jurisdictions, including under the Human Rights Act 1998, in construing provisions with modifications. Their construction would bring the Constitution into line with international obligations. They accepted that its effect was to require the rectification of some disconformities with fundamental rights while leaving others unrectified.

Regret at the majority's decision is unsurprising: the Privy Council held itself powerless to prevent the continuation of what all the judges regarded as inhuman and degrading punishment. The minority made their regret clear with the pointed observation that "[i]n recent years the Privy Council has generally shown itself to be an enlightened and forward-looking tribunal" (*Matthew* at [34]). But it is respectfully submitted that the majority were right. It was neither backward-looking nor unenlightened to recognise that the "living instrument" principle cannot make a specific, concrete provision in a Constitution mean something that it does not. The minority's analogy with modification of legislation under the Human Rights Act 1998 (as to which see the discussion in *Ghaidan* v. *Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557) gives insufficient weight to the fact that a written constitution is itself the supreme law. As Lord Hope, for the majority in *Watson*, put it at [53]: "Their Lordships firmly believe that respect for the rule of law requires them to give effect to [the existing laws clause], not to ignore it, when it says that existing laws are not to be held inconsistent with any of the provisions of Chapter III."

THOMAS ROE

THE BURDEN OF PROOF UNRESOLVED

THE House of Lords may have pondered the proper limits of the criminal law when hearing *Attorney General's Reference No. 4 of 2002; Sheldrake* v. *DPP* [2004] UKHL 43, [2004] 3 W.L.R. 976, conjoined appeals which concerned the interpretation of section 5 of the Road Traffic Act 1988 (a blood alcohol offence) and section 11 of the Terrorism Act 2000, but the specific questions they were asked were rather narrower and the answers rather unsatisfactory.

The reach of the offence in issue in the first appeal is broad. By section 11 of the Terrorism Act 2000,

(1) A person commits an offence if he belongs or professes to belong to a proscribed organization.
(2) It is a defence for a person charged with an offence under subsection (1) to prove—

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(a) that the organization was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and
(b) that he has not taken part in the activities of the organization at any time while it was proscribed.

A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for up to ten years. Let us imagine, for example, that you had unwisely decided to give a subscription to the International Sikh Youth Federation (listed amongst the 25 proscribed organizations on the Home Office's website) as a present to a friend interested in comparative religion. Or that your friend simply went along enthusiastically to some meetings of the Federation to find out more about it. Would she in either circumstance have committed an offence under section 11? (The facts are not so far-fetched. In *Hundal and Dhaliwal* [2004] EWCA Crim 389, [2004] 2 Cr. App. R. 19 the Court of Appeal upheld the convictions of two people who had been leading members of the ISYF, though they said they had left the organization some time before coming to the UK. They had entered the UK from Germany with an ISYF membership card, not knowing that the ISYF was a proscribed organization in the UK, and indeed it was not illegal in Germany. Their sentences were reduced from 30 months to 12 months imprisonment.)

The *Attorney General's Reference No. 4 of 2002* concerned the "reverse burden" of proof in section 11(2) of the 2000 Act. No doubt Parliament intended to impose a legal burden on the defendant in section 11(2), since section 118 of the Act lists a number of sections which are to be understood as imposing an evidential burden only, and section 11(2) is not among those listed. However, the majority of the House of Lords (Lords Steyn and Phillips agreed with Lord Bingham) decided that the imposition of a legal burden on the defendant was not a proportionate and justifiable legislative response to the problem of deterring people from joining and taking part in the activities of a proscribed terrorist organization. For Lord Bingham, an important consideration was that "there would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities" (at [51]).

Lord Rodger and Lord Carswell disagreed with the majority, accepting that the defence under section 11(2) imposed a legal burden of proof, but held that this was compatible with both Articles 6 and 10 of the European Convention on Human Rights.

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As Lord Rodger put it, "the nature of the offence created by section 11(1) does not engage any right of the defendant under article 6, since the article is concerned with the fair trial of offences and not with the substance of the offences themselves" (at [66]). He states that since section 11(2) served only to improve the defendant's situation, it could not precipitate a violation of Article 6. The dangers of this narrow interpretation of the "procedural" rights under Article 6 were evident to the majority, who wisely rejected it.

However, in the conjoined appeal, all five judges agreed that the Crown's appeal should be allowed. Sheldrake had been convicted of being in charge of a motor vehicle having consumed excess alcohol, under section 5(l)(b) of the Road Traffic Act 1988. Section 5(2) of the Act provides that it is a defence for a person charged with an offence under section 5(l)(b) "to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit". The Divisional Court (by a majority) had allowed an appeal by way of case stated and had quashed the conviction: all three judges had agreed that section 5(2) violated the presumption of innocence because it meant that a defendant could be convicted even though the court was not sure that there was a likelihood of his driving, and the majority concluded that it was not necessary to accomplish the objective of the 1988 Act to impose a legal burden on the defendant. However, the House of Lords (unanimously agreeing with Lord Bingham) did not accept that Sheldrake's conviction rested on a presumption that he was likely to drive: "it rested on his being in charge of a car while unfit in a public place. If it rested on a presumption that he was likely to drive, that did indeed flow directly from proof of his unfitness while in charge and his inability to show, despite a full opportunity to do so, that there was no likelihood of his driving" (at [43]). Thus the House has imposed on the accused a burden to disprove an ingredient of the offence, even if they suggest it is an "unimportant" ingredient. Don't ever wash your car when drunk: you may be convicted of this offence.

The "reverse burden" problem is not rare. Ashworlh and Blake discovered 219 examples amongst 540 offences triable in the Crown Court of legal burden or presumptions operating against the defendant (see [1996] Crim.L.R. 314) and the number has undoubtedly grown since then. The time has come for a category of "administrative regulations" which would carry little stigma and no possibility of imprisonment. Only for such "non-crimes" should

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strict liability or reverse burdens be acceptable. Meanwhile, we will continue to have a "blizzard of single instances" (as Roberts and Zuckerman nicely put it, in their *Criminal Evidence* (Oxford 2004), at p. 383) until the courts shout loudly that whenever an accused is required to prove some fact to avoid conviction, the provision violates the presumption of innocence.

NICOLA PADFIELD

CRIMINAL LIABILITY FOR THE TRANSMISSION OF HIV

IN *R.* v. *Dica* [2004] 3 W.L.R. 213, the Court of Appeal decided that a man who knows that he is infected with the HIV virus but who infects his unsuspecting sexual partner through unprotected sexual intercourse should be punishable for inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861. The Court did in fact quash the conviction of the accused, because the judge at the Old Bailey had not instructed the jury to decide whether or not the two infected partners of the accused had known of his infection and agreed to take the risk of contracting it themselves (this having been in dispute at the trial). Yet the case was sent for retrial, and if the next jury, properly directed, should find that his partners did not agree to take the risk of contracting the potentially fatal virus, then Dica would be properly convicted under OAPA, section 20.

Two important points of principle were decided in the Court of Appeal. First, if a person *does* consent to the risk of contracting HIV through sexual intercourse (through love of an infected partner, perhaps, or through a conscientious objection to using contraceptives) then no offence is committed by the carrier if the disease is transmitted. The trial judge, following *R.* v. *Brown* [1993] 2 All E.R. 75, had thought otherwise, and that is why (believing that there could be no defence based upon consent) he had (wrongly) instructed the jury that it did not need to decide whether Dica's victims had consented. But the cases are properly distinguishable. In *Brown*, sexual gratification was achieved through the harm itself—that is, pleasure was sought only through the pain of another; whereas the parties who have sexual intercourse will be seeking their gratification through the intercourse itself and will be hoping fervently that the harm potentially caused by the virus will *not* occur. It is not clear, however, whether this part of the decision in *Dica* should be interpreted to be (a) that the need to find a "good reason" (as first required in *Attorney-General's Reference*

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