

**Transcript of Keir Starmer QC (Doughty Street Chambers)**

**Submissions to the ICJ Eminent Jurist Panel,**

**UK hearings, on 24 April 2006 2.15-16:15**

**Arthur Chaskalson:** If you would indicate in a brief preliminary statement form yourself, of what your concerns are, what we should be concerned about in relation to the threat of terrorism and counter-terrorism and I am sure we will have some ways of developing the discussion with you.

**Keir Starmer QC:** Thank you. [...] The first issue that I wanted really to put before you was the relationship between anti-terrorism measures and human rights and the divergence between the theory and the practice. As everybody knows, there has been a huge number of resolutions and instruments in international law since 9/11 dealing with counter-terrorism measures and I think that nearly all of them expressly require all counter-terrorism measures to be compliant with human rights. So that, in theory, is the model or framework that has been adopted pretty universally by the UN and by all the regional bodies. But in practice the protection that is intended to give has some real gaps in it and under 1A I have highlighted an issue that has cropped up in the UK that gives me particular cause for concern. And that is the reliance on article 103 of the UN charter to trump human rights. Article 103 of the United Nations Charter states that any obligations arising under the United Nations Charter takes precedence over any obligation under international law. And recently the argument has been developed that if a Security Council Resolution obliges states to take certain action, they don't have to account for that action under human rights treaties. That cropped up first in the case of *Cardy* for which I have the reference for you there, which was in the Court of First Instance of the European Communities and more recently in *Al Jeddah*, which was in our Court of Appeal in March 2006.

In *Al Jeddah*, the individual in question, Mr Al Jeddah, had been interned in Iraq and the question, which arose before the Court of Appeal was whether that internment was [constituent] with the right to liberty and whether there should have been a derogation in the circumstances. The government argued before the Court of Appeal - and the Court accepted that argument - that since the forces operating in Iraq are operating under a UN resolution and since the UN resolution requires them to take certain action including internment, then the act of internment is not to be scrutinized for compliance with international human rights

standards at all and therefore, by using the combination of a Security Council Resolution and article 103, any action taken pursuant to a SCR is on the basis of these two cases not even subject to scrutiny for compliance with human rights. That, for me, cuts straight through everything that the international resolutions and instruments have been trying to achieve, which is that anti-terrorism measures must be compliant with human rights. And I think *Cardy* and *Al Jeddah* are the only two examples so far of that gap, but I am sure that there will be many more. *Al Jeddah* is on its way to the House of Lords in this country and therefore it will be reconsidered.

Secondly, and this is particular problem in the UK, article 103 of the UNC only operates in international law and the question therefore that confronts the court is whether the Human Rights Act, which gave effect to the European Convention on Human Rights now law, simply provided a mechanism to individuals to rely on their international law rights or whether it created self-standing domestic law rights because the latter, whatever happened on the international law plane, would not very much matter and a worrying feature of the *Al Jeddah* case is that the Court of Appeal decided that the Human Rights Act in England and Wales only gives individuals the rights they would have in Strasbourg. It hasn't created anything self-standing in our own law that exists independent of the international law rights.

And out of that, and I think under my 1<sup>st</sup> issue you have to take it together, the problem we confronted in the case of *Al Jeddah* was that by the mechanism of article 103 and the limits of the HRA, there was no accountability for troops in Iraq under our law and one of the last pieces of legislation put in place by the occupying powers before they left Iraq was to immunize all troops from local Iraqi law. And so the position for Mr Al Jeddah is that he is detained in Iraq, he is told that although he is detained by British troops, none of the UK international obligations apply. And he is also told that although the troops are subject to Iraqi law, the troops are immune from Iraqi legal process and therefore he can get neither a remedy in this country nor a remedy in Iraq. And I think that the combination of those three issues under number 1 mean that the theory of the relationship between anti-terrorism measures and human rights and the practice are diverging and it's a real gap that is of real concern.

The second issue is the one under my paragraph 2, which really is to bring to your attention and put before you the recent decision of the High Court in this country in the case of *Secretary of State v MB*. This concerns the control order regime, which was put in place following the House of Lords judgement in which internment in this country was found to be contrary to the European Convention. The Prevention of Terrorism Act 2005 provides for

control orders, which are orders made on individuals imposing all sorts of obligations on them, typically that they must live at a certain address, that they mustn't go out of the house between certain hours, that they mustn't meet anybody, that they mustn't have any guest at the house, that they must call in on a special telephone line every few hours and have other imposition on them. And what is achievable under the 2005 Act is every restriction you can think of on an individual's liberty save for the deprivation of liberty because it was the deprivation of liberty that caused the difficulty,

There is obviously an in principle argument: how and when control order should be used. But the particular problems that arose in *MB* I think are important and it was a combination of three features of the 2005 Act that gave the court reason to declare it incompatible with the European Convention.

The first is that to impose a control order, the test is whether the Secretary of State has a reasonable suspicion that the individual has been engaged in terrorist-related activities. And the test for reasonable suspicion is what was operating on the mind of the Secretary of the State at the time he took the decision, not what subjectively was the position if one was to review all of the material. So that's the first feature of the 2005 Act that caused the court concerns.

The second feature is that in proceedings before the court, the test whether or not the control order ought to be in place, the Secretary of State routinely relies on closed material provided by the security services. And the argument is that material cannot be disclosed to the individual because it would compromise the information and a mechanism is therefore set up in which special advocates can argue on behalf of the individual, not take instructions from him or communicate with him or her. The difficulty in most of the control order cases, and in fact with this mechanism, is that absent instructions, it is almost impossible for the special advocate to do the job effectively. For the simple reason that, if a piece of information is said about an individual, no advocate can sensibly test it unless they know whether the individual in question says 'yes, that happened but here is the explanation ' or 'no, that's a lie' and therefore the scope for any real testing is really very limited.

And the third feature, and this was really at the heart of the High Court's decision to declare the PTA incompatible with the European Convention, and that is that the role of the court was not to come to its own decision as to whether there were reasonable grounds to the control order, simply to review whether at the time he made it the decision of the Secretary of State was flawed. Now the problem with that is that it is a very limited exercise and it is a

historical exercise. And as the judge found in the case of *MB*, even if the individual subject to the control order was able to show by evidence before the court that the basis upon which the order was made was wrong, that was not something that the court could take into account. Because the only question was, and in the case of *MB* the decision was made last September, when the question in March and April this year was whether or not the decision last September was reasonable, not whether at the time it was before the court there were now continuing reasonable grounds for the order. So there are real problems I think in the anti-terrorism measures short of detention in England and Wales.

And then the third issue that I just wanted to put before you was in my paragraph 3 and that is the question of what human rights framework ought the law enforcement agencies be operating to particularly when, as is increasingly the case now, law enforcement agencies from one country are operating in another country, either the troops or police or other agents. And insofar as I have been able to research this, there doesn't seem to be any common position or agreed position as to what are the rules for law enforcement agencies when they are operating abroad. Each of the troops that were mandated by the UN adopted different position so far as I can see and the position of our government in relation to our troops in Iraq is that there is no agreed framework and it's an internal matter.

What I have flagged up in paragraph 3 is the model that is provided by the police services of Northern Ireland- I think you were there last week- and I am the Human Rights adviser to the policing board there, and I simply highlighted, really for the sake of discussion, the features in Northern Ireland that are intended to ensure that the police services in Northern Ireland complies with human rights.

And they are first that the police services adopted a code of ethics which is based on human rights- I don't know if anybody has had a chance to look at it, if you haven't, I would recommend that at some stage you do read it, it is a very interesting code of ethics. It is drawn on from international human rights standards and it is a disciplinary code. There is no surer way of making sure that police officers understand and want to understand human rights than having a code of ethics which means they can be disciplined if they breach it and because they have obviously got an interest there in finding out what it is that they are supposed or not supposed to do. So, that's the first feature of the system in Northern Ireland.

The second is that there is a very robust police Ombudsman who looks not only at complaints but also at every fatal shooting, every discharge of impact grounds etc.

The third is that there is an internal human rights legal adviser within the police service and that has been particularly effective at providing hands-on advice to the police when they need it as to how they comply with human rights. The fact that they have that resource and the fact that they use it is extremely good.

Finally, there is my role as a statutory duty in Northern Ireland for the policing board to monitor whether or not the police are complying with the Human Rights Act. I think it is the only statutory duty on any public authority in the UK to be monitored. Although all public authorities are under the same duty to comply with the Human Rights Act, I don't think any other oversight body has a statutory duty to monitor it. And that has meant that there is a relationship between the policing board and the police whereby one oversees compliance by the other. Now, there are a few of the features in Northern Ireland that are intended to ensure human rights compliance. And I put them before you really to progress the discussion as to what the framework should be for law enforcement agencies more generally and I am concerned by the fact it doesn't appear that there is any consensus at the moment as to what the framework should be. Thank you.

**Arthur Chaskalson:** I think I should tell you that we saw the Chief Constable and the Deputy Constable who said that the presence of the code and of these oversight mechanisms have been extraordinarily beneficial to the members of the force. It gave them a framework within which to operate and that they had felt greatly benefited by these procedures. They said that it assisted them very considerably in managing their difficult duties and that it had an extremely good impact they said on community relations.

**Keir Starmer QC:** I think that's right and I obviously observe them making decisions and to watch them go through a mechanism of thinking about which rights to engage and how to deal with them has been very good.

**Arthur Chaskalson:** Now, I wonder if I could just begin identifying some areas, which I would like clarifications on before the panel raises issues. It is not clear to me whether according to the *Al Jeddah* judgement, the conclusion reached is that there is no law applicable to the persons who are being interned or whether there is some law and if there is some law, what that law is. I haven't read the judgement.

**Keir Starmer QC:** The position is that the Court of Appeal accepted - there has been a big discussion lately about the extra-territorial application of human rights instruments and particularly the European Convention, and whether when British troops operate abroad they

take with them their obligations under the European Convention. The Court of Appeal accepted in *Al Jeddah* and in a previous case that in so far as British troops had individuals in British custody - in British detention centres in Iraq totally controlled by the British - then, the European Convention would apply. So, the European Convention applies to them and therefore, anybody in detention of British troops in Iraq has all the rights under the European Convention. The problem in *Al Jeddah* was that the government said 'we need then to examine what that means and if the Security Council Resolution obliges us to take certain action, then because of article 103 of the United Nations Charter, that overrides any other obligation and whereas on the one hand we owe you an obligation under the European Convention, on the other hand through article 103 that is displaced and there is nothing left.' So, it was not so much saying no law applies. It was saying 'when you analyse the obligations, they are displaced, they cease to exist'.

**Arthur Chaskalson:** Was the issue whether internment was permissible or was it related to the conditions of the internment?

**Keir Starmer QC:** It was whether it was permissible at all. The long line of jurisprudence saying 'if you are going to intern, you need to derogate' - and the government obviously has not derogated and so nobody could argue that there would not have been - no one argued that this was not in breach of the European Convention. The government had to say 'the obligations under the Convention are displaced' and so insofar as the case was able to be brought in London, that effectively said there was nothing for the court to scrutinize. Then, I asked the question 'can I raise the same issue please in Iraq?' and then you are confronted by the regulation put in place in Iraq which says 'all troops wherever they come from must be subject to Iraqi law', which is all very well and good; next clause that 'the members of the multinational force are immune from all Iraqi process'. So you have on the one hand the displacement of any obligation on the UK and on the other hand the immunization from the Iraqi legal process.

**Arthur Chaskalson:** What would be the legal regime, leave aside for the moment the validity or invalidity of internment, what would be the legal regime applicable to the internees in Iraq? Is there a legal regime and if so, what is it?

**Keir Starmer QC:** Well, it is provided for by Iraqi law. So, there is an Iraqi law that says that you cannot intern.

**Arthur Chaskalson:** But it doesn't apply?

**Keir Starmer QC:** Multinational forces are immune from Iraqi process, so you can't bring proceedings in court.

**Arthur Chaskalson:** What constraints would there be on the treatment of people who are in internment? Assuming the internment is not being challenged, is there some legal regime which controls what has to happen to the internees, review procedures, treatment of individual, visits and the like?

**Keir Starmer QC:** The local Iraqi law gives a procedure and provides for conditions and therefore Iraqi law does say it should be reviewed every month, I think it is, and the basic conditions apply. But the problem is the troops are immune from Iraqi legal process, so you can't go to a court in Iraq and complain. But I think it is important, and I make a distinction between the fact of internment and the conditions of internment. The issue as to the conditions of internment has not cropped up yet and I don't think to be fair to the Court of Appeal that it follows from their judgement that the conditions of internment would fall outside article 5. They are on one view of the resolution from the UN; you can argue there is an obligation to intern in certain circumstances. It would be extremely difficult to argue that there was an obligation to treat people in a way which fell outside...I don't think that the conditions would necessarily be immune but the fact of internment is.

**Robert K. Goldman:** Can I ask a question on - to follow up on this - because in the relevant dates that we are talking about, the resolution applied after Bremer formally turned over power to the interim government which meant that technically, both for the United States for the United Kingdom and the other coalition partners, the danger (indistinct) of occupation ceased because there is no question that occupying powers can under the 4<sup>th</sup> Convention detain. So in the end... in which case what you are dealing with is the *lex specialis*, even if you had extra-territorial application of the European Convention, which I must say I find very interesting. Since the Covenant clearly would apply and you are bound by the Covenant in this particular case, this is now a regional instrument which has been found to apply extra-territorially, which in one way is very good news but in that particular case...But if you are talking post-occupation, did the court ever get into the characterization of what the ensuing hostilities were? Because even in non-international armed conflict, there is provision for the government to be able to detain individuals and to hold individuals administratively. And consequently if the legal status -and I don't know what the answer to this is in terms of how Britain depicts this- if Britain is asked for instance by the Iraqis 'please stay, help us' here that is an appropriate thing under international law; in fact, it's helping them put down an

internal rebellion. In which case if they could detain, then arguably the British could detain and aren't we talking about another example where for instance you are dealing with IHL? Does this issue ever come up? And I know that we are dealing with the law of armed conflict and the law of non-international armed conflicts in this case.

**Keir Starmer QC:** We are dealing with the post-occupation period. The question of the status in international law whether it was internal conflict did not come up. It is true to say that Iraq can obviously take measures including internment in certain circumstances. But first, although it has declared a state of emergency for particular periods, this detention has now been going on for 18 months and is continuing and the periods of emergency declared in Iraq are not so extensive. Secondly, and I think most importantly, Iraq has not sought to derogate from the right to liberty as a matter of its own domestic law and it can do so both under the ICCPR obviously and in fact under its own Constitution that it has recently adopted. They have the provision which matches international law as you would expect. So, they could say that the state of emergency and as a consequence of that, we are going to have internment. They haven't done that and therefore that route was not open to the government.

**Robert K. Goldman:** When you say, and I just want to clarify, in domestic law this is including self-standing...is it equivalent to self-executing? Is that what you are talking about? In other words, are the rights in the European Convention... don't operate as rules of domestic law?

**Keir Starmer QC:** What the court decided was that the Human Rights Act had in the Schedule to that Act the right set out in the European Convention but that wasn't to create those rights into domestic law as separate rights. All you were being given were the rights that you could enforce on the international plane. What that means is that if, as in this case, the government can argue that as a matter of international law the UN resolution has displaced the international law obligation to protect human rights in this situation, there is nothing in the Schedule of the HRA that bites into domestic law. In other words, if you can't win your case in Strasbourg, you can't win your case in the [Strand] and to that extent no self-standing right were created.

**Robert K. Goldman:** I am just very...Is this the case that Christopher Greenwood argued for?

**Keir Starmer QC:** Yes, but I think on the one hand one could argue all day about Al Jeddah and whether it was good or bad or indifferent. What I am concerned about isn't the fact of that case but more importantly the general principle that, so that as long as an obligation is in a Security Council resolution, it displaces human rights law full stop. This happens to be internment but the principle holds for any action dictated by a UN Resolution; and what I am worried we may see are UN Resolutions which are clearer in the obligations they impose on certain member states and the consequences of this being that wherever it can be said that this is an obligation imposed by a Security Council Resolution, there will be then no scrutiny under international human rights law. This happens to be this example. So, if it was only this one example, you could say 'Well that is the situation in Iraq at the moment'. And you know, one has to be realistic about these things but the general principle is extremely worrying. And it is also worrying because in *Cardy*, which was a freezing of assets case, the court of first instance took the same position, which is 'we, as the court of first instance, are not even going to look at whether your human rights are breached because they have been displaced I am afraid'. So, it is really those two cases together and seeing what the general thrust is that I find particularly worrying.

**Robert K. Goldman:** Could you, after remedies are being exhausted in the UK, this could go to the European Court?

**Keir Starmer QC:** Yes.

**Robert K. Goldman:** Okay. I would suspect that would be the plan because obviously they should have something to say about this.

**Keir Starmer QC:** Yes, because I think at the moment no court has analysed the relationship between article 103 and international human rights law. I think I am right in saying that under the Inter-American Convention there is a slightly different procedure. But certainly the European Court never looked at it. And so the European court will have to ask itself in due course 'are we prepared to accept that a UN Resolution removes the obligations which we would otherwise impose on contracting parties and such that they are not answerable to us or anybody else?' I think that you will here evidence from Phil Sheiner tomorrow and I know he has got some more context on this; because historically, it appears that the use of UN Resolutions framed in a particular way coupled with article 103 is something which has been thought through by those involved in drafting those resolutions. It is not something that has cropped up and is now, as it were, being analysed first time; it is something which somebody

concerned about human rights obligations has thought through as an argument for removing them.

**Robert K. Goldman:** In this particular case, if this is based on the, in addendum to the - I believe someone was telling me about this - that there was an addendum that the power of the United States have asserted.

**Keir Starmer QC:** Yes. There is a UN resolution and appended to the resolution is an exchange of letters. And it is in the exchange of letters. So, what you have is a resolution saying that the UN agrees that the multinational force should, as it happens now, continue to (indistinct) in Iraq. So far so good. According to the exchange of letters attached to this resolution, in the exchange of letters, which is a direct exchange between the US and Iraq, Iraq says 'Please, could you help us by providing the following: dadadadada including taking the following actions: tadada'. There is a letter dated the same day - which is [funny] you should ask - 'We stand ready to comply with those, that request'. But it is in that exchange of letters, that is the only place where you find mention of the activities that the multinational force might be engaging in. And that is the real worry. An exchange of letters has displaced a fundamental right to liberty under the European Convention through this mechanism. And if it succeeds in this case, the arguments succeed in others.

**Arthur Chaskalson:** I understand. Would I be correct if I understand that the practical implications of the decision as being that at present there is no legal basis for challenging the interned?

**Keir Starmer QC:** The fact of internment?

**Arthur Chaskalson:** Yes. Yes. And the duration of the internment.

**Keir Starmer QC:** And the duration? Yes, I mean it is indefinite. It is continuing at the moment until the multinational forces leave. The mandate of the multinational forces is the resolution. So as long as there is a resolution allowing the multinational forces to be there, then there is a resolution allowing internment.

**Arthur Chaskalson:** Yes. And so from practical point of view, there is no legal basis upon which an internee can challenge the legality or validity of the action taken against that person to intern her or him and they may be hold in internment indefinitely as long as the forces remain in Iraq?

**Keir Starmer QC:** Yes.

**Robert K. Goldman:** Could I just ask a clarification? Because this is so puzzling. In no way am I challenging it all, but you said ... I am just trying to understand this, this is the first case of this kind I have ever encountered and in particular the interrelationship between 103 and human rights. In any other systems I saw- this could be extremely important. But if...I can understand that there could not be a challenge for instance it is true... Romer and the occupying powers... It is not only just the troops of the UK and the UK contractor who is there, is also not going to be subject to... Just this. US (indistinct) contractors are also not going to be subject to Iraqi law. It is one thing to say that British forces operating at the invitation or with the consent of what was the interim Iraqi government and continue now under the new Iraqi government in a situation after the occupation that is terminated would not be subject to legal process. Would not an Iraqi court be able to hear though a challenge in an Iraqi court concerning for instance their particular detention? There is a difference between... I am trying to conceive of...Okay. Is there somebody...Obviously, I don't have any idea of what Iraqi law provides for habeas relief or something like that.

**Keir Starmer QC:** The Constitution does. I mean the regulation says that effectively the actions of the multinational forces are immune of Iraqi legal process. On the face of it, it is a complete immunity and that has not to do with detention. That is any act.

**Robert K. Goldman:** Any Act. So you can't try. No soldier. A Briton commits a rape, commits a murder or whatever they are going to be, they are not going to be subject to Iraqi law.

**Keir Starmer QC:** No. Then you've got the question whether that domestic Iraqi regulation is consistent with the Iraqi constitution. Now, when the interim constitution was drafted, there was a careful provision saying that it would apply to everything except the multinational force. So you couldn't use your constitution to defeat your local legislation. The in-coming constitution is broader than that and there may be scope under the in-coming constitution to argue now, as a matter of Iraqi domestic law that the immunity provision has to be struck down. But nobody has gone that far yet. But the problem with the interim constitution was that it provided in fact a very good set of rights because international instruments were incorporated into the interim constitution but it too had an immunity clause. But I do want to clarify. It is the fact of interment that cannot be challenged. I think it would be unfair to the Court of Appeal to say that they [weren't] intending to go any further than that. And insofar as conditions...Even I think if it was prolonged for more than the current (indistinct) of 18

months they might take a different view on that issue. It is the fact of... You can't simply say 'I am invoking my right to liberty justifying my detention' because the court is saying 'well, I am afraid, the obligation doesn't apply'.

**Arthur Chaskalson:** Thank you Mr Starmer. Is there anything you feel in the light of the discussion you would like to raise with us, to clarify anything?

**Keir Starmer QC:** No. What I will do with your permission is to provide you with copies of *Cardy* and *Al Jeddah*. You can see the judgment and everything that flows from it.

**Robert K. Goldman:** One other question. Did the British government...What is the position of the British government concerning the extra-territorial application of not only the European Convention but the Covenant on Civil and Political Rights, the CAT and so forth?

**Keir Starmer QC:** The position of the government in the *Al Jeddah* case was to accept that for somebody in British custody the European Convention would apply.

**Robert K. Goldman:** Even outside of a state party, in a non-state party?

**Keir Starmer QC:** Yes. They accept... Mr Al Jeddah is in a British detention centre to which there is no right of access unless the British troops say so and he has always been in the detention of the British troops and nobody else. And in so far as his files are looked at, it's looked at by the British military. They accept that in no circumstances the European Convention would apply. There is a more complicated case, *Al Skeini*, which is also going to the House of Lords, which involved the shooting I think of six individuals by British troops. And the government's position there is: if there are not in our custody and control -and they are not, on the street- then the European Convention and the Human Rights Act don't apply. So they are seeking to draw a line between those that they are physically holding and those that are subject to their actions in some other way. And so, if you are shot on the street, they would argue, there is no obligation under international instruments on the British troops to carry out the sort of investigation that is necessary under international human rights law. But that is an issue going to the House of Lords as well but there is that distinction being made.

**Robert K. Goldman:** Does the ICRC have access to (indistinct)? Does the ICRC... Have they been visiting?

**Keir Starmer QC:** I don't know. I haven't seen anything to suggest that they have been denied access but I don't know.

**Arthur Chaskalson:** Thank you very much indeed.

**Robert K. Goldman:** Thank you.