EXCEPTIONALISM AND THE LAW

CHARLOTTE KILROY KC

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1. ***In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.***

2. No prizes for identifying this.

3. *Liversidge v Anderson* [1942] AC 206

4. Lord Atkin.

5. A celebrated dissent. Not only from the judgments of the four other law Lords but also all the judges of the Court of Appeal and below.

6. He was a lone voice. It was a great controversy. He was heavily criticised by his fellow Law Lords, by politicians and by parts of the press at the time. The Senior Law Lord, Lord Maugham even wrote a letter to the Times to criticise one aspect of what he had said.

7. But, it is now accepted, he was right. They were wrong.

8. Does this case have any relevance for us? I believe so. It's at the heart of our topic: exceptionalism in immigration and terror legislation. That is: exceptional measures departing from usual legal standards, often applied to limited groups of individuals.

9. *Liversidge v Anderson* is an illustration of the two faces of exceptionalism.

10. The first face is the legislation itself.

11. In that case, the Emergency Powers Defence Act 1939. Extraordinary powers were conferred by primary legislation on the Home Secretary in extraordinary times: the onset of war. The power was make defence regulations for the "*detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the Realm*"

12. Regulation 18B of the Defence Regulations themselves[1] was initially drafted so as to give the Home Secretary the power to detain individuals where "*satisfied … it is necessary to do so.*" An extraordinarily wide discretion.

[1] Defence (General) Regulations 1939, Regulation 18B

13. It was amended after political pressure in Parliament[2], however, and the words '*satisfied that*' were replaced with:

"If the Secretary of State has reasonable cause to believe.[3]

14. In other words the broad power to detain on grounds of prejudice to public safety or defence of the realm was now bounded by a condition *'having reasonable cause to believe'*.

15. So Parliament had done its bit to impose limits on an otherwise almost limitless discretion.

16. The stage was set for the second face of exceptionalism. The courts.

17. In a democracy governed by the rule of law, the courts have a critical part to play.

18. When, to quote Lord Bingham in his lecture about this case[4],

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[2] *The Case of Liversidge v. Anderson: The Rule of Law Amid the Clash of Arms,* Lord Bingham of Cornhill, 43 Int'l L 33 (2009), p33-34

[3] *… any person to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety or the defence of the Realm..and that by reason thereof, it is necessary to exercise control over him, he may make an order against that person directing that he be detained".*

[4] *The Case of Liversidge v. Anderson: The Rule of Law Amid the Clash of Arms,* Lord Bingham of Cornhill, 43 Int'l L 33 (2009)

… ‘*exceptional circumstances appear to call for exceptional remedies*’,

..and it seems that this is ‘*no time for legal niceties*’,

..and there is a temptation to conclude that ‘*the safety of the people is the supreme law*’,

Then it is the courts who are called upon to assert ‘*older, nobler, more enduring values: the right of the individual against the state; the duty to govern in accordance with law; the role of the courts as guarantor of legality and individual right; the priceless gift, subject only to constraints by law established, of individual freedom.*”

19. In 1941 in the middle of the war the House of Lords did not heed this call.

20. Mr Liversidge (real name Jack Perlzweig) was detained on the grounds of hostile associations.

21. In his action for false imprisonment the question was: when the statute said an individual may be detained if the Home Secretary ‘*has reasonable cause to believe*’, did his belief have to be subjective or objective? If it had to be objective the court would order the Home Secretary to explain the reasons for detention, and assess for itself whether the condition was met. If subjective, it would not.

22. As Lord Atkin explained in his excoriating judgment[5], regulation 18 B of the defence regulations had, unquestionably imposed an objective test, using language universally used for that purpose in the context of detention powers more generally, and in the defence regulations themselves. But the remainder of the House of Lords reasoned the opposite. They butchered the natural meaning of the words. As Lord Atkin said: " *If A has a broken ankle* " does not mean and cannot mean "*If A thinks that he has a broken* "*ankle.*" " *If A has a right of way*" does not mean and cannot mean " *If A thinks that he has a right of way*." Similarly "*If the Secretary of State has reasonable cause to believe*", does not mean "*If the Secretary of State thinks he has reasonable cause to believe*".[6]

23. Why did the House of Lords do it? Well of course: the war. As Lord Wright explained: "*If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency*"[7]. Their Lordships reasoned that the special context of the Regulations, the particular knowledge and status of the Secretary of State and the confidentiality of the information on which the detention was based all militated in favour of the unusual construction. They considered that a judge '*cannot possibly have the full information on which the minister has acted or appreciate the full importance in the national interest of what the information discloses*'[8]. Consequently:

"*if [the Home Secretary] has reasonable cause to believe, that is, believes that he has in his own mind what he thinks is reasonable cause. If that is his mental state, the duty to act in the national interest attaches. That is a higher duty than the duty to regard the liberty of the subject*'.[9]

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[5] *Liversidge v Anderson* [1942] AC 206, 225-247

[6] Ibid at 227-228
[7] Ibid at 261
[8] Ibid at 266
[9] Ibid at 265

24. No wonder Lord Atkin compared this approach to Humpty Dumpty. "*When I use a word…it means just what I choose it to mean neither more nor less.*"[10]

25. And no wonder he said that:

"*I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive*"[11]

26. As he reminded the rest of the court:

"*It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.*"[12]

27. It's no accident Lord Bingham chose to speak about *Liversidge v Anderson* to the American Bar Association in 2007, nearly 70 years later[13]. The House of Lords over which he had presided as Senior Law Lord had by then been called on to consider another exceptional legislative measure adopted in exceptional times, the Anti-Terrorism Crime and Security Act 2001 (ATCSA), adopted in the wake of the 9/11 attacks and the subsequent '*war on terror*'.

28. As he later explained (in *The Rule of Law*[14]):

[10] Ibid at 245
[11] Ibid at 244
[12] Ibid at 244
[13] *The Case of Liversidge v. Anderson: The Rule of Law Amid the Clash of Arms,* Lord Bingham of Cornhill, 43 Int'l L 33 (2009)
[14] P158-9, *The Rule of Law*, Tom Bingham, 2010

"*The advent of serious terrorist violence, carried out by those willing to die in the cause of killing others, tests adherence to the rule of law to the utmost: for states, as is their duty, strain to protect their people against the consequences of such violence, and the strong temptation exists to cross the boundary which separates the lawful from the unlawful*."

29. Parliament acceded to that temptation with the ATCSA. It provided for the indefinite detention without charge or trial of non-nationals suspected of international terrorism who could not be deported, derogating from Article 5 of the ECHR while doing so.

30. Importantly, however, British nationals were not liable to detention under the ATCSA, even though there were among them those who undoubtedly posed equivalent risk.

31. In *A v SSHD* [2005] 2 AC 68 (the **"Belmarsh case"**) a panel of judges of the House of Lords, led by Lord Bingham, duly considered the legality of the ATCSA. The issue was whether the derogation from Article 5 ECHR ("**the Derogation Order"**) was justified and proportionate, and thus its compatibility with the ECHR.

32. This House of Lords did heed Lord Atkin's call to assert the right of the individual against the state. They too were considering indefinite detention, and they too were invited by the Home Secretary to step back from their role as guardians of liberty. The Attorney General submitted (§37 in the speech of Lord Bingham):

"it was for Parliament and the executive to assess the threat facing the nation, [and] it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment…. matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere."

33. Lord Bingham's response in the judgment was (§41-43)

    "Even in a terrorist situation ……Judicial control of interferences by the executive with the individual right to liberty is an essential feature of the guarantee embodied in article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law….

    in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and

    ………. the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

34. Having rejected the argument that, on grounds of deference, it was not the court's place to judge the proportionality of the Derogation Order, the House of Lords found that it was disproportionate, highlighting that perversely, it permitted equally dangerous British nationals to walk free, and allowed similarly dangerous non-nationals who could be deported to leave the UK free

to conduct their attacks from abroad. The Derogation Order was quashed, and section 23 ATCSA was declared incompatible with Article 5 and 14 ECHR.

35. The Belmarsh case is a striking example of the courts' role in curbing exceptionalism.

36. And it also highlights the greater ease with which legal standards are diluted if not applied to the population as a whole.

37. Indeed Justice Jackson of the US Supreme Court said this in a famous case in 1949[15]:

"…..nothing opens the door to arbitrary action so effectively as to allow officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation"

38. Fast forward to the present day.

39. The war on terror has mutated, but not abated. In recent times, ISIS has occupied the attentions of legislators.

[15] *Railway Express Agency v New York*, 336 U.S. 106 (1949), a case about advertisements on trucks

40. The new tool of choice for the executive is deprivation of citizenship for those with dual nationality, exercised while they are out of the country so they can never return. Notoriously, a young girl named Shamima Begum, trafficked to Syria to become an ISIS bride at the age of 15, had her citizenship stripped without notice a few years later when she was 19 and was by then detained in a camp in Syria. Her circumstances were dire. Two of her children had already died and her third did shortly thereafter.

41. She was entitled to an appeal against that decision to SIAC, but her conditions of detention were so poor, and her ability to communicate with her lawyers so limited that she could not fairly exercise that right.

42. The Court of Appeal found the Home Secretary should have granted her leave to enter the UK to conduct that appeal.[16]

43. But the Supreme Court overturned that decision[17]. The Home Secretary was entitled to refuse leave to enter on national security grounds. The right to a fair and effective appeal was not as Lord Reed put it, a '*trump card'*[18]. The full appeal did not entitle SIAC to substitute its own assessment of the risk to national security posed by Ms Begum for that of the SSHD. On national security the deference owed to the SSHD was such that, even on appeal, it could only be displaced on what amounted to ordinary judicial review principles.[19]

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[16] *Begum v SIAC* [2020] 1 WLR 4267
[17] *Begum v SIAC* [2021] AC 765
[18] Ibid at §110
[19] Ibid at §110

44. The Court's reasoning was largely based on an analysis of various appeal rights within and without the immigration context.[20] But the Court did not examine the role of appeal rights within the immigration decision-making system as a whole.

45. Appeal rights have always had a special function in the asylum system, allowing short-cuts in the decision-making process which would, in the absence of a full appeal, render the underlying decision unfair or unlawful. That is why, in Ms Begum's case as in many others, the Home Secretary believed she could strip individuals' citizenship based on minimal evidence and with no notice or opportunity to make representations, relying on their ability to engage later in the process and her own ability to supplement the evidence relating to national security.

46. The impact of the Supreme Court's judgment in *Begum* on both the appeal process and the decision-making process is still being explored in SIAC and the Court of Appeal, with increasingly labyrinthine results[21]. It is at least possible that another trip to the Supreme Court will be required to try to sort the problems out.

47. But in the meantime, Ms Begum, and many others like her, have had neither a fair decision to deprive them of their citizenship nor a fair appeal, and have been languishing for years, often with children, in squalid and dangerous camps in Syria or Iraq exposed to a multitude of risks and degradations.

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[20] Ibid at §32-81

[21] See eg *R(E3) v SSHD* [2023] KB 149; *U3 v SSHD* [2023] EWCA Civ 811

48. It does unfortunately feel as if exceptionalism has prevailed.

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49. They are neither suspected Nazis, nor suspected terrorists, but some people consider them an invasion. They are of course asylum-seekers and refugees. Exceptional measures have been applied to this group for years, but the political capital now being expended on them is unprecedented.

50. Cue the Rwanda scheme, the Nationality and Borders Act 2022, and now the Illegal Migration Act 2023. Each more savage than the last, the aim is to remove the ability of genuine refugees to obtain leave in the UK if they have arrived illegally, which for most is the only way to get here, and thereby to deter refugees from fleeing to the UK in the first place.

51. Although there are a large number of extremely concerning aspects of these Acts, the fact remains that in being invited to pass them Parliament was repeatedly assured that:

"……the Government take their international obligations, including under the ECHR, very seriously, and there is nothing in the Bill that requires any act or omission that conflicts with UK international obligations."[22]

52. This is where the Courts will come in.

[22] Hansard, 28 June 2023, Lord Murray of Blidworth

53. As we’ve seen in times of national stress or turmoil the executive will frequently resort to exceptional legislative measures which threaten the fundamental rights of small and unpopular minorities. We should expect nothing less.

54. The role the Courts play in these circumstances is clear. Upholding the rule of law involves resisting the siren calls, and as Lord Atkin put it, standing ‘*between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.’*