

## ***A and others v Secretary of State for the Home Department: Anti-terrorism***

In *A and others v Secretary of State for the Home Department*, [2004] UKHL 56, the House of Lords decided that s 23 of the Anti-terrorism, Crime and Security Act 2001 was unlawful under the Human Rights Act 1998 in that it discriminated against non-nationals. Lord Bingham also found the detentions to be a violation of article 26 of the ICCPR and “so inconsistent with the United Kingdom’s other obligations under international law within the meaning of article 15 of the European Convention (on Human Rights)”. There was no need for a discussion of justiciability given the statutory context and while the decision was that the detention of non-nationals was incompatible with the European Convention because it was disproportionate and discriminatory, the Lords placed weight on Britain’s obligations in international law generally. Lords Hope, Scott, Rodgers and Nicholls agreed with Lord Bingham on the international law point and Baroness Hale found the legislation to be “inconsistent with our other obligations under international law from which there has been no derogation, principally art 14 of the European Convention.” Lord Hoffmann did not express a view on the discrimination point. He confined his judgment to a finding that the terrorist threat did not threaten “our institutions of government or our existence as a civil community” and, as such, the power of detention was “not compatible with our constitution”. He acknowledged that it was only because of the Human Rights Act that the court had the power to question an Act of Parliament. He was not prepared to investigate the international law sources, basing his decision on British constitutional history, conveniently in this case updated by the Human Rights Act.

In reaching their decision, their Lordships also found that the United Kingdom was not entitled to derogate from article 5 of the European Convention as the government had not proved that the exigencies of the situation warranted such a derogation. In doing so they disagreed with the Court of Appeal and refused to defer to the Secretary of State. Lord Bingham, in particular, rejected the Attorney General’s submission based on the distinction between democratic institutions and the courts. In his Lordship’s words: “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 somehow undemocratic.” Lord Bingham was, of course, operating within the statutory context but his words may find echoes in future debates about the extent to which UK state action on defence and foreign affairs remains truly non-justiciable. The decision is also significant in demonstrating again that UK courts have little difficulty in dealing with international law sources.