LEGAL COMMENTARY ON THE USE OF TORTURE EVIDENCE

A and others v Secretary of State for the Home Department [2005] UKHL 71: can material obtained through torture be admitted in legal proceedings challenging detention without trial, deportation and deprivation of citizenship on 'national security' grounds?

Introduction and overview

This judgment may well become regarded as the leading judgment on the issue of torture in the world. It answers the question of whether the State may allow evidence obtained from torture to be admissible in cases against terrorist suspects. This is a case that was not decided on the facts, but on the theoretical issue of whether admitting such evidence can ever be justified. This case is linked to that of the same name heard by the House of Lords in December 2004. Both cases involved appeals brought by individuals detained by the Home Secretary exercising powers conferred upon him by Parliament through the (now repealed) Part 4 of the Anti – Terrorism, Crime and Security Act 2001 (hereafter ATCSA). Because the legislation in question had been repealed by the time of the judgment, the issues at stake were mainly theoretical, and may not affect the position of the individuals who brought the case, who are being held by the UK government under different legislation. This judgment is not limited to detention under ATCSA, and will extend to other proceedings where national security grounds come to the fore, such as deportation proceedings, the issuing of control orders and depriving naturalised British subjects of their citizenship[1]. In order to understand the context of this decision, a brief background of the legislation and previous appeals will have to be given.

'Terrorism' and 'terrorist' are defined in the Terrorism Act 2000, sections 1 and 40 respectively. 'Terrorism' is defined as 'the use or threat of use of action' where the use or threat of is designed to influence the government or to intimidate the public or a section of the public[2], and the use or threat is made for the purpose of advancing a political, religious or ideological cause[3]. The action must involve serious violence against a person, serious damage to property, endangering a person's life, other than that of the person committing the action, create a serious risk to the health and safety

[1] This point was made in the House of Lords by Lord Brown, who accepted that this would be the most likely outcome of the judgment: [2005] UKHL 71, at para. 168.
[2] Terrorism Act 2000, s. 1 (1) (b).
[3] Ibid., s. 1 (1) (c).

of the public or a section of the public, or be designed seriously to interfere with or to disrupt an electronic system[4]. A 'terrorist' is defined as someone who has committed a terrorist offence under the Act, or is or has been concerned in the commission, preparation or instigation of acts of terrorism[5]. This definition includes people who have been concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 1[6]. These definitions apply to Part 4 of ATCSA[7].

ATCSA was passed by Parliament in response to the terrorist attacks on the United States of America on September 11th 2001. Part 4 of ATCSA, titled 'Immigration and Asylum' contained the most controversial provisions. It allowed for the detention without trial of foreign terrorist suspects who could not be deported from the UK due to the *Chahal* principle[8]. This legislation necessitated a derogation from Article 5 ECHR, which guarantees the right to liberty and security of the person[9].

The Secretary of State was able to issue a certificate under s.21 of ATCSA declaring that an individual was a suspected international terrorist if he believes that the person's presence in the UK is a risk to national security, and suspects that the person is a terrorist[10]. A 'terrorist' means a person who has been concerned in international terrorism, belongs to an international terrorist group, or has 'links' with an international terrorist group[11]. What constituted 'links' with an international terrorist group were not defined. Section 23 allowed a suspected international terrorist to be detained indefinitely under immigration legislation if they cannot be deported by a point of law relating to an international agreement, or a practical consideration[12]. This section referred to the case of *Chahal* and its subsequent decision[13].

At the end of 2003, the Home Secretary had certified 17 individuals, who were all detained. These 'detention without trial' provisions attracted a huge volume of criticism[14]. Seven men were still in custody by December 2004. Ten of the certified

[4] Ibid., s. 1 (2).
[5] Ibid., s. 40 (1).
[6] Ibid., s. 40 (2).
[7] ATCSA, s.21 (5).
[8] *Chahal* v *UK* (1997) 23 EHRR 413. The European Court of Human Rights (ECtHR) held that it would be a breach of Article 3 of the European Convention on Human Rights (ECHR), which prohibits absolutely torture, inhuman or degrading treatment, if an individual is deported to a country where there would be a real risk of them facing such treatment.
[9] HRA 1998 (Designated Derogation) Order 2001 (S.I. 2001 No. 3644).
[10] s. 21 (1) ATCSA.
[11] S. 21 (2) ATCSA.
[12] S.23 ATCSA.
[13] (1997) 23 EHRR 413, at n.2 above.
[14] A Tomkins "Legislating Against Terror: The Anti – Terrorism, Crime and Security Act 2001" [2002] *Public Law* 205; Privy Councillor Review Committee, "Anti – Terrorism, Crime and Security Act 2001 Review"; Human Rights Watch, "Neither Just Nor Effective: Indefinite Detention in the United

individuals challenged their detention on two separate grounds. Section 25 of ATCSA gave a suspected international terrorist a right of appeal against his certification to the Special Immigration Appeals Commission (SIAC) against his certification under section 21[15]. Section 30 of ATCSA also gave SIAC the jurisdiction to hear appeals against the validity of the UK's derogation from Article 5 ECHR. The detainees made two separate appeals: first, that the derogation was unlawful, and second, challenging the validity of the certificates issued by the Home Secretary. Both appeals ended up in the House of Lords.

In December 2004, the House of Lords, sitting as a nine member chamber, declared that the UK's derogation was unlawful and quashed the Derogation Order by a majority of 8 to 1[16]. The Law Lords decided the case by seeing whether the derogation was valid when judged by the criteria under Article 15 ECHR[17]. This article puts limits on the power of the State to derogate from certain articles of the Convention, and the derogation must not go further than the conditions under the article allow.

Article 15 (1) ECHR states that,

"In times of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent ***strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law"*** [emphasis added]

The majority (Lord Hoffman dissenting) held that there was a public emergency existing in the UK that threatened the life of the nation. The Law Lords went onto hold (Lord Walker of Gestingthorpe dissenting) that the measures taking were not strictly required by the exigencies of the situation and were inconsistent with the UK's obligations under international law. The House of Lords held that the derogation was

Kingdom under Part 4 of the Anti – Terrorism, Crime and Security Act 2001", *A Human Rights Watch Briefing Paper*, August 2004.

[15] SIAC was set up by the Special Immigration Appeals Commission Act 1997 (SIACA) to hear appeals against immigration decisions on almost all grounds, following criticisms of the previous system the UK had in place by the ECtHR in *Chahal* v *UK* (1997) 23 EHRR 413. SIACA s.7 allows for appeals on a point of law to be made from SIAC to both the Court of Appeal and the House of Lords.

[16] *A and others* v *Secretary of State for the Home Department* [2004] UKHL 56.

[17] See especially [2004] UKHL 56, at paras.151 – 152, per Lord Scott. The Human Rights Act 1998 (HRA), s.1 incorporates certain articles of the ECHR into UK law, but the limitations to the power to derogate set out by Article 15 ECHR are not so incorporated.

disproportionate, as it only permitted detention of foreign terrorist suspects in a way that discriminated on the ground of nationality or immigration status. The Law Lords then issued a declaration stating that section 23 of ATCSA is incompatible with articles 5 and 14 ECHR[18].

In response to this decision the Government published, and Parliament passed, the Prevention of Terrorism Act 2005 (PTA), which provided for the issuing of derogating and non – derogating control orders that would apply to British and foreign terrorist suspects alike[19]. The PTA repealed Part 4 of ATCSA, which contained the detention without trial provisions[20]. The PTA made explicit provision that it did not affect appeals still in progress over the Part 4 powers in ATCSA[21].

An emphatic rejection of the admissibility of evidence obtained through torture

The detainees appealed against their certifications issued under ATCSA to SIAC. SIAC heard open evidence when the appellants and their legal representatives were present and closed evidence when they were excluded but special advocates were present. SIAC upheld all the certificates issued, but considered the following question within their open judgment[22]:

> "May the Special Immigration Appeals Commission (SIAC), a superior court of record established by statute, when hearing an appeal under section 25 of the Anti – Terrorism, Crime and Security Act 2001 by a person certified and detained under section 21 and 23 of that Act, receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities?[23]"

SIAC gave an affirmative answer. The fact that evidence had been obtained by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it inadmissible.

[18] [2004] UKHL 56, para. 222 per Baroness Hale. Superior courts of record have a power conferred upon them by the HRA s.4 to issue a declaration of incompatibility if primary legislation cannot be interpreted in a way that is compatible with the ECHR.
[19] Prevention of Terrorism Act 2005, ss.1 – 2.
[20] PTA, s.16.
[21] PTA, s. 16 (4).
[22] *Ajouaou and A, B, C and D* v *Secretary of State for the Home Department*, SIAC judgment 29th October 2003.
[23] This question was put to the House of Lords by Lord Bingham in *A and others* [2005] UKHL 71, at para. 1.

On 11th August 2004, the Court of Appeal upheld this decision by a majority of 2 to 1[24]. The majority, Laws and Pill LJJ, held that it was for the appellants to *establish* that the statement in question was obtained by torture[25]. Laws LJ found that the fact that evidence had been or might have been obtained through torture from a third party would be a matter of weight rather than admissibility[26]. The majority held that Rule 44 (3) of the SIAC Procedure Rules[27], which states that the Commission may receive evidence that would not be admissible in a court of law, allowed the Commission to accept such third party torture evidence. However, Laws LJ went onto hold that if evidence were obtained through torture brought about with the connivance of the Secretary of State or English authorities, then SIAC would be bound to exclude it, as if they did so then it would reward the wrongdoing committed by the Secretary of State. Such evidence cannot be admitted, however grave the emergency[28].

Neuberger LJ disagreed with the majority on this distinction between 'foreign' and 'British' torture evidence. His Lordship felt that if the UK Government seeks to rely on evidence extracted from torture due to actions of agents of another State, then it can be said that the UK Government has 'adopted' that torture[29], and it is the duty of the court in that situation to intervene and exclude the evidence.

The appeal reached the House of Lords, who gave their judgment in December 2005.

The main arguments were set out in detail by Lord Bingham, the senior Law Lord, who gave the leading judgment in the House. The appellants contested that evidence obtained by torture should never be admitted into proceedings in the United Kingdom. Their argument was based on several points. First, the common law of England has set its face firmly against the use of torture and has done for 500 years[30]. In fact, the condemnation of torture by the common law acts more like a constitutional principle than as a rule of evidence. The appellants referred to Article 15 of the United Nations

[24] [2004] EWCA Civ 1123, Pill and Laws LJJ, Neuberger LJ in part dissenting.
[25] Ibid., Pill LJ at para. 136 and Laws LJ at para. 271.
[26] Ibid., at paras. 262 – 265.
[27] The Special Immigration Appeals Commission (Procedure) Rules 2003, hereafter the SIAC Rules 2003.
[28] [2004] EWCA Civ 1123, at para. 137.
[29] Ibid., at para. 413.
[30] This has been given effect in UK law by section 78 of the Police and Criminal Evidence Act 1984 {PACE).

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990, Cm 1775) (hereafter CAT)[31]. Article 15 CAT provides that,

> "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

The appellants also contested that the ECHR compels the rejection of evidence which has or may have been procured by torture. Article 3 ECHR guarantees that no – one is to be subjected to torture, inhuman or degrading treatment. This absolute, non – derogable prohibition has been said to enshrine "one of the fundamental values of the democratic societies making up the Council of Europe"[32]. Article 5 (4) ECHR entitles anyone deprived of his liberty by arrest or detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Such proceedings must satisfy the basic requirements of a fair trial[33]. The appellants contested that if such evidence were admissible there would be a breach of the ECHR.

His Lordship analysed these arguments in detail, and declared that from its very earliest days the common law of England rejected the use of torture. The common law has traditionally refused to accept, unlike the Court of Appeal in this case, that oppression or inducement should go to the weight rather than the admissibility of the confession. The common law has insisted on an exclusionary rule[34]. However, Lord Bingham recognised that in English law there exists the anomaly of excluding involuntary statements, but not excluding evidence obtained from such statements. This anomaly has been accepted as a pragmatic compromise by the common law[35]. However, this does not affect the fact that the inadmissibility of involuntary statements is perhaps the most fundamental rule of the English common law[36]. His

[31] See *R (Saifi)* v *Governor of Brixton Prison* [2001] 1 WLR 1134, at para. 60.
[32] *Soering* v *United Kingdom* (1989) 11 EHRR 439, para. 88.
[33] *Garcia Alva* v *Germany* (2001) 37 EHRR 335; *R (West)* v *Parole Board, R (Smith)* v *Parole Board (No. 2)* [2005] UKHL 1.
[34] See *Wong Kam – ming* v *The Queen* [1980] AC 247. This rule was justified as involuntary statements are inherently unreliable – see *R* v *Warwickshall* (1783) 168 ER 234.
[35] [2005] UKHL 71, at para. 16.
[36] [2005] UKHL 71, at para. 17, per Lord Bingham, citing Lord Griffiths in *Lam Chi – Ming* v *The Queen* [1991] 2 AC 212 at 220. This fundamental rule is applied in many other jurisdictions, such as the US, Ireland, Australia and New Zealand.

Lordship also noted that there was an inherent jurisdiction for a court not to admit evidence if it would be an abuse of process to do so[37].

Lord Bingham recognised that the ECtHR has insisted upon ensuring that proceedings, on the particular facts of the case, have been fair, and has recognised that the way in which evidence has been obtained or used may be such as to render the proceedings unfair[38]. However, a breach of Article 6 (1) lies not in the use of torture but in the reception of the evidence by the court for the determination of the charge[39]. Lord Bingham, citing cases from the ECtHR, concluded that if complaints of coercion and torture appear to be substantiated, then the admission of evidence obtained by such means would inevitably lead to a violation of Article 6 (1)[40].

Lord Bingham acknowledged the appellants' argument that the ECHR is not interpreted in a vacuum. Article 31 (3) (c) of the Vienna Convention on the Law of Treaties provides that in interpreting a treaty, there shall be taken into account any relevant rules of international law applicable between the parties[41]. The ECtHR has repeatedly invoked CAT when deciding cases. His Lordship also acknowledged the international prohibition on torture, encapsulated in such international instruments like the Universal Declaration of Human Rights 1948, article 5, Article 3 ECHR and the International Covenant on Civil and Political Rights 1966 (ICCPR) article 7. This repulsion towards torture led to the CAT, which the UK has ratified, and instructs every state party to take effective measures to prevent acts of torture under its jurisdiction[42], does not allow a state to return, extradite or expel a person to a State where there are substantial grounds for believing that they would be in danger of

[37] [2005] UKHL 71, at paras. 18 – 22. His Lordship cited *R* v *Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42; *R* v *Latif* [1996] 1 WLR 104; *R* v *Mullen* [2000] QB 520; *R* v *Loosely, A-G's Reference (No. 3 of 2000)* [2001] UKHL 53. Lord Nicholls in *Loosely* declared that every court has the power to prevent an abuse of its process, and the court must ensure that executive agents of the State do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the State.

[38] See *Saunders* v *UK* (1996) 23 EHRR 313; *Teixeira de Castro* v *Portugal* (1998) 28 EHRR 101, at para. 39.

[39] As held in *Montgomery* v *HM Advocate; Coulter* v *HM Advocate* [2003] 1 AC 641, at 649, per Lord Hoffman.

[40] [2005] UKHL 71, at para. 26, where Lord Bingham cited *Mamatkulov and Askarov* v *Turkey* (App. Nos. 46827/99 and 46951/99, unreported, 4th February 2005); *Haratyunyan* v *Armenia* (App. No. 36549/03, unreported, 5th July 2005).

[41] The ECtHR affirmed this position in *Al – Adsani* v *UK* (2001) 34 EHRR 273, at para. 55, and *Soering* v *UK* (1989) 11 EHRR 439, at para. 88.

[42] Article 2 CAT.

being subjected to torture[43], and instructs that all acts of torture are to be made offences under each State's criminal law[44].

Lord Bingham concluded that the international prohibition on the use of torture enjoys the status of a *jus cogens* or peremptory norm of general international law[45]. His Lordship quoted at length from the case of *Proseutor* v *Furundzija*[46], heard at the International Criminal Tribunal of the Former Yugoslavia. The tribunal declared that the torturer has become the enemy of all mankind, the prohibition even covers *potential* breaches, and imposes obligations *erga omnes*[47], and has acquired the status of *jus cogens*[48]. Lord Bingham declared that there are few issues that international legal opinion is more clear than on the condemnation of torture, and it is the duty of states, save in exceptional and limited circumstances, for example where it is immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law[49]. Article 15 CAT was held by his Lordship to impose a blanket exclusionary rule that applies to all proceedings[50]. The rationale behind this rule is based on the fact that statements made under torture are often unreliable statements, and torture is often aimed as ensuring evidence in judicial proceedings, so to render inadmissible such evidence removes an important reason for using torture. It also would damage the integrity of judicial proceedings if such statements were admissible[51]. Lord Bingham noted that the Court of Appeal's decision was heavily criticised, by the International Commission of Jurists and the Committee Against Torture[52] amongst others[53]. He noted that the House had not been referred to a single decision, opinion,

[43] Article 3 CAT, mirroring the prohibition contained within Article 3 ECHR, as held by the ECtHR in *Chahal* v *UK* (1997) 23 EHRR 413.
[44] Article 4 CAT.
[45] [2005] UKHL 71, at para. 33, citing *R* v *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, at 197 – 199.
[46] [1998] ICTY 3, 10th December 1998.
[47] That means, obligations that are owed towards all other members of the international community, each of which then has a correlative right.
[48] [1998] ICTY 3, at paras. 147 – 157.
[49] [2005] UKHL 71, at paras. 33 and 34.
[50] [2005] UKHL 71, at para. 35.
[51] See Burgers and Danelius, "The United Nations Convention Against Torture" (1988), p. 148, and the Rome Statute of the International Criminal Court, article 69 (7).
[52] The Committee was set up by Article 17 CAT to monitor compliance by member states.
[53] [2005] UKHL 71, at paras. 43 – 44. See also the statement made by the Committee Against Torture, the Special Rapporteur on Torture, the Chairperson of the 22nd session of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture an the Acting United Nations Commissioner for Human Rights on 26th June 2004 (CAT Report to the General Assembly, A/59/44 (2004), para. 17); UN Committee Against Torture, Conclusions and Recommendations on the United Kingdom, 10th December 2004 (CAT/C/CR/33/3); Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf (2005) 10), para. 31.

recommendation or resolution suggesting that a confession or statement obtained by torture is admissible in legal proceedings if the torture was inflicted without the participation of the state in whose jurisdiction the proceedings are held, or that such evidence is admissible in proceedings related to terrorism[54].

The Secretary of State founded his case on the statutory scheme established by Part 4 of ATCSA. It was accepted that the Secretary of State may, when forming the reasonable belief and suspicion required for certification under section 21, and when acting on that belief to arrest, search and detain a suspect, act on information which has or may have been obtained by torture inflicted in a foreign country without British complicity[55]. The Secretary of State submitted that there was a need to obtain intelligence from foreign sources, which may dry up if the means of obtaining such intelligence were the subject of intrusive enquiry; it would create a mismatch if Parliament intended that he were able to rely on material at the certification stage that SIAC could not receive. This would emasculate the statutory scheme, which is designed to enable SIAC to see all relevant material. The Secretary of State was empowered by SIACA to issue rules of procedure governing appeals to SIAC - Rule 44 (3), which dispensed with the rules of evidence, allowing SIAC to view evidence that would not be admissible in a court of law, was referred to.

Lord Bingham felt that the Secretary of State did not make a negligible argument, as it was broadly accepted by the Court of Appeal, yet he rejected it for a number of reasons. The Secretary of State accepted that 'officially – authorised British torture evidence' would be inadmissible before SIAC, which his Lordship concluded suggested that there is no correspondence between the material the Secretary of State may act on and that which is admissible in legal proceedings[56]. His Lordship was not impressed by the argument based on the practical undesirability of upsetting foreign regimes which may resort to torture. He noted that the majority of the Court of Appeal held that although third party torture evidence is legally admissible, it must be assessed by SIAC in order to decide what, if any, weight should be given to it. His Lordship felt that this exercise could scarcely be carried out without investigating whether the evidence had been obtained by torture, and, if so, when, by whom, in

[54] [2005] UKHL 71, at para. 45.
[55] [2005] UKHL 71, at para. 46 per Lord Bingham.
[56] [2005] UKHL 71, at para. 47. This is not an unusual position. An example given by Lord Bingham is that of a public official relying on information which the rules of public interest immunity prevent him from adducing in evidence, which is another anomaly that the common law tolerates.

what circumstances and for what purpose. Such an investigation would inevitably call for an approach to the regime said to have carried out the torture[57].

Although he acknowledged that a sovereign Parliament could legislate in breach of international law and confer power on SIAC to receive third party torture evidence, Lord Bingham went on to state,

> "The English common law has regarded torture and its fruits with abhorrence for over 500 years and that abhorrence is shared by over 140 countries which have acceded to the Torture Convention.
>
> I am startled, even a little dismayed, at the suggestion (and the acceptance by the Court of Appeal majority) that this deeply – rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all"[58]

Lord Bingham declared that the issue was one of constitutional importance, and accepted the appellants' arguments on the common law. The principles of the common law, standing alone, compelled the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and incompatible with principles which should animate a tribunal seeking to administer justice. Lord Bingham also declared that the common law does not stand alone, as effect must be given to the ECHR, which takes into account of the consensus contained within CAT. His Lordship also opined on the appellants' argument that all the principles that they relied upon apply also to inhuman and degrading treatment. He held that although a distinction between torture and inhuman and degrading treatments is explicitly drawn[59], the standard of what amounts to torture is not immutable and what falls within the definition may change over time, as the ECHR is a 'living instrument which must be interpreted in the light of present – day conditions'[60].

All of the other Law Lords reached the same conclusion as Lord Bingham, in ruling that third party torture evidence is inadmissible in any proceedings within the UK, although Lord Rodger 'found the issue far from easy' and felt that the difficulties

[57] [2005] UKHL 71, at para. 50.
[58] [2005] UKHL 71, at para. 52. See especially *R* v *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 131 per Lord Hoffman.
[59] Article 16 CAT; *Ireland* v *UK* (1978) 2 EHRR 25.
[60] *Selmouni* v *France* (1999) 29 EHRR 403, at paras. 99 – 101.

that had troubled the majority in the Court of Appeal had also troubled him[61]. Lord Brown felt that,

> "Torture is an unqualified evil. It can never be justified. Rather it must always be punished"[62]

His Lordship felt that SIAC could never uphold a section 23 detention order where the sole or decisive evidence supporting it is a statement established to have been coerced by the use of torture, and to hold otherwise would be to bring British justice into disrepute[63]. Lord Carswell went further, and declared that the legal system should refuse to admit evidence obtained by torture, even if other evidence suggests that it is true. This is even if the price is the loss of the prospect that some pieces of information relevant to the issue of the activities of the person concerned may be given to the tribunal, and relied on to make a final decision[64].

It must be noted that the House drew a distinction between that evidence which is admissible in judicial proceedings, and that evidence which the Executive branch of government can use and act upon in safeguarding the security of the State. Lord Nicholls held that the government cannot be expected to close its eyes to information at the price of endangering the lives of its citizens[65], indeed, some members of the House indicated that the executive is bound to make use of all such information, as it is under a duty to safeguard the State[66]. The House unanimously held that the English common law prohibited the admission of such statements, and this rule is to ensure that that integrity of the administration of justice is upheld[67].

Differing approaches on the test for exclusion

The House of Lords was unanimous in its condemnation of torture and its fruits. However, the House then divided when the question of how to approach the burden of proof in establishing whether or not a statement was obtained by torture.

Lord Bingham made note of the fact that a conventional approach to the burden of proof is inappropriate in proceedings before SIAC. This is because the appellant may

[61] [2005] UKHL 71, at paras. 128 – 129.
[62] [2005] UKHL 71, at para. 160.
[63] [2005] UKHL 71, at para. 165.
[64] [2005] UKHL 71, at para. 148.
[65] [2005] UKHL 71, at para. 69.
[66] [2005] UKHL 71, at para. 161, per Lord Brown.
[67] [2005] UKHL 71, at para. 91 per Lord Hoffman, at para. 137 per Lord Rodger, at para. 150 per Lord Carswell.

not know who made the adverse statement against him, see the statement or even know what the statement says, or discuss the evidence with his special advocate so he can determine who to call as rebuttal witnesses[68]. Lord Bingham also rejected placing the burden of proof wholly on the Secretary of State, as in his view in would render section 25 appeals all but unmanageable if a generalised and unsubstantiated allegation of torture were to impose a duty on the Secretary of State to prove the absence of torture. His Lordship therefore sought to devise a procedure that would afford protection to the appellant without imposing a burden of proof on either party that they would not be able to discharge. This was not a contentious point, and the House agreed with Lord Bingham[69]. Two separate tests to the burden of proof were then proposed, and the House split 4 to 3 over which test it should follow.

The majority of the Law Lords (Lords Carswell, Brown and Rodger) agreed with the test put forward by Lord Hope. Lord Hope stated that once the appellant raises the issue, for example by showing that the evidence came from a country that is alleged to practice torture, the onus passes to SIAC, which will assess whether there are reasonable grounds to suspect that torture has been used in the case under scrutiny[70]. Lord Hope then held that evidence should be excluded if it is *established*, by means of diligent enquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State *was* obtained by torture. In other words, if SIAC concluded that there was no more than a possibility that the statement was obtained by torture, then it would not have been established and the statement would be admissible[71].

The majority preferred this test, and Lord Hope thought that it would be unrealistic for SIAC to demand that *every* piece of evidence be proven not to have been obtained from torture - a balance must be struck between Articles 5 (4), 6 (1) and 2 ECHR[72]. In his Lordship's view, 'too often we have seen how the lives of innocent victims and their families are torn apart by terrorist outrages … the revulsion toward torture must not be allowed to create an insuperable barrier for those who are

[68] [2005] UKHL 71, at para. 55.
[69] Ibid., and at para. 155 per Lord Carswell.
[70] [2005] UKHL 71, at paras. 166 per Lord Hope.
[71] [2005] UKHL 71, at para. 172 per Lord Brown.
[72] Article 2 ECHR guarantees that 'everyone's right to life shall be protected by law'. States are under a duty under both the ECHR and common law to take reasonable steps to guard against a foreseeable threat to life – *R* v *McCann* (1996) 1 EHRR 97, and are required not to make decisions that expose anyone to the real possibility of a risk to life in the future - *R* v *Governor of Pentonville Prison ex parte Fernandez* [1971] 1 WLR 987.

doing their honest best to protect us'[73]. Lord Rodger agreed with Lord Hope, although he added a caveat. He ruled that if SIAC had investigated the statement's origins, and the matter is left in doubt, that is, SIAC cannot be satisfied that on the balance of probabilities that the statement has been obtained by torture, then SIAC can admit the statement but should bear in mind its doubtful origins when evaluating it[74].

The test preferred by the minority was put forward by Lord Bingham, and supported by Lords Nicholls and Hoffman[75]. The procedure Lord Bingham felt should be followed is that first the appellant must advance a plausible reason why evidence may have been procured by torture. It would then be for SIAC to inquire as to whether there is a real risk that the evidence has been obtained by torture, and if there is, the evidence should not be admitted. If there is no such real risk, the evidence should be admitted. Lord Bingham felt the test preferred by the majority could not be satisfied in the real world,

> "It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet."[76]

His Lordship concluded that the result of such a test would be that, despite the Lords' agreeing with the universal abhorrence of torture and its fruits; evidence procured by such means will be laid before SIAC because its sources will not have been 'established'. He criticised the value of the authorities relied upon by Lord Hope and Lord Rodger in their establishing of such a test, and regretted that the House had lent its authority to a test which will undermine the effectiveness of CAT, and deny detainees the standards of fairness to which they are entitled under Articles 5 (4) and 6 (1) ECHR[77]. Lord Nicholls felt that such a test will place a burden on the appellant that he can seldom discharge[78]. This is a reasonable argument, and Lord Bingham's test could be said to be more effective at ensuring that governments do not seek to admit evidence obtained from torture in such proceedings – if there is a 'real risk' that it was so obtained, then it will not be admissible.

[73] [2005] UKHL 71, at para. 119.
[74] [2005] UKHL 71, at para. 145.
[75] [2005] UKHL 71, at paras. 54 – 62, 88 and 98.
[76] [2005] UKHL 71, at para. 59.
[77] [2005] UKHL 71, at paras. 61 – 62.
[78] [2005] UKHL 71, at para. 80.

A landmark decision? Evaluation and scope/impact

This judgment underlines the universal abhorrence towards torture. However, the majority of the Lordships' adopted a test as to the burden of proof in establishing whether such evidence was obtained by torture that could, potentially, handicap the appellant and place a burden that is too stringent upon him. It is worth noting that it is not certain that such evidence was used against the men in their section 25 appeals against detention[79]. The House of Lords set aside all of the orders made by the Court of Appeal and SIAC, and remitted all cases to SIAC for reconsideration. However, as Lord Brown said, it is unlikely that the exclusionary rule concerning coerced statements will affect many, if act, of the individual cases[80]. This is because those detained under the Part 4 powers of ATCSA are being held under other legislation – either by control orders under the Prevention of Terrorism Act 2005 or under immigration legislation pending deportation[81]. However, Lord Brown went on to opine that this judgment may spill over into other court proceedings that involve terrorist suspects. This may well be the case, so the House's reasoning towards the burden of proof for such coerced statements may be very far reaching.

The Home Secretary, Charles Clarke, writing in *The Guardian* newspaper, welcomed the House's judgment, declaring that it reflects the government's own policy, and stated that the Law Lords declared it perfectly lawful for the Executive to rely on evidence obtained from torture, both operationally and in making policy decisions[82]. With respect, the judgement does not go this far. Mr Clarke's reply was disagreed with both Brian Barder, a former lay member of SIAC, and Michael Mansfield, a senior QC[83]. The Law Lords did not hold that it would be lawful for the Secretary of State to rely on such information; they merely stated that the government cannot be expected to close its eyes to such information if it may save the lives of its

[79] See the Anti – terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2004, by Lord Carlile of Berriew Q.C. (the Carlile Review), and Lord Carlile's answer to question 14 posed by the Joint Committee on Human Rights to Lord Carlile of Berriew Q.C., on Wednesday 16th June 2004. This was during oral evidence for the Committee to write up the Review of Counter – Terrorism Powers.
[80] [2005] UKHL 71, at para. 168.
[81] The UK Government is trying to resolve the issue of the foreign terrorist suspect who cannot be deported due to the *Chahal* principle by seeking 'Memoranda of Understanding' with third countries, which provide assurances that if deported individuals will not suffer treatment that would amount to a breach of Article 3 ECHR.
[82] Rt Hon Charles Clarke MP, "I welcome the ban on evidence gained through torture", *The Guardian*, 13th December 2005.
[83] See Brian Barder, "New Labour fails the torture test", *The Guardian*, letters page, 14th December 2005, and Michael Mansfield QC, "Clarke puts spin on torture evidence", *The Guardian*, letters page, 16th December 2005.

own citizens[84]. At no point did the Law Lords condone the use of such information, yet the House limited their judgment to the admissibility of such statements in judicial proceedings[85], and did not involve itself in the business of governmental decisions, as it has done in the past[86].

This is a landmark decision, and underlies the rejection of torture that the English common law has had for the past 500 years. It will affect many future decisions and judgments involving terrorist suspects, and is likely to affect appeals against control orders imposed since the PTA was passed in March 2005, and appeals against deportation for those men the government seeks to deport to countries it has obtained a memorandum of understanding with. These proceedings, however, allow for the appellants and their lawyers to be excluded and for parts of hearings to be held in 'closed' session. The burden of proof established by the House in this case may well present an unfair situation to the appellants, and impose a burden that he cannot discharge, so for all the important words and principles laid out in the judgments, evidence obtained by torture may well still be used in English courtrooms and cases.

Tom Frost

CAMPACC

January 2006

[84] [2005] UKHL 71, at para 69 per Lord Nicholls.
[85] [2005] UKHL 71, at para.1 per Lord Bingham.
[86] See especially *A and others* v *Secretary of State for the Home Department* [2004] UKHL 56; *Secretary of State for the Home Department* v *Rehman* [2002] 1 All ER 122.