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Our responsibility to respect the rights of others: legality and humanity

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1. Introduction

A. *Challenge and continuity*

States tend to be concerned about self-definition, and immigration law arose as one attempt to mark out territory by establishing a regulatory system which defined who could enter, remain and be removed (with nationality and citizenship laws addressing membership). The risk with migration law, however, is the governmental temptation to nurture a continuing form of communal insecurity by constructing 'others' as a threat.[1] Governments have given into this urge all too often, and the application of migration law often says as much about national communities as it does about those seeking to enter or remain

Migration brings with it many benefits, but from the governmental perspective it also carries potential risks. Immigration law has historically been used to limit these risks at the entry stage, and also its enforcement provisions have been applied against those considered a danger to public order or national security. This has included, for example, internment during times of war,[2] mass and individualised deportations[3] or the expulsion of those who had simply outstayed their original welcome. It is a well-established area of legal regulation that vests formidable powers with the executive, and has done so for some time and in many states.

[1] Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Oxford: Routledge, 2006), p. 47: 'migration and asylum become a factor in a constitutive political dialectic in which securing unity and identity of a community depends on making this very community insecure.'

[2] See David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terror* (New York: The New Press, 2003).

[3] *R* v. *Secretary of State for the Home Department, ex parte Cheblak* [1991] 2 All ER 319 (deportation of Iraqis and Palestinians following the outbreak of the Gulf War in 1991).

Refugees and asylum seekers generally require an effective form of international protection, as they are fleeing human rights abuses in their state of origin where national forms of protection have broken down. They may even be fleeing conflicts that they themselves were participants in or became the targets of. If they do secure a form of international protection, they may become politically active (perhaps renewing earlier commitments) or develop support for political movements overseas. Although they may be victims and survivors of conflict, that does not render refugees and asylum seekers empty of all the complex political and social human associations, allegiances and commitments that everyone can become party to. It is when this activity begins to slide into the counter-terrorism frame or the person concerned is simply a member of a 'suspect community'[4] that enhanced problems can arise. In three broad areas the impact can become marked: first, in the attempts to exclude terrorists from refugee status (as envisaged in the 1951 Convention relating to the Status of Refugees, art. 1F); second, in the deployment by states of repressive internal measures to deal with established and emerging 'suspect communities' (which may include refugees and those seeking asylum);[5] and third in attempts (ever more elaborate) to secure the removal of asylum seekers who pose a threat to national security. Although serious concern continues about the use of exclusion clauses, it is in the last two categories where matters have raised stark and ongoing human rights problems. States like the United Kingdom are increasingly uneasy about the risks they face from transnational terrorist networks, and the scale and extent of the proactive and preventative responses (which did not, however, involve repeal of the Human Rights Act 1998) demonstrate this clearly. The starting point now is frequently framed in rights-based terms, for example, the positive obligation on the state to protect the right to life of all within its jurisdiction confronts the absolute rights established under art. 3 of the European Convention.

B. Using migration law?

The events of 11 September 2001 (US), 11 March 2004 (Spain) and 7 July 2005 (UK) prompted an intense focus on the effectiveness of existing counter-terrorism law and policy, and the rapid international promotion

[4] Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (London: Pluto Press, 1993).

[5] Ibid.

of new and more proactive approaches. As part of this general mood of anxiety and fear, asylum, immigration and nationality law have been put to use in the 'global war against terror'.[6] The ease with which this body of law could be deployed (as well as amended and enhanced) highlights the flexibility embedded in pre-existing law and policy; a point further underlined when laws are selected precisely because they lack the procedural and other protections that are present in, for example, the criminal law.[7] Immigration and asylum law appeared to permit just the right level of room required by states to achieve some counter-terrorist aims (these existing powers could always be extended), but also contained enough constraints to generate significant and vocal governmental frustration. A reason for this is, of course, that a connection between the national security obligations of states and their migration laws and policies is already present.[8] Aspects of immigration and asylum law at the national level were put in place precisely because of security fears resulting from migration flows. To those engaged with immigration and asylum law (in all its long-established normality in public law terms), the new discourse of radical departures seemed odd and over-egged. States had been thinking proactively and preventatively in a migration context for some time. Had public lawyers not noticed?

Claims to novelty by those who suggest that the position changed the rules should therefore be treated with caution for three reasons. First, refugee and asylum law in particular was designed precisely to address the supposedly 'exceptional situation' of forced migration, where instability and insecurity are at the core of the human dilemma.[9] The law emerged in the aftermath of massive global conflict and huge population movements when war crimes, crimes against humanity and serious criminality were firmly in view. It was designed with these problems in mind and is reflective of a world where conflict and complexity are ever present. It is a regime that recognises that people may be involved in legitimate political struggle in their societies and this might be the reason why they are seeking

[6] Kent Roach, Chapter 20 in this volume; Howard Adelman 'Refugees and border security post-September 11' (2002) 20 *Refuge* 5; Kate Martin 'Preventive detention of immigrants and non-citizens in the United States since September 11th' (2002) 20 *Refuge* 23.

[7] See Stephen Legomsky 'The new path of immigration law: asymmetric incorporation of criminal justice norms' (2007) 64 *Washington and Lee Law Review* 469.

[8] Daniel Moeckli, 'Immigration law enforcement after 9/11 and human rights', in Alice Edwards and Carla Ferstman (eds.), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010), Chapter 13.

[9] Adelman, 'Refugees and border security', 11 ('there is virtually no evidence linking *global* terrorism with refugees…').

asylum elsewhere. The dilemma may arise when this political struggle takes violent form and falls under a counter-terrorism framework.

Second, the 'security discourse' being constructed around the treatment of forced migration was evident for some time and well before 9/11.[10] The construction of the institution of asylum as a potential security threat has a history, with the last decade witnessing a further escalation. This is not to deny that potential security threats posed by global migration can be real and credible; terrorists make use of our interdependent world too. It is to suggest that the responses can be viewed as part of a historical pattern.[11] Arguably, the pressures exerted in the national security context are simply more intense versions of the strain the overall asylum system is under.[12] The 1951 Convention relating to the Status of Refugees contains such express recognition of the security concerns of states that at times it appears to privilege these over asylum, particularly when viewed within a European human rights context. The final point is, as noted, that the models were already in place in existing law. New measures were actively promoted and adopted, but much of this worked off established legal settings rather than signifying appalling breaks with the past.

In the United Kingdom, the government has woven migration policy into the narrative of providing generalised security for all citizens, as well as into debates on national self-definition; a trend also evident internationally in the actions of other states. Concern about asylum, and the implications for counter-terrorism policy, reached the highest political levels and extended beyond national contexts. The UN Security Council, for example, made clear after 9/11 that there should be no safe havens for terrorists and that refugee status should not be 'abused' by 'perpetrators, organizers or facilitators of terrorist acts'.[13] This position was underlined further after 7 July 2005, when the-then British Prime Minister, Tony Blair, stressed that the 'rules of the game were changing'.[14] It should also be noted that this international discourse is aligned with an expressed commitment to enduring respect for international law, including refugee

[10] See Huysmans, *The Politics of Insecurity*.

[11] See Prakash Shah, 'Taking the "political" out of asylum: the legal containment of refugees' political activism', in Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999), pp. 119–35.

[12] See Reg Whitaker, 'Refugee policy after September 11: not much new' (2002) 20 *Refuge* 29.

[13] UN SC Res. 1373 (28 September 2001) and 1377 (12 November 2001). See generally C. H. Powell, Chapter 2, this volume.

[14] UN SC Res. 1624 (16 September 2005); Tony Blair, Speech, *The Guardian*, 5 August 2005.

law and human rights law. In other words, this period did not witness the rhetorical abandonment of rights, in fact something of a rights resurgence took place as governments sought to justify their actions in precisely these terms. This confirms that the principle of legality continues to matter, and the practical impact of counter-terrorism policy on the treatment of refugees and asylum seekers is evidence that constant vigilance is required. This prompts the suggestion that the values which give life to the principle need not be tied to any one institutional context and must become embedded in the wider (globalised) public sphere if the abuse of human rights is to be effectively confronted. There are few more challenging contexts than the collision of counter-terrorism, globalised conflict and migration, but there is evidence of a globalised public sphere rising to meet it.

C. *The rules remain the same*

In this overall context, what is the argument here? This chapter seeks to argue for the significance of the principle of legality, and what it should imply in this and other contexts, using evidence available from the United Kingdom primarily.[15] It is a contribution framed by scepticism about the melodramatic deployment of discourses of novelty. Although perhaps not 'eternal recurrence',[16] or first as tragedy and then as farce,[17] the story of human history is underpinned by enough constancy to suggest other factors are at work when we are told that the 'rules of the game' have changed,[18] or that we are facing singular, unique or unprecedented threats in the face of which innovation and flexibility are required.[19] These are discourses that in their obsessive use of existential angst (and decisionist rhetoric) oddly and eerily mirror the appalling aesthetic of the terrorist attack, and carry within them the seeds of essentially anti-democratic and anti-rule of law tendencies. The differences are clearly there, but both seek symbolic and material breaks with the past for particular political, social and economic purposes. Both wish to side-step the constant and often messy demands and constraints of democratic life – with the hard work of democratic dialogue and persuasion avoided. The careful nurturing

[15] Appellate Committee of the House of Lords, and now the UK Supreme Court in particular.
[16] Friedrich Nietzsche, *The Gay Science* (New York: Random House, 1991).
[17] Karl Marx, 'The eighteenth brumaire of Louis Napoleon', in Lawrence H. Simon (ed.), *Selected Writings* (Indiana Polis, IN: Hackett Publishing Company Ltd, 1994), p. 187.
[18] Tony Blair, *The Guardian*. [19] Ibid.

of insecurity, anxiety, fear and doubt can be contrasted with the values which stand over constitutional democracies, and which march under the banner of the political ideal of the rule of law. To gain life, however, these values must flow through and from institutions and people (and find concrete expression in precise and detailed laws, policies and practices). Those who defend conceptions of legality are rightly criticised for disappearing into a common law constitutionalist haze of vague principles.[20] If it is a shared project to be aspired to, and worked towards, the steps need to be clear and we should know what the destination might look like.

2. Does the political ideal of legality matter?

The conceptual debates in UK public law remain polarised between those who are sceptical of the judicial role (and troubled by what has happened to Parliament) and those who believe that judges do not go far enough in defence of individual rights (who are also worried about what has happened to Parliament). Both share a belief that executive domination is something to curb, but disagree on what the precise remedy might be. It is a tired and old debate given fresh life by a recent resurgence in liberal constitutionalism. Those sceptical of the judicial role place their trust in the potential of Parliament (in a richer and wider democratic context) to deliver more effective protection of rights. They believe that Parliament is not only best placed but has the democratic legitimacy and power required to keep the executive in check (to become a genuine obstacle to bad practice). Those who view the majoritarian nature of parliamentary democracy with suspicion look to the law and the courts to provide necessary restraints. Viewed pragmatically (from the perspective of the effective protection of refugees and asylum seekers) overreliance on parliaments that are dominated by their executives is troubling. Just as judges can provide a cloak of legality to otherwise questionable practices, so Parliament can offer a veneer of democracy that masks a rather more decisionistic reality. Individuals and groups with a marginal democratic voice have good reason to fear executive-dominated legislatures (as well as executives dominated by the Prime Minister), particularly at times of profound local and global insecurity. That is why the values which animate the notion of legality should also inform the work of Parliament. The courts have, of course, a key and central role, and a construction of the judicial role must

[20] See Thomas Poole, 'Constitutional exceptionalism and the common law' (2009) 7 *International Journal of Constitutional Law* 247.

form part of any analysis of public law which has not abandoned adjudication as a form of decision making. Even under a thoroughly democratic and republican reading of public law, we need to know what the courts should do and what principles should guide their approach (and this is evident in the recent work of, for example, Tomkins).[21] This debate has significant practical implications in the field of immigration law where legislatures and executives can be unresponsive.

One practical problem is that the UK government is steadily narrowing the scope for individuals to challenge asylum decisions. If there is a theme of the last decade, it is the crushing pressure on the asylum regime to deliver speedier results, as well as the creative ways of ensuring people never reach the United Kingdom to make a claim (for example, visa requirements on refugee-producing countries, combined with carrier sanctions and safe third country rules, and much else). From the mid-1990s, the introduction of accelerated procedures in combination with a barrage of other measures, including the giving and then the restriction of rights of appeal, resulted in an 'abused system' which continues to display a suspicion of challenge.[22] This was particularly evident in the failed attempts to oust judicial review entirely.[23] Similar objectives can, however, be achieved through a variety of other more nuanced legal and policy mechanisms – which perhaps do not attract a similarly robust response from the wider legal community. Whatever view is taken of the judicial role, it must confront a legal system that is making it increasingly difficult to contest asylum decisions, or for many to receive effective scrutiny of their claims. The rule of law is not only undermined through direct attempts to exclude judicial review. It may also be eroded by a creative legal and policy framework which seeks to immunise itself from scrutiny. This is also why advocates of the 'rule of law project' (to use Dyzenhaus' term) must spread over a range of institutions and societal contexts. The 'rule of law project' needs to move beyond judges, lawyers, public administrators

[21] See, for example, Adam Tomkins, 'The role of the courts in the political constitution' (2010) 60 *University of Toronto Law Journal* 1–22 and Adam Tomkins, 'National security and the role of the courts: a changed landscape?' (2010) 126 *Law Quarterly Review* 543. Tomkins argues that the *Belmarsh* decision looks rather more like a 'one-off' than a 'landmark', and in practice the lower courts (Administrative Court, SIAC, and the Proscribed Organisations Appeal Commission) are being consistently more robust in the intensity of review.

[22] This is not unique; such generalised critiques are evident in many areas of legal regulation where quick results are desired but legal processes appear to stand in the way.

[23] A. W. Bradley, 'Judicial independence under attack' [2003] *Public Law* 397.

and politicians and work with a richer understanding of what it means in practical terms.

An approach is needed to public law in the United Kingdom which recognises both the importance of parliamentary democracy, properly understood in a democratically diverse setting (devolution), and the robust parliamentary, judicial and societal protection of the rights of all persons, with particular emphasis on vulnerable and marginalised individuals and groups (objectively determined).[24] This will not be found in excessive deference to executives, even in matters of immigration and asylum, and particularly when national security concerns are raised. It is not to be discovered either in attempts to place too much strain on the judicial role. Courts cannot be expected to become permanent surrogates for the institutional failings of democratic, parliamentary and civic life (as pragmatically understandable as it is to pursue this route when all other avenues are blocked). The establishment of 'hybrid' mechanisms, such as the Special Immigration Appeals Commission (SIAC), raise intriguing questions around attempts to reconcile the competing demands, and further complicate an already complex debate.[25] The alternative has been sketched out well by others. A start might be made by switching attention from the institutional question of 'who decides' to what the content of the political ideal of the rule of law is. Here, however, the danger is of a drift into vagueness, uncertainty and rights-based abstraction. What does Dyzenhaus' 'rule of law project' commit us to in contexts where there is every reason to question the dire common law record? In my view, the stress on the priority of legality is not a political argument for a resurgent common law constitutionalism, it is a defence of starting the constitutional conversation on the basis of principles, values and arguments rather than simply circling around institutions, or promoting a subservient notion of deference to

[24] Rabinder Singh, 'Equality: the neglected virtue' [2004] *European Human Rights Law Review* 141.

[25] SIAC was established as a direct result of *Chahal* v. *UK* (1996) 23 EHRR 413. The Court held that the old advisory committee system in the United Kingdom violated arts. 5(4) and 13 of the European Convention. See also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006), p. 205: while recognising the problems with the SIAC model he does also see positive elements, '… it goes much further than the United Kingdom had gone before in trying to ensure that a rule-by-law response to a perceived emergency is coupled with the rule of law'. He talks about the creation of grey (rather than black) holes, which if put to use can assist in reducing 'official arbitrariness' but offer nothing substantive. In defending the 'rule of law project' throughout this book, Dyzenhaus also has in mind judges who uphold rule by law rather than the rule of law.

hierarchies (judicial, political or any other). When national security concerns are prominent, the existing normative framework – and the principles which give it tangible meaning and life – must be interpreted and applied appropriately and convincingly. This process need not be exclusively undertaken by the judiciary, although we should expect judges to demonstrate an understanding of the principled constitutional context within which they function. In the United Kingdom, parliamentary committees, MPs, devolved administrations, human rights and equality bodies, the legal profession and NGOs all have a responsibility to argue for the values which underpin legal order. This could be pressed further: everyone has a responsibility to uphold and respect human rights. Vibrant networks have emerged to challenge human rights abuses, and they often draw inspiration from the political ideal of legality. Approaches which therefore aim to hold onto a substantive understanding of the rule of law remain persuasive in this context. All these participants seem to assume that adherence to the notion of legality has a distinctive ethical and political component. As Dyzenhaus has consistently argued, the rule of law is a political ideal which should draw attention to the substance of legal argumentation and ultimately assist in promoting a general political and legal culture of justification.[26] The aim should be to highlight the arguable and dynamic nature of law as well as its basis in distinct values.[27] It means something, in substantive political terms, to be committed to legal order (rule of law rather than rule by law). The rule of law is essential to the construction of a democratic culture in which people are treated equally, but the preferred approach should shift attention towards reasons, arguments and justifications as opposed to a rigid focus on the institutions or the decision-maker. 'Who decides' does matter (particularly where experience and expertise is demonstrably there), but the rationale for decisions matters more. When national security is raised in the asylum context, judges should operate consistently in the application of principle and thus bring it fully under legal order; others must do so too.

The weakness in such an approach is that it can appear naive and unrealistic, and miss the highly strategic orientation of participants in legal and political arenas. In such contexts, precise rules are often being

[26] David Dyzenhaus, 'The permanence of the temporary', in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press, 2001), pp. 21–37.

[27] David Dyzenhaus, 'Recrafting the rule of law', in David Dyzenhaus (ed.), *Recrafting the Rule of Law* (Oxford: Hart Publishing, 1999), pp. 1–12; Neil MacCormick, 'Rhetoric and the rule of law' in Dyzenhaus, *Recrafting the Rule of Law*, pp. 163–77.

used in context-sensitive, pragmatic and strategic ways to achieve specific outcomes. The strength of the approach rests on the respect for the individual it generates, and respect for the basic principles of fairness which it implies. These are logical outcomes of a basic point: the evasion of legality should not be condoned, especially by those charged with being its guardians. Legality as a convenient mask should also be challenged, as a potentially even more insidious erosion of standards. For example, what might we do if the whole edifice of an area of legal regulation is just a sophisticated cloak for injustice which we perpetuate by condoning its more positive elements?

We should move beyond the idea (evident in debates in some national contexts) that the respect flowing from legality is owed primarily to citizens. It is still too often the case that non-national status is used unreflectively in local contexts to justify separate and unjust treatment, thus neglecting and eroding the rights of non-nationals. In asylum law, where extensive pressures are often placed on government and public administration by opposition parties, hostile media and sections of the electorate, insistence on the importance of respect for each individual is significant. A commitment to legalism thus still has an overriding ethical dimension.[28] This does not, however, mean exclusive support for a particular institutional belief that the courtroom is the only forum for its vindication (we do need to know what it is we think judges should do), or that our morality is exhausted in the legal framework, and it is not a plea for an inappropriate revival of ineffective common law constitutionalism.

3. Refugees, asylum seekers and counter-terrorism in the United Kingdom

A. A culture of suspicion, hostility and fear

Asylum law in the United Kingdom has developed (within the wider body of immigration law) rapidly in the last two decades as a highly specialised area of public law (and now must also be viewed in the context of EU law and policy). Legal regulation has responded to the twin objectives of recognising the humanitarian institution of asylum, anchored around the 1951 Refugee Convention (and other human rights commitments), and seeking to manage an inherently selective process within which tragic choices will often be made. The challenge in this area of public law is

[28] Ibid.

to maintain the principled imperatives of the rule of law (as this applies to each human person) in the face of other formidable pressures and demands on the system. The tensions are built into the regulatory regime, with decision-makers, adjudicators and courts tasked with making an essentially selective system function, all in a profoundly unjust global setting of human rights abuse and severe inequality. It is an area of public law where the substantive understanding of legality is consistently tested, even without national security concerns arising.

The policy premise in the United Kingdom often reflects an embedded official view that the current system is being widely abused by those who are not in genuine need of international protection. This has also become the official narrative of Western democracies, who evidently view the humanitarian institution of asylum as a doorway into their states for those they would generally rather exclude (these states can often have quite generous entry rules for selected and desirable migrants). A 'culture of suspicion' remains evident, and the events of 9/11 and 7/7, and what has followed, simply intensified an existing process of national deterrence and restriction. An overriding focus on the reduction in the number of applicants in general remains, combined with the criminalisation and securitisation of the entire migration debate.[29] Nevertheless, it is worth observing that the UK Government did not repeal its refugee and human rights law commitments, despite moments of evident irritation and frustration with particular judicial outcomes, a trend which is generalisable beyond the United Kingdom. The arguments were intense at times, and remain so, but thus far they have largely been conducted within the terms of the human rights and refugee law regimes.

The refugee regime should primarily be concerned with the provision of protection to asylum seekers from return to another state where there is a real risk of sufficiently serious human rights abuse. Asylum is a humanitarian institution designed to offer surrogate protection to those in genuine need of it; a terrorist facing lawful and legitimate prosecution is therefore not someone who necessarily has a well-founded fear of being persecuted. Even that seemingly simple statement is, however, problematic. A terrorist may well have faced torture or other forms of mistreatment as part of the prosecution process in another state and may have a well-founded expectation of similar treatment if returned.

Permanent settlement in the UK may be the result of a grant of refugee status, however, the principal official purpose of the legal regime is to offer

[29] See Huysmans, *The Politics of Insecurity*.

international protection as long as it is needed (international refugee law also includes the notion of cessation of status). Decision making in asylum cases is particularly challenging because it involves judgments about future risk based on the individual's testimony, and available objective evidence about the applicant's state of origin; the outcome can have serious implications for each individual. The risks involved in getting this future-oriented assessment wrong are substantial, as are the challenges involved in getting it right.

Legal provision is now extensive, intricate and complex. An expansive statutory framework, and a substantial body of case law dealing with immigration and asylum, has evolved.[30] Counter-terrorism legislation has also progressed further over the last decade and has had an impact on nationals and non-nationals (the adverse impact on particular minority ethnic communities, refugees, asylum seekers and migrants remains marked).[31] The restrictive legal developments progressed alongside moves to further embed a culture of human rights in the United Kingdom. The Human Rights Act 1998 changed the human rights context by permitting localised access to European Convention rights in domestic law. The creation of human rights commissions (Northern Ireland Human Rights Commission, Scottish Human Rights Commission, Equality and Human Rights Commission), the establishment of a Joint Parliamentary Committee on Human Rights and the creation of a new UK Supreme Court are all notable trends on the positive side of the balance sheet. Restrictive and repressive trends have therefore not gone unchallenged

[30] The Immigration Act 1971 remains the governing legislation for entry and removal generally and sets the overall legal framework. It includes, for example, in s. 2A the power to deprive a person of the right of abode in the United Kingdom, if the Home Secretary thinks it would be conducive to the public good for the person to be excluded or removed (a power subject to human rights and refugee convention obligations). The British Nationality Act 1981 is the principal legislation dealing with nationality and includes, for example, a power to deprive a person of British citizenship if the Home Secretary thinks it would be conducive to the public good, s. 40. The following list gives an indication of the legislative activity since the early 1990s: Borders, Citizenship and Immigration Act 2009; Criminal Justice and Immigration Act 2008; UK Borders Act 2007; Immigration, Asylum and Nationality Act 2006; Asylum and Immigration (Treatment of Claimants, Etc.) Act 2004; Nationality, Immigration and Asylum Act 2002; Immigration and Asylum Act 1999; Special Immigration Appeals Commission Act 1997; Asylum and Immigration Act 1996; Asylum and Immigration Appeals Act 1993. More detail is provided in the Immigration Rules (made by the Home Secretary under the Immigration Act 1971 s. 3(2) and, for example, the Asylum Policy Instructions.

[31] For example, Counter-Terrorism Act 2008; Terrorism Act 2006; Terrorism (Northern Ireland) Act 2006; Prevention of Terrorism Act 2005.

on the basis of existing law, inside and outside of Parliament and by the courts, but there remains a sense that what was given in human rights terms was constantly undermined by an increasingly authoritarian approach and ever more elaborate attempts to evade accountability. The asylum debate became ominously and routinely entangled with a broader governmental anxiety about British national identity, and the old narrative of defining 'self' against the terrifying other re-emerged.

National security *may* become relevant to the asylum process at different stages, but there is no necessary or intrinsic connection between the asylum system and national security. A link may emerge if asylum seekers, like other individuals, engage in specified actions in the asylum state or before entry. Counter-terrorism law can be applied, and deportation for reasons of public order (with recognised and appropriate limitations and protections) is a well-established concept in immigration law. No state could afford to permit its asylum system to become a domestic vehicle of internal attack, and no one concerned with the rule of law or human rights would suggest that this should be the case. Some asylum seekers and refugees will have been politically active in their state of origin – and that can be precisely why they are seeking refuge. That need not mean that they are terrorists, or pose a threat to national security. Such a formal, official and highly regulated route of entry does not seem an obvious choice for the determined terrorist.

National security concerns may arise when the exclusion clauses are being considered during the status determination process. National security is not intended to be the primary concern at this stage, as the focus will ultimately be on the risk if returned, but the exclusion clauses do need to be considered and applied. At this initial stage it can be assessed. If a person is still awaiting determination of their claim, or is recognised as a refugee, their actions in the asylum state may trigger concern about a possible security risk. At this point their removal may be sought with reference to national security considerations, and again, immigration law has historically provided for deportation for reasons of public order and national security. Removal in this context presents particular challenges where the individual faces a real risk of serious ill-treatment upon return – as there are clear prohibitions under the European Convention on Human Rights. But there are also no necessary impediments to prosecution under anti-terrorism or criminal laws. The re-emergence of more proactive and ultimately preventative counter-terrorism strategies is where problems may arise, mainly because offences may not have been committed, as yet. However, it is important to stress that the existing legal framework in the

United Kingdom includes provision for dealing with asylum seekers and refugees who are suspected of being involved in terrorism, lawfully and appropriately (and provides human rights safeguards against abuse). This has not, however, prevented the emergence of specialised regimes and the creation of a new and special immigration status in the United Kingdom.

B. Exclusion from refugee status

The institution of asylum and the law of refugee status both contain express provision for excluding certain persons from protection while containing no direct references to terrorism.[32] The exclusion clauses are not optional, but an intrinsic part of refugee law. The clauses are now (inevitably) viewed in the context of counter-terrorism policy and attempts internationally to challenge impunity (particularly as this relates to those responsible for war crimes and crimes against humanity[33] but also in the context of globalised counter-terrorism policies). There is a determined global effort to ensure there are no safe havens for terrorists.

The United Nations High Commissioner for Refugees (UNHCR) provides guidance on their interpretation and application.[34] It suggests that the primary purpose of these clauses 'is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum to avoid

[32] Universal Declaration of Human Rights 1948, art. 14(2); Convention relating to the Status of Refugees 1951, art. 1F. See Immigration Act 1971, s. 3(5) and the relevant Immigration Rules made under s. 3(2); Asylum and Immigration Appeals Act 1993, ss. 1 and 2; Nationality, Immigration and Asylum Act 2002; Immigration, Asylum and Nationality Act 2006. See also arts. 32 and 33 of the 1951 Convention. In the UK, see UKBA Asylum Policy Instructions 'Exclusion – articles 1F and 33(2) of the refugee convention'; 'Humanitarian Protection'; 'Discretionary leave'. See also, IND Asylum Policy Unit Notice 1/2003 'Humanitarian Protection and Discretionary Leave'; UKBA, Asylum Policy Unit Notice, 'Exceptional leave to remain: suspected war criminals and perpetrators of crimes against humanity and genocide'.

[33] For a comparative analysis of Australia, Canada, New Zealand, the United Kingdom and United States, see Joseph Rikhof, 'War criminals now welcome; how common law countries approach the phenomenon of international crimes in the immigration and refugee context' (2009) 21 *International Journal of Refugee Law* 453. After a detailed examination of law and practice he concludes that all the states identified take war crimes very seriously.

[34] UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses – Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, UN Doc. HCR/GIP/03/05. See also Volker Türk, 'Forced migration and security' (2003) 15 *International Journal of Refugee Law* 113; Geoff Gilbert 'Editorial' (2004) 16 *International Journal of Refugee Law* 1. See also, Federal Administrative Court (German), 10 C48.07, 14 October 2008, reported in (2009) 21 *International Journal of Refugee Law* 592.

being held legally accountable for their acts'.[35] The guidelines also address the issue of terrorism:

> Despite the lack of an … agreed definition of **terrorism**, acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses even though Art. 1F is not to be equated with a simple anti-terrorism provision. Consideration of the exclusion clauses is, however, often unnecessary as suspected terrorists may not be eligible for refugee status in the first place, their fear being of legitimate prosecution as opposed to persecution for Convention reasons.[36]

The UNHCR's view is that each case requires individual consideration, and the fact that someone may be on a list of terrorist suspects might trigger assessment under the exclusion clauses but should not in itself justify exclusion.[37] In addition, it suggests that the exclusion decision should in principle be addressed within the regular status determination process.[38]

In the 1990s, the Law Lords addressed exclusion in *T* v. *Home Secretary*.[39] The appellant, an Algerian citizen whose claim for asylum in the UK was rejected, was involved in a bomb attack on Algiers airport (ten people were killed) and a raid on an army barracks (another person was killed). The special adjudicator concluded that this brought him within the exclusion clause in art. 1F(b) because, as provided in that provision, 'there were serious reasons for considering' that he had committed serious non-political crimes.[40] The House of Lords dismissed his appeal. The ruling contains extensive consideration of the meaning of 'serious non-political crime' within the context of refugee law, and provides a test to define a 'political crime' with two conditions:

> (1) it is committed for a political purpose, i.e. with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose.

[35] UNHCR, *Guidelines on International Protection*, [2].
[36] Ibid., [25]. [37] Ibid., [26]. [38] Ibid., [31].
[39] [1996] AC 742 (HL). In the UK see, *R (JS)* v. *Secretary of State for the Home Department* [2010] UKSC 15; *MH (Syria), DS (Afghanistan)* v. *Secretary of State for the Home Department* [2009] EWCA Civ 226. See also *Canada* v. *Ward* [1993] 2 SCR 689; *Pushpanathan* v. *Canada* [1998] 1 SCR 982; *Zrig* v. *Minister of Citizenship and Immigration* (2003) FCA 178; and, in the United States, see *INS* v. *Aguirre-Aguirre* (1999) 526 US 415.
[40] Article 1F provides: 'The provisions of this Convention shall not apply to a person with respect to whom there are serious reasons for considering that: … (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.'

In determining (2), the majority stated that the means used should be examined, as well as the nature of the targets (governmental or civilian), and whether indiscriminate killing of members of the public was involved. It was held in this case that (2) had not been satisfied and the decision to exclude him was upheld.

The position on the exclusion clauses has been further clarified (and expanded in the counter-terrorism context) in domestic law, with provision made for a new immigration status. The new legislation followed the events of 7 July 2005 in London and the-then Prime Minister's twelve-point plan for tackling terrorism[41] – a plan which focused heavily on foreign nationals even though, as Walker has emphasised, the bombings were carried out by British citizens.[42]

The Immigration, Asylum and Nationality Act 2006, s. 54 specifically provides for an interpretation of art. 1F(c) of the 1951 Convention which links the assessment of whether something is 'contrary to the purposes and principles of the UN' to acts of committing, preparing or instigating terrorism, and acts of encouraging or inducing others to commit, prepare or instigate terrorism.[43] The domestic statutory provision therefore connects the exclusion clause directly to terrorism and is widely drawn.

This statutory theme is mapped onto the appeal process through a system of certification whereby the Tribunal, or Special Immigration Appeals Commission (SIAC), must begin substantive consideration of the appeal on the basis of the Secretary of State's certification that the individual is not entitled to art. 33(1) protection because art. 1F or art. 33(2) applies. In other words, exclusion is to be considered as a preliminary issue, and application of the clause arguably widened. Other matters addressed in the Act include, for example, the removal of British citizenship if this would be 'conducive to the public good', and this again has been meshed with the national security context.[44] At EU level, the Qualification Directive art. 12 addresses exclusion.[45] It follows the language of the 1951 Convention

[41] See Tony Blair, *The Guardian*, 5 August 2005. This plan included a commitment to refuse asylum automatically to anyone who had participated in terrorism anywhere.

[42] Clive Walker, 'The treatment of foreign terror suspects' (2007) 70 *Modern Law Review* 427, 428.

[43] See also Terrorism Act 2000, s. 1. For a recent application of art. 1F(c) see *SS* v. *Secretary of State of the Home Department*, 30 July 2010, SC/56/2009 (SIAC).

[44] Sections 56–7. The twelve-point plan included a commitment to stripping citizens of citizenship. See also, *Secretary of State for the Home Department* v. *David Hicks* [2006] EWCA Civ 400.

[45] EU Qualification Directive, 29 April 2004, OJ L 304, p. 12. For comment see, Hugo Storey, 'EU Refugee Qualification Directive: a brave new world?' (2008) 20 *International Journal*

with some notable additions. For example, particularly cruel actions – even if committed with an alleged political objective – may be classed as 'non-political'. The Directive also makes clear that the exclusion clauses apply to those who instigate or otherwise participate in the commission of crimes or other relevant acts.

R (JS) v. *Secretary of State for the Home Department* involved the correct interpretation of art. 1F(a) of the 1951 Convention.[46] The question here essentially hinged on membership of an organisation (that had corporately been involved in war crimes) and what more than simple membership was required to determine personal responsibility and thus exclude a person from refugee status. The respondent in the case was a Tamil and member of the LTTE (an organisation that the court acknowledged was not exclusively terrorist in nature), and held a variety of roles and positions. His application for asylum and humanitarian protection was refused by the Home Secretary expressly on art. 1F(a) grounds.[47]

In the Supreme Court, Lord Brown stated:

> Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.[48]

of Refugee Law 1. This also means that the European Court of Justice has recently been involved in providing clarification of the meaning of a number of aspects of EU law and policy relating to refugee status. See also art. 14 of the Directive, which provides for revocation, ending or refusal to renew refugee status in cases of refugees who are a danger to the security and/or the community of a member state.

[46] *R (JS)* v. *Secretary of State for the Home Department* [2010] UKSC 15. For Canadian practice, see James C. Simeon, 'Exclusion under article 1F(a) of the 1951 Convention in Canada' (2009) 21 *International Journal of Refugee Law* 193, which concludes that the post-9/11 fears about enhanced use of the exclusion clauses has not come to pass in Canada.

[47] Following the Court of Appeal judgment in *KJ* v. *Secretary of State for the Home Department* [2009] EWCA Civ 292, the application of art. 1F(c) (purposes and principles of the UN) to cases from Sri Lanka involving the LTTE had become less straightforward.

[48] *R (JS)* v. *Secretary of State for the Home Department* [2010] UKSC 15, [38]. Lord Hope stated: 'Lord Brown puts the test for complicity very simply at the end of para 38 of his judgment. I would respectfully endorse that approach. The words "serious reasons of considering" are, of course, taken from article 1F itself. The words "in a significant way" and "will in fact further that purpose" provide the key to the exercise. Those are the essential elements that must be satisfied to fix the applicant with personal responsibility. The words "made a substantial contribution" were used by the German Administrative Court, and they are to the same effect. The focus is on the facts of each case and not on any presumption that may be invited by mere membership.'

The judgment attempts to shift the exclusive focus away from the nature of the organisation[49] and any attempt to carve out sub-categories amongst organisations engaged in terrorism[50] (and in this Lord Brown was critical of the influential Immigration Appeal Tribunal decision in *Gurung*)[51] and presumptions of individual liability, towards an assessment of the war crimes and crimes against humanity alleged to have been committed. It also reflected a concern not to narrow notions of responsibility in an excessively restrictive way (there is some criticism in the judgment of the Court of Appeal in this respect). In its approach the Supreme Court drew heavily on the Rome Statute of the International Criminal Court, as well as guidance from UNHCR,[52] and the EU Qualification Directive.[53] In revisiting the decision, the Secretary of State was directed explicitly to the Supreme Court's reasoning and guidance, which now forms the basis for considering Article 1F(a) in the United Kingdom.

C. *A well-founded fear of prosecution?*

What should be done about those who are seeking asylum from persecution arising from anti-terrorism operations in other states? While a state may seek to arrest and prosecute terrorists, there is ample evidence of human rights being abused in the process of counter-terrorist operations locally and globally. In *R (Sivakumar)* v. *Secretary of State for the Home Department*, the claimant was a Tamil from Sri Lanka whose claim for asylum was rejected by the Home Secretary.[54] Article 1F was not raised. On appeal the adjudicator accepted he had been detained and tortured, but this was due to the suspicion held that he was involved in terrorism and not to his political opinions. In the House of Lords, Lord Steyn stated that 'not all means of investigating suspected terrorist acts fall outside the protection of the Convention'.[55] By suggesting that being investigated for involvement in terrorist acts took a person outside the protection of the 1951 Convention, the Special Adjudicator had got it wrong. He also noted

[49] Lord Brown at [32]: 'War crimes are war crimes however benevolent and estimable may be the long-term aims of those involved. And actions which would not otherwise constitute war crimes do not become so merely because they are taken pursuant to policies abhorrent to western liberal democracies.'

[50] Lord Brown did, however, provide a seven-point guide to assessing complicity with reference to membership (at [30]).

[51] *Gurung* v. *Secretary of State for the Home Department* [2008] Imm AR 115.

[52] For example, UNHCR *Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective* (November 2001).

[53] (2004/83/EC). [54] [2003] UKHL 14. [55] Ibid., [17].

the clear evidence of torture, and concluded that the Special Adjudicator had not approached the matter correctly. At the time of the decision the applicant had a well-founded fear of persecution, but four years had passed since then and the case was remitted to the Immigration Appeal Tribunal to reconsider in the light of the Law Lords' judgment. For Lord Hutton, the proper conclusion was that the acts of torture were inflicted not solely to obtain information to tackle terrorism, but also 'by reason of the torturers' deep antagonism towards him because he was a Tamil'.[56]

D. Due deference?

Past cases reveal that when national security, immigration and asylum collide, judges are likely to defer to the executive. The leading recent example of this approach is *Secretary of State for the Home Department* v. *Rehman*.[57] The issue here was whether the Home Secretary could make a deportation order under the Immigration Act 1971 on the grounds that the appellant's deportation was conducive to the public good for national security reasons. The appellant, a Pakistani national, arrived in the UK in February 1993 after being given entry clearance to work as a minister of religion in Oldham. Both his parents were British citizens. The Home Secretary refused his application for indefinite leave to remain, citing information connecting him to a terrorist organisation; he appealed to SIAC.[58]

The Home Secretary stated that the appellant had directly supported terrorism in the Indian subcontinent and was therefore a threat to national security. But SIAC held, to the contrary, that the term 'national security' should be narrowly defined:

> we adopt the position that a person may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals. National security extends also to situations where United Kingdom citizens are targeted, wherever they may be.[59]

[56] Ibid., [29]. [57] [2001] UKHL 47.

[58] SIAC was created in 1997 in response to the judgment of the European Court of Human Rights in *Chahal* v. *UK* (1996) 23 EHRR 413. See Special Immigration Appeals Commission Act 1997.

[59] [2003] UKHL 14, [2].

SIAC concluded that it had not been established to a high civil balance of probabilities that the appellant was likely to be a threat to national security. The Home Secretary appealed successfully to the Court of Appeal.[60]

On further appeal to the House of Lords, Lord Slynn acknowledged that the term 'in the interests of national security' could not be used to justify any reason the Home Secretary had for seeking the deportation of an individual.[61] However, he did not accept the narrow interpretation suggested by the appellant.

> I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate. Whether there is a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made.[62]

Lord Slynn stressed the need for SIAC to give due weight to the assessment and conclusions of the Home Secretary in the light of his responsibilities.[63] Lord Steyn agreed, adding that 'even democracies are entitled to protect themselves, *and* the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies'.[64] He concluded by acknowledging the well-established position that issues of national security do not fall beyond the competence of the courts. But it was 'self-evidently right that national courts must give great weight to the views of the executive on matters of national security'.[65]

Lord Hoffmann continued this theme, stating that SIAC had failed to acknowledge the inherent limitations of the judicial function which flowed from the doctrine of the separation of powers and the need 'in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker'.[66] This restraint did not limit the appellate jurisdiction of SIAC and the need for it 'flows from a common-sense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and [SIAC]'.[67] In a postscript Lord Hoffmann stated:

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline

[60] [2000] 3 WLR 1240 (CA). [61] [2003] UKHL 14, [15]. [62] Ibid., [16].
[63] Ibid., [26]. [64] Ibid., [28]. [65] Ibid., [31]. [66] Ibid., [49]. [67] Ibid., [58].

> the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security … If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[68]

The notion that the executive must be deferred to because of its democratic legitimacy and expertise in times of crisis is one that is often advanced. Lord Hoffmann's comments suggest that the executive can step outside the normal application of the rule of law in times of public emergency by making its own decision about what the law is. This is the essence of what is being said here on the question of legal interpretation. As Allan suggests, the focus is probably better placed on the quality of the reasons advanced about the meaning of the law, rather than on who should make the decision.[69] The main question should be whether the legal reasoning is worthy of support in the individual case, and if a convincing account is provided of what the law is, even when national security is raised. Criticism can therefore be made of the ruling, on the basis that the Law Lords acted reasonably in interpreting national security more broadly than SIAC, but erred in placing great reliance on the concept of judicial deference. If the focus should remain on the reasons for the substantive decision, rather than who made it, this view is a compelling one. To defer mainly because it is an executive decision based on assessments of the national security threat is problematic (even when factual information may be held by the executive). In the national security context, the rule of law is tested, both in the sense of protecting individual rights and ensuring that an effective regulatory framework exists. By according decisive weight to the views of the executive, judges are not discharging their responsibility to take a view on the meaning of law. If the courts do this they risk abandoning one of the values of the rule of law: the defence of the person against arbitrary power through an established legal framework properly interpreted and applied.

[68] Ibid., [62]. Cf. *R* v. *BBC, ex parte Pro Life Alliance* [2003] UKHL 23, [74] ff; *R* v. *Secretary of State for the Home Department, ex parte Simms and O'Brien* [2000] 2 AC 115, Lord Hoffmann at 131 on the principle of legality; and see *A and others* v. *Secretary of State for the Home Department* [2004] UKHL 56.

[69] Trevor Allan, 'Common law reason and the limits of judicial deference' in David Dyzenhaus (ed.), *The Unity of Public Law* (Oxford: Hart, 2004), pp. 289–306.

E. The prohibition on return to torture, human rights and national security

These debates were played out in cases such as *A and others* v. *Secretary of State for the Home Department*,[70] which was concerned with the detention of a number of individuals suspected of international terrorism under the Anti-Terrorism, Crime and Security Act 2001 (Part IV now repealed). What should be done with those who could not be deported for human rights reasons, but who the government believed constituted a continuing threat to national security? The Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 were introduced after the terrorist attacks of 9/11. The Act empowered the Home Secretary to issue a certificate if he reasonably believed that an individual's continuing presence in the United Kingdom was a risk to national security and suspected that the person was a terrorist. A suspected international terrorist could therefore be detained indefinitely. There was a right of appeal to SIAC.[71] A challenge was brought against the provisions of the 2001 Act. SIAC held that the measures were discriminatory and contrary to arts. 5 and 14 of the European Convention on Human Rights, as they did not apply equally to British nationals.

On appeal against the SIAC decision the Court of Appeal reached a different conclusion. Following an approach with echoes of *Rehman*, Lord Woolf stated:

> Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference to the Secretary of State because he is better qualified to make an assessment as to what action is called for.[72]

British nationals were not in the same position as foreign nationals in this context. According to Lord Woolf, the non-nationals involved in this case no longer had a right to remain, only a right not to be removed.[73] This distinguished their plight from that of nationals. He also stressed the distinction in international law between the treatment of nationals and non-nationals. Parliament was entitled to limit the measures to foreign

[70] [2004] UKHL 56. See Court of Appeal judgment at [2002] EWCA Civ 1502.
[71] For criticism of SIAC from a former member, see Sir Brian Barder 'The Special Immigration Appeals Commission' (18 March 2004) 26(6) *London Review of Books*.
[72] [2003] UKHL 14, [39]. [73] Ibid., [47].

nationals on the basis that art. 15 of the European Convention permitted measures that derogate only 'to the extent strictly required by the exigencies of the situation'. The tension between arts. 14 and 15 had, Lord Woolf argued, an important impact. The Secretary of State was obliged to derogate only to the extent necessary and widening the powers of indefinite detention would conflict with this objective.

The case subsequently progressed to the House of Lords,[74] and the issues were also tested eventually before the Grand Chamber of the European Court of Human Rights.[75] In one of the leading judgments under the Human Rights Act, the majority of the Law Lords concluded that there was a public emergency threatening the life of the nation (art. 15(1)) but (unlike the Court of Appeal) were willing to quash the derogation order and declare s. 23 of the 2001 Act incompatible with art. 5(1) and art. 14 on the basis of proportionality and that it allowed discriminatory detention of suspected international terrorists who were non-nationals. The judgments are filled with profound concern about the notion of executive detention, with Lord Hoffmann scathing in his comments about the 2001 Act, Lord Nicholls expressing his concern about indefinite detention and Lord Bingham making pointed comments about the nature of judicial decision-making in these cases. In striking a blow for constitutional principle in the face of executive detention the case did not herald the end of deference. As is clear in the judgment of Lord Bingham, it underlines the idea of degrees of deference, and in confirming the role of the Home Secretary in determining when there was a public emergency endorsed the concept of variable institutional competencies (some people are better placed to make certain judgments than others).

The judgment of the European Court largely followed the conclusions reached by the House of Lords; however, in the operation of the SIAC process (on the issue of reliance on closed material and the lack of disclosure of sufficient information) the Court found a breach of art. 5(4).

The procedures used by SIAC were also questioned in the other *A* case to reach the House of Lords.[76] This case addressed the matter of the admissibility of evidence by SIAC, which may have been procured by torture

[74] [2004] UKHL 56. See David Feldman, 'Proportionality and discrimination in anti-terrorism legislation' (2005) 64 *Cambridge Law Journal* 271. See also, David Campbell, 'The threat of terrorism and the plausibility of positivism' [2009] *Public Law* 501. Cf. J. Finnis, 'Nationality, alienage and constitutional principle' (2007) 123 *Law Quarterly Review* 417.

[75] (2009) 49 EHRR 29. See also *Charkaoui* v. *Canada* [2007] SCC 9.

[76] *A* v. *Secretary of State for the Home Department* (No. 2) [2005] UKHL 71.

inflicted by officials of other states without the complicity of the British authorities. Here the value and importance of the rule of law was underlined (with Lord Bingham stressing the constitutional principles at stake), as the Court concluded that evidence obtained in this way should not be admissible (the majority disagreed with Lord Bingham on the burden of proof). The two *A* cases (while by no means perfect in human rights terms) therefore demonstrated the role that courts might have in setting out a principled vision of what the rule of law is, even when national security is raised.

Following the *A* judgment, a new regime was put in place under the Prevention of Terrorism Act 2005,[77] providing for the much criticised control order system in the United Kingdom. One form of executive detention was therefore replaced by a more carefully engineered method of executive control and restraint. The Act established an elaborate system of individualised monitoring and control of those suspected of terrorist activity who were assessed as a risk to the UK. The new regime quite explicitly applies to British nationals and non-nationals alike. The system has attracted considerable judicial scrutiny, where the terms of particular control orders have been assessed with reference to Convention obligations,[78] as well as the procedure for making and challenging them.[79] In these cases the Law Lords, and now the Supreme Court, have given careful, close and anxious scrutiny to the regime in place, with human rights concerns noted (taking into account developments in the Strasbourg jurisprudence) on the nature of the repressive restrictions imposed (holding that they have in specific contexts amounted to a deprivation of liberty) and on aspects of the procedure (the disclosure of information, the use of special advocates and the need – stressed by the Grand Chamber of the European Court of Human Rights – for the provision of sufficient

[77] The long title states: 'to provide for the making against individuals involved in terrorism related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity'. However, see the recommendation that a new regime be established: HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) and compare *A Report by Lord MacDonald: Review of Counter-Terrorism and Security Powers* (Cm 8003, 2011).

[78] *Secretary of State for the Home Department* v. *AP* [2010] UKSC 24; *Secretary of State for the Home Department* v. *JJ* [2007] UKHL 45; *Secretary of State for the Home Department* v. *E* [2007] UKHL 47. See generally Helen Fenwick and Gavin Phillipson, Chapter 19 this volume.

[79] Cf. *Secretary of State for the Home Department* v. *AF* [2009] UKHL 28 and *Secretary of State for the Home Department* v. *MB* [2007] UKHL 46.

information to a 'controllee' to permit effective instruction to his or her special advocate). The case law emerging suggests a determined executive placing ever more 'sophisticated', complex and oppressive processes in place with judges attempting to ensure the correct level of scrutiny and careful assessment is applied, and ultimately challenging their severity through the use of human rights standards.

Despite the best efforts of the British government, the Grand Chamber of the European Court of Human Rights, in *Saadi* v. *Italy*, has confirmed the absolute nature of the prohibition against return in art. 3. The UK government has sought, for some considerable time, to argue that there should be a balancing element injected into art. 3 assessments (the risk of return balanced against the national security threat similar to the approach adopted by the Canadian Supreme Court in *Suresh*[80]). The European Court has consistently held to its established jurisprudence, much to the evident frustration of the UK government.[81] No balancing is involved or permitted,[82] and the 'conduct of the person concerned, however undesirable or dangerous, cannot be taken into account'.[83] The sole focus will remain on whether the well-established standard in art. 3 has been met. This continues to cause the executive in the United Kingdom much anxiety, and was the subject of several negative comments by the former Prime Minister, Tony Blair, during his time in office. This linked with his general view that the 'rules of the game were changing' and his clear frustration with the implications of his own human rights legislation.[84]

The Criminal Justice and Immigration Act 2008 provides for a special immigration status to attach to designated foreign nationals who have committed terrorism or other serious criminal offences but who cannot be removed for Human Rights Act reasons.[85] The impact is that a person so

[80] *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 77.

[81] See the governmental response to the Afghan hi-jackers case: *S and others* v. *Secretary of State for the Home Department* [2006] EWCA Civ 1157, see [50]: 'We commend the judge for an impeccable judgment…Judges and adjudicators have to apply the law as they find it, and not as they wish it to be.' The-then Prime Minister, Tony Blair, described the first instance judgment of Mr Justice Sullivan as 'an abuse of common sense', see BBC News, 10 May 2006. See also, Lord Carlile of Berriew QC, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (3 February 2011), [79]: 'The effect is to make the UK a safe haven for some individuals whose determination is to damage the UK and its citizens, hardly a satisfactory situation save for the purist.'

[82] *Saadi* v. *Italy* [2008] ECHR 37201/06. See also Rene Bruin and Kees Wouters, 'Terrorism and the non-derogability of *non-refoulement*' (2003) 15 *International Journal of Refugee Law* 5, [139].

[83] Ibid., [138]. [84] Tony Blair, *The Guardian*. [85] Part 10.

designated does not have leave to enter or remain in the United Kingdom,[86] and a range of conditions may be imposed on residence, employment, reporting and monitoring (in relation to the police, the Secretary of State or an immigration officer)[87] and particular arrangements have been put in place to limit existing support.[88] This new regime was a reaction to a variety of challenges to the previous system, and intended to grapple with a governmental concern about those believed to be a terrorist threat who could not be returned for art. 3 European Convention reasons.

F. Challenging the regime: legality in action?

Suspected international terrorists have used the courts to challenge other aspects of their detention.[89] In *Secretary of State for the Home Department* v. *M*, SIAC allowed an appeal against an order deporting a Libyan national.[90] M failed in his asylum application, but he was not removed, and it came to be accepted that he could not be returned. He was certified in November 2002 as a suspected international terrorist, his deportation was sought and he was subsequently detained. M's argument was that he feared persecution on return to Libya as a result of his opposition to the Gaddafi regime. However, the Home Secretary believed that he had links to al-Qaeda. The judgment of the-then Chief Justice, Lord Woolf, contained strong comment on the value of SIAC, which can perhaps be viewed in the light of the public criticism of this body.[91] Lord Woolf stressed the critical nature of the value judgment which SIAC had to make:

> While the need for society to protect itself against acts of terrorism today is self evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained, as 'M' was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not. If it is not lawful, then he has to be released.[92]

This was the first time SIAC had allowed an appeal under the 2001 Act, and thus also the first time that the Home Secretary had reason to challenge the decision. It also followed the resignation of Sir Brian Barder from SIAC. He was a lay member of SIAC who resigned in January 2004, and his reasoning remains revealing in his critique of the Court of Appeal and House of Lords in *Rehman*, and the way that legal imperatives handed

[86] Section 132. [87] Section 133. [88] Section 134.
[89] See *R (A)* v. *Secretary of State for the Home Department*, [2004] HRLR 12 (Admin).
[90] [2004] EWCA Civ 324. [91] [2003] UKHL 14. [92] Ibid., [34] (iii).

down by the higher courts were hobbling the work of SIAC. His well-founded worry was that the government could use SIAC's existence to offer a cloak of legality to highly disturbing practices.[93] Despite evidence that SIAC has been robust in its approach, there remains a constant concern for those who fear the concept of legality becomes drained of substance in such contexts.

Another case of interest is *G* v. *Secretary of State for the Home Department*.[94] The case again involved an individual who had been certified as a suspected international terrorist. He applied to SIAC for a grant of bail, claiming that his mental and physical health had deteriorated rapidly as a result of detention. SIAC held that once certain conditions were met he should as a matter of principle be granted bail. The Home Secretary appealed against this decision. The Court of Appeal held that it had no jurisdiction to hear the appeal, since bail was not a final determination of an appeal for the purposes of the legislation. The Home Secretary reacted badly to the decision,[95] and the government's response was to introduce an amendment to the Asylum Bill then going through Parliament.[96] *A, B, C and others* v. *Secretary of State for the Home Department* involved an appeal against SIAC decisions not to cancel certificates issued by the Home Secretary.[97] The Court of Appeal held that SIAC had not erred in its approach, but the issue which provoked considerable comment was the admissibility of evidence which may have been gathered through the use of torture by other states – and this would eventually be considered by the House of Lords (as noted above).

G. Securing assurances?

In addition to further promoting a harsh internal regime through legislative and other mechanisms (e.g., the 2006 and 2008 Acts), the British government has also worked hard to secure deportation assurances from other states to facilitate the process of removal. This is additional evidence of a government determined to achieve its counter-terrorism objectives; again, however, conducting the engagement within the framework of legal argumentation and often in human rights terms. It has achieved more

[93] [2004] UKHL 56. [94] [2004] EWCA Civ 265.
[95] 'Blunkett may change law over suspect's bail', *The Guardian*, 23 April 2004.
[96] Mr Browne, *Hansard*, HC, vol. 421, col. 778w, 17 May 2004. See Asylum and Immigration (Treatment of Claimants, Etc.) Act 2004, s. 32.
[97] [2004] EWCA Civ 1123.

success in agreeing diplomatic assurances[98] than it has in persuading the European Court of Human Rights to abandon its decision in *Chahal*.[99] Diplomatic assurances have been secured with a number of North African and Middle Eastern states.[100]

What has been the response when the counter-terrorism measure adopted is deportation to another state from which assurances have been received? The protection of refugee law can be limited, as the 1951 Convention provides for the concept of permissible return, as well as exclusion from status. The focus will therefore often be on the European Convention on Human Rights – which contains a strong and clear prohibition on return, a position consistently confirmed and upheld by the European Court of Human Rights. The hard questions will often arise around how effective these assurances are. Seeking them in the first place is an open acknowledgement of risk, but can there be certainty around their application in practice? Detailed tests have been developed to determine compliance with human rights obligations, but the government has no absolute guarantee that it will be upheld.

In the cases of *RB (Algeria) and another* v. *Secretary of State for the Home Department* and *OO (Jordan)* v. *Secretary of State for the Home Department* precisely that question arose.[101] The absolute prohibition under art. 3 of the European Convention on Human Rights remains clear, but the European Court of Human Rights has established that assurances may provide a basis for safe return, with the adequacy of the assurance determined on a case-by-case basis.[102] The result has been the development by SIAC of a set of tests to determine if reliance on the assurances is permitted. The Law Lords held unanimously in both cases that SIAC reached the correct conclusion on the facts, that the assurances given by Jordan and Algeria contained appropriate levels of protection. The

[98] There are currently agreements with five states: Algeria, Jordan, Ethiopia, Libya and Lebanon.

[99] 'The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.' *Saadi* v. *Italy* [2008] ECHR 37201/06, [137].

[100] [2004] EWCA Civ 1123.

[101] [2009] UKHL 10. See Jennifer Tooze, 'Deportation with assurances: the approach of the UK Courts' [2010] *Public Law* 362, who examines the approach taken by domestic courts in the UK to deportation with assurances (DWA); Clive Walker, 'The treatment of foreign terror suspects', 441–50.

[102] *Saadi* v. *Italy* [2008] ECHR 37201/06.

judgment therefore confirmed the potential of deportation with diplomatic assurances as one tool in counter-terrorism policy which includes removal from the UK.[103]

The approach has been considered as part of the UK's Counter-Terrorism Review with recommendations made for further development.[104] The Review rejected the argument that deportation with assurances provided insufficient protection or that it undermined the absolute prohibition on torture.[105] The recommendations included the view that generic agreements should be preferred, but assurances for specific individuals should not be ruled out if 'viable assurances' could be obtained.[106] In addition, the Review recommended a range of possible improvements, including commissioning an annual independent review of the system and better engagement with other countries, international organisations and NGOs to increase understanding of the objectives of the policy.[107]

H. Dealing with dissent?

Individuals are not only removed from the United Kingdom, but can also be refused admission on national security and public order grounds.[108] In the intriguing case of *R (Farrakhan)* v. *Secretary of State for the Home Department* the claimant was an African–American refused entry on public order grounds (the concern of the Home Secretary that disorder might result from his visit).[109] A question here was whether art. 10 of the European Convention was engaged in this pre-emptive decision to refuse admission on the basis of a future risk. The Court of Appeal held that art. 10 was engaged (he was being excluded precisely to prevent him exercising his right to free expression in the United Kingdom), but concluded that the decision of the Home Secretary could be justified as it was for a legitimate aim under art. 10(2). The Court of Appeal held that the Home Secretary had provided sufficient explanation for the decision (although no convincing evidence was offered in this respect), which was based

[103] See, for example, *XX* v. *Secretary of State for the Home Department*, 10 September 2010, SC/61/2007 (SIAC), assurance regime between the United Kingdom and Ethiopia held to provide sufficient safeguards to permit Convention compliant return.

[104] HM Government *Review of Counter-Terrorism and Security Powers*, pp. 33–5.

[105] Ibid. [106] Ibid., p. 35.

[107] Ibid. The pending judgment of the European Court of Human Rights in the *Abu Qatada* case in 2011 should prove instructive.

[108] Immigration Act 1971, s. 3. [109] [2002] 3 WLR 481 (CA).

around an alleged risk to community relations between Muslims and Jews in Britain. There have been several recent high profile examples of the use of this power, and it continues to attract considerable debate on the balance to be struck between freedom of speech and public order in the United Kingdom.[110]

The case of Abu Hamza is also of interest in this context.[111] He is a prominent Muslim cleric, currently in prison in the United Kingdom serving a seven-year sentence for inciting murder and racial hatred, and challenging through the European Court of Human Rights attempts to extradite him to the United States. He has expressed open and vocal support for terrorism, and is the subject of considerable official interest (going back some time). His case was complicated for the UK authorities by the fact that he held British citizenship. In 2003, the Home Secretary opted to attempt to deprive him of his British citizenship, a decision which was successfully appealed to SIAC in November 2010, on the basis that it would render him 'stateless'.[112]

Following *Hicks*, and the events of 7 July 2005, the British Nationality Act 1981 was amended in 2006 in order to further enhance the powers available on 'citizenship stripping'. David Hicks (who was detained at Guantanamo Bay) sought to register as a British citizen (his mother was born in the UK). The Home Secretary acceded to the request but also, at the same time, made a deprivation order. The case revolved around whether the Home Secretary could rely on conduct prior to the acquisition of citizenship. In concluding that the respondent could not have been 'disaffected' within the meaning of the 1981 Act, the Court of Appeal sided with the first instance judgment. The provisions relating to deprivation of citizenship in the 2006 Act (which align it more closely with other 'conductive to the public good' mechanisms) can be viewed in the context of, and in reaction to, *Hicks*.

These two cases (one dealing with admission, the other with British nationality law) provide useful examples of the approaches adopted by

[110] See also *Naik* v. *Secretary of State for the Home Department* [2010] EWHC 2825 (Admin). N is a leading Muslim writer and public speaker whose views were alleged by the Home Secretary to have influenced those who instigated terrorist attacks. He was excluded from admission to the United Kingdom and his entry clearance visa revoked. The Court ruled that art. 10 was engaged (as a consequence of the right of others to receive information and the potential audience in the United Kingdom) but that the interference with the right was lawful and proportionate. See also, for example, 'US preacher banned from speaking in Milton Keynes', *BBC News*, 20 January 2011.

[111] See *Abu Hamza*, 5 November 2010, SC/23/2005.

[112] The Home Secretary has no such power: see British Nationality Act 1981, s. 40(4).

the Home Secretary to deal with those (citizens and non-citizens) perceived to be a threat (primarily through the expression of their radical views) to public order and/or national security.

I. What should judges do?

The question in all these cases is not whether judges should have a role, but what should judges do with the law that currently exists. Beyond the national security context, the views of the Home Secretary, and the governmental perspective, are accorded significant weight, but they are not generally regarded as decisive. While one can understand a certain judicial unease in addressing national security matters, excessive deference to the executive is inappropriate if there is a principled commitment to the consistent interpretation and application of the law.[113] Evidence suggests that this is precisely the time when the values which underpin the rule of law need to be upheld, and there are examples to prove that the courts in the UK have responded to the challenge and have the experience and expertise to do so.[114]

While the Home Secretary will have access to detailed factual information, and is the person who will face democratic accountability through Parliament (and ultimately to the electorate) for the decision, judges should not automatically defer to his or her understanding of the substantive content of what the law means. On this matter the Home Secretary is in no better position than a judge – he or she can have a view, but it will not necessarily be the definitive one. This is reinforced when one considers that human rights standards are now a relatively secure part of domestic law, in the form of the Human Rights Act 1998. Judges have a responsibility to ensure that the law, properly understood, is applied to all on an equal basis. The risk is that exceptional treatment of particular groups and individuals will lead to further erosion of existing guarantees and ultimately undermine the principle of legality as it applies to everyone.

The overall picture is too complex and varied to offer one definitive judgment on performance, and much remains context sensitive. The normative argument advanced about legality is, however, clear. The focus

[113] See Tomkins, 'National security and the role of the courts', 545, who states on the evidence of the lower courts: '… judicial scrutiny of government actions and decisions taken in the interests of national security appears never to have been more intense than it is now'. He places particular emphasis on *Al Jedda*, 7 April 2009, SIAC. See also, *Secretary of State for the Home Department* v. *Al Saadi* [2009] EWHC 3390 (Admin).

[114] Cf. Tomkins, 'National security and the role of the courts'.

must remain on the substance of legal argumentation across particular cases. The judicial role should not be exaggerated, or too great a burden placed upon it. But it is clear that it is the role of the courts to give voice to what the current law is. So much of the debate is now conducted within the terms of legal argumentation, for example: that 'we did X but the legal advice told us it was not torture', 'we invaded Y but the legal advice said that this was in accordance with international law', 'we do not believe the control order regime constitutes a deprivation of liberty' or 'yes, we deported A (and he was tortured), but the diplomatic assurances had all the relevant safeguards'. The courts have a secure constitutional role in focusing on what the law is, rather than 'who decides'. If any express democratic reassurance is needed, in the United Kingdom this is located within the Human Rights Act 1998 and its enactment by Parliament. In some instances judges have displayed admirable courage by insisting on the application of a convincing account of what the law requires. In other cases judges have been too ready to step aside in the face of a determined and creative executive operating in the midst of a public mood of anxiety, insecurity and fear – fuelled by credible terrorist threats and attacks.

3. Conclusion

Asylum law is a significant site of continuing skirmishes between the executive, judiciary, and occasionally the legislature, in many common law jurisdictions. It often raises in stark terms the tensions between a normative commitment to respect for human dignity, with the attempts of states to create bounded communities of belonging. All the rigid legal or political doctrines in the world can never wash away the strains and tensions of dealing humanely with the physical presence of the suffering other who is in need. Asylum is a humanitarian route to entry that has not been closed down (it remains a home for humanity within legality), but which is approached by many governments with profound suspicion and unease. One of the early reactions to 9/11 was to identify refugee status determination systems as possible safe havens, and in the United Kingdom the events of 7/7 prompted a renewed focus on the deportation of foreign nationals (even though the attacks were carried out by British nationals). The argument is still made that human rights protections create safe havens for terrorists, with a renewed focus on the work of the European Court of Human Rights.

It is an area where the commitment to *human* rights is tested, asylum seekers cannot rely on national status as a basis of entitlement

(intriguingly in a counter-terrorism context even nationals from certain minority ethnic communities cannot depend on the rights and entitlements of citizenship in such contexts[115]). The basis for protection often rests on legal provisions which owe their allegiance to notions of personhood and which seek legal acknowledgement of a common humanity.[116] These are areas of law and policy where the moral commitment to respect for humanity as the basis of entitlement finds a fragile home.

The global resurgence in counter-terrorism policies and strategies intensified the pressure on an already contested arena of constitutional law and politics. The story can be portrayed simply: in the face of rising security threats, and terrorist attacks, a determined executive sought to advance authoritarian measures in the context of existing constitutional and human rights constraints (within which it generally sought to operate rather than abandon). It was always likely to lead to constitutional conflict, and so it did. Despite a change of government in 2010, and attempts at reform, the challenges will remain, and for now the Human Rights Act and the protections of the European Convention on Human Rights survive.[117]

The traditional values associated with the principle of legality are of particular significance for refugees and asylum seekers. The protection against the exercise of arbitrary power and the commitment to basic principles of fairness, which should be securely embedded within any proper understanding of legal order, remain vital for vulnerable and marginalised groups. There is a duty to uphold the rule of law in the face of public criticism and in times of insecurity and fear. While founded on an enabling and humanitarian basis, asylum law and policy in the UK has largely followed a restrictive path, made worse by counter-terrorism policies, and is now marked by measures (accelerated procedures, reduced appeal rights) which limit in practice the ability of individuals to challenge asylum decisions. While not as blatant as the deliberate exclusion of judicial review, the practical impact can be similar. The rule of law may be undermined by a slow and deliberate accumulation of laws and policies which

[115] See Daniel Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'* (Oxford University Press, 2008).

[116] On the complex relationship between personhood and citizenship see Linda Bosniak, 'Persons and citizens in constitutional thought' (2010) 8 *International Journal of Constitutional Law* 9. She notes that personhood brings with it a challenge function in almost any context it is deployed, but also stresses just how complicated a notion it is.

[117] See Colin Harvey, 'Taking the next step? Achieving another bill of rights' [2011] *European Human Rights Law Review* 24.

make it difficult to contest the legality of administrative decision-making in a rigorous and thorough way. This is a pattern that is not confined to the United Kingdom.

Under a substantive concept of legality, adherence to the rule of law should bring with it respect for the inherent dignity of the human person. While its application is associated with judges, they are not the only ones responsible for ensuring widespread and lasting respect for the principle. When national security is raised, in the asylum context and in related areas, there is an ever-present danger of excessive deference undermining a thorough examination of the substantive legal issues, and practical risks to the individual. Those who are vulnerable in normal times are even more so when there is an intimidating climate of hostility and fear which circles menacingly around particular individuals and particular 'suspect communities'. They will depend on people and institutions prepared to uphold the values which underpin legal order, in the good times and bad. All those institutions and actors in the public sphere who have the current capacity to give practical life to the principle of legality must do so. They must unearth and probe the strength of the arguments, reasons and justifications advanced when judged against the fabric of a constitutional democracy that all would wish to protect and promote. The responsibility to defend a culture of human rights falls unevenly on those who must not remain silent in the face of oppression, from whatever source it emanates. When the state insists on enthusiastically embracing the positive obligation to protect the right to life of everyone, this endorsement of a robust human rights culture should be welcomed and put to use by all of us. The real risk at the present time is of a retreat into national protectionism combined with the anxious construction of external (and internal) threats. Terrorism must be confronted, effectively, lawfully and directly, but to surrender hard-won values, and allow terrorism to erode respect for our common humanity is a mistake. States like the United Kingdom depend on all those who recognise the responsibility to protect the rights of others and who will continue to remain insistent and firm, even in these hard times.