it was weak in its response to international terrorists operating in its territory (being apparently unable to deal with those whom the Secretary of State had determined should be removed on the basis that they were suspected, on objective grounds, of being terrorists)."

111 This consideration does not, however, justify targeting the 2001 Act at non-national terrorists alone, unless there was some other feature which distinguishes them from British nationals suspected of terrorism whom the state was unable to prosecute for fear of compromising its intelligence sources. This may well be the reason why it does not feature in the Secretary of State's grounds of appeal. For the necessary distinctions it is necessary to turn back to paragraph 103 of this judgment or forward to the well established principles of international law to which I now turn.

11. Differential treatment of non-nationals: relevant principles of international law

112 It has been a longstanding feature of international law that a state is entitled to treat non-nationals differently from nationals in time of war or other public emergency threatening its life as a nation. *Oppenheim's International Law*, 9th ed (1992), vol 1, *Peace*, pp 851–859, paras 378–379, contains a helpful discussion of the difference between nationals and non-nationals. In short, the nationality of an individual is his quality of being a subject of a certain state. In historical terms, the concept of nationality has its origins in the oath of allegiance owed by the subject to his king.

113 International law recognises that every state has a right of protection over its nationals abroad, and a duty to receive on its own territory such of its nationals as are not allowed to remain on the territory of other states. (This was the reason why this country received large numbers of East African Asians who were expelled from Uganda 30 years ago and had nowhere else to go.) On the other hand no state has an obligation to allow foreigners to remain within its borders and is free to expel them, subject to any constraints imposed by international treaties, if there is another country to which it can send them which is bound to receive them.

114 As to the treatment of non-nationals in time of war, in earlier times all the citizens of an enemy state in time of war who were found on a belligerent's territory could be immediately detained as prisoners of war. As early as the 18th century, however, a practice grew up of allowing enemy subjects a reasonable period of time in which to withdraw. Thus when 10,000 Englishmen, who were arrested in France by Napoleon at the outbreak of war with England in 1803, were kept as prisoners of war for many years, Napoleon did not justify this action because they happened to be on French soil at the outbreak of war. He maintained, in contrast, that it was a legitimate act of reprisal for what he saw as a prior violation by England of the Law of Nations by beginning hostilities without a formal declaration of war.

115 In *Oppenheim's International Law*, 7th ed (1952), vol 2, *Disputes, War and Neutrality*, pp 306–309, para 100, from which this history is taken, it is said that a customary rule of international law developed by which all subjects of the enemy who were not actual or potential members of its armed forces must be allowed a reasonable period for withdrawal once war was declared.

116 In the First World War this country, France and Germany all adopted a policy of general internment in relation to enemy aliens on their soil. When the Second World War was declared in 1939, the policy of internment was not so rigid, and as a consequence of the work of special tribunals the number of German nationals who remained in internment

following a tribunal hearing was small in comparison with the numbers detained in the earlier war.

117 During the years since 1945 powers of internment relating to non-nationals on the soil of a state have been largely regulated by international treaty, but before examining the treaty dimension it is worth setting out two judicial statements, which state concisely the position in international law 100 years apart.

118 In *Nishimura Ekiu v United States* (1892) 142 US 651, 659 the United States Supreme Court said:

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

In *Chahal v United Kingdom* (1996) 23 EHRR 413, 454, para 73, the European Court of Human Rights said:

> "contracting states have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens."

119 Even more recently, in *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 356, 387–388, para 37, Lord Phillips of Worth Matravers MR cited with evident approval the decision of the Privy Council in *Attorney General for the Dominion of Canada v Cain* [1906] AC 542, 546 in which Lord Atkinson said:

> "One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests: *Vattel, Law of Nations*, book 1, s 231; book 2, s 125."

120 In the aftermath of the horrors of the Second World War the international community resolved to introduce by treaty a common set of standards governing the treatment of non-nationals on each other's soil. At a very basic level, these standards proclaimed that there was in ordinary times no justification for a state to differentiate between nationals and non-nationals in matters concerned with fundamental human rights, such as the right to life, the right to protection from torture and cruel or inhuman treatment, and the right to liberty and security of the person (including protection from arbitrary arrest and detention). Principles of this kind have long been recognised by the English common law, as Lord Scarman observed in *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 111–112:

> "Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the

black' in *Sommersett's Case* (1772) 20 State Tr 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed."

121 The Convention relative to the Protection of Civilian Persons in Time of War (1949) represented an early attempt to introduce these principles into an international treaty. It codified the rules by which enemy aliens were entitled to leave the territory of a belligerent "unless their departure is contrary to the interests of the state": article 35. It also provided that subject to the requirements of national security, enemy aliens who remained on the territory of a belligerent must be regulated, in principle, by the principles governing the treatment of aliens in time of peace: article 38. Articles 41 and 42 provide:

"41. Should the power in whose lands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment . . .

"42. The internment or placing in assigned residence of protected persons may be ordered *only if the security of the detaining power makes it absolutely necessary.*" (Emphasis added.)

Article 43 contains an obligation to have detainees' individual cases regularly reviewed by an appropriate court or administrative board, and much of this Convention is concerned with regulating the treatment of internees. In other words, it explicitly recognises the existence of special rules relating to the position of aliens in time of war.

122 Next in time was the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (1953) (Cmd 8969). Article 1 marked out the fact that the rights and freedoms set out in its first section were to be secured to everyone within the jurisdiction of the members of the Council of Europe. Its Preamble acknowledged the fact that fundamental freedoms were best maintained not only by an effective political democracy, but also by a common understanding of the human rights upon which they depended. All-important in the context of the present appeal are articles 5(1), 14 and 15(1), the terms of which Lord Woolf CJ has set out in paragraphs 17, 18 and 32 of his judgment.

123 At this stage it need only be noted that in the absence of an article 15(1) derogation the only difference in treatment as between nationals and non-nationals which the Convention is willing to recognise is that set out in article 5(1)(f). Lord Woolf CJ has explained the limits placed on the power of detention contained in that provision in paragraph 16 of his judgment.

124 The international community next turned its attention to the treatment of refugees. The Convention relating to the Status of Refugees (1951) (Cmd 9171) contains three provisions which expressly permit a state to treat a refugee differently from others if questions of national security are involved. Articles 9, 32 and 33 provide, so far as is material, that:

"9. Nothing in this Convention shall prevent a contracting state, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national

security in the case of a particular person, pending a determination by the contracting state that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

"32(1) The contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

"(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.

"(3) The contracting states shall allow such a refugee a reasonable period within which to seek legal admission into another country. The contracting states reserve the right to apply during that period such internal measures as they may deem necessary.

"33(1) No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is . . ."

125 It is noteworthy that the United Kingdom Government also made an express reservation to article 9 when it adhered to the Convention. Its reservation (for the text of which see *Macdonald's Immigration Law and Practice*, 5th ed (2001), p 1679) begins:

> "The Government of the United Kingdom . . . understand article . . . 9 as not preventing them from taking in time of war or other grave and exceptional circumstances measures in the interests of national security in the case of a refugee on the grounds of his nationality."

This reservation reflected its correct understanding of relevant principles of international law.

126 The Convention relating to the Status of Stateless Persons (1960) (Cmnd 1098) made the same distinctions in matters relating to national security as the Convention relating to Refugees: see the language of articles 9 and 31, which correspond with articles 9 and 32 of the earlier Convention. The United Kingdom Government made a similar reservation.

127 The International Covenant on Civil and Political Rights (1977) (Cmnd 6702), for its part, contains in article 3 the obligation to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant. Article 9 protects the right of personal liberty, and article 26 contains an express anti-discrimination clause along the same lines as articles 5 and 14. The Covenant, however, also contains (in article 4) an express right of derogation in time of public emergency which threatens the life of the nation which is similar to article 15(1), although the proviso is somewhat more extensive: "provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language,

religion or social origin." It should be noted that discrimination on the ground of nationality or national origin is not included in this embargo. In other words, all these international treaties preserve the principle of international law I have set out in paragraph 112 above. In paragraphs 129 and 130 of his skeleton argument Lord Goldsmith drew attention to two further, more recent, international declarations to similar effect.

128 Issues relating to the power of a state to detain non-nationals in time of peace arose in a particularly vivid form in 1980, when 125,000 Cuban refugees arrived in the United States. In *Shaughnessy v United States ex rel Mezei* 345 US 206 the United States Supreme Court had ruled in general terms that the continued detention of an excludable but non-removable alien does not violate any statutory or constitutional right. An influx of refugees on a massive scale, however, required the US courts to examine the criteria which should dictate which refugees should be detained, and which released.

129 In *Fernandez v Wilkinson* (1980) 505 F Supp 787, 797 a judge at first instance suggested that indefinite detention constituted a violation of international law. The more general view, however, was articulated by the District Court for the Northern District of Georgia in *Fernandez-Roque v Smith* (1983) 567 F Supp 1115 which held that the Government's power to detain was conditional on there being clear and convincing evidence that those affected were likely to abscond, or posed a risk to national security or a significant and serious threat to persons or property. The court said that these were precisely the standards to be derived from general international law.

130 What emerges from the efforts of the international community to introduce orderly arrangements for controlling the power of detention of non-nationals is a distinct movement away from the doctrine of the inherent power of the state to control the treatment of non-nationals within its borders as it will towards a regime, founded on modern international human rights norms, which is infused by the principle that any measures that are restrictive of liberty, whether they relate to nationals or non-nationals, must be such as are prescribed by law and necessary in a democratic society. The state's power to detain must be related to a recognised object and purpose, and there must be a reasonable relationship of proportionality between the end and the means. On the other hand, both customary international law and the international treaties by which this country is bound expressly reserve the power of a state in time of war or similar public emergency to detain aliens on grounds of national security when it would not necessarily detain its own nationals on those grounds.

131 In the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 284, para 10 the European Court of Human Rights said that in assessing any justification that was proffered for differential treatment regard should be had to the principles which normally prevail in democratic societies. The principle that democratic states are entitled to detain non-nationals on national security grounds in time of war or other public emergency is one which is very firmly established.

12. My conclusion on the third main issue

132 It appears to me, therefore, that two different considerations tend inexorably to the conclusion that the Commission's conclusion was wrong on the third main issue. The first is that there were good objective reasons

A entitling the Secretary of State, if he chose, to make this distinction between nationals and non-nationals. The second is that both customary international law and the international treaties by which this country is bound give this country the right, in time of war or comparable public emergency, to detain non-nationals on national security grounds without necessarily being obliged to detain its own nationals, too.

B 133 For these reasons, I agree that the appeal of the Secretary of State should be allowed, and the orders made by the Commission set aside. I also agree that the cross-appeals should be dismissed.

CHADWICK LJ

134 I agree that we should allow the Secretary of State's appeal, dismiss the cross-appeals and set aside the order made on 30 July 2002 by the Special C Immigration Appeals Commission. The issues have been fully analysed in the judgments delivered by the other members of the court. I agree with their reasoning and with the conclusions which they have reached. In the light of those judgments, my own views can be stated more shortly.

1. The statutory framework which underlies this appeal

D 135 The individuals who are the respondents to this appeal are detained under paragraph 2 of Schedule 3 to the Immigration Act 1971. The power to detain them under that provision is conferred by section 23(1) of the Anti-terrorism, Crime and Security Act 2001. It has been common ground that the extended power to detain conferred by section 23 involves (or may well involve) a derogation from article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). E Article 5 has effect as part of the law of the United Kingdom "subject to any designated derogation or reservation"—see section 1(2) of the Human Rights Act 1998. The designated derogation relied upon is that proposed in the Human Rights Act 1998 (Designated Derogation) Order 2001 ("the Derogation Order").

136 The derogation proposed in the Derogation Order, and given effect F by the provisions of section 23 of the 2001 Act, is a "derogation matter" for the purposes of section 30 of the 2001 Act; and, as such, it can be questioned in legal proceedings only before the Commission. It was in the exercise of its powers under section 30(2)(b) and (3)(c) that the Commission made an order quashing the Derogation Order on the grounds that it was outside the powers of the Secretary of State. Absent the Derogation Order, it followed that section 23 (in so far as it did involve a derogation from article 5(1) of the G Convention) was incompatible with the Convention rights of those detained. Further, the Commission was satisfied that the effect of section 23 was discriminatory; and so incompatible with article 14 read in conjunction with article 5 of the Convention. The Commission made a declaration to that effect under section 4(2) of the Human Rights Act 1998. An appeal from the Commission to this court may be brought on a question of law: see section 7 H of the Special Immigration Appeals Commission Act 1997.

2. The Derogation Order

137 The right of the United Kingdom to derogate from its obligations under the Convention is to be found in article 15(1):

"In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

138 Article 15(3) required the United Kingdom, when availing itself of that right, to keep the Secretary General of the Council of Europe fully informed of the measures which it had taken and the reasons therefor. The Schedule to the Derogation Order reflects that requirement. It takes the form of a notification to the Secretary General of the intention of Her Majesty's Government to exercise the extended powers to detain contained in the 2001 Act.

139 The Schedule to the Derogation Order, as might be expected, addressed the question whether there was a public emergency threatening the life of the nation, identified the measures which the United Kingdom was proposing to take, and asserted that those were measures strictly required by the exigencies of the situation to meet that emergency. The relevant passages are these:

"There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom. As a result, a public emergency, within the meaning of article 15(1) of the Convention, exists in the United Kingdom. As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security [Act 2001], inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers . . . The extended power of arrest and detention in the Anti-terrorism, Crime and Security [Act 2001] is a measure which is strictly required by the exigencies of the situation . . . If, at any time, in the Government's assessment, the public emergency no longer exists or the extended power is no longer strictly required by the exigencies of the situation, then the Secretary of State will, by Order, repeal the decision."

3. The existence of a public emergency threatening the life of the nation

140 The Commission was satisfied, on the "open" material before it, that there did exist a public emergency threatening the life of the nation within the terms of article 15 of the Convention. It expressed its conclusions in the passage (in paragraph 35 of its decision) which Lord Woolf CJ has already set out, in paragraph 33 of his judgment. It found nothing in the "closed" material which required it to take a different view; indeed, the closed material confirmed its view that the emergency was established. The individual detainees challenge that finding. They do so on two grounds: first, that the Commission applied "an insufficiently intensive standard of

review"; and, second, that the Commission erred "in distinguishing, in the present context, between an imminent emergency and an imminent threat of terrorist attack, and thereby permitted a remote and inchoate threat to stand as the basis for a derogation".

141 The criticism that the Commission applied an insufficiently intensive standard of review is founded on two sentences, in paragraph 21 of its decision:

> "We are satisfied that our proper function in the context of this case is to decide whether the [Secretary of State's] decision that there was such an emergency as justified derogation was one which was reasonable on all the material or to put it another way, was one which he was entitled to reach. We do not accept that we should make the decision for ourselves."

142 I agree that, taken out of context, those sentences suggest that the Commission had misunderstood its role. But I also agree with Lord Woolf CJ and with Brooke LJ that a careful reading of the whole of paragraph 21 of the decision, in the context of what had gone before—and, in particular, the analysis, in paragraphs 13 to 16 of the Strasbourg judgment in *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, and the speeches in the House of Lords in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 and *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153—lays that suspicion to rest. The first ground of challenge under this head is not made out.

143 The criticism that the Commission misdirected itself in making a distinction between an imminent emergency and an imminent threat of terrorist attack is founded on a passage in paragraph 24 of the decision:

> "Much has been made of the requirement that the emergency should be actual or imminent. We have had our attention drawn to many observations by ministers in the weeks following 11 September 2001 that there was no imminent terrorist threat to the United Kingdom or that there was no evidence available of any specific attack target in Britain. But it is not the imminence of a threat which is required: it is the actuality or imminence of an emergency. The distinction is by no means an unreal one. The measures which involve the need to derogate (here, the detention of suspected terrorists) are required to try to prevent the outrages which would have a disastrous effect if they occurred. Thus it would be absurd to require the authorities to wait until they were aware of an imminent attack before taking the necessary steps to avoid such an attack . . . An emergency can exist and can certainly be imminent if there is an intention and a capacity to carry out serious terrorist violence even if nothing has yet been done and plans have not reached the stage when an attack is actually about to happen."

144 As Brooke LJ has pointed out, in paragraphs 75 and 76, the requirement that the emergency should be actual or imminent is identified in the report of the European Commission of Human Rights in *The Greek Case* (1969) 12 YB 1, 72, para 153, and can be derived from the French text of article 15. But, as the Commission observed, it is the emergency which must be actual or imminent; and there is a real distinction between the actuality of the emergency and the imminence of any threatened attack. In my view the Commission were correct to approach the question which they

had to decide on the basis that an emergency can exist notwithstanding that matters have not reached the stage at which there is a threat of imminent attack. I, too, would reject the second ground of challenge under this head.

4. Measures strictly required by the exigencies of the situation

145 The measures which the United Kingdom was proposing to take in response to the public emergency which the Government had identified are spelt out in the Schedule to the Derogation Order: "an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible . . ." If there were a need to detain a foreign national whom it was intended to deport in circumstances where deportation were not for the time being possible, the need for "an extended power to . . . detain" is not in doubt. The power to detain under paragraph 2 of Schedule 3 to the Immigration Act 1971 could not be exercised in circumstances where it had become clear that removal or deportation was not going to be possible within a reasonable time: see *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704. Section 23(1) of the 2001 Act takes the form that it does because the Government had identified a need to detain certain foreign nationals whom it intends to deport from the United Kingdom—but whom it is not possible to deport for the time being—and had recognised that existing legislation did not enable that need to be met.

146 The foreign nationals in relation to whom the extended power is exercisable can be identified by three characteristics. First, they must be the subject of a certificate issued by the Secretary of State under section 21(1) of the 2001 Act; that is to say, they must be persons whose presence in the United Kingdom the Secretary of State reasonably believes to be a risk to national security and whom the Secretary of State reasonably suspects to be terrorists. Second, they must be persons in respect of whom the Secretary of State has made or would be entitled to make a deportation order under section 5(1) of the 1971 Act. Third, they must be persons whose removal or deportation is prevented (whether temporarily or indefinitely) by a point of law which wholly or partly relates to an international agreement, or by a practical consideration. The paradigm example of a person whose removal is prevented by an international agreement is one whose removal to the country of which he is a national would expose him to the risk of torture, or of inhuman or degrading treatment. To remove him in those circumstances would be to act in contravention of his Convention right under article 3: see *Chahal v United Kingdom* (1996) 23 EHRR 413.

147 The relevant question, therefore, is whether the detention of persons in respect of whom the conditions described in the preceding paragraph are satisfied is a measure "strictly required by the exigencies of the situation". The Commission held that it was. As Brooke LJ has pointed out (in paragraph 91 of his judgment) that was a finding of fact, in relation to which (absent some misdirection in law) there can be no appeal.

148 The finding is challenged on two main grounds: that the measure is both "over-inclusive" and "under-inclusive". Over-inclusive in the sense that the power to certify, under section 21(1), goes beyond the need posed by the existing emergency. Under-inclusive in that the measure does not permit the detention of those who are not subject to immigration control; that is to

say, it does not permit the detention of suspected international terrorists who are not capable of being deported because, as British citizens, they cannot fall within section 3(5) or (6) of the 1971 Act. And under-inclusive in that the measure does not permit the detention of those who are subject to deportation but in respect of whom there is no point of law or practical consideration which prevents their removal.

149 I agree that, on the language of section 21(1) of the 2001 Act, the power to certify does go beyond what can be regarded as strictly required by the exigencies of the situation. But, as Lord Woolf CJ has pointed out (in paragraph 42 of his judgment), that is a point of no substance. It is plain that the power to certify can only be exercised in relation to the emergency which gave rise to the Derogation Order. That the Secretary of State recognises that limitation was confirmed by the Attorney General in the course of the hearing.

150 The question whether it was necessary (or strictly required), in order to meet the exigencies of the situation, to detain those who were subject to deportation and who could be deported (because there was nothing to prevent deportation) seems to me to be a question of fact which is not capable of challenge on an appeal to this court. If, as the Commission held (in paragraph 51 of its decision), detention of persons who could be deported (as an alternative to deporting them) was not strictly required, then the decision not to take power to detain them cannot be criticised. Indeed, article 15(1) would not permit derogation from article 5 with a view to detaining persons whose detention was not strictly required.

151 Subject to the argument based on discrimination, I take the same view in relation to the question whether it was necessary to detain those who, as British citizens, were not subject to deportation. If the detention of British citizens, suspected of being international terrorists, was not strictly required in order to meet the exigencies of the situation, then article 15(1) would not permit derogation from article 5 with a view to detaining them; and the decision not to attempt to take power to do so cannot be criticised as irrational. If, on the other hand, the detention of British citizens was strictly required, then the decision not to include them within the scope of the power was both irrational and discriminatory.

5. Discrimination

152 It follows, in my view, that the question whether the Derogation Order can be quashed on the grounds of discrimination turns on whether the decision of the Secretary of State—that the measures required to meet the emergency which he had identified could, and so should, be confined to the detention of those who were subject to deportation but who could not, for the time being, be removed—can be sustained or must be overturned. As Lord Woolf CJ has pointed out, there is no suggestion that the Secretary of State did not reach that conclusion, bona fide and after consideration of the material before him. The reasons which led him to that conclusion are set out in the evidence of Mr Whalley, to which Brooke LJ has referred in paragraph 102 of his judgment. Like them, I do not understand the Commission to have taken the view that the Secretary of State's decision on that point must be overturned. And, as Lord Woolf CJ has observed (in paragraph 40 of his judgment), it is impossible for this court, on the material before it, to reach a different decision.

153 If the Secretary of State's decision as to what the exigencies of the situation strictly required stands (as I think it must), then the argument based on discrimination falls away. The decision to confine the measures to be taken to the detention of those who are subject to deportation, but who cannot (for the time being) be removed, is not a decision to discriminate against that class on the grounds of nationality. It is a decision that it is only persons who fall within that class who need to be detained in order to meet the emergency. What would be discriminatory would be to decide that all suspected international terrorists needed to be detained in order to meet the emergency; but to confine the power to detain to those who, because they were foreign nationals, were subject to immigration control. If that were what the Secretary of State had done, then it would be right to quash the Derogation Order. But, on the facts found by the Commission, it was wrong to do so.

Appeal allowed.
Cross-appeals dismissed.
No order as to costs.
Permission to appeal refused.

Solicitors: Treasury Solicitor; Birnberg Peirce & Partners; Tyndallwoods, Birmingham; Solicitor, Liberty.

JBS

Re Chiarelli and Minister of Employment & Immigration; Security Intelligence Review Committee, Intervener

[Indexed as: Chiarelli v. Canada (Minister of Employment and Immigration)]

Supreme Court of Canada, Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ. March 26, 1992.

Immigration — Inadmissible and removable classes — Criminality — Act providing for deportation of permanent resident convicted of serious offence — Appeal to Immigration Appeal Board on clemency grounds barred if Minister issues certificate following investigation of Security Intelligence Review Committee determining there is reasonable ground to believe individual is involved in organized crime — Individual not permitted to hear evidence of police before committee, but given summary of evidence and opportunity to cross-examine or present witnesses — Procedure used by committee not violating principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 82.1, 83(1) — Canadian Security Intelligence Service Act, S.C. 1984, c. 21, s. 48(2).

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Act providing for deportation order against permanent resident convicted of serious criminal offence — Not violation of guarantee against cruel and unusual punishment — Canadian Charter of Rights and Freedoms, s. 12 — Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 27(1)(d)(ii), 32(2).

Constitutional law — Charter of Rights — Right to life, liberty and security — Act providing for deportation of permanent resident convicted of serious criminal offence — Appeal to Immigration Appeal Board on clemency grounds barred if Minister issues certificate following investigation of Security Intelligence Review Committee determining there is reasonable cause to believe individual involved in organized crime — Deportation of permanent resident for serious criminal conviction not Charter violation — Procedure followed by committee barring individual from hearing police evidence, but giving summary, in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 27(1)(d)(ii), 32(2), 82.1, 83(1) — Canadian Security Intelligence Service Act, S.C. 1984, c. 21, s. 48(2).

Constitutional law — Charter of Rights — Equality rights — Act providing for deportation of permanent resident convicted of serious criminal offence — Appeal to Immigration Appeal Board on clemency grounds barred if Minister issues certificate following investigation of Security Intelligence Review Committee determining there is reasonable cause to believe individual involved in organized crime — No denial of equality rights — Canadian Charter of Rights and Freedoms, s. 15(1) — Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 27(1)(d)(ii), 32(2), 82.1, 83(1).

The respondent, a permanent resident, pleaded guilty to one offence punishable by up to 10 years' imprisonment, for which he received a suspended sentence, and to an indictable offence punishable by a maximum penalty of life imprisonment, for which he was sentenced to six months' imprisonment. An immigration officer signed a report pursuant to s. 27 of the *Immigration Act, 1976*, S.C. 1976-77, c.

52, identifying him as a permanent resident described in s. 27(1)(*d*)(ii) who has been convicted of an offence under a federal Act for which a term of imprisonment of five or more years may be imposed. An adjudicator, following a hearing, issued a deportation order, which was appealed to the Immigration Appeal Board. The board's hearing was adjourned because of a joint report by the Solicitor-General and the Minister of Employment and Immigration to the Security Intelligence Review Committee pursuant to s. 82.1(2) of the *Immigration Act, 1976*, which, after an investigation, determined that the individual was a person described in s. 19(1)(*d*)(ii) who, there were reasonable grounds to believe, would engage in a pattern of organized criminal activity. The individual received summaries of information presented before the committee relating to his involvement in extortion and drug-related activities of a criminal organization. He submitted no evidence and chose not to cross-examine two police witnesses who had testified *in camera*, although he made written submissions. The committee determined that a certificate should be issued under s. 83(1) in respect of his appeal, barring the board from considering clemency in the appeal under s. 72(1)(*b*). A certificate was issued by the Minister of Employment and Immigration pursuant to a direction from the Governor in Council. On a reference by the Immigration Appeal Board to determine certain constitutional questions pursuant to s. 28(4) of the *Federal Court Act*, R.S.C. 1985, c. F-7, the Federal Court of Appeal held that the certificate authorized by s. 83 of the *Immigration Act, 1976* resulted in an infringement of the respondent's rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*, because the procedure followed by the Security Intelligence Review Committee did not meet the requirements of s. 7 and was not justified under s. 1 of the *Canadian Charter of Rights and Freedoms*.

On appeal and cross-appeal to the Supreme Court of Canada, **held**, the appeal should be allowed and the cross-appeal dismissed.

Sections 27(1)(*d*)(ii) and 32(2) of the *Immigration Act, 1976* do not violate the Charter. It is not necessary to determine if deportation for serious offences is a deprivation of liberty within s. 7, because there has been no breach of fundamental justice. As non-citizens do not have an unqualified right to enter or remain in the country, Parliament can prescribe conditions for them to enter and remain in Canada. One condition imposed on a permanent resident's right to remain in Canada is that he or she not be convicted of a serious criminal offence. There is no denial of fundamental justice in deporting a permanent resident who has deliberately violated an essential condition under which he or she was permitted to remain in Canada. It is not necessary to look at aggravating or mitigating circumstances.

The deportation authorized by ss. 27(1)(*d*)(ii) and 32(2) is not "cruel and unusual" treatment or punishment within s. 12 of the Charter. The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a serious criminal offence does not outrage standards of decency. There is no violation of s. 15 of the Charter because the deportation scheme applies to permanent residents and not citizens. The mobility rights guaranteed in s. 6 provide for differential treatment of citizens and permanent residents.

Sections 82.1 and 83 of the *Immigration Act, 1976* do not infringe s. 7 of the Charter. That section does not mandate the provision of a compassionate appeal from a decision which comports with principles of fundamental justice. If any right of appeal from the deportation order is necessary in order to comply with principles of fundamental justice, a "true" appeal, which enables the decision of

the first instance to be questioned on factual and legal grounds, as in s. 72(1)(*a*), satisfies such a requirement.

Assuming that proceedings before the Security Intelligence Review Committee were subject to the principles of fundamental justice, those principles were observed, even though s. 48(2) of the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, provides that no one is entitled as of right to be present during the review committee proceedings. The various documents summarizing information and evidence gave the respondent sufficient information to know the substance of the allegations against him and to be able to respond by calling his own witnesses or cross-examining the police witnesses who had testified *in camera*. It is not necessary, in order to comply with fundamental justice in this context, that the respondent also be given details of the criminal intelligence investigation techniques or police sources used to acquire that information. Therefore, reliance upon the certificate authorized by s. 83 of the Act does not violate s. 7 of the Charter.

Cases referred to

Hoang v. Canada (Minister of Employment & Immigration) (1990), 13 Imm. L.R. (2d) 35, 120 N.R. 193, 24 A.C.W.S. (3d) 1140; *Reference re: Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536, 23 C.C.C. (3d) 289, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 15 W.C.B. (2d) 343; *R. v. Wholesale Travel Group Inc.* (1991), 84 D.L.R. (4th) 161, 67 C.C.C. (3d) 193, 38 C.P.R. (3d) 451, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 7 C.R.R. (2d) 36, 49 O.A.C. 161, 130 N.R. 1, 4 O.R. (3d) 799*n*, 30 A.C.W.S. (3d) 660, 14 W.C.B. (2d) 208; *Kindler v. Canada (Minister of Justice)* (1991), 84 D.L.R. (4th) 438, 67 C.C.C. (3d) 1, [1991] 2 S.C.R. 779, 8 C.R. (4th) 1, 6 C.R.R. (2d) 193, 129 N.R. 81, 45 F.T.R. 160*n*, 14 W.C.B. (2d) 30; *R. v. Governor of Pentonville Prison; Ex p. Azam*, [1973] 2 All E.R. 741; *Prata v. Minister of Manpower & Immigration* (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 N.R. 484; *Re Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] 2 D.L.R. 348, 59 C.C.C. 301, [1933] S.C.R. 269; *Hurd v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 594, 90 N.R. 31, 12 A.C.W.S. (3d) 328, 6 W.C.B. (2d) 69; *R. v. Smith* (1987), 40 D.L.R. (4th) 435, 34 C.C.C. (3d) 97, [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193, 31 C.R.R. 193, [1987] 5 W.W.R. 1, 15 B.C.L.R. (2d) 273, 75 N.R. 321; *R. v. Lyons* (1987), 44 D.L.R. (4th) 193, 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, 61 C.R. (3d) 1, 32 C.R.R. 41, 82 N.S.R. (2d) 271, 80 N.R. 161; *Syndicat des Employés de Production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)* (1989), 62 D.L.R. (4th) 385, [1989] 2 S.C.R. 879, 11 C.H.R.R. D/1, 89 C.L.L.C. ¶17,023, 100 N.R. 241, 17 A.C.W.S. (3d) 479; *Knight v. Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 489, [1990] 1 S.C.R. 653, 43 Admin. L.R. 157, 30 C.C.E.L. 237, 90 C.L.L.C. ¶14,010, [1990] 3 W.W.R. 289, 83 Sask. R. 81, 106 N.R. 17, 20 A.C.W.S. (3d) 315; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, [1990] 1 S.C.R. 425, 76 C.R. (3d) 129, 47 C.R.R. 1, 39 O.A.C. 161, 106 N.R. 161, 72 O.R. (2d) 415*n*, 10 W.C.B. (2d) 7; *R. v. Secretary of State for Home Department; Ex p. Hosenball*, [1977] 3 All E.R. 452; *R. v. Scott* (1990), 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153, 1 C.R.R. (2d) 82, 43 O.A.C. 277, 116 N.R. 361, 11 W.C.B. (2d) 358; *Ross v. Kent Institution (Warden)* (1987), 34 C.C.C. (3d) 452, 57 C.R. (3d) 79, 29 C.R.R. 125, 12 B.C.L.R. (2d) 145, 1 W.C.B. (2d) 324

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 6, 7, 12, 15
Canadian Security Intelligence Service Act, S.C. 1984, c. 21, ss. 39(1), 43, 44, 48 to 51 — now R.S.C. 1985, c. C-23
Criminal Code, R.S.C. 1970, c. C-34, s. 331(1)(*a*) — now R.S.C. 1985, c. C-46, s. 373 [repealed R.S.C. 1985, c. 27 (1st Supp.), s. 53]
Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 28(4) [am. 1986, c. 38, s. 61] — now R.S.C. 1985, c. F-7
Immigration Act, S.C. 1910, c. 27, s. 19
Immigration Act, R.S.C. 1952, c. 325
Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 4(2)(*a*) [rep. & sub. 1988, c. 35, s. 3], 5, 19(1)(*d*)(ii), 27 [am. 1987, c. 37, s. 4], 32(2) [rep. & sub. 1988, c. 35, s. 11(1)]; 72(1) [rep. & sub. *idem*, s. 18], 82.1 [enacted 1983-84, c. 21, s. 84; am. 1987, c. 37, s. 10], 83 [rep. & sub. 1983-84, c. 21, s. 84; am. 1987, c. 37, s. 11; 1988, c. 35, s. 33], 84 [rep. & sub. *idem*, s. 19], 128 [repealed *idem*, s. 32] — now R.S.C. 1985, c. I-2, ss. 4(2)(*a*) [rep. & sub. R.S.C. 1985, c. 28 (4th Supp.), s. 3], 5, 19(1)(*d*)(ii), 27 [am. R.S.C. 1985, c. 30 (3rd Supp.), s. 4], 32(2) [rep. & sub. R.S.C. 1985, c. 28 (4th Supp.), s. 11(1)], 70(1), 81 [am. R.S.C. 1985, c. 30 (3rd Supp.), s. 9], 82 [am. R.S.C. 1985, c. 28 (4th Supp.), s. 33], 83 [re-enacted *idem*, s. 19]
Immigration Appeal Board Act, S.C. 1966-67, c. 90 [repealed by 1976-77, c. 52, s. 128], ss. 11, 15, 21
Narcotic Control Act, R.S.C. 1970, c. N-1, s. 4(2) — now R.S.C. 1985, c. N-1

Rules and regulations referred to

Security Intelligence Review Committee Rules, Rules 45 to 51

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, 67 D.L.R. (4th) 697, [1990] 2 F.C. 299, 42 Admin. L.R. 189, 1 C.R.R. (2d) 230, 10 Imm. L.R. (2d) 137, 107 N.R. 107, 19 A.C.W.S. (3d) 1226, holding, on a reference by the Immigration Appeal Board to determine certain constitutional questions pursuant to s. 28(4) of the *Federal Court Act*, that a certificate authorized by s. 83 of the *Immigration Act, 1976* (Can.), resulted in an infringement of rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*.

David Sgayias, Q.C., and *Gerry N. Sparrow*, for appellant.
Irwin Koziebrocki and *David W. Schermbrucker*, for respondent.
Simon Nöel and *Sylvie Roussel*, for intervener.

The judgment of the court was delivered by

SOPINKA J.:—This appeal calls into question the constitutionality of the statutory scheme pursuant to which a permanent resident can be deported from Canada if, upon the report of an immigration officer and following an inquiry, he is found to have been convicted of an offence for which a term of imprisonment of five years or more may be imposed. The scheme is attacked on the grounds that it violates ss. 7 and 12 of the *Canadian Charter of Rights and*

Freedoms. A further attack, based on s. 7 of the Charter, is brought against the interaction of that scheme with investigations conducted by the Security Intelligence Review Committee into the activities of persons reasonably believed to be involved in certain types of criminal or subversive activity.

I. *The legislative scheme*

This appeal requires the court to consider the operation of a comprehensive legislative scheme which governs the deportation of permanent residents who have been convicted of certain criminal offences. I find it convenient to reproduce the relevant provisions at the outset. The provisions are those that were in force when these proceedings were commenced by the inquiry before the adjudicator. Since that time, several of the section numbers have been amended and there have been other minor amendments such as the consolidation of two subsections into one. However, the substance of the provisions relevant to this appeal remains the same: see *Immigration Act*, R.S.C. 1985, c. I-2.

Immigration Act, 1976, S.C. 1976-77, c. 52, as amended by the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21

> 4(2) Subject to any other Act of Parliament, a Canadian citizen, a permanent resident and a Convention refugee while lawfully in Canada have a right to remain in Canada except where
>
> (*a*) in the case of a permanent resident, it is established that a person is a person described in subsection 27(1) . . .
>
> . . . . .
>
> 19(1) No person shall be granted admission if he is a member of any of the following classes:
>
> . . . . .
>
> (*d*) persons who there are reasonable grounds to believe will
>
> . . . . .
>
> (ii) engage in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable under any Act of Parliament by way of indictment;
>
> . . . . .
>
> 27(1) Where an immigration officer or a peace officer has in his possession information indicating that a permanent resident is a person who
>
> . . . . .
>
> (*d*) has been convicted of an offence under any Act of Parliament for which a term of imprisonment of
>
> (i) more than six months has been imposed, or
>
> (ii) five years or more may be imposed,
>
> . . . . .

he shall forward a written report to the Deputy Minister setting out the details of such information.

. . . . . a

(3) Subject to any order or direction of the Minister, the Deputy Minister shall, on receiving a report pursuant to subsection (1) or (2), and where he considers that an inquiry is warranted, forward a copy of that report and a direction that an inquiry be held to a senior immigration officer.

(4) Where a senior immigration officer receives a copy of a report and a direction pursuant to subsection (3), he shall, as soon as reasonably b practicable, cause an inquiry to be held concerning the person with respect to whom the report was made.

. . . . .

32(2) Where an adjudicator decides that a person who is the subject of an inquiry is a permanent resident described in subsection 27(1), he shall, subject to subsections 45(1) and 47(3) [convention refugee], make a c deportation order against that person.

. . . . .

72(1) Subject to subsection (3), where a removal order . . . is made against a permanent resident . . . that person may appeal to the Board on either or both of the following grounds, namely, d

(*a*) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and

(*b*) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

. . . . .

82.1(1) In this section and section 83, "Review Committee" has the e meaning assigned to that expression by the *Canadian Security Intelligence Service Act*.

(2) Where the Minister and the Solicitor General are of the opinion, based on security or criminal intelligence reports received and considered by them, that

(*a*) a person who has made . . . an appeal pursuant to paragraph f 72(1)(*b*) . . .

. . . . .

is a person described,

(*c*) in the case of a permanent resident, in subparagraph 19(1)(*d*)(ii) or paragraph 19(1)(*e*), (*g*) or (*j*) or 27(1)(*c*) . . . g

. . . . .

they may make a report to the Review Committee and shall, within ten days after a report is made, cause a notice to be sent informing the person who made the appeal of the report and stating that following an investigation in relation thereto, the appeal may be dismissed.

(3) Where a report is made to the Review Committee pursuant to h subsection (2), the Review Committee shall investigate the grounds on which it is based and for that purpose subsections 39(2) and (3) and sections 43, 44 and 48 to 51 of the *Canadian Security Intelligence Service Act* apply, with such modifications as the circumstances require, to the investigation as if the

investigation were conducted in relation to a complaint made pursuant to section 42 of the Act, except that

(a) a reference in any of those provisions, to "deputy head" shall be read as a reference to the Minister and the Solicitor General; and

(b) paragraph 50(a) of that Act does not apply with respect to the person concerning whom the report is made.

(4) The Review Committee shall, as soon as practicable after a report is made to it pursuant to subsection (2), send to the person who made the appeal referred to in that subsection a statement summarizing such information available to it as will enable the person to be as fully informed as possible of the circumstances giving rise to the report.

(5) Notwithstanding anything in this Act, where a report concerning any person is made to the Review Committee pursuant to subsection (2), the hearing of an appeal concerning the person ... pursuant to paragraph 72(1)(b) ... shall be adjourned until the Review Committee has, pursuant to subsection (6), made a report to the Governor in Council with respect to that person and the Governor in Council has made a decision in relation thereto.

(6) The Review Committee shall,

(a) on completion of an investigation in relation to a report made to it pursuant to subsection (2), make a report to the Governor in Council containing its conclusion whether or not a certificate should be issued under subsection 83(1) and the grounds on which that conclusion is based; and

(b) at the same time as or after a report is made pursuant to paragraph (a), provide the person who made the appeal referred to in subsection (2) with a report containing the conclusion referred to in that paragraph.

83(1) Where, after considering a report made by the Review Committee referred to in paragraph 82.1(6)(a), the Governor in Council is satisfied that a person referred to in paragraph 82.1(2)(a) ... is a person described

(a) in the case of a permanent resident, in subparagraph 19(1)(d)(ii) or paragraph 19(1)(e), (g) or (j) or 27(1)(c) ...

. . . . .

the Governor in Council may direct the Minister to issue a certificate to that effect.

(2) Notwithstanding anything in this Act, the Board shall dismiss any appeal made ... pursuant to paragraph 72(1)(b) ... if a certificate referred to in subsection (1), signed by the Minister, is filed with the Board.

Canadian Security Intelligence Service Act, S.C. 1984, c. 21 (now R.S.C. 1985, c. C-23)

48(2) In the course of an investigation of a complaint under this Part by the Review Committee, the complainant, deputy head concerned and the Director shall be given an opportunity to make representations to the Review Committee, to present evidence and to be heard personally or by counsel, but no one is entitled as of right to be present during, to have access to or to comment on representations made to the Review Committee by any other person.

Canadian Charter of Rights and Freedoms

6(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

. . . . .

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

. . . . .

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

II. *Facts and proceedings*

The respondent, Joseph (Giuseppe) Chiarelli, was born in Italy in 1960. He received landed immigrant status upon his arrival in Canada in 1975. On November 1, 1984, the respondent pleaded guilty to unlawfully uttering threats to cause injury, contrary to s. 331(1)(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34, as amended, an offence punishable by a maximum of ten years' imprisonment. He received a suspended sentence. On November 5, 1984, he pleaded guilty to possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, as amended, which carries a maximum sentence of life imprisonment. He was sentenced to six months' imprisonment. In January of 1986, Immigration Officer A. Zografos signed a report pursuant to s. 27 of the *Immigration Act, 1976* ("the Act"), identifying the respondent as a permanent resident described in s. 27(1)(*d*)(ii), that is, a permanent resident who has been convicted of an offence for which a term of imprisonment of five years or more may be imposed.

As a result of this report, an inquiry was directed pursuant to s. 27(3) of the Act. The respondent was notified of this inquiry and attended. At the conclusion of the inquiry on May 7, 1986, Adjudicator J.E. McNamara determined, relying on the *Narcotic Control Act* conviction, that the respondent was a person described in s. 27(1)(*d*)(ii). He therefore made a deportation order against the respondent pursuant to s. 32(2). The hearing of the respondent's appeal to the Immigration Appeal Board against the deporta-

tion order, brought pursuant to s. 72(1) (now R.S.C. 1985, c. I-2, s. 70(1)) was adjourned after the Solicitor-General and the Minister of Employment and Immigration made a joint report to the Security Intelligence Review Committee (the "Review Committee") pursuant to s. 82.1(2) (now s. 81(2)). The report indicated that in the opinion of the Ministers, the respondent was a person described in s. 19(1)(*d*)(ii), that is, a person who there are reasonable grounds to believe will engage in activity that is part of a pattern of organized criminal activity.

Upon receipt of the joint report, the Review Committee conducted the required investigation and a hearing was held on September 2 and 3, 1987. Prior to this hearing the respondent was provided with a document entitled "Statement of Circumstances giving rise to the making of a Report by the Solicitor General of Canada and the Minister of Employment and Immigration to the Security Intelligence Review Committee", as well as two summaries of information. The first was a document entitled "Chronology of Information and Occurrences Relating to Giuseppe Chiarelli" and consisted of an extensive summary of surveillance of the respondent. The second document was entitled "Summary of Interpretation of Intercepted Private Communications [relating to the murder of Domenic Racco]". The first day of the hearing was held *in camera* and a summary of the evidence provided to the respondent. This summary indicated that evidence was led that the respondent, together with certain named individuals, was a member of a criminal organization which engaged in extortion and drug-related activities and, further, that the respondent personally took part in the extortion and drug-related activities of the organization.

At the second day of the hearing, the respondent attended with counsel. The "Statement of Circumstances", the "Chronology of Information" and the "Summary of Interpretation of Intercepted Private Communications" were placed before the Review Committee, as were the criminal records of the respondent and his alleged associates. The respondent was then invited to respond. Counsel for the respondent objected to the fairness and constitutionality of the proceeding. He submitted no evidence at the hearing and chose not to cross-examine the two R.C.M.P. witnesses who had testified on the first day. He did, however, later make written submissions to the committee.

After consideration of the matter, the Review Committee reported to the Governor in Council, pursuant to s. 82.1(6)(*a*) (now s. 81(7)), that the respondent was a person described in s. 19(1)(*d*)(ii). The Governor in Council adopted the conclusion of

the Review Committee and directed the appellant Minister to issue a certificate under s. 83(1) (now s. 82(1)) with respect to the respondent's appeal to the Immigration Appeal Board from the deportation order. This certificate was issued, with the result that the respondent's appeal would have to be dismissed in so far as it was brought pursuant to s. 72(1)(*b*) (now s. 70(1)(*b*)).

The hearing of the appeal was scheduled to resume in February of 1988. The respondent, however, gave notice that he intended to raise constitutional questions before the board and the hearing was adjourned. On February 1, 1989, the board, with the agreement of the parties, referred three questions to the Federal Court of Appeal for determination pursuant to s. 28(4) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.):

1. (a) do paragraph 27(1)(*d*)(ii) and subsection 32(2) of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now paragraph 27(1)(*d*)(ii) and subsection 32(2) of the *Immigration Act*, R.S.C. 1985, c. I-2) infringe or deny the rights guaranteed by sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* in that they require the deportation of persons convicted of an offence carrying a maximum punishment of five years or more, without reference to the circumstances of the offence or the offender;

   (b) if the paragraph and subsection referred to above do infringe or deny the rights guaranteed by sections 7, 12 and 15 of the *Charter*, are they justified by section 1 of the *Charter*?

2. (a) do sections 82.1 and 83 of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now sections 81 and 82 of the *Immigration Act*, R.S.C. 1985, c. I-2) infringe or deny the rights guaranteed by sections 7, 12 and 15 of the *Charter* as those provisions:

      (i) deprive individuals of the right to life, liberty and security of the person in violation of the principles of fundamental justice, and/or;

      (ii) subject individuals to cruel and unusual punishment? and/or;

      (iii) deny individuals equality before and under the law?

   (b) if the sections referred to above do infringe or deny the rights guaranteed by sections 7, 12 and 15 of the *Charter*, are they justified by section 1 of the *Charter*?

3. (a) does reliance upon the Certificate authorized by section 83 of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now section 82 of the *Immigration Act*, R.S.C. 1985, c. I-2) filed in Mr. Chiarelli's case result in an infringement of his rights pursuant to section 7 of the *Charter*, because the process followed by the Security Intelligence Review Committee did not meet the requirements of section 7?

   (b) if reliance upon the certificate does infringe or deny the right guaranteed by section 7 of the *Charter*, is it justified by section 1 of the *Charter*?

III. *Judgment of the Federal Court of Appeal* (1990), 67 D.L.R. (4th) 697, [1990] 2 F.C. 299, 42 Admin. L.R. 189

Pratte J.A. (dissenting on the answer to reference (Q. 3(b))

Pratte J.A. held that the combination of ss. 27(1)(*d*)(ii) and 32(2) of the Act do not violate s. 12 of the Charter because they do not impose a punishment. Section 32(2) is the corollary of the limits imposed by s. 4 of the Act on the right of a permanent resident to come to and remain in Canada. Similarly, he held that they do not violate s. 7 since there is no injustice in requiring the deportation of a person who has lost the right to remain in Canada. Finally, there is no violation of s. 15. Section 6 of the Charter specifically provides for different treatment of citizens and permanent residents regarding the right to remain in Canada. Nor does a distinction between permanent residents who have been convicted of an offence described in s. 27(1)(*d*)(ii) and other permanent residents amount to discrimination within the meaning of s. 15.

Pratte J.A. refused to answer the second question of the reference in so far as it related to s. 7 of the Charter as it had not been determined by the Immigration Appeal Board that the respondent had not been given a full opportunity to refute the allegations against him. He held that there was no violation of s. 12 or s. 15.

With respect to the third question, he observed that the filing of the s. 83 certificate had the effect of depriving the Immigration Appeal Board of its power to allow the respondent's appeal on compassionate grounds. The resulting deportation necessarily implied an interference with the liberty of the person. In concluding that the respondent's rights under s. 7 of the Charter had been infringed, Pratte J.A. observed at p. 711 that "it is a requirement of fundamental justice that no decision be made determining the rights of a person without giving that person a meaningful opportunity to be heard". In order to have a meaningful opportunity to be heard, the respondent had to know the information before the Review Committee in order to be able to contradict it. The respondent had not been provided this opportunity and therefore the procedure followed by the Review Committee did not meet the requirements of fundamental justice.

Pratte J.A. concluded, however, that this limitation could be justified under s. 1 of the Charter. Section 48(2) of the *Canadian Security Intelligence Service Act* which denies a party the right to be informed of the evidence led by the other party imposes a reasonable limit in light of the need to protect the secrecy of police investigations of organized criminal activities. This was particu-

larly the case in view of the fact that the committee's investigation was not to determine the guilt of the respondent, but only whether he deserved to benefit from an appeal on purely compassionate grounds.

Stone J.A. (Urie J.A. concurring)

The majority agreed with Pratte J.A.'s reasons except that in their view, the violation of s. 7 could not be justified under s. 1 of the Charter. Although the interest of the state in protecting confidential police sources and techniques is of sufficient importance to warrant overriding constitutionally protected rights and the withholding of information is rationally connected to that objective, the majority concluded that the procedure enacted by s. 82.1(3) (now s. 81(4)) failed the remaining requirements of the proportionality test. Rather than balancing the state's interest in protecting confidential sources and techniques with the individual's interest in fundamental justice, it was the majority's view that the provision opts for a "complete obliteration" of the individual's right in favour of the state's interest.

The Federal Court of Appeal answered the questions put to it as follows [pp. 713-4]:

1. Sections 27(1)(*d*)(ii) and 32(2) of the *Immigration Act, 1976* do not infringe ss. 7, 12 or 15 of the *Canadian Charter of Rights and Freedoms*.
2. Sections 82.1 and 83 of the *Immigration Act, 1976*, do not infringe ss. 12 or 15 of the *Canadian Charter of Rights and Freedoms*. The question whether those sections contravene s. 7 of the Charter is not a question that the board may refer to the court pursuant to s. 28(4) of the *Federal Court Act*.

3.(a) The board would, in relying upon the certificate issued pursuant to s. 83 in respect of Mr. Chiarelli, violate Mr. Chiarelli's rights under s. 7 of the Charter.

(b) That violation of s. 7 is not justified by s. 1 of the Charter.

IV. *Issues*

The appellant was granted leave to appeal and the following constitutional questions were stated by Gonthier J.:

1. (a) Do sections 82.1 and 83 of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now ss. 81 and 82 of the *Immigration Act*, R.S.C., 1985, c. I-2) infringe or deny the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

(b) If the sections referred to above do infringe or deny the rights guaranteed by s. 7 of the *Charter*, are they justified by s. 1 of the *Charter*?

2. (a) Does reliance upon the certificate authorized by s. 83 of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now s. 82 of the *Immigration Act*, R.S.C., 1985, c. I-2) filed in the respondent's case result in an infringement of his rights pursuant to s. 7 of the *Charter*, because the process followed by the Security Intelligence Review Committee did not meet the requirements of s. 7?

(b) If reliance upon the certificate does infringe or deny the right guaranteed by s. 7 of the *Charter*, is it justified by s. 1 of the *Charter*?

The respondent in the main appeal was granted leave to cross-appeal, and the following constitutional questions were stated by Gonthier J.:

1. (*a*) Do s. 27(1)(*d*)(ii) and s. 32(2) of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now s. 27(1)(*d*)(ii) and s. 32(2) of the *Immigration Act*, R.S.C., 1985, c. I-2) infringe or deny the rights guaranteed by ss. 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* in that they require the deportation of persons convicted of an offence carrying a maximum punishment of five years or more, without reference to the circumstances of the offence or the offender;

(b) If the paragraph and subsection referred to above do infringe or deny the rights guaranteed by ss. 7, 12 and 15 of the *Charter*, are they justified by s. 1 of the *Charter*?

The answers to these questions will dispose of the questions submitted to the Court of Appeal pursuant to s. 28(4) of the *Federal Court Act* with this exception. Question 2 at the Federal Court of Appeal corresponds to Q. 1 in the main appeal but referred to ss. 12 and 15 in addition to s. 7 of the Charter. Sections 12 and 15 were neither argued by the parties in this court nor referred to in the constitutional questions. In the circumstances, I will not deal with them.

V. *Analysis*

The cross-appeal attacks the general scheme providing for deportation of permanent residents who have been convicted of certain criminal offences. The main appeal concerns the removal of a ground of appeal from a deportation order and the procedure by which that removal is effected. I will address the cross-appeal first. Throughout these reasons I will refer to Chiarelli as "the respondent" and the Minister as "the appellant", although their positions are actually reversed on the cross-appeal.

1. *Do s. 27(1)(d)(ii) and s. 32(2) of the Immigration Act, 1976 violate the Charter?*

Section 27(1) requires an immigration officer in possession of information that a permanent resident falls into one of its enumerated classes to forward a report setting out the details of that information to the Deputy Minister. The relevant class in this case is that set out in s. 27(1)(*d*)(ii), a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of five years or more may be imposed. An inquiry is then held by an adjudicator in cases where the Deputy Minister considers that one is warranted (s. 27(3)). Section 32(2) provides that where an adjudicator decides that a person who is the subject of an inquiry does fall within one of the classes in s. 27(1), the adjudicator shall, except in the case of a convention refugee, make a deportation order against that person.

(a) *Section 7*

The essence of the respondent's position is that ss. 27(1)(*d*)(ii) and 32(2) are contrary to principles of fundamental justice because they are mandatory and require that deportation be ordered without regard to the circumstances of the offence or the offender. The appellant correctly points out that the threshold question is whether deportation *per se* engages s. 7, that is, whether it amounts to a deprivation of life, liberty or security of the person. The Federal Court of Appeal in *Hoang v. Canada (Minister of Employment & Immigration)* (1990), 13 Imm. L.R. (2d) 35, 120 N.R. 193, 24 A.C.W.S. (3d) 1140, held that deportation for serious offences is not to be conceptualized as a deprivation of liberty. I do not find it necessary to answer this question, however, since I am of the view that there is no breach of fundamental justice.

The principles of fundamental justice are to be found in the basic tenets of our legal system. Lamer J. (as he then was) stated in *Reference re: Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 at p. 558, 23 C.C.C. (3d) 289, [1985] 2 S.C.R. 486:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

He recognized that "principles of fundamental justice" could not be defined in the abstract but would have to be interpreted in the context of alleged violations (p. 558): ". . . those words cannot be given any exhaustive content or simple enumerative definition, but

will take on concrete meaning as the courts address alleged violations of s. 7".

a The importance of a contextual approach to the interpretation of s. 7 was emphasized by Cory J. in *R. v. Wholesale Travel Group Inc.* (1991), 84 D.L.R. (4th) 161 at p. 211, 67 C.C.C. (3d) 193, 38 C.P.R. (3d) 451, [1991] 3 S.C.R. 154:

> b It is now clear that the Charter is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of Charter rights, as well as to the determination of the balance to be struck between individual rights and the interests of society.

He noted that under a contextual approach, constitutional standards developed in the criminal context could not automatically be c applied to regulatory offences. Similarly, in *Kindler v. Canada (Minister of Justice)* (1991), 84 D.L.R. (4th) 438, 67 C.C.C. (3d) 1, [1991] 2 S.C.R. 779, McLachlin J. adopted a contextual approach which "takes into account the nature of the decision to be made" (at p. 491). She concluded that in defining the fundamental justice d relevant to extradition, the court must draw upon the principles and policies underlying extradition law and procedure.

Thus, in determining the scope of principles of fundamental justice as they apply to this case, the court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do e not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country: *R. v. Governor of Pentonville Prison; Ex p. Azam*, [1973] 2 All E.R. 741 (C.A.); *Prata v. Minister of Manpower & Immigration* (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 f N.R. 484.

La Forest J. recently reiterated this principle in *Kindler v. Canada (Minister of Justice)*, *supra* (at p. 448):

> g The government has the right and duty to keep out and to expel aliens from this country if it considers it advisable to do so. This right, of course, exists independently of extradition. If an alien known to have a serious criminal record attempted to enter into Canada, he could be refused admission. And by the same token, he could be deported once he entered Canada. . . . If it were otherwise, Canada could become a haven for criminals and others whom we legitimately do not wish to have among us.

h The distinction between citizens and non-citizens is recognized in the Charter. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1).

Thus, Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act, 1976*. Section 5 of the Act provides that no person other than a citizen, permanent resident, Convention refugee or Indian registered under the *Indian Act* has a right to come to or remain in Canada. The qualified nature of the rights of non-citizens to enter and remain in Canada is made clear by s. 4 of the Act. Section 4(2) provides that permanent residents have a right to remain in Canada *except* where they fall within one of the classes in s. 27(1). One of the conditions Parliament has imposed on a permanent resident's right to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. The requirement that the offence be subject to a term of imprisonment of five years indicates Parliament's intention to limit this condition to more serious types of offences. It is true that the personal circumstances of individuals who breach this condition may vary widely. The offences which are referred to in s. 27(1)(*d*)(ii) also vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. However there is one element common to all persons who fall within the class of permanent residents described in s. 27(1)(*d*)(ii). They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of a deliberate violation of the condition imposed by s. 27(1)(*d*)(ii) is sufficient to justify a deportation order. It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances.

(b) *Section 12*

The respondent alleges a violation of s. 12 for essentially the same reasons that he claims s. 7 is infringed. He submits that the combination of ss. 27(1)(*d*)(ii) and 32(2) constitutes cruel and unusual punishment because they require that deportation be ordered without regard to the circumstances of the offence or the offender. He submits that in the case at bar, the deportation order

is grossly disproportionate to all the circumstances and, further, that the legislation in general is grossly disproportionate, having regard to the many "relatively less serious offences" which are covered by s. 27(1)(*d*)(ii).

I agree with Pratte J.A. that deportation is not imposed as a punishment. In *Re Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] 2 D.L.R. 348, 59 C.C.C. 301, [1933] S.C.R. 269, Duff C.J.C. observed that deportation provisions were "not concerned with the penal consequences of the acts of individuals" (at p. 357). See also *Hurd v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 594 at pp. 606-7, 90 N.R. 31, 12 A.C.W.S. (3d) 328 (C.A.), and *Hoang v. Canada (Minister of Employment and Immigration)*, *supra*. Deportation may, however, come within the scope of a "treatment" in s. 12. The Concise Oxford Dictionary (1990), defines treatment as "a process or manner of behaving towards or dealing with a person or thing . . .". It is unnecessary, for the purposes of this appeal, to decide this point since I am of the view that the deportation authorized by ss. 27(1)(*d*)(ii) and 32(2) is not cruel and unusual.

The general standard for determining an infringement of s. 12 was set out by Lamer J., as he then was, in the following passage in *R. v. Smith* (1987), 40 D.L.R. (4th) 435 at pp. 476-7, 34 C.C.C. (3d) 97, [1987] 1 S.C.R. 1045:

> The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J.C. in *Miller and Cockriell*, *supra*, at p. 183 C.C.C., p. 330 D.L.R., p. 688 S.C.R., "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency. On the contrary it would tend to outrage such standards if individuals granted conditional entry into Canada were permitted, without consequence, to violate those conditions deliberately.

(c) *Section 15*

Although the constitutional question stated by Gonthier J. raises the issue of whether ss. 27(1)(*d*)(ii) and 32(2) violate s. 15 of the Charter, the respondent made no submissions on this issue. I agree, for the reasons given by Pratte J.A. in the Federal Court of Appeal, that there is no violation of s. 15. As I have already

observed, s. 6 of the Charter specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is, therefore, no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.

2. Do ss. 82.1 and 83 of the Immigration Act, 1976 or reliance on the certificate authorized by s. 83, infringe s. 7 of the Charter?

Two separate sets of questions were stated on the main appeal — first, whether ss. 82.1 and 83 themselves infringe s. 7 and, if so, whether they can be saved under s. 1 and, secondly, whether reliance on the certificate authorized by s. 83 infringes s. 7 in a manner that cannot be saved under s. 1. I agree with the submissions of both parties that the question of whether ss. 82.1 and 83 violate s. 7 was properly before the Federal Court of Appeal and should have been answered. It can therefore be addressed by this court on appeal from the decision of the Federal Court of Appeal.

The s. 7 violation raised in both questions involves the operation of a certificate issued under s. 83 of the Act to deprive the respondent of an appeal under s. 72(1)(*b*) of the Act. These questions raise two issues — first, whether the substantive provisions violate s. 7 and, secondly, whether the procedure followed by the Review Committee results in a s. 7 violation. I will deal with these issues in that order.

The practical significance of ss. 82.1 and 83 of the Act stems from their interaction with the rights of appeal from a s. 32(2) deportation order provided by s. 72(1) of the Act. Section 72(1)(*a*) provides for a true appeal, based on any question of law or fact or mixed law and fact. Under s. 72(1)(*b*), Parliament has granted a further appeal on the ground that "having regard to all the circumstances of the case, the person should not be removed from Canada". This latter ground of appeal grants the Immigration Appeal Board discretion to quash a deportation order notwithstanding the fact that the individual falls within one of the categories in s. 27(1) such that the deportation order was properly made under s. 32(2). It thus allows for clemency from deportation on compassionate grounds.

Section 82.1 sets out the conditions which may give rise to an investigation by the Review Committee and the procedure to be followed in such an investigation. In general terms the Solicitor-

General and the Minister of Employment and Immigration may make a report to the Review Committee in respect of a permanent resident who has launched an appeal pursuant to s. 72(1)(*b*) where they are of the opinion, based on security or criminal intelligence reports, that that person is likely to engage in organized crime, espionage, acts of violence that might endanger the lives or safety of persons in Canada, or subversion by force of any government. In the case of the respondent the joint report was based on s. 19(1)(*d*)(ii):

> (*d*) persons who there are reasonable grounds to believe will
>
> . . . . .
>
> (ii) engage in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable under any Act of Parliament by way of indictment;

When the Review Committee receives such a joint report, it must conduct an investigation into the grounds on which it is based and report to the Governor in Council. Where, after considering the report of the Review Committee, the Governor in Council is satisfied that the person does fall within one of the categories in s. 82.1(2) (the categories pursuant to which the Ministers can make a joint report to the Review Committee), he or she may direct the issuance of a certificate under s. 83. The effect of this certificate is to direct the Immigration Appeal Board to dismiss any appeal made pursuant to s. 72(1)(*b*). In other words, the individual's appeal will be limited to questions of fact or law or mixed fact or law.

Substantive ground

The respondent submits that the impugned legislation is inconsistent with s. 7 of the Charter because it creates a process whereby he is deprived, contrary to the principles of fundamental justice, of his right to appeal against deportation on the ground set out in s. 72(1)(*b*). The necessary implication of this position is that it is a principle of fundamental justice that a permanent resident who is the subject of deportation proceedings be afforded an appeal on all of the circumstances of the case. Otherwise it cannot be a violation of principles of fundamental justice for Parliament to limit the availability of such an appeal. In my view, s. 7 does not mandate the provision of a compassionate appeal from a decision which, as I have already concluded, comports with principles of fundamental justice.

Before a deportation order can be issued against a permanent resident, an inquiry must be conducted by an adjudicator to

determine whether the permanent resident does fall into one of the classes in s. 27(1). Section 72(1)(*a*) provides for an appeal from such a deportation order on any question of law or fact or mixed law and fact. The decision of the board is subject to appeal to the Federal Court of Appeal on a question of law if leave is granted by that court (s. 84 of the Act (now s. 83)). These rights of appeal offer ample protection to an individual from an erroneous decision by the adjudicator. The question is whether principles of fundamental justice require more than this. In order to answer this question it is necessary to consider the "nature, source, rationale and essential role" of the right to appeal from deportation orders under the Act and the evolution of that right: *Reference re Section 94(2) of the Motor Vehicle Act, supra*.

The *Immigration Act*, S.C. 1910, c. 27, did not provide any specific grounds of appeal. A person ordered deported could only resort to the Minister who, under s. 19, had the authority to overturn a deportation order on unspecified grounds. The *Immigration Act*, R.S.C. 1952, c. 325, provided for an immigration appeal board; however, appeals against deportation orders remained under the control of the Minister. The appeal board heard only those appeals directed to it by the Minister and the Minister retained the power to confirm or quash the appeal board's decision or substitute his decision as he deemed just and proper. The *White Paper on Immigration* (Ottawa: Queen's Printer, 1966), criticized the broad overriding power of the Minister with respect to appeals, and recommended that a reconstituted Immigration Appeal Board have authority to deal conclusively with appeals against deportation orders except in "security cases". In 1967, the *Immigration Appeal Board Act*, S.C. 1966-67, c. 90, established an independent Immigration Appeal Board. Section 11 provided for appeals on any questions of law or fact or mixed law and fact. Section 15, for the first time, conferred upon the board the power to stay or quash a deportation order made against a permanent resident on the basis of all the circumstances of the case. However, s. 21 provided that that new power was still subject to the discretion of the Minister and the Solicitor-General who could certify their opinion, based on security or criminal intelligence reports, that it would be contrary to the national interest to permit such relief. In *Prata v. Minister of Manpower and Immigration, supra*, Martland J. stated (at p. 386):

> The effect of s. 21 is to reserve to the Crown, notwithstanding the powers conferred upon the Board by the Act, the right, similar to the prerogative right which existed at common law, to determine that the continued presence

in Canada of an alien, subject to a deportation order, would not be conducive to the public good.

The *Immigration Appeal Board Act* was repealed by the *Immigration Act, 1976*, s. 128. Section 72 of the *Immigration Act, 1976* effectively consolidated ss. 11 and 15 of the former *Immigration Appeal Board Act* into one section setting out two separate grounds of appeal. However, in my view it did not change the nature of the decision that could be made by the board "having regard to all the circumstances of the case". That decision remained, as it had been under the 1967 Act, an exercise of discretion based on compassionate grounds. Section 83 of the *Immigration Act, 1976* continued to limit the availability of relief based on all the circumstances of the case. Such an appeal had to be dismissed if the Minister and the Solicitor-General certified their opinion that, based on security or criminal intelligence reports, it would be contrary to the national interest to permit it. Finally, in 1984 the Security Intelligence Review Committee was established by the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21. The Review Committee was assigned various functions under several Acts, including the *Immigration Act, 1976*. Section 83 was repealed and s. 82.1 and an amended version of s. 83 were substituted. Section 82.1 assigned to the Review Committee the task of investigating and reporting to the Governor in Council as to whether a permanent resident came within the classes of persons not entitled to an appeal on all the circumstances of the case. However, the decision as to whether to direct the issuance of a certificate under s. 83 is that of the Governor in Council.

It can thus be seen that there has never been a universally available right of appeal from a deportation order "on all the circumstances of the case". Such an appeal has historically been a purely discretionary matter. Although it has been added as a statutory ground of appeal, the executive has always retained the power to prevent an appeal from being allowed on that ground in cases involving serious security interests.

If any right of appeal from the deportation order in s. 32(2) is necessary in order to comply with principles of fundamental justice, a "true" appeal which enables the decision of the first instance to be questioned on factual and legal grounds clearly satisfies such a requirement. The absence of an appeal on wider grounds than those on which the initial decision was based does not violate s. 7.

Procedural ground

The respondent submitted that his s. 7 rights were violated as a result of the procedure followed by the Review Committee. This argument was the basis for the judgment of the majority in the Court of Appeal. I have already concluded that the respondent can assert no substantive right to an appeal on compassionate grounds. It is entirely within the discretion of Parliament whether an appeal on this basis is provided. Accordingly, Parliament could have simply provided that a certificate could issue without any hearing. Does the fact that Parliament has legislated beyond its constitutional requirement to provide that a hearing will be held enable the respondent to complain that the hearing does not comport with the dictates of fundamental justice? It could be argued that the provision of a hearing *ex gratia* does not expand Parliament's constitutional obligations. I need not resolve this issue in this case because I have concluded that, assuming that proceedings before the Review Committee were subject to the principles of fundamental justice, those principles were observed.

These proceedings took place within the framework of several legislative provisions and Security Intelligence Review Committee Rules. Section 82.1(3) of the *Immigration Act, 1976* provides that in an investigation by the Review Committee pursuant to a joint report by the Solicitor-General and the Minister of Employment and Immigration, ss. 43, 44 and 48 to 51 of the *Canadian Security Intelligence Service Act* ("*C.S.I.S. Act*") apply, subject to certain specific modifications and with such other modifications as the circumstances require. Section 48(2) of the *C.S.I.S. Act* provides that no one is entitled as of right to be present during, to have access to or to comment on representations made to the Review Committee by any other person. Pursuant to s. 39(1) of the Act, the Review Committee adopted the "Rules of Procedure of the Security Intelligence Review Committee in Relation to its Function Under Paragraph 38(*c*) of the Canadian Security Intelligence Service Act". Rules 45 to 51 set out the procedure relating to the making of representations under s. 48(2) of the *C.S.I.S. Act.* A party to an oral hearing may be represented by counsel, may call and examine witnesses and may make representations (Rule 48(1)). It is within the committee's discretion to exclude from the hearing one or more parties during the giving of evidence or making of representations by another party (Rule 48(3)). It is also within the committee's discretion, in balancing the requirements of preventing threats to the security of Canada and providing fairness to the person affected, to determine whether a party is

entitled to cross-examine witnesses called by other parties (Rule 48(2)) and whether, if a party has been excluded from portions of the hearing, the substance of the evidence given or the representations made by the other party should be disclosed to that party (Rule 48(4)).

The scope of principles of fundamental justice will vary with the context and the interests at stake. In *R. v. Lyons* (1987), 44 D.L.R. (4th) 193 at p. 237, 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, La Forest J., writing for the majority, stated:

> It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness: see, *e.g.*, the comments to this effect of Wilson J. in *Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 at pp. 463-5, [1985] 1 S.C.R. 177 at pp. 212-3, 58 N.R. 1. It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

Similarly, the rules of natural justice and the concept of procedural fairness, which may inform principles of fundamental justice in a particular context, are not fixed standards: see *Syndicat des Employés de Production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)* (1989), 62 D.L.R. (4th) 385 at p. 425, [1989] 2 S.C.R. 879, 11 C.H.R.R. D/1; *Knight v. Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 489 at p. 510, [1990] 1 S.C.R. 653, 43 Admin. L.R. 157.

In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161 at pp. 244-5, 55 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, [1990] 1 S.C.R. 425, La Forest J. explained that in assessing whether a procedure accords with fundamental justice, it may be necessary to balance competing interests of the state and the individual:

> What these practices have sought to achieve is a just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice: see *R. v. Lyons*, *supra*, at pp. 213 and 214 D.L.R., pp. 21 and 22 C.C.C.; *R. v. Beare*, *supra*, at pp. 493-5 D.L.R., pp. 70-2 C.C.C.; also my reasons in *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 at p. 439, [1988] 1 S.C.R. 670, [1988] 4 W.W.R. 481 (dissenting on another point); see also *R. v. Jones* (1986), 31 D.L.R. (4th) 569 at pp. 597-8, 28 C.C.C. (3d) 513 at p. 541, [1986] 2 S.C.R. 284, *per* La Forest J. (Dickson C.J.C. and Lamer J. concurring). The interests in the area with which we are here concerned involve particularly delicate balancing.

In the context of hearings conducted by the Review Committee pursuant to a joint report, an individual has an interest in a fair procedure since the committee's investigation may result in its

recommending to the Governor in Council that a s. 83 certificate issue, removing an appeal on compassionate grounds. However, the state also has a considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources. The need for confidentiality in national security cases was emphasized by Lord Denning M.R. in *R. v. Secretary of State for Home Department; Ex p. Hosenball*, [1977] 3 All E.R. 452 (C.A.) at p. 460:

> The information supplied to the Home Secretary by the Security Service is, and must be, highly confidential. The public interest in the security of the realm is so great that the sources of information must not be disclosed, nor should the nature of the information itself be disclosed, if there is any risk that it would lead to the sources being discovered. The reason is because, in this very secretive field, our enemies might try to eliminate the source of information.

On the general need to protect the confidentiality of police sources, particularly in the context of drug-related cases, see *R. v. Scott* (1990), 61 C.C.C. (3d) 300 at p. 314, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153. See also *Ross v. Kent Institution (Warden)* (1987), 34 C.C.C. (3d) 452 at pp. 457-61, 57 C.R. (3d) 79, 29 C.R.R. 125 (B.C.C.A.), in which that court held that it is not essential in order to comply with principles of fundamental justice that an inmate know the sources of information before the Parole Board as long as he is informed of the substance of that information.

The *C.S.I.S. Act* and Review Committee Rules recognize the competing individual and state interests and attempt to find a reasonable balance between them. The rules expressly direct that the committee's discretion be exercised with regard to this balancing of interests.

In this case the respondent was first provided with the "Statement of Circumstances giving rise to the making of a report by the Solicitor General of Canada and the Minister of Employment and Immigration to the Security Intelligence Review Committee". This document set out the nature of the information received by the Review Committee from the Ministers, including that the respondent had been involved in drug trafficking, and was involved in the murder of a named individual. Also prior to the Review Committee hearing, the respondent was provided with an extensive summary of surveillance of his activities (the "Chronology of Information") and a "Summary of Interpretation of Intercepted Private Communications [relating to the murder of Domenic Racco]". Although the first day of the hearing was conducted *in camera*, the respondent was provided with a summary of the evidence presented. In my view, these various documents gave the respond-

ent sufficient information to know the substance of the allegations against him, and to be able to respond. It is not necessary, in order to comply with fundamental justice in this context, that the respondent also be given details of the criminal intelligence investigation techniques or police sources used to acquire that information.

The respondent was also given the opportunity to respond, by calling his own witnesses or by requesting that he be allowed to cross-examine the R.C.M.P. witnesses who testified *in camera*. The chairman of the Review Committee clearly indicated an intention to allow such cross-examination (C.O.A. at p. 330):

> Certainly it would be my inclination that if the RCMP wish to call witnesses in support of any or all of the comments that they may make in support of the Statement of Circumstances, there would be the opportunity for the applicant's counsel to cross-examine.

The respondent chose not to exercise these options. Having regard to the information that was disclosed to the respondent, the procedural opportunities that were available to him, and the competing interests at play in this area, I conclude that the procedure followed by the Review Committee in this case did not violate principles of fundamental justice.

VI. *Conclusion*

I would therefore allow the appeal, dismiss the cross-appeal, both with costs, and answer the constitutional questions as follows:

Main appeal

1. (a) Do sections 82.1 and 83 of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now ss. 81 and 82 of the *Immigration Act*, R.S.C., 1985, c. I-2) infringe or deny the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Assuming without deciding that s. 7 applies, the answer is no.

(b) If the sections referred to above do infringe or deny the rights guaranteed by s. 7 of the *Charter*, are they justified by s. 1 of the *Charter*?

Answer: This question does not have to be answered.

2. (a) Does reliance upon the certificate authorized by s. 83 of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now s. 82 of the *Immigration Act*, R.S.C., 1985, c. I-2) filed in the respondent's case result in an infringement of his rights pursuant to s. 7 of the *Charter*, because the process followed by the Security Intelligence Review Committee did not meet the requirements of s. 7?

Answer: Assuming without deciding that s. 7 applies, the answer is no.

(b) If reliance upon the certificate does infringe or deny the right guaranteed by s. 7 of the *Charter*, is it justified by s. 1 of the *Charter*?

Answer: This question does not have to be answered.

Cross-appeal

1. (a) Do s. 27(1)(*d*)(ii) and s. 32(2) of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended by S.C. 1984, c. 21, s. 84 (now s. 27(1)(*d*)(ii) and s. 32(2) of the *Immigration Act*, R.S.C., 1985, c. I-2) infringe or deny the rights guaranteed by ss. 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* in that they require the deportation of persons convicted of an offence carrying a maximum punishment of five years or more, without reference to the circumstances of the offence or the offender;

Answer: With respect to s. 15, the answer is no. Assuming, without deciding, that either s. 7 or s. 12 apply, the answer is no.

(b) If the paragraph and subsection referred to above do infringe or deny the rights guaranteed by ss. 7, 12 and 15 of the *Charter*, are they justified by s. 1 of the *Charter*?

Answer: This question does not have to be answered.

Appeal allowed; cross-appeal dismissed.

Boxeur v. Smith et al.; Insurance Corp. of British Columbia et al., Third Parties

[Indexed as: Boxeur v. Smith]

*British Columbia Court of Appeal, Lambert, Cumming and Rowles JJ.A. February 26, 1992.**

Insurance — Automobile insurance — Interpretation — Obligation to defend — Policy benefits forfeited — Insurer not obliged to defend — Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204, s. 18(1)(c) — B.C. Reg. 447/83 (Insurance (Motor Vehicle) Act), s. 47.

Courts — Stare decisis — Court of Appeal — Court of Appeal bound by own previous decision.

By s. 74 of B.C. Reg. 447/83 (*Insurance (Motor Vehicle) Act*), the Insurance Corp. of British Columbia is obliged to defend any action for damages brought against an insured. By s. 18(1)(*c*) of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204, where an insured violates a term or condition of a plan, "all claims by or in respect of the applicant or the insured shall be rendered invalid, and his right and the right of a person claiming through or on behalf of or as a dependent of the applicant or the insured to benefits and insurance money shall be forfeited". The plaintiff brought an action against the defendant, who was insured under the terms of the Act, for damage to a motor cycle. The trial judge found that the defendant was liable to the plaintiff and in breach of the insurance policy. He held,

* Received March 26, 1992.

to append penalties to a valid provincial undertaking such as the regulation of the streets in a municipality. In the former case it is much easier to determine provincial validity because the reference to conduct is only in relation to the operation of an activity which properly falls within provincial competence. Thus the licensing program is part of a general provincial regulatory program. Consequently, the provincial legitimacy is found in s. 92(13) and/or (16). In the second category the problem is rendered more difficult by the fact that the provincial regulation reaches outside premises owned or controlled by a provincial licensee. In the circumstances, the Province again must find a valid provincial regulatory program and must confine the offences created in support of that programme to those which are reasonably necessary for that purpose.

The longer the penalty and the closer the terminology comes to describing conduct traditionally criminal, the more doubtful the validity of the provincial enactment. The exclusive right in Parliament to legislate with reference to criminal law and criminal procedure may not be eroded by provincial legislation disguised as that which is necessary to give effect to an otherwise valid provincial program.

[32] In my view, these words are particularly applicable to the situation in the present appeal. Here the Province has created offences which are not necessary to the support of the program for which they were created. Purely and simply, it is criminal legislation.

[33] The appeals are allowed and the convictions set aside.

Appeal allowed.

Ruby v. Solicitor General of Canada; Privacy Commissioner of Canada et al., Interveners

[Indexed as: Ruby v. Canada (Solicitor General); Ruby v. Royal Canadian Mounted Police]

Court File No. 28029

Supreme Court of Canada
McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

Heard: April 24, 2002
Judgment rendered: November 21, 2002

Civil procedure — Costs — Party and party — Entitlement — Statute directing court to award costs to unsuccessful applicant if application raised important new principle in relation to statute — Application raised such principle — Applicant awarded costs — Privacy Act, R.S.C. 1985, c. P-21, s. 52(2).

Constitutional law — Charter of Rights — Freedom of expression — Statute requiring in camera and ex parte submissions when dealing with information affecting national security and obtained from foreign sources — Provision infringed freedom of expression — Infringement not justified as regards in camera requirement, except for ex parte submissions — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Privacy Act, R.S.C. 1985, c. P-21, ss. 19, 21, 22(1)(b), 51(2)(a), (3).

Constitutional law — Charter of Rights — Right to life, liberty and security — Statute requiring in camera and ex parte submissions when dealing with information affecting national security and obtained from foreign sources — Assuming right to privacy triggers right to life, liberty and security, deprivation of right not contrary to principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Privacy Act, R.S.C. 1985, c. P-21, ss. 19, 21, 22(1)(b), 51(2)(a), (3).

The applicant requested and was refused access to personal information held in information banks maintained by the Canadian Security Intelligence Service ("CSIS"), the Royal Canadian Mounted Police ("RCMP"), and the Department of External Affairs ("DEA"). Having complained to the Privacy Commissioner, who reviewed the matter, the applicant made applications under the *Privacy Act*, R.S.C. 1985, c. P-21, for judicial review of the decisions to deny access. Among other grounds, he challenged the constitutional validity of s. 51(2)(*a*) and (3) on the ground that they infringed his right to freedom of the press and the security of his person, guaranteed, respectively, by ss. 2(*b*) and 7 of the *Canadian Charter of Rights and Freedoms*. Other sections of the Act raised on the applications were ss. 19, 21, and 22(1)(*b*).

Section 19 provides that the head of a government institution shall refuse to disclose personal information that was obtained in confidence from the government of a foreign state except with the consent of the foreign government. Section 21 provides that the head of a government institution may refuse to disclose personal information if disclosure could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or its allies, or the efforts of Canada to detecting, preventing, or suppressing subversive or hostile activities. Section 22(1)(*b*) provides that the head of a government institution may refuse to disclose personal information, the disclosure of which could reasonably be expected to be injurious to, *inter alia*, the conduct of lawful investigations. Section 51(2)(*a*) provides that an application for judicial review shall be heard *in camera*. Section 51(3) provides that the head of the government institution concerned shall, on request, be given the opportunity to make representations *ex parte*.

The judges of first instance dismissed the applications. One of them held that s. 51 did not infringe s. 7, but did infringe s. 2(*b*) of the Charter. However, she held that the infringement was justified by s. 1. The other held that s. 22(1)(*b*) applied to investigations in general. The Federal Court of Appeal allowed the appeals in part, holding, *inter alia*, that s. 22(1)(*b*) applies only to circumstances in which there is a reasonable expectation of harm to a current investigation or identifiable prospective investigation and that CSIS was not justified in claiming an exemption under that section.

The applicant appealed to the Supreme Court of Canada on the issue of the constitutional validity of s. 51(2)(*a*) and (3). The appeal concerned only the application to CSIS, since only CSIS named ss. 19 and 21 of the Act as exemptions from the duty to disclose and only those sections attracted s. 51(2)(*a*) and (3). CSIS had refused to confirm or deny the existence of information pertaining to the applicant in its database, as it was entitled to do by the Act. The respondent cross-appealed that part of the judgment of the Federal Court of Appeal on the s. 22(1)(*b*) issue. The applicant also sought costs of the appeal and of the earlier proceedings. Section 52(2) of the Act provides that if the court is of the opinion that an application for review has raised an important new principle, it shall order that costs be awarded to the applicant even if the applicant was not successful.

Held, the appeal should be allowed in part, the cross-appeal should be allowed, and costs should be awarded to the applicant.

(1) Section 51 requires a court to hear an application for judicial review, or an appeal therefrom, *in camera*. Thus, the applicant is not excluded from the hearing, but the public is. Further, in the course of the *in camera* hearing, the court must hear the government institution *ex parte* upon request. For that part of the hearing the applicant is also excluded.

It was unnecessary to decide whether a right to privacy, which includes a corollary right of access to personal information, triggers the application of s. 7 of the Charter. The focus of the applicant's constitutional challenge on this point was the mandatory *ex parte* and *in camera* provisions of s. 51. Assuming, without deciding, that the applicant suffered a deprivation of his liberty or security of his person, the deprivation was not contrary to the principles of fundamental justice.

While s. 51(3) is mandatory in nature, the applicant's proposed solution of giving the court a discretion to provide him with sufficient information in the form of judicial summaries to answer the government's case effectively would imperil confidentiality. A judicial summary would not provide any further detail without compromising the integrity of the information that s. 51 is designed to protect, and would, indeed, increase the risk of inadvertent disclosure of the information or its source. Moreover, s. 51(3) was not contrary to the principles of fundamental justice. Those principles are informed in part by the rules of natural justice and the concept of procedural fairness and vary with the context and the statutory framework. Further, it may be necessary to balance the competing interests of the state and the individual. In the context of a statutory scheme that permits the government to confirm or deny the existence of information, and that permits the court to conclude that the information was properly withheld and should not be disclosed, *ex parte* submissions by the government are necessary. Moreover, if the mandatory provisions of s. 51(3) were relaxed, the flow of information from foreign sources would be seriously affected. Since the circumstances in which a court will be required to hear and accept *ex parte* submissions are exceptional; since the applicant has the right to complain to the Privacy Commissioner, apply for judicial review, and appeal the reviewing court's decision; and since the courts have access to the information sought, the constitutional requirements of procedural fairness are met.

(2) The judge of first instance was correct in holding that the mandatory nature of s. 51(2)(*a*) and (3) infringe the applicant's right to freedom of the press and in holding that that freedom extends to the listening and reading public. However, she erred in holding that the *in camera* provision of s. 51(2)(*a*) was justified by s. 1 of the Charter. Section 51(2)(*a*) is rationally connected to the objective of ss. 19 and 21 of preserving Canada's supply of intelligence from foreign sources, and of protecting information injurious to national security. However, s. 51(2)(*a*) did more than minimally impair the applicant's rights. While a judicial practice had developed of requiring only those portions of the hearing in which the *ex parte* submissions are received to be *in camera*, that practice was not supported by s. 51(2)(*a*). Similarly, the Solicitor General's interpretation of s. 51(2)(*a*) that only those portions of the hearing that concerned the merits of the exemptions claimed by the government needed to be *in camera* was not supported by the section. There was no need to exclude the public from the hearing to prevent disclosure of confidential information, except for *ex parte* submissions, which must be held *in camera*. Consequently, s. 51(2)(*a*) should be read down so as to apply only to the *ex parte* submissions required by s. 51(3).

(3) The second judge of first instance was correct in holding that s. 22(1)(*b*) applies to investigations in general and that CSIS had established a reasonable expectation of probable injury to investigations in general.

(4) The court has a discretion to award costs to an unsuccessful party and, in light of s. 52(2) of the *Privacy Act*, it was appropriate to award the applicant his costs on the judicial review, his appeal to the Federal Court of Appeal, and to the Supreme Court of Canada, since the constitutional issues raised by the applicant were serious, important, and novel.

Cases referred to

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1995), 122 D.L.R. (4th) 1, [1995] 1 S.C.R. 315, 26 C.R.R. (2d) 202, 9 R.F.L. (4th) 157, 78 O.A.C. 1, 176 N.R. 161 *sub nom. Sheena B. (Re)*, 21 O.R. (3d) 479*n*, 52 A.C.W.S. (3d) 1226 — **refd to**

Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4th) 193, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777 — **refd to**

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 139 D.L.R. (4th) 385, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 2 C.R. (5th) 1, 39 C.R.R. (2d) 189, 182 N.B.R. (2d) 81, 203 N.R. 169, 66 A.C.W.S. (3d) 444, 32 W.C.B. (2d) 273 — **refd to**

Chiarelli v. Canada (Minister of Employment and Immigration) (1992), 90 D.L.R. (4th) 289, 72 C.C.C. (3d) 214, [1992] 1 S.C.R. 711, 2 Admin. L.R. (2d) 125, 8 C.R.R. (2d) 234, 16 Imm. L.R. (2d) 1, 135 N.R. 161, 32 A.C.W.S. (3d) 622 — **refd to**

Edmonton Journal v. Alberta (Attorney General) (1989), 64 D.L.R. (4th) 577, [1989] 2 S.C.R. 1326, 41 C.P.C. (2d) 109, 45 C.R.R. 1, [1990] 1 W.W.R. 577, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 102 N.R. 321, 18 A.C.W.S. (3d) 894 — **refd to**

Knight v. Indian Head School Division No. 19 (1990), 69 D.L.R. (4th) 489, [1990] 1 S.C.R. 653, 43 Admin. L.R. 157, 30 C.C.E.L. 237, 90 C.L.L.C. ¶14,010, [1990] 3 W.W.R. 289, 83 Sask. R. 81, 106 N.R. 17, 20 A.C.W.S. (3d) 315 — **refd to**

Lavigne v. Canada (Office of the Commissioner of Official Languages) (2002), 214 D.L.R. (4th) 1, 289 N.R. 282, 114 A.C.W.S. (3d) 365, 2000 SCC 53 — **refd to**

Manitoba (Attorney General) v. National Energy Board (1974), 48 D.L.R. (3d) 73, [1974] 2 F.C. 502 — **refd to**

R. v. Beare (1988), 55 D.L.R. (4th) 481, 45 C.C.C. (3d) 57, [1988] 2 S.C.R. 387, 66 C.R. (3d) 97, 36 C.R.R. 90 *sub nom. R. v. Beare; R. v. Higgins*, [1989] 1 W.W.R. 97, 71 Sask. R. 1, 88 N.R. 205, 8 W.C.B. (2d) 247 — **refd to**

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R. v. McClure (2001), 195 D.L.R. (4th) 513, 151 C.C.C. (3d) 321, [2001] 1 S.C.R. 445, 40 C.R. (5th) 1, 80 C.R.R. (2d) 217, 142 O.A.C. 201, 266 N.R. 275, 48 W.C.B. (2d) 514, 2001 SCC 14 — **refd to**

R. v. O'Connor (1995), 130 D.L.R. (4th) 235, 103 C.C.C. (3d) 1, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 33 C.R.R. (2d) 1, [1996] 2 W.W.R. 153, 112 W.A.C. 1, 191 N.R. 1, 29 W.C.B. (2d) 152 — **refd to**

Royal Bank of Canada v. W. Got & Associates Electric Ltd., [1994] 5 W.W.R. 337, 17 Alta. L.R. (3d) 23, 150 A.R. 93, 45 A.C.W.S. (3d) 791 [supplementary reasons 18 Alta. L.R. (3d) 140, 154 A.R. 274, 47 A.C.W.S. (3d) 61]; affd 47 C.B.R. (3d) 1, [1997] 6 W.W.R. 715, 141 W.A.C. 241, 196 A.R. 241, 70 A.C.W.S. (3d) 580; affd 178 D.L.R. (4th) 385, [1999] 3 S.C.R. 408, 15 P.P.S.A.C. (2d) 61, [2000] 1 W.W.R. 1, 213 W.A.C. 1, 73 Alta. L.R. (3d) 1, 250 A.R. 1, 247 N.R. 1, 91 A.C.W.S. (3d) 879 — **refd to**

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Ternette v. Canada (Solicitor General) (1991), 86 D.L.R. (4th) 281, 39 C.P.R. (3d) 371, [1992] 2 F.C. 75, 12 Admin. L.R. (2d) 235, 49 F.T.R. 161, 31 A.C.W.S. (3d) 181 — **consd**

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s. 16(1)(*c*)

Canadian Charter of Rights and Freedoms
ss. 1, 2(*b*), 7, 8

Privacy Act, R.S.C. 1985, c. P-21
s. 11
s. 12(1) [rep. & sub. 2001, c. 27, s. 269]
s. 16(1)
s. 16(2)
ss. 19-23
s. 24 [am. 1994, c. 26, s. 56]
ss. 25-28
s. 29 [am. 1992, c. 21, s. 37]
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s. 41
ss. 45-47
s. 49
s. 51
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APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, 187 D.L.R. (4th) 675, 6 C.P.R. (4th) 289, [2000] 3 F.C. 589, 256 N.R. 278, 184 F.T.R. 159*n*, 97 A.C.W.S. (3d) 1059, [2000] F.C.J. No. 779 (QL), allowing in part appeals from judgments of Simpson J., 22 C.R.R. (2d) 324, 80 F.T.R. 81, 48 A.C.W.S. (3d) 535, [1994] F.C.J. No. 789 (QL), and 136 D.L.R. (4th) 74, [1996] 3 F.C. 134, 113 F.T.R. 13, 64 A.C.W.S. (3d) 5, [1996] F.C.J. No. 748 (QL), and MacKay J., [1998] 2 F.C. 351, 11 Admin. L.R. (3d) 132, 140 F.T.R. 42, 76 A.C.W.S. (3d) 879, [1997] F.C.J. No. 1750 (QL), dismissing applications for judicial review of decisions refusing the applicant access to personal information contained in government data banks.

Marlys A. Edwardh and *Breese Davies*, for appellant.

Barbara A. McIsaac, Q.C., *Gregorios S. Tzemenakis* and *Christopher Rupar*, for respondent.

Dougald E. Brown and *Steven J. Welchner*, for intervener, Privacy Commissioner of Canada.

Robert Lavigne, intervener, on his own behalf.

The judgment of the court was delivered by

[1] ARBOUR J.:—This appeal involves a constitutional challenge to a procedural section of the *Privacy Act*, R.S.C. 1985, c. P-21, that provides for mandatory *in camera* and *ex parte* proceedings where the government denies an applicant's request for access to personal information on the grounds of national security or the maintenance of foreign confidences. Specifically, the issue is whether ss. 51(2)(*a*) and 51(3) of the Act infringe or deny the appellant's rights and freedoms as guaranteed in ss. 2(*b*) and 7 of the *Canadian Charter of Rights and Freedoms*.

[2] The constitutional challenge in this case is in fact very narrow. For the purposes of this appeal, the appellant does not challenge the right of a government institution to refuse to confirm or deny the existence of personal information. Nor does the appellant challenge the right of a government institution to refuse to disclose information on the basis of the exemptions enumerated in the Act. The appellant only attacks the procedural requirement under the Act that in certain narrow circumstances it is mandatory for a reviewing court to hold the entire hearing of a judicial review application *in camera* and to accept *ex parte* submissions at the request of the government institution refusing disclosure. To be clear, the appellant

only challenges the *mandatory* nature of this provision and not the discretionary regime that applies for all other exemptions allowing a reviewing court to order a hearing *in camera* and accept *ex parte* submissions.

[3] For reasons that I will expand upon below, I conclude that it is constitutional, within this statutory scheme, for the *Privacy Act* to require a reviewing court to accept submissions *ex parte* from the government institution refusing disclosure. However, the *in camera* requirement found in s. 51(2)(*a*) is overly broad. The provision must be read down to require only the *ex parte* submissions to be held *in camera*, with the reviewing court's retaining the discretion to order the hearing or portions thereof *in camera*.

I. LEGISLATIVE SCHEME

[4] An understanding of the legislative framework of the *Privacy Act* is essential in order to understand this case. I have reproduced all the relevant provisions of the Act as an Appendix to these reasons. I will cite them as necessary in the course of my analysis.

[5] First, a brief overview of the Act. Persons have a right to access personal information held about them by a government institution by virtue of s. 12 of the Act. A government institution may refuse to disclose personal information if able to claim one of the exemptions contained in ss. 19 through 28, inclusive. Section 19 is a mandatory exemption. A government institution *shall* refuse to disclose personal information requested under s. 12(1) that was obtained in confidence from the government of a foreign state or an international organization, unless that government or organization agrees to the disclosure or makes the information public. This exemption is commonly referred to as the "foreign confidences" exemption. Section 21 is a discretionary exemption. A government institution may refuse to disclose any personal information requested under s. 12(1) if such disclosure can reasonably be expected to be injurious to "the conduct of international affairs, the defence of Canada or any state allied or associated with Canada . . . or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities". This exemption is commonly referred to as the "national security" exemption.

[6] The Act provides for two levels of independent review when a government institution refuses a request for access to personal

information: the Privacy Commissioner and the Federal Court of Canada. The Privacy Commissioner has broad powers to carry out investigations. Upon completing an investigation, if the Privacy Commissioner finds that the complaint is well founded, the Commissioner may recommend that the information be disclosed. The Commissioner does not, however, have the power to compel disclosure. Where the Privacy Commissioner has completed an investigation and a government institution continues to refuse to disclose the personal information, the individual who has been refused access may apply to the Federal Court for judicial review of the refusal. Pursuant to s. 46(1), the reviewing judge must take every reasonable precaution to avoid the disclosure of information that, in the end, may be found to be appropriately withheld. Accordingly, s. 46(1) gives the reviewing judge the discretion to receive representations *ex parte* and to conduct hearings *in camera*.

[7] Section 51 changes the discretionary regime of s. 46 to a mandatory one in circumstances where a government institution has claimed an exemption under s. 19(1)(*a*) or (*b*) or s. 21 (the "foreign confidences" and the "national security" exemptions). When an exemption has been claimed under these provisions, s. 51(2)(*a*) ***mandates*** that the court hear the judicial review application or an appeal therefrom *in camera*. Section 51(3) provides that on the request of the head of the government institution that has refused access to material on the basis of one of these provisions, the court must receive submissions from the government institution on an *ex parte* basis.

II. FACTS

[8] The analysis and outcome of this case does not turn on the facts. However, the facts are useful in order to understand the history of this particular litigation and also as an example of access to information litigation in general.

[9] On March 22, 1988 the appellant, Clayton Ruby, requested access to personal information held in personal information bank SIS/P-PU-010 ("Bank 010") maintained by the Canadian Security Intelligence Service ("CSIS"). The request was made pursuant to s. 12(1)(*a*) of the Act. The request to CSIS was only one of a number of access to information requests made by the appellant to the Royal Canadian Mounted Police ("RCMP") and the Department of External Affairs. Only CSIS named ss. 19 and 21 as exemptions

and therefore the constitutional challenge to s. 51 involves only the request to CSIS. In the original application the respondent filed an affidavit of Robert Ian MacEwan, Director General, Counter Terrorism, CSIS. In order to describe the information contained in Bank 010, the affidavit reproduced the Personal Information Index published in 1987 in accordance with s. 11 of the Act:

> This bank contains information on individuals whose activities may, on reasonable grounds, be suspected of directly relating to espionage or sabotage that is against or is detrimental to the interests of Canada; or, activities directed toward or in support of such activity; foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada, and are clandestine or deceptive, or involve a threat to any person; activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state; and, activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada. **This bank may also contain personal information that, in relation to the defence of Canada or to the conduct of the international affairs of Canada,** pertains to the capabilities, intention; or activities of any foreign state or group of foreign states; of any person other than a Canadian citizen or permanent resident; or, any corporation except one incorporated pursuant to the law of Canada or of any province. Information is also held in respect to CSIS providing advice relating to the *Citizenship* or *Immigration Acts*.

[10] Although the appellant's access request was with respect to personal information contained in Bank 010, CSIS took the liberty of also searching personal information bank SIS/P-PU-015 ("Bank 015"). Bank 015 is described in the Personal Information Index published in 1987 as containing information similar in nature to that in Bank 010 but of a less current and less sensitive nature.

[11] CSIS responded to the appellant's request by letter dated August 12, 1988. With respect to Bank 010 CSIS would neither confirm nor deny the existence of information but if such information did exist CSIS refused to disclose the information claiming the exemptions in ss. 19, 21, 22, and 26 of the Act. With respect to information in Bank 015, CSIS disclosed 41 pages, portions of which were excised and claimed as exempt under ss. 21 and 26. CSIS disclosed a further 71 pages from a different source, or portions therefrom, claiming exemptions under s. 21 of the Act for the excised portions.

[12] The appellant filed a complaint with the federal Privacy Commissioner pursuant to s. 29 of the Act regarding the refusal of CSIS to disclose information in Banks 010 and 015. Subsequent to

the complaint the appellant was informed by CSIS that two more documents containing personal information about him existed in Bank 015 but were being claimed as exempt pursuant to ss. 19, 21, 22(1)(*a*)(iii), 22(1)(*b*) and 26. CSIS later amended the exemption to s. 22(1)(*a*)(ii) as opposed to s. 22(1)(*a*)(iii). As a result of the investigations by the Privacy Commissioner, CSIS disclosed an additional four pages, portions of which were excised claiming exemptions under ss. 21 and 26 of the Act.

[13] The Acting Privacy Commissioner conducted an investigation and concluded that CSIS's refusal to neither confirm or deny the existence of information in Bank 010 was within the requirements of s. 16(2) of the Act and thus the complaint in regard to this refusal was not well founded. In regards to the exemptions claimed in respect of information held in Bank 015, the Privacy Commissioner concluded that, with the exception of two documents, the undisclosed material was properly exempted under the Act. The Privacy Commissioner asked the Solicitor General to disclose two documents but the request was refused. The Commissioner informed the appellant that this was the first case in which a Minister had refused to accept a recommendation that information be disclosed. The documents were subsequently disclosed, with portions excised, after the judicial review proceeding was initiated.

[14] Three years after the original access request, the appellant filed an application in the Federal Court, Trial Division under s. 41 of the Act for a review of CSIS's refusal to disclose the information. Section 41 provides that where a person has requested access to information, has been denied, and has filed a complaint with the Privacy Commissioner, he or she may then apply to the Federal Court for a judicial review of the refusal.

[15] CSIS released additional documents to the appellant in July 1992. CSIS disclosed 211 pages, portions of which were excised claiming exemptions under ss. 19, 21, 22(1)(*a*), 22(1)(*b*) and 26 of the Act. CSIS maintains its position of non-disclosure with respect to all documents contained in Bank 010 and the remainder of documents in Bank 015, including the excised portions therefrom, based on disclosure exemptions in ss. 19, 21, 22 and 26 of the Act.

[16] Prior to the commencement of the judicial review hearing, the appellant filed notice of intent to challenge the s. 51 mandatory procedure provision under ss. 7, 8 and 2(*b*) of the *Charter*.

[17] In the application, CSIS submitted a secret affidavit of an officer of CSIS, filed on order of the court. The affidavit informed the court whether personal information about the appellant existed in Bank 010 and if it did exist, the documents were provided with an explanation of the claimed exemptions for examination by the court. The undisclosed information that was contained in Bank 015 was also provided for examination by the court with an explanation of the exemption claimed.

[18] Both the Trial Division and appellate level of the Federal Court ruled that s. 51(2)(*a*) and (3) violated s. 2(*b*) of the *Charter* but that they were saved by s. 1. Both levels of the Federal Court also found that the mandatory procedure in s. 51 did not violate s. 7, however they differed with respect to their characterizations of a right to privacy under s. 7.

[19] The appellant appeals to this Court on the issues as to whether s. 7 of the *Charter* is engaged by s. 51(3), whether the violation of s. 2(*b*) is justifiable under s. 1 and costs. The Solicitor General cross-appeals on an issue of interpretation of s. 22(1)(*b*) of the Act and whether "injury" contemplated in that section is restricted to injury to current ongoing or identifiable prospective investigations.

III. JUDGMENTS BELOW

[20] The constitutional validity of s. 51 and the merits of the exemptions claimed by CSIS were determined separately in the Federal Court, Trial Division. The Court of Appeal consolidated the appeals on the constitutional question and the merits of the exemptions.

A. *Federal Court, Trial Division* (1994), 80 F.T.R. 81, and [1996] 3 F.C. 134, 136 D.L.R. (4th) 74

[21] Simpson J. ruled in the preliminary proceeding on the constitutional validity of s. 51. She held that any privacy rights protected by the *Charter* were not engaged by s. 51. She did, however, find that s. 51 was contrary to s. 2(*b*) of the *Charter* but that such violation was saved by s.1.

B. *Federal Court of Appeal*, [2000] 3 F.C. 589, 187 D.L.R. (4th) 675, 6 C.P.R. (4th) 289

[22] The Court of Appeal held that the mandatory *in camera* and *ex parte* provisions did not engage the liberty interest enshrined in s. 7. The court agreed with the decision of Simpson J. that the provisions are procedural in nature and do not interfere with the right of

access granted by the *Privacy Act*. The Solicitor General did not appeal Simpson J.'s finding that the mandatory provisions in s. 51 violate s. 2(*b*). The Court of Appeal held that the provisions were saved by s. 1.

IV. CONSTITUTIONAL QUESTIONS

[23] The following constitutional questions were stated by Order of this Court on June 21, 2001:

1. Do ss. 51(2)(*a*) and 51(3) of the *Privacy Act*, R.S.C. 1985, c. P-21, as amended, infringe or deny the appellant's rights or freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to Question 1 is in the affirmative, are ss. 51(2)(*a*) and 51(3) of the *Privacy Act* reasonable limits, prescribed by law, that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Does s. 51(3) of the *Privacy Act* infringe or deny the appellant's rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?
4. If the answer to Question 3 is in the affirmative, is s. 51(3) of the *Privacy Act* a reasonable limit, prescribed by law, that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

V. ANALYSIS

[24] It is important to clarify at the outset the meaning and effect of the mandatory *in camera* and *ex parte* provisions. Section 51 reads:

> 51(1) Any application under section 41 or 42 relating to personal information that the head of a government institution has refused to disclose by reason of paragraph 19(1)(*a*) or (*b*) or section 21 . . . shall be heard and determined by the Associate Chief Justice of the Federal Court or by such other judge of the Court as the Associate Chief Justice may designate to hear the applications.
>
> (2) An application referred to in subsection (1) or an appeal brought in respect of such application shall
>
> (*a*) be heard *in camera*; and
>
> (*b*) on the request of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.
>
> (3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

Section 51 requires a court, in an application for judicial review brought under s. 41 of the Act, to hear the application or any appeal

therefrom *in camera*. Simpson J., in her s. 1 analysis, noted that there was a judicial practice of reading down s. 51 as requiring only those portions of the hearing in which the *ex parte* submissions are received to be *in camera*. I will discuss this practice later in my reasons. Suffice it to say, at this point, however, that such an interpretation cannot be reasonably supported on a plain reading of the Act. The provision is clear that the entire hearing and any appeal therefrom, are to be held *in camera*.

[25] *Ex parte*, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party: *Manitoba (Attorney General) v. National Energy Board*, [1974] 2 F.C. 502, 48 D.L.R. (3d) 73 (T.D.). The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given. For instance, temporary injunctions are often issued *ex parte* in order to preserve the *status quo* for a short period of time before both parties can be heard (to prevent the demolition of a building, for example).

[26] *Ex parte* proceedings need not be held *in camera*. Indeed, *ex parte* submissions are often made in open court (in interlocutory matters, for example). In fact, an order will still be considered *ex parte* where the other party happens to be present at the hearing but does not make submissions (for instance, because of insufficient notice): *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1994] 5 W.W.R. 337 (Alta. Q.B.), at para. 10; affirmed [1997] 6 W.W.R. 715 (Alta. C.A.); affirmed (without reference to this point) [1999] 3 S.C.R. 408, 178 D.L.R. (4th) 385. On the other hand, other *ex parte* proceedings are, by necessity, not held in public. An application for a wiretap authorization, for instance, must be made both *ex parte* and *in camera*.

[27] In all cases where a party is before the court on an *ex parte* basis, the party is under a duty of utmost good faith in the representations that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld: *Royal Bank*, *supra*, at para. 11. Virtually all codes of professional conduct impose such an ethical obligation on lawyers. See for example the *Alberta Code of Professional Conduct*, c. 10, r. 8.

[28] Section 51 of the *Privacy Act* contemplates the following: where a "foreign confidence" or "national security" exemption is claimed by a government institution, the hearing must be held *in camera* (s. 51(2)(*a*)). This means that the hearing is not open to the public but the applicant is not excluded and may participate. In the course of that *in camera* hearing, the government institution may request that the applicant be excluded and, in such a case, the court must hear the government *ex parte* (s. 51(3)) (and, of course, still *in camera*). Therefore it is only through the operation of ss. 51(2)(*a*) and 51(3) together that the appellant is excluded from the proceeding.

[29] Properly understood, the constitutional challenge on the basis of s. 7 relates essentially to the appellant's exclusion from the hearing as a result of the operation of ss. 51(2)(*a*) and 51(3) together, resulting in portions of the government's submissions being *ex parte* and *in camera* and therefore unavailable to the appellant. It is the exclusion of the appellant from portions of the government's submissions that is alleged to be contrary to the principles of fundamental justice. As for the s. 2(*b*) challenge, it relates to the statutory requirement that the entire hearing be *in camera*, inclusive of the *ex parte* submissions. It is the mandatory exclusion of the public and the media, (of which the appellant is a member) from the proceedings that the appellant alleges violates s. 2(*b*) of the *Charter*.

A. Section 7

[30] In addition to his claim under s. 7, the appellant also argued a violation of s. 8 of the *Charter*. The arguments presented under s. 8 are entirely subsumed under s. 7 and need not be addressed independently.

[31] The appellant argues that the right to security of the person protected by s. 7 of the *Charter* protects the right to privacy in a biographical core of information to which an individual would wish to control access. This biographical core of information includes information which tends to reveal intimate details of lifestyle and individual personal or political choices. This right to privacy is said to include a concomitant right of access to personal information in the hands of government in order that an individual may know what information the government possesses. This, in turn, will ensure that government action in the collection of personal information can be scrutinized and inaccuracies in the information collected may be corrected. Any limit on this right to access must accord with the principles of fundamental justice. Following this argument, the appellant submits that the procedural provisions in s. 51 directly affect an individual's ability to "control such information in the hands of the state" and for that reason the procedural unfairness created by s. 51 violates s. 7 of the *Charter*.

[32] The Court of Appeal, citing *R. v. Dyment*, [1988] 2 S.C.R. 417, 55 D.L.R. (4th) 503, *R. v. Beare*, [1988] 2 S.C.R. 387, 55 D.L.R. (4th) 481, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1, and *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235, observed that there is an emerging view that the liberty interest in s. 7 of the *Charter* protects an individual's right to privacy. They accepted the appellant's view that in order for the right to informational privacy to have any substantive meaning it must be concerned both with the acquisition and the subsequent use of personal information. Recognizing that one has a legitimate interest in ensuring that information has been properly collected and is being used for the proper purpose, the Court of Appeal held that the right to privacy includes the ability to control the dissemination of personal information obtained by the government. To this end the court stated (at para. 169):

> In a case such as this where an individual may not be fully aware of the information collected and retained by the government, the ability to control the dissemination of personal information is dependent on a corollary right of access, if only to verify the information's accuracy. In short, a reasonable expectation of access is a corollary to the reasonable expectation of privacy.

[33] In my view, it is unnecessary to the disposition of this case to decide whether a right to privacy comprising a corollary right of access to personal information triggers the application of s. 7 of the *Charter*. Assuming, for the purposes of this analysis, that the appellant has suffered a deprivation of his liberty or security of the person interest, that deprivation is not contrary to the principles of fundamental justice. In order to determine whether an alleged deprivation of the right to life, liberty and security of the person is or is not in accordance with the principles of fundamental justice, it is necessary to appreciate the exact nature of the deprivation. Here, without deciding if there is a deprivation of a liberty or security interest, we can take the alleged deprivation to be as stated by the appellant: he claims that he has a right to access personal information

already in the hands of government in order to correct inaccurate information and ensure that the information was collected lawfully. He then asserts that this component of his liberty and security interest is infringed by the mandatory secrecy of some of the government's submissions.

[34] The appellant stresses that it is the mandatory nature of s. 51(3) that does not comply with the principles of fundamental justice. Because the provisions are mandatory, the court does not have the discretion to control what information should be provided to an applicant in order to enable him or her to challenge effectively the government's refusal to disclose information and the legitimacy of the exemption claimed. The appellant submits that a provision permitting *ex parte* and *in camera* proceedings must contain a judicial discretion to provide the applicant with sufficient information in order to answer the government's case effectively. This could be accomplished, the appellant submits, through the use of judicial summaries similar to those that are used in wiretap proceedings.

[35] I agree with the view expressed by the Court of Appeal that there is a disharmony between the appellant's proposed solution of judicial summaries and the alleged *Charter* violation brought about by the mandatory *ex parte* submissions at the request of a government institution. Section 46 of the Act provides a court with the authority to receive representations *ex parte* and conduct hearings *in camera* in order to guard against the inadvertent disclosure of information the government institution may have legitimately refused to confirm exists, as well as information that may be found to be properly exempted:

> 46(1) In any proceedings before the Court arising from an application under section 41, 42 or 43, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of
>
> (*a*) any information or other material that the head of a government institution would be authorized to refuse to disclose if it were requested under subsection 12(1) or contained in a record requested under the *Access to Information Act*; or
>
> (*b*) any information as to whether personal information exists where the head of a government institution, in refusing to disclose the personal information under this Act, does not indicate whether it exists.
>
> (2) The Court may disclose to the appropriate authority information relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in the opinion of the Court there is evidence thereof.

When a court exercises its discretion under s. 46 to receive evidence *ex parte*, either through a confidential affidavit or otherwise, there is no obligation to provide the applicant with a judicial summary. The *Privacy Act* does not impose an obligation on a court to prepare a judicial summary of evidence in any circumstance. The appellant has not challenged the discretionary power of a court to accept *ex parte* submissions under s. 46. The alternative to the mandatory *in camera* and *ex parte* provisions in s. 51 is therefore the discretion conferred on the court under s. 46 to order proceedings *in camera* or accept submissions *ex parte*.

[36] In any event, I fail to see how a judicial summary of the evidence would assist the appellant. Where the institution body has refused to confirm or deny the existence of information a judicial summary is simply inappropriate. Where the existence of information is known to the appellant, the use of judicial summaries would not appreciably increase the amount of information already available to the appellant through the public affidavits. The public affidavits outline the purpose of the exemption, its importance and the risk associated with disclosure. The secret affidavit and the *ex parte* submissions directly involve the information exempted, if any exists. I accept the respondent's claim that a judicial summary could not provide any further detail without compromising the very integrity of the information.

[37] Furthermore, the use of judicial summaries would increase the risk of inadvertent disclosure of the information or its source. Parliament has seen fit, in those cases involving national security or foreign confidences, to provide for the maximum protection against disclosure. For a court to embark upon preparing summaries of confidential information would imperil confidentiality without adding much to the transparency requested by the appellant.

[38] It remains to determine whether the requirement in s. 51(3) that a court accept *ex parte* submissions on request of the government institution refusing to disclose information is contrary to the principles of fundamental justice. As I have already noted, the circumstances in which a court will accept *ex parte* submissions are exceptional. The circumstances in which a court will be obliged to hear *ex parte* submissions at the request of one party are even more

exceptional. The question is whether, in the context of this case, such a provision is consistent with the principles of fundamental justice. I believe that it is.

[39] The principles of fundamental justice are informed in part by the rules of natural justice and the concept of procedural fairness. What is fair in a particular case will depend on the context of the case: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 682, 69 D.L.R. (4th) 489; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at p. 743, 90 D.L.R. (4th) 289. As stated by La Forest J. for the majority in *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 361, 44 D.L.R. (4th) 193, and quoted with approval in *Chiarelli*, *supra*, at p. 743:

> It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness (see, e.g., the comments to this effect of Wilson J. in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at pp. 212-13). It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

In assessing whether a procedure accords with the principles of fundamental justice, it may be necessary to balance the competing interests of the state and individual: *Chiarelli*, *supra*, at p. 744, citing *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at p. 539, 67 D.L.R. (4th) 161, 29 C.P.R. (3d) 97. It is also necessary to consider the statutory framework within which natural justice is to operate. The statutory scheme may necessarily imply a limit on disclosure. "The extent of the disclosure required by natural justice may have to be weighed against the prejudice to the scheme of the Act which disclosure may involve": W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000) at p. 509. See also *Baker*, *supra*, at para. 24.

[40] As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position: see generally Wade and Forsyth, *supra*, at p. 506; S.A. de Smith, J. Jowell and H. Woolf, *Judicial Review of Administrative Action* (5th ed. 1995) at p. 441; D.P. Jones and A.S. de Villars, *Principles of Administrative Law* (3rd ed. 1999) at p. 261. The exclusion of the appellant from portions of the government's submissions is an exceptional departure from this general rule. The appellant operates in an informational deficit when trying to challenge the legitimacy of the exemptions claimed by the government. However, the general rule does tolerate certain exceptions. As indicated earlier, some situations require a measure of secrecy, such as wiretap and search warrant applications. In such circumstances, fairness is met through other procedural safeguards such as subsequent disclosure, judicial review and rights of appeal. In other cases, for instance where a privilege is successfully asserted, the content of the disputed information may never be revealed (see *R. v. Brown*, 2002 SCC 32 [now reported 210 D.L.R. (4th) 341]; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, 195 D.L.R. (4th) 513).

[41] The context of this case is therefore critical. As I indicated earlier, the constitutional challenge is very narrow. The s. 7 challenge relates only to the lack of discretion of the court to decide whether a government institution which refuses to disclose information should be allowed to make *ex parte* submissions. Section 51(3) requires a court to hear submissions *ex parte* at the request of a government institution. The appellant is not challenging the right of a government institution, when faced with an access to information request under s. 12 of the Act, to refuse to disclose certain information on the basis of the exemptions enumerated in the Act. The appellant also does not challenge the right of the government under s. 16(2) to refuse to confirm or deny the existence of personal information when claiming an exemption. Within the context of a valid statutory scheme that permits the government to refuse to confirm or deny the existence of information (we must assume that it is valid since it is not challenged) and where the judicial review may conclude that the information was properly withheld and must therefore not be disclosed, it necessarily follows that a government institution must be able to make submissions *ex parte*. Accepting that it is appropriate for the government to refuse to disclose information when there is a legitimate exemption and accepting that it is not inappropriate for the government, when claiming an exemption, to refuse to confirm or deny the existence of information, it can only follow that the government must have the capacity to proceed *ex parte*.

[42] For all the exemptions in the Act other than s. 19(1)(*a*) or (*b*) or s. 21 the government's ability to make *ex parte* submissions is subject to the discretion of the reviewing court. Through the mandatory *ex parte* provision in s. 51(3), Parliament has seen fit to assert the special sensitive nature of the information involved and has provided added protection and assurance against inadvertent disclosure. Even though the adversarial challenge to the claim of exemptions in such cases is limited, recourse to the Privacy Commissioner and to two levels of court who will have access to the information sought and to the evidence supporting the claimed exemption is sufficient, in my view, to meet the constitutional requirements of procedural fairness in this context.

[43] The purpose of the exemption contained in s. 19(1)(*a*) and (*b*) is to prevent an inadvertent disclosure of information obtained in confidence from foreign governments or institutions. This provision is directly aimed at the state's interest in preserving Canada's present supply of intelligence information received from foreign sources. Section 21 is aimed at Canada's national security interests. The appellant acknowledges that the state's legitimate interest in protection of information which, if released, would significantly injure national security is a pressing and substantial concern. This Court recognized the interest of the state in protecting national security and the need for confidentiality in national security matters in *Chiarelli*, *supra*, at p. 745.

[44] The mandatory *ex parte in camera* provision is designed to avoid the perception by Canada's allies and intelligence sources that an inadvertent disclosure of information might occur, which would in turn jeopardize the level of access to information that foreign sources would be willing to provide. In her reasons, Simpson J. reviewed five affidavits filed by the respondent from CSIS, the RCMP, the Department of National Defence ("DND"), and two from the Department of External Affairs ("DEA"). These affidavits emphasize that Canada is a net importer of information and the information received is necessary for the security and defence of Canada and its allies. The affidavits further emphasize that the information providers are aware of Canada's access to information legislation. If the mandatory provisions were relaxed, all predict that this would negatively affect the flow and quality of such information. This extract from one of the affidavits from the DEA is typical:

> Canada is not a great power. It does not have the information gathering and assessment capabilities of, for instance, the United States, the United Kingdom or France. Canada does not have the same quantity or quality of information to offer in exchange for the information received from the countries which are our most important sources. If the confidence of these partners in our ability to protect information is diminished, the fact that we are a relatively less important source of information increases our vulnerability to having our access to sensitive information cut off.
>
> Without these extra procedural protections [the mandatory *in camera* nature of the hearing and the right to make *ex parte* representations provisions in section 51] the substantive protections in sections 19 and 21 are greatly diminished in value. The confidence in foreign states would be diminished because, while the Government of Canada could give assurances that a request for such information could and would not be refused under Canadian law, it could not give assurances that it would necessarily be protected from inadvertent disclosure during a hearing.

[45] In her reasons Simpson J. provided a brief overview of the affidavit evidence. The affidavit from CSIS stated that sensitive information is received on the understanding that neither the source nor the information will be disclosed unless the provider consents. The affidavit from the RCMP representative discussed the agreements, as for example with Interpol, which operate on the basis that information will be kept confidential. The DND affidavit predicts that increasing the number of persons with access to information during the legal review process would "almost certainly restrict, if not completely eliminate" the possibility of Canada receiving information in the future. One of the affidavits from DEA observed that international convention and practice dictates that such information is received in confidence unless there is an express agreement to the contrary. The other DEA affidavit noted first that confidentiality is necessary to protect information critical to diplomacy, intelligence, and security. This affidavit acknowledged that whether the predicted drying up of information would actually occur if the mandatory protections were loosened would be hard to know since "you don't know what you are not getting", but he stressed his belief that under a different calculation of risks and benefits, foreign sources would likely screen information passed to Canada for fear that it would be compromised.

[46] In the *Privacy Act* Parliament has recognized and attempted to balance the interests of the appellant in accessing personal information held by government institutions with the significant and

legitimate interest of the state in national security and in maintaining foreign confidences. Only in the exceptional and limited circumstance where a government institution is claiming an exemption on the basis that the information involves national security and foreign confidences will the procedural regime in s. 51 requiring *ex parte in camera* proceedings be activated. The principles of fundamental justice do not require that the applicant have the most favourable proceedings. They do require that the proceedings be fair: *Lyons*, *supra*, at p. 362; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, 191 D.L.R. (4th) 1, at para. 130; B. (R.), *supra*, at para. 101.

[47] The *Privacy Act* includes alternative procedural protections in order to protect the interests of applicants. The government does not have unrestrained use of the exemptions. The government bears the burden of establishing that the information is properly exempted (s. 47). As mentioned before, when making *ex parte* submissions to the reviewing court, the government institution is under a duty to act in utmost good faith and must make full, fair and candid disclosure of the facts, including those that may be adverse to its interest. I also stress again that recourse to these exemptions is subject to two independent levels of scrutiny: the Privacy Commissioner and the Federal Court on a judicial review application under s. 41. Both the Privacy Commissioner and the reviewing court have access to the information that is being withheld (ss. 34(2) and 45) in order to determine whether an exemption has been properly claimed. In addition, the Federal Court has the power to order the release of the personal information if the court determines that the material was not received in confidence from a foreign source or is not within the bounds of the national security exemption.

[48] The appellant argues that the provision for discretion in other contexts involving national security, such as those at issue in *Chiarelli*, *supra*, shows that there is neither the need, nor the constitutional justification for the mandatory rule in s. 51 of the Act. It is true that s. 51(3) grants no discretion to the reviewing court to receive submissions *ex parte*. However, in order to determine whether the procedure accords with the principles of fundamental justice, in this case, it must be considered in the specific context in which it arises.

[49] I agree with the observations of both Simpson J. and the Court of Appeal that if the statutory scheme in s. 51 were discretionary as opposed to mandatory, it is virtually certain that a reviewing court would exercise its discretion to hear the matter *in camera* and accept submissions *ex parte* whenever the government presented appropriate evidence that the undisclosed material was received in confidence from foreign sources or involved national security.

[50] It is also important to understand that the information withheld from an applicant under these exemptions may be quite innocuous to the applicant but, rather, reveal the interest of a government institution in other persons or groups or reveal the source of information, as in the case of information received from foreign sources. Section 19 protects information received in confidence from foreign sources regardless of how innocuous it may be as it relates to the appellant.

[51] In this case, given the statutory framework, the narrow basis of the appellant's constitutional challenge and the significant and exceptional state and social interest in the protection of information involved, I find that the mandatory *ex parte* and *in camera* provisions do not fall below the level of fairness required by s. 7.

B. Section 2(b)

[52] The respondent did not appeal the finding of the motions judge (Simpson J.) that the mandatory nature of ss. 51(2)(*a*) and 51(3) infringe the appellant's rights and freedoms as guaranteed by s. 2(*b*). Simpson J. held that the appellant's rights as a reader were directly affected if the hearing was held *ex parte* and *in camera*. In such situations, members of the public, including the press, are excluded. As a member of the reading public the appellant was entitled to raise s. 2(*b*) to challenge the mandatory *ex parte* and *in camera* provision in s. 51. In support of this, Simpson J. cited *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, for the principle that freedom of expression in s. 2(*b*) protects both listeners and readers.

[53] The concept of open courts is deeply embedded in our common law tradition and has found constitutional protection in s. 2(*b*) of the *Charter*. This Court confirmed in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, 139

D.L.R. (4th) 385, the importance of this principle, which is inextricably linked to the rights guaranteed by s. 2(*b*). As stated by La Forest J. at para. 23:

> Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place. Cory J. in *Edmonton Journal* described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:
>
> > "That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings — the nature of the evidence that was called, the arguments presented, the comments made by the trial judge — in order to know not only what rights they may have, but how their problems might be dealt with in court. *It is only through the press that most individuals can really learn of what is transpiring in the courts.* They as 'listeners' or readers have a right to receive this information. Only then can they make an assessment of the institution. *Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.* [Emphasis added.]"
>
> That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(*b*) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered.

To the extent that the *in camera* provision excludes both the appellant and the public from the proceedings it is clear that the provision violates s. 2(*b*). The respondent did not appeal the finding of Simpson J. that the mandatory nature of ss. 51(2)(*a*) and 51(3) infringe the appellant's rights and freedoms as guaranteed by s. 2(*b*).

The respondent has not challenged the appellant's standing to challenge the provision under s. 2(*b*). I therefore assume, without comment, that he has standing to do so.

[54] It remains to determine whether the *in camera* provision in s. 51(2)(*a*) can be saved by s. 1 as a reasonable limit that can be demonstrably justified in a free and democratic society. I conclude that it cannot. In relation to s. 21, the appellant concedes that the protection of information which could reasonably be expected to be injurious to Canada's national security is a pressing and substantial concern. In reference to s. 19(1)(*a*) and (*b*) I agree with Simpson J. that the preservation of Canada's supply of intelligence information from foreign sources is also a pressing and substantial objective. *In camera* hearings reduce the risk of an inadvertent disclosure of sensitive information and thus the provision is rationally connected to the objective.

[55] The provision fails, however, on the question of minimal impairment. Simpson J. identified a judicial practice of reading down s. 51 as requiring only those portions of the hearing in which the *ex parte* submissions are received to be *in camera*. Indeed, it is evident from her reasons that the Solicitor General consented to proceeding on such a basis in this case ((1994), 80 F.T.R. 81, at para. 5). As an example of this judicial practice Simpson J. cited *Ternette v. Canada (Solicitor General)*, [1992] 2 F.C. 75, 86 D.L.R. (4th) 281, 39 C.P.R. (3d) 371 (T.D.).

[56] *Ternette* was an application under s. 41 of the Act for a review of a refusal to disclose personal information pursuant to s. 21. Although the respondent Solicitor General filed a notice of motion in advance of the hearing for the hearing to be conducted *in camera*, at the commencement of the hearing the Solicitor General proposed, with the consent of the applicant and the intervener Privacy Commissioner, that the hearing proceed in open court with the exception that the *ex parte* submissions would be made *in camera*. The motions judge acknowledged that s. 51(2) provides that in an application such as the one before him, where the refusal to disclose personal information is based on s. 21, the hearing "*shall* be heard *in camera*" (emphasis added). Despite this, he ordered that the hearing proceed in public, as proposed, with the opportunity for the Solicitor General to make submission *ex parte* and *in camera*. He explained the reason for his order as follows (at p. 89):

> That order was based on the principle that the Court's proceedings are open and public unless there be a particular ground urged by a party that is deemed to warrant exceptional proceedings *in camera* or *ex parte*. Such a ground exists by virtue of subsections 51(2) and (3). That provision is intended for the protection of public and private interests in information. If it is not seen as necessary for protection of those interests for the entire proceedings but only for a portion of them to be held *in camera*, by counsel representing the head of the government institution concerned, by the applicant, or by the Privacy Commissioner, in my view it would be contrary to the longstanding tradition of our judicial system and the Rules of this Court (*Federal Court Rules*, C.R.C., c. 663) for the Court *ex proprio motu* to direct that the hearing be fully *in camera*.

[57] In our case, counsel for the Solicitor General informed the Court during oral argument that the hearing in this case before MacKay J. with respect to the merits of the exemptions claimed, was heard *in camera*. On the other hand, the hearings before Simpson J. on the constitutional questions were conducted in public. Counsel for the Solicitor General further represented to the Court that the Department of Justice has interpreted s. 51 narrowly, limiting the *in camera* requirement only to those portions of a hearing that concern the merits of the exemptions claimed under s. 19(1)(*a*) or (*b*) or s. 21 but allowing the Crown to consent to "collateral" issues (*i.e.*, constitutional or procedural issues) being heard in open court.

[58] Aside from the constitutional issue, the Solicitor General's interpretation of s. 51(2)(*a*) is not one that the statute can reasonably bear. Section 51(2)(*a*) *mandates* that the hearing of an application under s. 41 and an appeal therefrom relating to personal information that a government institution has refused to disclose by reason of s. 19(1)(*a*) or (*b*) or s. 21 be heard *in camera*. Contrary to the apparent practice referred to by the Solicitor General, the statute does not limit the *in camera* requirement to only those parts of a hearing that involve the merits of an exemption. It is not open to the parties, even on consent, to bypass the mandatory *in camera* requirements of s. 51. Nor is open to a judge to conduct a hearing in open court in direct contradiction to the requirements of the statute, regardless of the proposal put forth by the parties. Unless the mandatory requirement is found to be unconstitutional and the section is "read down" as a constitutional remedy, it cannot otherwise be interpreted to bypass its mandatory nature.

[59] The existence of this judicial practice makes clear, though, that the requirement that the entire hearing of a s. 41 application or appeal therefrom be heard *in camera*, as is required by s. 51(2)(*a*), is too stringent. The practice endorsed by the Solicitor General and courts alike demonstrates that the section is overbroad in closing the court to the public even where no concern exists to justify such a departure from the general principle of open courts.

[60] I have already concluded that the *Privacy Act* validly obliges a reviewing court to accept *ex parte* submissions from a government institution, on request, in order to prevent the inadvertent disclosure of sensitive information. It follows, for the same reasons, that these *ex parte* submissions must be received *in camera*. The appropriate remedy is therefore to read down s. 51(2)(*a*) so that it applies only to the *ex parte* submissions mandated by s. 51(3). A reviewing court retains the discretion, pursuant to s. 46, to conduct the remainder of the hearing or any portion thereof, either in public, or *in camera*, or *in camera* and *ex parte*.

VI. CROSS-APPEAL

[61] Subsequent to the decision of Simpson J. in respect of the constitutionality of the provisions, MacKay J. ruled on the applicability of the various exemptions claimed. The cross-appeal concerns the decisions of MacKay J. ([1998] 2 F.C. 351) and the Court of Appeal ([2000] 3 F.C. 589, 187 D.L.R. (4th) 675) with regards to the exemption in s. 22(1)(*b*) specifically. MacKay J. held that CSIS was justified in claiming the exemption based on s. 22(1)(*b*) as they had established a reasonable expectation of probable injury to investigations in general. MacKay J. commented that the only evidence on the public record before him was the public affidavit filed by CSIS. The evidence was uncontradicted and strengthened by CSIS's secret affidavit.

[62] Soon after MacKay J. issued his reasons on the merits of the exemptions, the Federal Court of Appeal released its decision in *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430, 154 D.L.R. (4th) 414. *Rubin* involved the interpretation of s. 16(1)(*c*) of the *Access to Information Act*, R.S.C. 1985, c. A-1, a similar, almost identical, provision to s. 22(1)(*b*) of the Act. The Court in *Rubin* held that the exemption involved was limited to circumstances where a reasonable expectation of harm could be established to a current specific investigation or identifiable prospective investigation. The Court of Appeal cited *Rubin* with approval and held that MacKay J. should not have extended the notion of injury in s. 22(1)(*b*) to

investigations in general. The material was ordered sent back for a new review.

[63] In light of this Court's decision in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 [now reported 214 D.L.R. (4th) 1], the cross-appeal must be allowed and the decision of the motions judge restored. The motions judge interpreted s. 22(1)(*b*) in a manner consistent with this Court's ruling in *Lavigne*. The exemption in s. 22(1)(*b*) is not limited to current investigations or an identifiable prospective investigation. The appellant, respondent on cross-appeal, did not challenge the finding of the motions judge that the Solicitor General had established a reasonable expectation of harm. The decision of MacKay J. is therefore restored.

VII. Costs

[64] The appellant requested but was not awarded costs of his original application for a declaration that s. 51 was unconstitutional. Nor was he awarded costs on his appeal to the Federal Court of Appeal dealing with the constitutionality of s. 51. He asks this Court to award him costs on this appeal, the original constitutional application before Simpson J. of the Federal Court, Trial Division and on the appeal of the constitutional issue to the Federal Court of Appeal.

[65] Although routinely costs follow the outcome of a case, this Court has the discretion, pursuant to s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to award costs on an appeal regardless of the outcome. It also has the discretion to order the payment of costs of the proceedings in the courts below.

[66] The *Privacy Act* specifically contemplates an award of costs to an unsuccessful party where an important and novel issue has been raised.

> 52(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not bee successful in the result.

The spirit and purpose of s. 52(2) is a relevant consideration for this Court in the exercise of its discretion. The constitutional issues raised by the appellant in this case were serious, important and novel in the context of access to information litigation.

VIII. Conclusion

[67] The appeal is allowed in part. I am of the opinion that it is appropriate in this case to award costs of the proceedings, here and

in the courts below, to the appellant. The cross-appeal is allowed with costs to the respondent, appellant on the cross-appeal. The constitutional questions are answered as follows:

1. Do ss. 51(2)(*a*) and 51(3) of the *Privacy Act*, R.S.C. 1985, c. P-21, as amended, infringe or deny the appellant's rights or freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes, as was conceded by the respondent.

2. If the answer to Question 1 is in the affirmative, are ss. 51(2)(*a*) and 51(3) of the *Privacy Act* reasonable limits, prescribed by law, that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No. Section 51(2)(*a*) is read down to apply to subsection (3) only.

3. Does s. 51(3) of the *Privacy Act* infringe or deny the appellant's rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Assuming without deciding that s. 7 applies, the answer is no.

4. If the answer to Question 3 is in the affirmative, is s. 51(3) of the *Privacy Act* a reasonable limit, prescribed by law, that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: This question need not be answered.

Appeal allowed in part; cross-appeal allowed.

Appendix

Relevant Statutory Provisions

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

. . . . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

. . . . .

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

Privacy Act, R.S.C. 1985, c. P-21

12(1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of the *Immigration Act* has a right to and shall, on request, be given access to

(*a*) any personal information about the individual contained in a personal information bank; and

(*b*) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

. . . . .

16(1) Where the head of a government institution refuses to give access to any personal information requested under subsection 12(1), the head of the institution shall state in the notice given under paragraph 14(*a*)

(*a*) that the personal information does not exist, or

(*b*) the specific provision of this Act on which the refusal was based or the provision on which a refusal could reasonably be expected to be based if the information existed,

and shall state in the notice that the individual who made the request has a right to make a complaint to the Privacy Commissioner about the refusal.

(2) The head of a government institution may but is not required to indicate under subsection (1) whether personal information exists.

. . . . .

19(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any personal information requested under subsection 12(1) that was obtained in confidence from

(*a*) the government of a foreign state or an institution thereof;

(*b*) an international organization of states or an institution thereof;

(*c*) the government of a province or an institution thereof; or

(*d*) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government.

(2) The head of a government institution may disclose any personal information requested under subsection 12(1) that was obtained from any government, organization or institution described in subsection (1) if the government, organization or institution from which the information was obtained

(*a*) consents to the disclosure; or

(*b*) makes the information public.

. . . . .

21. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, as

defined in subsection 15(2) of the *Access to Information Act*, or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities, as defined in subsection 15(2) of the *Access to Information Act*, including, without restricting the generality of the foregoing, any such information listed in paragraphs 15(1)(*a*) to (*i*) of the *Access to Information Act*.

22(1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)

(*a*) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Act*,

if the information came into existence less than twenty years prior to the request;

(*b*) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

(ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation; or

. . . . .

(3) For the purposes of paragraph (1)(*b*), "investigation" means an investigation that

(*a*) pertains to the administration or enforcement of an Act of Parliament;

(*b*) is authorized by or pursuant to an Act of Parliament; or

(*c*) is within a class of investigations specified in the regulations.

. . . . .

34(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.

. . . . .

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

. . . . .

45. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 43, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Court may examine under this section may be withheld from the Court on any grounds.

46(1) In any proceedings before the Court arising from an application under section 41, 42 or 43, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of

(*a*) any information or other material that the head of a government institution would be authorized to refuse to disclose if it were requested under subsection 12(1) or contained in a record requested under the *Access to Information Act*; or

(*b*) any information as to whether personal information exists where the head of a government institution, in refusing to disclose the personal information under this Act, does not indicate whether it exists.

(2) The Court may disclose to the appropriate authority information relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in the opinion of the Court there is evidence thereof.

47. In any proceedings before the Court arising from an application under section 41, 42 or 43, the burden of establishing that the head of a government institution is authorized to refuse to disclose personal information requested under subsection 12(1) or that a file should be included in a personal information bank designated as an exempt bank under section 18 shall be on the government institution concerned.

. . . . .

49. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of section 20 or 21 or paragraph 22(1)(*b*) or (c) or 24(*a*), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems

appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.

. . . . .

51(1) Any application under section 41 or 42 relating to personal information that the head of a government institution has refused to disclose by reason of paragraph 19(1)(*a*) or (*b*) or section 21 . . . shall be heard and determined by the Associate Chief Justice of the Federal Court or by such other judge of the Court as the Associate Chief Justice may designate to hear the applications.

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall

(*a*) be heard *in camera*; and

(*b*) on the request of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

. . . . .

52(1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

(2) Where the Court is of the opinion that an application for judicial review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Saskatchewan Human Rights Commission et al. v. Prince Albert Elks Club Inc.

[Indexed as: Saskatchewan (Human Rights Commission) v. Prince Albert Elks Club Inc.]

Court File No. 214

Saskatchewan Court of Appeal
Vancise, Lane and Jackson JJ.A.

Heard: September 26, 2001
Judgment rendered: September 26, 2002
Addendum to majority judgment released: October 10, 2002

Human rights legislation — Discrimination — Marital status — Employer terminating woman's employment because of marriage to penitentiary