After seven years as a Special Advocate before the Special Immigration Appeal Court (SIAC), Ian Macdonald QC resigned in December 2004, following the House of Lords judgment in the Belmarsh detainees' derogation appeal.[1] He explains his decision

Police state?

I was one of the first batch of senior barristers to be appointed to the post of Special Advocate by the then Attorney General in 1998 under laws, set up following the *Chahal*[2] decision in the European Human Rights in Strasbourg. I held the post for some seven years and was involved in the Appeals of over ten Appellants.

What is SIAC?

Although SIAC is called a Commission, it is a Court, presided over by a High Court judge, who sits with an immigration judge and someone with a background in security. The proceedings are fairly informal; and no-one wears wigs or gowns and, of course there is no jury. It is a secure court in a basement room in Field House, just off Chancery Lane. The Appellant is represented by his or her own solicitor and counsel and can be, and often is, present for the open sessions of the court. But the appellant and the appellant's legal team and the public must leave court, when it goes into closed session.

Macdonald: flawed system

When I was first appointed, SIAC was an immigration court dealing exclusively with immigration cases involving questions of national security. Often the case would concern someone whose presence in the UK was undesirable because of national security and the government has decided to deport or exclude them.

The 'purge' procedure

Prior to SIAC there was no appeal only a reference to what was referred to as The Three Advisers.

This procedure was based on the 'purge' procedure for civil servants, introduced after the 1939-1945 war to root out communist sympathisers from involvement on secret state work.[3] It was introduced by a Labour government under considerable pressure from the United States, where McCarthy purges were in full swing. Over a seven year period 135 civil servants lost their jobs when investigations by the police and MI5 revealed communist connections. One civil servant who appeared before the panel said he was asked why he went to Moscow rather than Vienna to watch the ballet.[4]

Appellants could not be represented before the Three Advisers; they had no idea of the extent of the accusations against them, and there was no-one with access to the sensitive and secret evidence, who could speak on their behalf. The creation of SIAC was, therefore, seen as a progressive measure, giving these appeals an element of fair procedure which had been missing previously.

Indefinite detention

After 9/11, however, Part 4 of the Anti-Terrorism, Crime and Security Act 2001 gave SIAC a new jurisdiction to hear appeals against the indefinite detention without trial of suspected international terrorists accused of having links to AQ. This applied only to foreigners who could not otherwise be deported or removed safely from this country.

This was a wrong law brought in the wrong way to the wrong court. But like other Special Advocates, I thought I might make a difference. This allowed me to see how everything worked from the inside. In fact, I represented the interests of

five of the detainees on their appeals to SIAC. This meant that I received all the secret material prepared by the government in the case of each of them; I cross examined the intelligence officers and made a closing speech on behalf of the Appellant. All this was done in closed session.

In their landmark judgment the House of Lords have now ruled that a law, which imposes indefinite imprisonment without trial but is partial in its operation and only targets one of the groups who may be involved in terrorist planning, is unlawful. It is a disproportionate and discriminatory response to the threat to the nation.

This was an overwhelming condemnation by a majority of 8 to 1. And the language used in the speeches of the Judges was strong and forthright. There was little mincing of words. The government had simply got it wrong.

The detainees have not been targeted simply as a group of foreigners suspected of involvement in international terrorism. The overwhelming focus has been on the fact that they are Muslim. They are said to be part of an international *jihad* bent on destruction of the West. The implication is that what they are doing somehow represents the whole of Islam, which is patently untrue. It produces hatred and attacks not just on Muslims, but on the whole Asian community. In January this year the Crown Prosecution Service said that race hate crimes soared 13% in 2004. In 4,728 racially aggravated crimes more than half the victims were Asians, with many attacked or taunted as supporters of Osama Bin Laden or Saddam Hussein.[5] The portrayal of the war on terrorism has already eroded the confidence of British Muslims and must, in the longer term, affect social cohesion.

Flagrant and defiant breach

This kind of law alienates Britain in the international arena. The government's response to the House of Lords ruling is extraordinary. They have no intention of making a general release of the detainees, even although they now know that their detention has been unlawful from its inception under Strasbourg law; that they have lost the shield of the derogation; and that their continued detention is a flagrant and defiant breach of the Rule of Law. They clearly have no intention of making a general release until they have put in place new means of restraint. In a carefully worded statement in Parliament on 26 January a defiant Home Secretary stated that it was the government's intention to introduce control orders. These will have a far wider reach, enabling the Home Secretary to place British and foreign nationals under strict conditions of house arrest with complete bans on communication by phone or email.

This will all be achieved on "reasonable suspicion" garnered from secret information, which will be withheld from the person affected. House arrest is slightly better than imprisonment; but it is more of the same kind of medicine. And what an example it sets. Every tin pot dictator, who wishes to lock up his opponents, for an indeterminate period, without trial, from Burma to Zimbabwe and every country with internal unrest, can point to Britain and say, "well, we're only doing what the Brits have done." Not a good way to spread the ideas of democracy and the Rule of Law.

The solution to the perceived threat of international terrorism is not to pass new laws, which apply arbitrary arrest and indefinite detention without trial to every terrorist suspect, British and foreign alike. The point was trenchantly made by Lord Hoffman in his speech:

"I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to UK citizens as well. The real threat to the life of the nation, in the sense of people living in accordance with its traditional laws and political values comes not from terrorism but from laws like these."

Fig leaf of respectability

The judgment in the House of Lords supports and vindicates my view. I resigned because I felt that whatever difference I might make as a special advocate on the inside was outweighed by the operation of a law, fundamentally flawed and contrary to our deepest notions of justice. My role was to provide a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial. For me this was untenable. No other country in Europe has felt it necessary to follow this course and derogate from Article 5 of the European Convention. Britain should not stand apart from the rest of Europe on this issue.

Odious blot

At the time of my resignation I described the law as an odious blot on our legal landscape and said that for reasons of conscience I felt that I must resign. I now feel that this stance has been fully vindicated by the response of the government, and their defiance of the rule of law, all done because of a danger we are not allowed to know about or discuss. You must trust me, the police and the security services, says the Home Secretary. Where have I heard these words before?

My action is not intended as a criticism of the judges of SIAC, who have always acted fairly and conscientiously within the restraints imposed on them by this intolerable legislation, or of my fellow Special Advocates. One has already resigned. The rest will have their own views of what is the right course of action. ❖

Reference

[1] *A (FC) and others (FC) and X (FC) and another (FC) v. Secretary of State for the Home Department* [2004] UKHL 56.

[2] *Chahal v UK* (1996) 23 EHRR 413.

[3] See David Williams *Not in the Public Interest* (London 1965) at p170et seq; David Jackson 'Individual Rights and National security' in [1957]20 MLR 364, at 378-379.

[4] Time Out November 1976.

[5] Daily Mirror 19.01.05

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