Has the law reached a fair balance between protecting the rights of individuals, whilst still safeguarding society against crime and terrorism?

The UK faces a severe threat from terrorism and organised crime and the Government is entitled to and indeed must respond to such threats, including through passing legislation to protect society. Such legislation is likely to be a proportionate response if, so far as is reasonable, it also protects the rights of individuals.

The balance between counter-terrorism measures and proportionate restrictions on individual's rights is principally a matter for the Government. It is not the function of the Courts to apply their own view on what is an effective anti-terrorism strategy or a measure to punish those who commit crime if it is deemed by the Government necessary to protect society and the democratic institutions of the state.

The rights of individuals are enshrined in the Human Rights Act[1] ("HRA"). It represents a fair balance between the rights of the individual and interests of society and the state as it protects the rights of individuals who are affected by criminal and anti-terrorism legislation and their sanctions. In a democratic society when the rights of individuals and the duty of the Government to protect society come into conflict, the function of the Courts is to resolve the conflict by placing greater significance on the duty to safeguard society. This requires the Courts to accept that anti-terrorism and serious crime legislation is to be interpreted so as to provide a greater margin of discretion to the Government and the bodies implementing the legislation than would be the case for legislation which has a less serious impact on individuals that may be affected by it.

The contrary argument, which treats the rights of individuals as pre-eminent, does not provide a fair balance between those rights and protecting society from imminent danger. Departing from a principle which places emphasis on safeguarding society permits recognition of a diverse range of other less important interests, ostensibly in aid of applying a fair balance. Such an approach fails to have sufficient regard to the duty of the state to pursue a proportionate response to threats to national security and serious crime. In the *Beghal*[2] case the Supreme Court was asked to determine whether anti-terrorism legislation[3] was compatible with the ECHR[4] and the common law privilege against self-incrimination. By a majority the Supreme Court dismissed the appeal on the basis that the interference suffered was comparatively slight, there was convincing independent justification for the powers, supervision of the powers by the Independent Reviewer was being carried out, there were substantial potential benefits to having the powers and an equally effective but less intrusive proposal had not been put forward. Accordingly, the powers met the test of legality.

[1] The rights and freedoms of the European Convention on Human Rights ("ECHR") were given effect by the HRA when it came into force in the UK in 2000. Since Brexit the HRA is the governing statute, although the body of law interpreting the ECHR remains helpful by parity of reasoning.
[2] *Beghal v DPP* [2015] UKSC 49
[3] Paragraph 2 of Schedule 7 of the Terrorism Act 2000 states that "*an examining officer may question a person to whom this paragraph applies for the purpose of determining whether he appears to be a person who [is or has been concerned in the commission, preparation or instigation of acts of terrorism]."*
[4] Articles 5, 6 and 8.

The Supreme Court recognised that a balance between the rights of an individual and the protection of the security of the state raised difficult and important issues but it rightly concluded that it would be lawful to detain a person for as long as necessary to complete a lawful process[5] and on some occasions a person may need to be detained for longer than necessary to complete the lawful process. For such detention to be proportionate, objectively demonstrated grounds are required. This was an appropriate check and balance for the power that had been created by the state and complied with the ECHR (HRA). In Mrs Berghal's case, as she was not detained for longer than was necessary to complete the process of questioning there had been no breach[6].

While the Supreme Court's decision in the *Berghal* case with respect to self-incrimination and Article 6[7] is more problematic, as it supported the replacement of long held and cherished rights with a law that provides no objective criteria for its application, it is nevertheless justifiable because the powers were not directed to obtaining information for prosecution, there was not a sufficient risk of self-incrimination and sufficient safeguards had been put in place. Lord Kerr's challenge to the view that because a measure was an effective counterterrorism tool the way in which it was deployed would be automatically proportionate and in accordance with law is not without strength and follows a long line of dissenting view including *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department*[8] in which Lord Hoffman advocated a more libertarian approach. However, this view fails to have sufficient regard to the mischief which antiterrorism legislation is intended to address and the role of the Government in determining what is a proportionate response to an imminent threat[9].

The case of *R (GC) v The Commissioner of Police of the Metropolis; R (C) v The Commissioner of Police of the Metropolis*[10] proceeded on the basis that that the ACPO scheme for the retention of data was a breach of the ECHR[11]. The Supreme Court correctly sought to ascertain Parliament's intention with respect to the retention of data

[5] Applying *Gahramanov v Azerbaijan* (application No 26291/06) (unreported) given 15 October 2013.
[6] Article 5.
[7] See the dissenting judgement of Lord Kerr and the concern expressed by the Independent Regulator.
[8] [2004] UKHL 56, "*95. But the question is whether such a threat is a threat to the life of the nation. The Attorney General's submissions and the judgment of the Special Immigration Appeals Commission treated a threat of serious physical damage and loss of life as necessarily involving a threat to the life of the nation. But in my opinion this shows a misunderstanding of what is meant by "threatening the life of the nation". Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: "Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours"*
96. This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community"
[9] The Parliamentary Select Committee on Human Rights dealing with Schedule 7 powers said "*We have considered carefully whether the Government has demonstrated the necessity for these more intrusive powers".*
[10] [2011] UKSC 21.
[11] Article 8 of the ECHR.

under PACE[12] and concluded that it was to remove the previous obligation to destroy data as soon as practicable after a person was cleared of an offence and to create a scheme for the retention of data even when suspects were not prosecuted. As such the Scheme was compatible with Article 8 of the ECHR. However, because it was possible to put in place a scheme which complied with the ECHR, PACE was compatible with it[13]. The case can be seen as reflecting a fair resolution of the unpalatable position of those who prefer supremacy of the rights of the individual (which would allow the destruction of large amounts of data which would see crimes undetected) and Government legislation (and the rules of a quasi-government body such as ACPO) in a way which was disproportionate to the nature of the threat. The UK Courts have shown themselves ready to act so as to ensure that the power of the Government with respect to antiterrorism legislation is interpreted and applied in a proportionate manner which protects the freedom of the individual from misuse of legislation, including the right to protest, most recently this can be seen in the case of *Thacker & Ors v R*[14] (29 January 2021).

When the Government legislates with respect to terrorism and serious crime it does to safeguard society and it may limit the rights of the individual. The Courts have shown themselves willing to uphold this approach where it is necessary and the restrictions are proportionate and this may mean that appropriate checks and balances are put in place, as in the *Beghal* case. Where legislation is not compatible with the HRA, the Courts are willing to construe legislation so as to maintain it in a form which is compatible, such as in the case of *R (GC)*. The weighing of individual rights and collective security is most important during events such as the present COVID-19 pandemic. For example, Lord Sumption (as a retired Law Lord) described COVID-19 as a 'individual risk' arguing that the infringement of civil liberties through lockdown measures is unjustified whilst the Government depicts coronavirus as a societal risk (leaving it in hands of individuals to risk exposure runs the risk of increasing infection levels, a significant threat to general society).This latter approach to a new present day risk can be applied by parity of reasoning to the balance to be achieved between counter-terrorism measures and individual rights. Thus, it can be seen that the law of the UK, while it is flexible and evolving, nevertheless continues to provide a fair balance between protecting the rights of individuals whilst safeguarding society against crime and terrorism and where it does not do so, the Courts are willing to intervene.

[12] PACE, s 64(1A): "*Where—(a) fingerprints, impressions of footwear or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints, impressions of footwear or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came."*

[13] Per Lord Dyson at [25].

[14] [2021] EWCA Crim 97.