

## Human rights in an age of terrorism

### Middle Temple lecture 13 February 2017

Sir Nigel Rodley should have been standing here tonight to speak about the work of the United Nations Human Rights Committee. Tragically, he succumbed to a particularly aggressive form of lung cancer and died a few days ago. He was a great human rights academic lawyer. He also had many achievements in the field of international human rights. I would single out for particular mention the fact that he served as Special Rapporteur on Torture of the UN Commission on Human Rights from 1993 until 2001 and from 2001 he was the UK Member of the UN Human Rights Committee. Nigel was a dear friend. I had known him since about 1950. We were at school together in Leeds. I am giving this lecture in his memory.

I imagine that most people have a *general* idea of what terrorism is. It is not new. The anarchists who were active especially in Russia in the 19<sup>th</sup> century and who sought to provoke social upheaval by violent means were regarded as terrorists. Anarchists seeking to cause terror in London to secure their political objectives form the background to Joseph Conrad's 1907 novel *The Secret Agent*. They would have been understood to be terrorists. Britain has experienced spasmodic outbursts of terrorist violence (or attempted violence) since at least the time of Guy Fawkes in 1605. More recently, it was subjected to three decades of terrorist violence at the hands of republicans and loyalists in Northern Ireland and mainland Britain. This terrorism was treated as a civil emergency, not a war; and the terrorists were treated as criminals and not combatants. It is worth noting that the British authorities, having resorted to internment of those suspected of involvement in terrorism and to methods of interrogation that were condemned by the European Court of Human Rights as inhuman and degrading treatment (contrary to article 3 of the European Convention on Human Rights—"the Convention"), abandoned these methods as

ineffective and counterproductive, alienating the very people on whose support the stability of the state depended. It is easy for those of us who lived through the Northern Ireland troubles to forget how serious they were. But serious though they were, they were insignificant when compared with what was to come.

The events of 9/11 and what has happened in many parts of the world since then have shocked the world. These types of acts of terrorism have been fundamentally different from what preceded them both as to the ends that they pursue and the means employed to pursue them. Take the Troubles in Northern Ireland as an example. The means adopted by the terrorists were on a relatively limited scale. They were carried out through an identifiable paramilitary organisation with a clear hierarchy and leadership. There was little doubt as to the political ends that they sought to achieve. On the other hand, the act of terrorism perpetrated on 9/11 and the many acts that have been perpetrated worldwide since then were on a massive scale and committed by various shadowy organisations with a diverse range of supporters in many parts of the world. Moreover, their ideology is spread at the press of a button through social media, with the result that attacks can be made by individuals anywhere in the world; and the means employed are becoming increasingly unpredictable.

These developments have caused authorities in democratic societies to re-appraise the orthodox approach to dealing with terrorism which was described in these terms on 17 April 2000 by Madeleine Albright, the US Secretary of State, in a speech to the University of World Economy and Diplomacy at Tashkent in Uzbekistan:

“One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent citizens. Terrorism is a criminal act and should be treated accordingly—and that means applying the law fairly and consistently. We have found through experience round the world that the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights”.

So what exactly is terrorism? There is an elaborate definition in our Terrorism Act 2000 the essence of which is (i) the use or threat of action which (ii) endangers a person’s life, other than that of the person

committing the action where (iii) the use or threat is designed to influence the Government or an international governmental organisation or to intimidate the public or a section of the public and (iv) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause. This is a very broad definition.

As David Anderson QC (the UK Independent Reviewer of Terrorism Legislation) observed in one of his annual reports, it is wide enough to include a campaigner or blogger who voices a religious objection to vaccination against diseases. If the blogger's purpose is to influence the Government and if his words are judged capable of creating a serious risk to public health, he could be treated as a terrorist; detained for long periods of time; prosecuted; have his assets frozen and so on. Voicing support for him could also be a terrorist crime.

A terrorist is defined in the 2000 Act as a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. Thus ideologies are a pre-condition for terrorist acts which must seek to advance (in the words of section 1 of the 2000 Act) "a political, religious, racial or ideological cause". As Mr Anderson says in his report dated September 2015 (para 9.5-9.6), the evils of violent extremism are self-evident. No democracy that takes seriously the idea of individual liberty and self-determination (and I would add the duty to protect life) should tolerate those who threaten or incite violence irrespective of any claimed justification in politics, religion or social custom. While it is ultimately only social pressure that can cause such views to disappear, the state is entitled to use all legitimate means at its disposal to counter them, including prosecuting the various offences under the Terrorism Acts.

Non-violent extremism requires much greater caution. Most of us have little sympathy for those who campaign for a law against blasphemy or adultery; consider homosexuality to be an abomination; seek to deny the right to choose a religion; or maintain that sharia law is preferable to the law of the land. But the response of a vigorous democracy is to take them on, rather than to criminalise them, although the Government

may need to protect the vulnerable from indoctrination and intimidation, whether in schools, prisons or even the family.

The 2000 Act gives the authorities extensive powers. The powers conferred by Schedule 7 have been the subject of considerable scrutiny by our courts. They authorise an “examining officer” to stop and detain a person and question him at a port or border area for the purpose of determining whether he appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. Strikingly, the powers may be exercised whether or not the officer has grounds for suspecting that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. A person who is questioned must give the officer any information in his possession which the officer requests and give the officer on request any document which he has with him and which is of a kind specified by the officer. Failure to comply is a criminal offence.

Any Government that takes seriously its obligation to protect those who live in its country will want to do everything in its power to discharge that obligation. Hence legislation like the 2000 Act. In such a climate, the human rights of individuals are likely to come under pressure. Should some or all of the human rights which we would normally seek to protect in normal circumstances be somehow be limited or given less importance when it comes to taking on the terrorists? There are many in the UK who would give a resounding affirmative answer to that question. Hostility to our Human Rights Act 1998 and the Convention has been common currency in the UK for some time now. This has been fuelled by some of the media. For example, last year the Daily Telegraph ran a headline “the Human Rights Act has helped 28 terrorists remain in the UK”. There have been many more headlines to similar effect. There was widespread criticism in the media of the decision of our courts that Abu Qatada (a suspected terrorist) could not be deported to Jordan because he would be likely to face a trial there in which key prosecution evidence had been obtained by torture.

As a means of accommodating such court decisions, the UK Government has concluded agreements with some states in the Middle East and North Africa that deportees will not be ill-treated if returned to those states. Such an agreement was made with Jordan which, somewhat surprisingly, Abu Qatada found acceptable. Deportations to Algeria have been permitted on the strength of formal assurances, despite the absence of an agreement. But deportation to Libya was denied despite the existence of an agreement. This is a difficult area, not least because assessing whether assurances given by states that are guilty of routine torture can be a tricky business. Our courts do their best to assess the effectiveness of such assurances. But they are often not well placed to do so.

Human rights lawyers and responsible commentators know that the protection of human rights when national security is at stake is far more complicated than the popular media suggest. Human rights law acknowledges that there are some rights whose full realisation must be balanced against competing considerations (such as national security) and that they may have to yield to those considerations. However, there are other rights which are unqualified and which are not required to be balanced against security considerations. Article 4 of the International Covenant on Civil and Political Rights allows states to derogate from some rights (subject to strict conditions) in times of public emergency: see too the similar provision in article 15 of the Convention. Thus derogation is one way in which human rights law deals with the challenges posed by terrorism. The other and more common way is to operate what is essentially a hierarchy of rights, with absolute non-derogable rights (such as the right to protection from torture or degrading treatment) at one end of the spectrum, and limited or qualified rights (such as the right to respect for family and private life, the rights to religious expression, freedom of expression and freedom of assembly and association) at the other end of the spectrum.

The non-derogable nature of the right not to be tortured under article 3 of the Convention was asserted emphatically by the Strasbourg court in *Chahal v UK* (1996) ECHR 54. Mr Chahal was to be deported from

the UK to India on the grounds that he posed a threat to national security in the UK. He opposed deportation on the grounds that there was a real risk that he would be tortured in India. The court rejected the argument advanced by the UK that article 3 rights had to be balanced against threats to national security. Dr John Reid (then Home Secretary) described the judgment as “outrageously disproportionate” and later suggested that those in the House of Commons who defended the decision “just don’t get it”. Rather measured language when compared with some of the recent utterances of President Trump. In the subsequent case of *Saadi v Italy* [2007] 44 EHRR 50, the Strasbourg court strongly reaffirmed its approach in *Chahal*. The court insisted that it did not underestimate the scale of the danger of terrorism and the threat it presents to the community, but that could not call into question the absolute nature of article 3.

I wish to refer to three recent English cases in which our courts have had to grapple with issues arising from the exercise of the wide-ranging powers given by the 2000 Act to examining officers at ports and airports and the interplay between those powers and the human rights of the individuals who were subjected to their exercise.

In *Beghal v DPP* [2016] AC 88, the defendant went to visit her husband who was in custody in France in relation to terrorist offences. On her return, she was stopped at an airport and detained for almost two hours by police officers exercising their powers under the 2000 Act. She refused to answer most of the questions that she was asked. She was charged with wilfully failing to comply with a duty contrary to Schedule 7. At her trial, she submitted that the proceedings should be stayed as an abuse of the process of the court on the grounds that the powers given to the officers under Schedule 7 infringed her right to liberty, the privilege against self-incrimination and her right to privacy and family life under articles 5, 6 and 8 of the Convention. The Supreme Court rejected all of these submissions.

It was not in dispute that the questioning and search under compulsion pursuant to Schedule 7 was an interference with the defendant’s right to respect for his or her private life under article 8 which required to be

justified under article 8.2 as meeting the requirement of legality (“in accordance with the law”) and as being a proportionate means of achieving a legitimate end. By a majority, the Supreme Court held that the legislation is “in accordance with the law” i.e. that it has some basis in domestic law and that the law is adequately accessible to the public and that its operation is sufficiently foreseeable to enable people affected by it to regulate their conduct with a degree of certainty of outcome.

Of greater importance for present purposes is the fact that the requirement of legality calls for the law to contain sufficient safeguards to avoid the risk that the power will be arbitrarily exercised and the risk that unjustified interference with a fundamental right will occur. On this point, the main focus was on whether the fact that questioning was not dependent on the existence of objectively established grounds for suspicion meant that there were no adequate safeguards against the arbitrary exercise of the power. Lord Hughes (in the first majority judgment) said that the safeguards were sufficient. These included that the powers were restricted to those passing in and out of the country; the powers had to be exercised for the specified statutory purpose; they were exercised by specially trained and accredited police officers; the questioning was restricted to a period of 6 hours; there were restrictions on the type of search authorised by the statute; there was a requirement to give explanatory notice to those questioned, to permit consultation with a solicitor and notification of a third party; a requirement for records to be kept; the availability of judicial review; and there was continuous supervision by the Independent Reviewer. I was party to a second majority judgment which gave slightly different reasons. In his dissenting judgment, Lord Kerr asked the pertinent question: if the examining officer does not have to form a suspicion that the person is or has been concerned in the commission, preparation or instigation of acts of terrorism, how is the exercise of the powers to be reviewed by the courts?

I did not find this an easy case to decide. In the end, I was influenced by the reasoning of the important Strasbourg decision of *Gillan v UK*

(2010) 50 EHRR 1105 that, in considering whether the legality principle is satisfied in relation to a particular system, one must not only look at the provisions of the statute or other relevant instrument in question, but also at how the system actually works in practice. To a lawyer schooled in the crucible of the common law, this may well seem unprincipled and unsatisfactory. But Strasbourg often adopts a pragmatic approach and that is what it did here. It was significant that in *Beghal*, the evidence showed that a relatively small number of people were interviewed under Schedule 7 and that number had decreased each year from 2009-10 to 2013-14. Unlike in the *Gillan* case, the exercise of the Schedule 7 powers had led to convictions for terrorist offences. Most significantly of all was the fact that the Independent Reviewer was very positive about the way in which the Schedule 7 powers were being exercised. Indeed, he described the system as an essential ingredient in the fight against terrorism.

I have spent a little time on this case because it shows how difficult it can be to apply the important “in accordance with the law” safeguard. As in so many areas (including proportionality to which I shall come a little later), the courts are required to make sensitive value judgments as to which it is not surprising that there is scope for more than one view.

I shall come back to *Beghal* when I consider the question of proportionality. But I would like to mention a recent decision of our Court of Appeal which illustrates our approach to the legality principle. I do so because this principle has been in the spotlight in cases where the court has been asked to decide how to resolve the tension between the state’s wish to take measures to safeguard national security and the interference with human rights that such measures may engender. In *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6, the facts in brief were these. Mr Miranda, the husband of a Guardian newspaper journalist (Mr Greenwald), was carrying data provided by Edward Snowden through Heathrow airport. He was stopped, questioned and detained for nine hours under Schedule 7 of the 2000 Act and the hard drives that he was carrying were retained by

the examining officers. Mr Miranda sought judicial review of the action taken against him on a number of grounds including (i) that the Schedule 7 powers, being exercisable without prior judicial scrutiny, were for that reason incompatible with the right to freedom of expression guaranteed by article 10 of the Convention and (ii) that the use of the powers was a disproportionate interference with his right to protection of journalistic expression.

The court noted at the outset that this was a case about article 10, whereas *Beghal* was a case about articles 5, 6 and 8 of the Convention. The Strasbourg court has always considered there to be a vital public interest in the protection of journalistic sources. The protection of a journalist's sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. Press freedom is one of the anchors of a democratic system. It is clear enough that the Strasbourg jurisprudence requires prior or (in an urgent case) immediate *post factum* judicial oversight of interferences with article 10 rights where journalists are required to reveal their sources. In such cases, lack of judicial oversight means that there are no safeguards sufficient to make the interference with the right "in accordance with the law" i.e. so as to avoid arbitrary interferences with the right. But the *Miranda* case was not about the protection of a journalist's source. The source was known. The court said that protection of a journalist's sources was no more than one aspect of a journalist's freedom of expression. There was no reason in principle for drawing a distinction between disclosure of journalistic material *simpliciter* and disclosure of journalistic material which may identify a confidential source.

Basing itself on the decision in *Beghal*, the court below had held that the constraints on the exercise of the power were an adequate safeguard against its arbitrary exercise. The particular features relied on were the requirements of the general law that the power be exercised on a reasoned basis, proportionately and in good faith; the limitation on the meaning of terrorism given by reference to the mental or purposive elements prescribed by section 1(1)(b) and (c); the fact that the power

could only be exercised at a port or border area; and the fact that the period of detention allowed was limited to nine hours. In giving the main judgment in the Court of Appeal, I said that these constraints did not afford effective protection of journalists' article 10 rights. The central concern was that disclosure of journalistic material (whether or not it involved the disclosure of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect article 10 rights. If journalists can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. The only real safeguard against the powers not being exercised rationally, proportionately and in good faith is the possibility of judicial review. But that possibility provides little protection against the damage that is done if journalistic material is disclosed when it should not be disclosed. The court therefore declared that the stop power was incompatible with article 10 of the Convention in relation to journalistic material in that it was not subject to adequate safeguards against its arbitrary exercise. It was for Parliament to enact a provision which would provide such protection. The most obvious safeguard would be some form of judicial or other independent and impartial scrutiny conducted in such a way as to protect the confidentiality in the material.

*Beghal* and *Miranda* illustrate well the difficulties which face the courts in deciding whether a legal system provides effective safeguards against the arbitrary exercise of a statutory power which interferes with the enjoyment of a qualified Convention right. The Supreme Court was split in *Beghal*. The Court of Appeal disagreed with the Divisional Court in *Miranda*. Whether a constraint provides an adequate safeguard is not a hard-edged question. As I have said, it calls for an exercise of judgment on which opinions may reasonably differ. In this respect, it bears some resemblance to proportionality, an issue that was also raised in both cases. It is to that topic that I now wish to turn.

In *Beghal*, it was submitted on behalf of the defendant that the questioning and search powers contained in Schedule 7 are incompatible with article 8 of the Convention because they are

disproportionate. In cases which concern human rights protected by the Convention, our courts apply the proportionality test as the standard of review. In other cases, we have moved away from the austere irrationality standard of review to something more nuanced. In the recent case of *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, the Supreme Court considered whether there should be a general move away from the traditional judicial review tests to one of proportionality. The court decided that, if this were to be done, it should require consideration by an enlarged court. So far this has not happened, but we are creeping forward in that direction. As long ago as 2003, I said in *R (ABCIFER) v Defence Secretary* [2003] EWCA Civ 473 that the case for the recognition of proportionality as part of English domestic law in cases which do not involve Community law or the Convention was a strong one, not least because proportionality is a more precise and sophisticated standard of review than the *Wednesbury* test, although the latter has been relaxed in recent years, even in areas which have nothing to do with fundamental rights. Indeed, the *Wednesbury* test is moving closer to proportionality. Although the court said that it had difficulty in seeing what justification there now was for retaining the *Wednesbury* test, it was not for the Court of Appeal to perform its burial rites.

So the *Wednesbury* test is still just about alive. But as I have said, there is no doubt that we apply the proportionality standard of review in cases involving alleged violations of Convention rights. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, Lord Sumption conveniently stated that four questions were inherent in the concept of proportionality. These were: (i) is the objective of the measure under consideration sufficiently important to justify limitation on a fundamental right? (ii) Is the measure rationally connected to the objective? (iii) Could a less intrusive measure have been adopted? (iv) Has a fair balance been struck between the individual rights and the interests of the community? The second of these questions does not usually admit of more than one answer. It can be resolved by the application of objective criteria. But the first, third and especially the fourth questions

raise issues of value judgment on which opinions may well differ. The first involves an assessment of the relative importance of the objective of the measure and the right that is affected by it. The third involves a judgment of whether the objective could be achieved by less intrusive means. The fourth involves an assessment of whether a fair balance has been struck between the right of the individual that is affected by the measure and the interests of the community which the measure is intended to serve. In varying degrees, the judicial responses to these questions depend on subjective considerations. Some judges give more weight than others to the protection of individual human rights in balancing these rights against the need to safeguard the security interests of the community at large. Some judges are more cautious and conservative than others. That is a fact of life. Differences of approach of this kind tend to be exposed particularly acutely when the court is asked to decide whether security measures interfere with human rights too much.

Issues of proportionality arose in both the cases of *Beghal* and *Miranda*. In *Beghal*, it was not in dispute that the objective of Schedule 7 was the prevention and detection of terrorism and that this was sufficiently important to justify *some* intrusion on article 8 rights. The power of questioning and search was rationally connected to that objective: it was designed to serve it and the evidence was that it was useful in achieving that end. The real complaint was that *any* questioning and searching was disproportionate unless it was based on an objectively established reasonable ground for suspecting the person concerned of being engaged in terrorist acts. The defendant's case was that a less intrusive measure, namely a power based on objective grounds for suspicion, could and should have been adopted, and that by reason of its failure to do so, the legislation did not strike a fair balance.

The majority of the court held that the measure was not disproportionate. They reasoned as follows. It was common ground that the state was entitled to a generous margin of judgment in striking the balance. The importance for the public of the prevention and detection of acts of terrorism could hardly be overstated and the level

of risk of such acts was at least as high as it had been at any time since the powers were introduced. The unanimous view of all independent observers was that the power to question and search which was not grounded on objectively demonstrable reasonable suspicion of involvement in terrorism was of undoubted value in the struggle against terrorism. The power would not have the same utility if it were restricted to those individuals in respect of whom a reasonable suspicion could be demonstrated to the satisfaction of the court. The level of intrusion into the privacy of an individual was comparatively light and not beyond the reasonable expectation of those who travel across the UK's international borders. Taking all the circumstances into account, the majority concluded that the port questioning and associated search powers represented a fair balance between the rights of the individual and the interests of the community at large.

Lord Kerr took a different view. He agreed with the majority that they had identified the four relevant questions. He agreed that the objective of the Schedule 7 powers of counteracting terrorism was a legitimate aim and that obtaining information about whether a person appears to be a terrorist is rationally connected to that aim. But he said that, while the state enjoys an area of discretionary judgment as to what measures are needed to pursue a particular aim, this does not relieve it of the obligation to produce some evidence that the specific means chosen were no more than is required. There was no evidence that a suspicionless power to stop, detain, search and question was the only way to achieve the goal of combating terrorism. And the absence of any evidence of a need for such a power led Lord Kerr to conclude that the measure did not strike a fair balance between the article 8 rights of the persons affected by the powers and the security interests of the community at large. It is noteworthy that, despite it being common ground that the state was entitled to a generous margin of judgment, Lord Kerr held that Schedule 7 did not strike a fair balance.

A similar issue arose in the *Bank Mellat* case to which I have referred. The Treasury made an order pursuant to Schedule 7 of the 2000 Act prohibiting all persons operating in the financial sector in the UK from

entering into or continuing to participate in any transaction or business relationship with Bank Mellat, an Iranian bank, on the grounds that the Treasury reasonably believed that the development or production of nuclear weapons in Iran posed a significant risk to the national interests of the UK. The bank applied to the court to set aside the order on a number of grounds. These included that the requirements were disproportionate to the risk posed to the national interests of the UK. The majority acknowledged that the subject matter of the application lay in the areas of foreign policy and national security, areas in which the Treasury was to be accorded a large margin of judgment; that the consequences of nuclear proliferation justified a precautionary approach and called for experienced executive judgment; but that although the Order had a rational connection with the objective of frustrating the Iranian weapons programme, the distinction made between the claimant bank and other Iranian banks was irrational and disproportionate. The majority acknowledged that a large margin of judgment was required because of the importance of the public interest in nuclear non-proliferation; and the question of whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret. This is something that is pre-eminently a matter for the executive. For the majority, however, the margin of judgment was not large enough to overcome the irrationality of the singling out of the claimant bank and the fact that it was disproportionate to any contribution that the measure could be expected to making it more difficult for Iran to finance its weapons programmes.

The minority analysed the evidence and concluded that an order directed against the claimant bank was not pointless or arbitrary. The court was in a poor position to weigh the effectiveness of a measure whose object was to reduce (if not eliminate) Iran's ability to fund its weapons programmes. This was not an area in which the court had any expertise. It should only hold that such a measure was irrational or disproportionate if it was confident that this had been clearly

demonstrated. On the facts of the case, the court was not confident that it had been.

Before leaving this topic, I wish to return to *Miranda*. It was submitted on behalf of Mr Miranda that the exercise of the Schedule 7 power against him was an unjustified and disproportionate interference with his right to freedom of expression. The issue turned on the fourth question: had the exercise of the power struck a fair balance between Mr Miranda's article 10 rights and the security interests of the wider community?

The examining officers (and those who were directing their operations) knew that the material in the possession of Mr Miranda contained personal information that would allow individuals involved in security operations to be identified and that it was highly likely to describe techniques that had been crucial in counter-terrorism operations. Mr Miranda sought to challenge the defendants' evidence as to the actual or potential damaging effects of the dissemination of the material seized from him. Mr Miranda placed much weight on the need to have regard to the importance of "responsible journalism" as a factor when weighing the competing interests in the case. It was submitted on his behalf that the evidence of the defendants' witnesses indicated no more than a theoretical risk that would arise only if key parts of the data were released into the public domain. There was no evidence that there was a real risk that such disclosure would occur. There was nothing to suggest that Mr Miranda, Mr Greenwald or the Guardian newspaper would not approach the question of publication with the appropriate degree of responsibility.

The Court of Appeal started its consideration of the issue of fair balance by saying that, when determining the proportionality of a decision taken by the police in the interests of national security, the court should accord a substantial degree of deference to their expertise in assessing the risk to national security and in weighing it against countervailing interests. This is because the police have the institutional competence and the constitutional responsibility to make such assessments and decisions. Our approach differs somewhat from that taken by the

courts, for example, in Israel whose judges are fiercely independent of the Executive. This is well illustrated in the Israeli cases dealing with judicial review challenges to the route of the security fence or wall. The courts in Israel accept that the military commander is the expert in relation to the security considerations of one route as against another route. The courts do not normally second guess the military when it comes to the security assessments of particular decisions of this kind. They do not have the expertise to do so and may well not have access to secret material which is highly relevant to the decision that has been taken. I say “normally” because one of the earliest lessons I learnt as a judge was never to say “never”. There may be circumstances in which it can be shown without fear of contradiction that a decision taken by the military or the police ostensibly on grounds of national security cannot be justified even on the basis of military or police considerations alone. In a case of this kind, the court is unlikely to give special weight to the expertise of the decision-maker. But such cases are likely to be rare.

The courts in Israel have, however, said that, whereas the military commander is the expert as to where, from a security point of view, the fence should be erected, the court has the expertise to determine whether harm caused to local residents by the proposed route is proportionate. This is the fair balance question to which I referred earlier.

As the decisions to which I have referred show, our courts would accord a substantial margin of judgment to the military. In *Miranda*, we took into account the fact that the police were ultimately accountable to Parliament and that the constitutional responsibility for the protection of national security lies with the elected government. The greater the risk to national security, the greater the weight that should be accorded to it when balancing it against a countervailing factor. The assessment of the police and the Security Service was that the risk in that case was substantial. They had the expertise and access to secret intelligence material which made it very difficult to challenge such an assessment in a court. The greater the potential harm, the

greater the weight that should be accorded to the community interests. The potential for harm in that case was very substantial. The court concluded that the compelling national security interests clearly outweighed Mr Miranda's article 10 rights on the facts of that case.

At this point, it is also worth mentioning that it is well established in the US jurisprudence that the courts will pay substantial deference to the judgment of the Executive in relation to decisions on national security. But that does not mean that national security always carries the day. The court has to weigh the rights afforded by the Constitution to individuals against the risk to national security. As I have said, it is usually very difficult for a court to assess the gravity of the risk. This weighing exercise lies at the heart of the current challenge to Donald Trump's Executive Order banning visitors from 7 countries from entering the US for 90 days. So far, the litigation has only been about the order granted by the district court temporarily restraining the implementation of the Executive Order and whether it should be stayed pending the hearing of the substantive claim. In other words, despite the hype, it is something of a preliminary skirmish.

To end this lecture, I wish to return to the question of the protection of unqualified rights in an age of terrorism. I have already spoken about the unqualified article 3 Convention right not to be subjected to torture or degrading treatment. I should say something about the article 6 right to a fair trial. This too is an unqualified right, although issues can arise as to the content of the right. The right to a fair trial is a cardinal requirement of the rule of law. It includes the right in a party to know the case he has to meet and the evidence on which it is based, particularly in criminal cases. This is trite and elementary. But terrorist cases pose particular challenges here too. Under the Prevention of Terrorism Act 2005, the Home Secretary had the power to make a control order against a person if he had reasonable grounds for suspecting the person to be or to have been involved in terrorism-related activity and he considered that it was necessary, in order to protect the public against the risk of terrorism, to make such an order. The order could not lawfully deprive the controlee of his liberty, but

could contain obligations not far short of house arrest whose cumulative effect could render any normal life impossible.

Following the making of such an order, there had to be a hearing before a judge at which the question whether the Home Secretary's decision to make the order was flawed would be considered. It would be flawed if there was no evidence reasonably capable of supporting the order. But under the Act and the rules made under it, no information was to be made available to the controlee or his lawyers if disclosure would be contrary to the public interest. A special advocate could be appointed to represent the interests of the controlee, but on condition that the advocate did not share with the controlee or his lawyers information judged to be contrary to the public interest. This could be very prejudicial to the interests of the controlee who, if the information were disclosed to him, might be able to provide a "knock-out blow" which would completely destroy its effect. Here we find the tension between an unqualified right (the right to a fair hearing) and the community interest in national security exposed in a particularly acute form. It is not surprising that the lawfulness of the special advocate procedure was tested in our courts and in Strasbourg in a number of cases. The limitations of the special advocates system have been the subject of much criticism. Those who have acted as special advocates have spoken eloquently of the difficulties they face in representing their clients effectively when operating in what has been described as a "Kafkaesque" setting. But in the end, the courts decided that the special advocates system did not violate article 6. A compromise solution was devised. They said that article 6 required that in such cases the "gist" of the evidence relied on against the party had to be disclosed.

I am conscious that I have only touched on a few aspects of the vexed, difficult and important subject of my lecture. Terrorists present a real and continuing threat. In a nuclear age, the potential to wreak havoc is alarming. It is the duty of all responsible governments and security forces to do everything in their power to minimise the threat. But not at any price. Striking the balance in the right place between doing everything possible to reduce, if not eliminate, the threat on the one

hand and protecting the human rights of individuals potentially affected by those steps on the other hand is one of the biggest challenges of our time.