National Security and Judicial Review
(Administrative Law Bar Association, 13th July 2024)

Introduction

1. As Independent Reviewer of Terrorism and, since February, of State Threat Legislation, I count myself an informed outsider, or perhaps an ill-informed insider. I used to do national security work as a barrister, but now I read the caselaw wearing a different hat.

2. I read the caselaw because judicial review or oversight is one of the key safeguards to exceptional national security legislation. It is precisely the sort of safeguard that I may publicly call for when the government proposes new national security measures – for example in the recent Criminal Justice Bill[1].

3. It is precisely the sort of safeguard that the government may have as a 'concession strategy'. This happens when needed legislation meets opposition, perhaps in the Lords. The government may be able to get useful legislation on the statute book by agreeing to judicial oversight clauses.

4. So it is quite important to know what judicial oversight of national security decision-making actually entails.

5. I will admit that as an informed outsider (or ill-informed insider) to finding this question perplexing on the current state of the law. Can judges overturn decisions on national security? Is judicial oversight restricted to questions of procedure rather than substance?

6. If it's hard for me to know, I suspect it is also hard for Parliamentarians who have the task of working out whether to pass a Bill, and who may feel that meaningful judicial oversight makes the difference between good and bad national security legislation.

Same Evidence Different Tests

7. In 2015, **Yahya Rachid** was convicted at Woolwich Crown Court of preparing acts of terrorism contrary to Terrorism Act 2006. The jury were sure that he travelled to Turkey via Morocco with the ultimate purpose of entering Syria to fight with Islamic State. In the event he abandoned his plans before getting to Syria, flew back to the UK and was arrested on his return.

8. In his defence he said he didn't really understand what he had become involved with. His counsel relied on the defendant's low IQ and learning difficulties[2].

[1] Evidence to the Public Bill Committee, Criminal Justice Bill Debate (12.12.23). The government wanted a power for the Justice Secretary to reclassify old convictions as terrorism convictions.
[2] BBC News, 'Low IQ teen convicted for Syria plan' (13.11.15).

9. The jury accepted that he intended to travel and intended to commit acts of terrorism. But it is not hard to imagine a situation where the jury could have heard the defendant in evidence and found him credible.

10. If the jury had been less than sure having heard all the evidence they would have had to acquit - whatever the prosecution case theory.

11. Now let's switch this round and imagine that Rachid was facing deportation on the grounds that he was a risk to national security because of his previous travel to Turkey. He is now before a civil court or tribunal where judicial review principles are being applied.

12. The question this time would be whether the Secretary of State made a legal mistake in her assessment that Rachid is a risk to national security. But the factual issue is identical to the criminal case. Did he go to Turkey with a view to entering Syria or not?

13. In this sort of case, you are likely to have a statement from an MI5 officer giving an assessment (if you like, the prosecution version). Imagine Rachid gives evidence in these proceedings and is cross-examined. Imagine that the tribunal finds him entirely credible.

14. What to do? The tribunal finds him credible, and that he never intended to go any further than Turkey, but the Secretary of State advised by MI5 assessments has concluded that he was in fact going to Syria.

15. I regret to say I have absolutely no idea of how the principles of judicial review apply in this situation. I suspect the tribunal wouldn't have either. The law is confused. Does judicial oversight mean that the tribunal could disagree with the Secretary of State having heard the defendant's evidence, or not?

16. To understand how we got here let's consider 2 real life spy cases.

Spy Cases

17. The first is the deportation case of **Katia Zatuliveter**, which came before the Special Immigration Appeals Commission (known as SIAC) in 2011. The Appellant was an aide to and lover of Mike Hancock MP, then a member of the Commons Defence Committee, and was alleged by MI5 to be a Russian spy.

18. On the panel of SIAC was Sir Stephen Lander, the former Director-General of MI5. A preliminary issue arose whether an alleged Russian spy could have a fair hearing before such a tribunal, where the outcome depended on MI5 assessments.

19. SIAC, chaired by Mr Justice Mitting, rejected the recusal application: it was one of SIAC's strengths that it included experts such as Sir Stephen[3].

[3] BBC News, 'Can a spook judge the spooks?' (30.9.11).

20. At the substantive hearing, possibly to the appellant's surprise, this expertise had impact. Whilst SIAC thought that MI5 had ample grounds for suspicion, they found that those suspicions had been dispelled and allowed the appeal[4].

21. The second spy case is C2 which was decided earlier this year[5]. C2 was also alleged to be a Russia spy. SIAC heard C2 give evidence but on this occasion they did not find him to be credible and dismissed the appeal.

22. But listen to what the chairman of SIAC Mr Justice Jay then said[6]:

> "Had the [SIAC] taken a different view of C2's evidence, and decided for example that he was a highly compelling witness of credibility, reliability and integrity, we do think that uncomfortable issues would have arisen…. Fortunately, these uncomfortable issues lie in the realm of the academic and the hypothetical in the circumstances of C2's case."

23. Why is this uncomfortable? What has happened when a judicial tribunal might find an appellant credible on the key factual issue, but is uncertain whether it could allow the appeal? What sort of judicial review or oversight is this?

What Happened

24. What happened between the two spy cases is all about attitudes to a decision of the House of Lords which was decided shortly after 9/11. This is the case of **Shafiq ur Rehman**[7] which concerned judicial expertise and judicial competence in matter of national security. Between the two spy cases, this House of Lords decision went from being sidelined to becoming the dominant approach.

25. Before 1997, someone excluded from the UK on grounds of national security could not appeal but could ask to be interviewed by independent advisors known as the Three Wise Men. These advisers were able to recommend the revocation of an exclusion order and did so five times in 1989, four times in 1990 and 1991, once in 1992 and twice in 1993. In all these cases, it is interesting to note that the recommendations were accepted by the Secretary of State[8].

26. But famously, in Chahal's case in 1996[9], the European Court of Human Rights said this system was not Article 6 compliant – the Three Wise Men were not an independent tribunal, there was no right to appear as a party, and their decisions were not binding. This led to the creation of a specialist tribunal SIAC[10], and their first case was Rehman.

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[4] Zatuliveter v SSHD, Appeal No: SC/103/2010 (29.11.11).
[5] C2 v SSHD, Appeal No: SC/166/2019 (17.5.24).
[6] At para 111.
[7] SSHD v Rehman [2001] UKHL 47 (11.10.01).
[8] McCullough v UK, Application No. 24889/94 (12.9.97), ECtHR.
[9] Chahal v UK 23 EHRR 413 (15.11.96), ECtHR.
[10] The history of SIAC is neatly summarised History summarised in a letter from Lord Goldsmith QC, then Attorney General to the chain of the Constitutional Affairs Committee (15.3.05).

27. The details don't matter but SIAC decided, like the Three Wise Men had recommended in other cases, that the deportation order against him should be revoked. The Secretary of State's appeal reached the House of Lords.

28. Lord Hoffman's judgment established the point, and I summarise, that national security matters were really for the Secretary of State, and it was not for SIAC to substitute its own opinion. This decision led to the resignation of one of SIAC's original members[11].

29. In the first spy case Zatuliveter, SIAC expressly decided that it would not follow what it called Lord Hoffman's self-denying ordinance. This was because SIAC was better placed than the Secretary of State to consider all the evidence including evidence adduced at the hearing itself[12]. It also had the expertise of Sir Stephen Lander, the ex-spy chief.

30. But then came along the case Shamima Begum in the context of the terrifying and dangerous activities of the so-called Islamic State. You may remember what happened. She was in a camp in Syria and was deprived of her citizenship in 2019.

31. As a preliminary issue she argued that she couldn't receive a fair hearing from abroad. When it reached the Court of Appeal, the appeal judges reached various conclusions.

32. The relevant conclusion for our purposes was, without any evidence having been heard on risk or risk management, that Shamima Begum could be safely managed on return to the UK, for example by imposition of a TPIM[13]. Interestingly, the appeal judges included Flaux LJ past president of SIAC and Singh LJ current chair of IPT, both judges with great knowledge, you might even say expertise, of national security matters.

33. But the Supreme Court set this aside. In a unanimous judgment the court held that Lord Hoffman's approach in Rehman governed the field and that the Court of Appeal had been wrong to make their own assessment of national security risk[14]. How the Supreme Court might have approached the case if detailed findings had been made after hearing all the evidence is an intriguing question.

34. The effect since then has been, to quote Mr Justice Jay when Shamima Begum's case returned to SIAC for a full merits hearing, that national security as a public interest factor on one side of the balance "…remains (largely) legally inscrutable"[15]. This is the era in which the second spy case C2 was decided, leading to those striking remarks I quoted earlier about what the tribunal could do even if they concluded that C2 was not a spy.

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[11] Letter of Brian Barder (former ambassador and member of SIAC) to the London Review of Books (18.3.04).
[12] Zatuliveter, supra, at para 8.
[13] Begum v SIAC and SSHD [2020] EWCA Civ 918 at para 120.
[14] R (Begum) v SIAC; R (Begum) v SSHD; Begum v SSHD [2021] UKSC 7 at para 108.
[15] Begum v SSHD, Appeal No: SC/163/2019 (22.2.23) at para 70.

Analysis

35. Whether MI5 assessments really are written on golden paper will one hopes be addressed by the Supreme Court in a different case, U3, later this year.

36. Until then there is a terminological debate about the circumstances in which a tribunal can disagree with a national security decision.

37. For example, does it depend on whether the Secretary of State got something wrong that was "pivotal"[16]? To take my Rachid example, if the tribunal found that Mr Rachid had not travelled to Turkey at all, because MI5 and therefore the Secretary of State misread the flight manifest. Or does it depend on whether the tribunal is looking at an "assessment" rather than a question of "fact"[17]?

38. Alternatively, are the strictures less binding in other settings – for example, in the Proscribed Organisations Appeals Commission[18] or perhaps in the Investigatory Powers Tribunal, or where the challenge is framed as an appeal as opposed to a review?

39. Institutional competence and expertise are often mentioned.

40. True, the Secretary of State is charged with decisions on protecting the public as the first task of government. But if that is an exclusive role for the executive, there is no role for judges at all. Judges do make decisions which impact on national security – juries do it all the time, if they decide to acquit someone the prosecution say is a dangerous terrorist.

41. And judges have obvious institutional competence on the exercise of statutory powers – this is the very nature of judicial oversight of terrorism and national security legislation.

42. As to expertise, it is true that MI5 officers are experts in assessment. But as the Sir Stephen Lander case shows, some tribunals will have their own expertise. Plus, tribunals have expertise in assessing witnesses, and will usually have the advantage of evidence and submissions that were not considered in the original decision.

43. I will conclude with some observations as Reviewer on why meaningful judicial oversight matters.

44. Firstly, as already mentioned, if politicians lose faith in judicial oversight as a safeguard, then valuable legislative measures may fail to win support, to the detriment of the UK's national security.

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[16] U3 [2023] EWCA Civ 811 at paras 174-5.
[17] U3, supra, at 175; C2, supra, at 110.
[18] In Arumugam's appeal to the Proscribed Organisations Appeal Commission (POAC, 21.6.24), Jay J considered at para 22 that POAC had more freedom to disagree with the Secretary of State than SIAC.

45. Secondly, no one is perfect and effective challenge leads to better future decisions.

46. Thirdly, and paradoxically, effective judicial oversight can get ministers out of a pickle. It may be politically difficult for ministers to be seen to weaken their position on national security even though it might be beneficial to do so.

47. Fourthly, and I hesitated before making this point because the law is certainly not for the benefit of lawyers, but lawyers may become demoralised and stop doing this work, if their work is incapable of making a difference on issues of fact. If special advocates and appellant counsel decline to accept instructions, the system which the UK positively relies upon as part of its national security architecture will grind to a halt. We know the consequences of a profound human resourcing problem in the criminal courts.

48. But I can also see, being much more familiar in my current role with resources, competing priorities, and the international dimension, that judges are not well-placed to rule on risk-management, or national security strategy[19].

49. So, my plea is not for rule by judges, but for meaningful judicial oversight on issues of fact.

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[19] See for example, Chandler v DPP (1964) AC 763 and recently, Begum v SSHD [2024] EWCA Civ 152 at para 10(iv).