Paper No. 98

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Legislative Council

Paper for the Bills Committee on
National Security (Legislative Provisions) Bill

Special Procedures for Appeals against Proscription :
Extracts of overseas cases

At the meeting of the Bills Committee on 10 June 2003, the Legal Adviser advised that the UK case of *A, X and others v Secretary of State for the Home Department* [2003] 2 WLR 564 related to the detention of non-nationals if the Home Secretary believed that their presence in the United Kingdom was a risk to national security. The Court of Appeal held, among other things, that the Home Secretary could not have taken action to detain nationals and legally, non-nationals came into a different class from those who had a right of abode. At the request of members, we attach the head notes and relevant extracts of the case in **Annex I**.

2. The distinction between citizens and non-citizens in the context of protection of rights in the Canadian Charter of Rights and Freedoms is also recognized in the Canadian case of *Re Chiarelli and Minister of Employment & Immigration; Security Intelligence Review Committee, Intervener* (1992) 90 DLR(4th) 289. The head notes and relevant extracts of the case are in **Annex II**.

3. The full text of both cases may be found in Paper No. 65.

Encl

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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.

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 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 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 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).

Lord Woolf CJ at page 575

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 discrimination.

Lord Woolf CJ at page 584

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.

Lord Woolf CJ at page 584

However, as the European Court of Human Rights pointed out, the court retains its supervisory role.

Lord Woolf CJ at page 586

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.

Lord Woolf CJ at page 586

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.

Lord Woolf CJ at page 586

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.

Lord Woolf CJ at page 586

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.

Lord Woolf CJ at page 587

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.

Brooke LJ at page 594

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.

Brooke LJ at page 606

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.

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 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.

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.

Sopinka J at page 303

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).

Sopinka J at page 304

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.