“Internment and House Arrest: Recent Developments”
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The most important legal issue confronting the government in the first half of 2005 is what to do about the remarkable pre-Christmas decision of the House of Lords in the Belmarsh detention case. As is well known, the ruling concerned the power to hold non-nationals in indefinite detention without trial which the executive (in particular the then Home Secretary David Blunkett) had obtained from Parliament in the immediate aftermath of the 11 September attacks. These powers had been judged necessary because it was asserted that there was a small group of suspected international terrorists (all connected to Al-Qaida) who could neither be expelled from the country (for fear of being killed or tortured in any state willing to taken them) nor prosecuted for specific offences here. Even at the time, when the levels of anxiety engendered by 11 September were still very high, this had seemed a draconian and disproportionate response to a threat that was invisible to many and purely hypothetical to all. But the government had pushed it through, and some seventeen suspects were promptly swept up and placed within a regime of detention that threatened to be indefinite and was subject to no proper judicial accountability. Despite having expressed serious misgivings about the law when it was first enacted, the Lord Chief Justice Lord Woolf and two colleagues upheld it when the matter came before them in the Autumn of 2002. It seemed to many that the provisions were well on the way to becoming fully embedded in our legal system; indeed some of the diluted legal practices it had introduced (such as special advocates instead of proper defence counsel) were beginning to be extended to other branches of the law.

Now in an unprecedented ruling, in which no fewer than eight of the nine senior judges who heard the case in the House of Lords have joined, the whole internment policy has been brought crashing down. Only one law lord, Lord Hoffmann, thought that the courts could actually override the government’s assessment that there was the ‘public emergency threatening the life of the nation’ which under human rights law is required before you can restrict basic freedoms such as the right to liberty. But seven of the nine were clear that the measures actually deployed by the authorities

to deal with the emergency were neither necessary, rationally connected to the aims being pursued, nor objectively justifiable. The cumulative effect of the ruling is quite devastating. Once the Attorney General's argument that their lordships (and one 'ladyship', Baroness Hale of Richmond) should simply defer to the executive in this area had been rejected, he simply had no answer to the questions that were on the judges' minds. Why allow these so called suspected international terrorists to leave the country at all, if they were so dangerous? If the power is only restricted to Al Qaida, why is the legislation itself drafted in such wide terms, potentially exposing to indefinite detention a far wider category of persons?

Most damagingly of all, why is the law restricted to foreign nationals: either there are no British suspects at all (manifestly absurd) or the law can cope adequately with those suspects, but if the latter is the case, why should it not also be true for the handful of suspects for whom expulsion is not an option? Reading the judgments is like listening to a nine hour Today programme interview in which only reason is allowed to be deployed. Stripped of the vagueness of the kind of political rhetoric to which Ministers usually resort when justifying this kind of power, the illogicality and sheer irrationality of the targeting of foreigners in this way was laid bare for all to see. It is perhaps just as well for Mr Blunkett that he had for other reasons been required to leave office the day before these speeches by Britain's senior judges were delivered; it is hard to believe that he could have survived such a judicial battering, inevitably raising as it did questions about his competence and judgment.

So what now? This is where the politics of the judgment come into play, and the uniqueness, some would say the democratic beauty, of the Human Rights Act become apparent. The lords' ruling may have been a devastating knock-out blow – but it nevertheless left the detention player firmly in the ring. British human rights law does not allow the judges to strike down legislation, as opposed merely to declaring it incompatible with human rights, which is what has happened here. It was technically possible for Charles Clarke and his ministerial colleagues to have brazened it out, keeping the laws in place, and getting Parliament to renew them as and when necessary. But this might have awakened the consciences of even the most new Labour of loyalists on the backbenches, and it would certainly have gone down badly

in Strasbourg where (when the case reached it) the European judges would have had the power to harden the advice of the lords into a solid international law obligation on the UK.

The government therefore decided that the best way out of the impasse was via house arrests. A bail application for a detainee under the old regime had been permitted with conditions which effectively amounted to house arrest. This had been noted in the Lords ruling as an indication that alternatives to detention were available. The government took the hint and sought to present the change as a liberal concession, evidence of its principled commitment to human rights. This worked only until the implications of house arrest had been properly digested. Clifford Longley made many of these points in his *Viewpoint* piece in this magazine last week. The life of somebody under perpetual house arrest is in many ways as bad as that of a detainee. The power, moreover, would be deployable against all and sundry and not just supposed Al-Qaida operatives. Whether or not compatible with human rights law in the narrow sense, the spectre of the South Africa of old and the Burma of today seeped inexorably into public discussion. Hostility to the proposed changes gathered momentum, and the government now finds itself – rightly – on the defensive.

The key question remains the simple one of why suspected terrorists are not charged or released. There is a plethora of offences available, many terrorist-specific and of extremely wide reach. It is said that the evidence on which such charges could be brought is in the form of wire-taps and other forms of covert surveillance the admissibility of which is not permitted by law. But if that is the case, then simply change the law: a country should not be allowed to drift into authoritarianism merely on account of squeamishness at the prospect of a minor procedural reform. The suspicion is that those relying on the ‘intelligence’ provided by such intercepts do not want such data exposed to the light of day. Or, even worse, that there is no such intercept evidence, that people are being held on the word of informers, other suspects or as a result of ‘information’ supplied by foreign intelligence sources, including from such services in those very countries to which we have agreed we cannot send suspects least they be tortured on their return. Last weekend the new Metropolitan Police Commissioner added his voice to those calling for the admission

of intercept evidence in court, and it is difficult to see how this change can be resisted for much longer. When the change comes, it will be another victory for the principles of legality and due process over creeping democratic authoritarianism. If the change does not come, then the house arrest policy will be exposed as internment via another name, and it may not be long before it meets the same legal fate as the executive incarceration against which the lords have already so conclusively and so dramatically ruled.