not need to consider implications for other litigation (joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, para. 10). In addition, the ICJ's decision to rule on the application of Article 35(2) was highly unusual, given that Serbia and Montenegro did not invoke this provision; the ICJ's approach to this issue was described in the joint declaration as "astonishing" (joint declaration, para. 11; see also separate opinion of Judge Higgins, para. 18). While the outcome in the *Legality of Use of Force* cases is the right one, the ICJ would have done well to find less problematic grounds on which to base its decision.

CHESTER BROWN

PROPORTIONALITY AND DISCRIMINATION IN ANTI-TERRORISM LEGISLATION

PART 4 of the Anti-terrorism, Crime and Security Act 2001 (the ATCS Act) allowed the Home Secretary to certify a person as a suspected international terrorist. If subject to immigration control, the person could then be detained pending removal from the UK. If there was no country to which the person could be sent without being at risk of death, torture or inhuman or degrading treatment, section 23 authorised indefinite detention. The government purported to derogate under Article 15 of the ECHR from the right to liberty under Article 5 and made an order under section 14 of the Human Rights Act 1998 to make the derogation effective in municipal law. In *A and others* v. *Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 W.L.R. 87, detainees claimed that the derogation was not justified by Article 15, and that indefinite detention of people subject to immigration control constituted unlawful discrimination on the ground of nationality or immigration status contrary to Article 14 taken together with Article 5. Of the nine Law Lords (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell) a majority agreed, quashing the derogation order and declaring section 23 of the ATCS Act to be incompatible with Articles 5 and 14.

Their Lordships assumed that the detention needed to be justified under Article 15(1) of the ECHR as a measure strictly required by the exigencies of a public emergency threatening the life

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of the nation and consistent with the UK's other obligations under international law. They accepted that after the terrorist attacks on the USA on 11 September 2001 the Al-Qaeda threat amounted to a national emergency. Eight of them (Lord Hoffmann dissenting) accepted (not without significant hesitation) that the emergency could be said to threaten the life of the nation. However, seven Law Lords (Lord Walker of Gestingthorpe dissented and Lord Hoffmann did not express a view) held that the detention was not strictly required by the exigencies of the situation and so was not protected by Article 15(1). They also held that section 23 violated Article 14 by treating people differently in the enjoyment of their right to liberty on the ground of their nationality or immigration status without a rational and objective justification. The choice of immigration legislation as the vehicle for the measure did not justify singling out those suspected international terrorists who were subject to immigration control when they were not objectively more dangerous than those who, having a right of abode in the UK, were not subject to immigration control. The right to liberty is too fundamental and indefinite deprivation of it without a criminal conviction too serious to be easily justifiable.

It was unprecedented for UK judges to adjudicate on the legitimacy of measures adopted in good faith on national security grounds. The deportation of Iraqis during the first Gulf War just over a decade earlier had attracted no such scrutiny: see *R.* v. *Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 W.L.R. 890 (C.A.). The Human Rights Act 1998 and well publicised weaknesses in the evaluation and use of intelligence material by the Secret Intelligence Service and the Government in seeking to justify the second Gulf War combined to ensure that heightened scrutiny where human rights are engaged, long proclaimed but rarely effectively implemented (see for example *Bugdaycay* v. *Secretary of State for the Home Department* [1987] A.C. 514 (H.L.); *R.* v. *Ministry of Defence, ex parte Smith* [1996] Q.B. 517, C.A.), would henceforth be a reality.

The majority also adopted a more demanding proportionality test than had hitherto been employed in the UK. They accepted that before a balancing of rights and interests was needed there had to be a rational connection between the measures adopted and the legitimate aim of combating international terrorism. They held that indefinite detention of foreign (but not British) suspected international terrorists without charge failed this part of the proportionality test, for two reasons. First, the government considered that some British suspected international terrorists were as dangerous as the foreigners who could be detained under the

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ATCS Act, yet had regarded detention as unacceptably draconian, other means of controlling their activities being considered adequate. Secondly, the detainees were free to leave the country at once if they could find countries that would accept them, and the government had given undertakings to continue to seek safe countries to which they could be removed. The majority did not think that it could be necessary to detain some dangerous people indefinitely if on the one hand others who were equally dangerous were left at large; and if detention of some was essential for national security (a notion that can include the security of the UK's allies: *Secretary of State for the Home Department* v. *Rehman* [2003] 1 A.C. 153 (H.L.)), setting them at large on condition that they went abroad was not rationally related to combating international terrorism.

Finally, the discussions of the role of the judiciary in this field are of great importance. Lord Bingham (at [42]) firmly asserted the judicial prerogative of upholding the rule of law in human rights cases: "I do not ... accept the distinction which [the Attorney General] drew between democratic institutions and the courts .... [T]he function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state." In the same vein (at [33]) he rejected an undertaking that the Attorney General offered that the detention powers would be used only against people suspected of contact with Al-Qaeda: "It is not however acceptable that interpretation and application of a statutory provision bearing on the liberty of the subject should be governed by implication, concession and undertaking". The Law Lords did not consider case law from other jurisdictions to be a safe guide when deciding on the intensity of review if the constitutional contexts and texts of the legislation are significantly different: see for example Lord Hope of Craighead (at [131]). The discussion of these matters and of the related question of the appropriate intensity of judicial review in such cases repays careful study.

For all these reasons, although the measures have been replaced with the Prevention of Terrorism Act 2005 the decision, perhaps the most powerful judicial defence of liberty since *Leach* v. *Money* (1765) 3 Burr. 1692 and *Somersett* v. *Stewart* (1772) 20 St. Tr. 1, will long remain a benchmark in public law.

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