NATIONALITY, ALIENAGE AND CONSTITUTIONAL PRINCIPLE

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Constitutional principles: basic aspects of our common good

Our courts call some principles of our law "constitutional".[1] Some rights, too, were picked out as constitutional, well before the courts were charged with enforcing rights as "human".[2] Constitutional principles and rights prevail over ordinary norms of statutory interpretation; the presumption that statutes do not overturn these rights and principles qualifies the ordinary subordination of common law to Parliamentary authority. They correspond to aspects of our common good which are of special concern to the judiciary. Many of them concern the responsibility of the courts themselves to be available to all, not least to protect everyone within their jurisdiction from legally unwarranted detention.

"The power to admit, exclude and expel aliens was among the earliest and most widely recognized powers of the sovereign state",[3] and the power remains "undoubted".[4] But unless is understood to be a constitutional principle, or the instrument of constitutional principle, the power will crumble, eroded by newly enforceable constitutional principles of equality before the law, and by rights as ancient as liberty (immunity from coercion or imprisonment) or as newly fecund as "to respect for [one's] private life". For *principle*, adequately conceived, is not merely a matter of general normative propositions; more fundamentally, it retains its connotative link to *principium*, a starting point and source. And the source of normativity, in legal or moral schemes of right, is value, purpose, point – in short, common good. So the power of exclusion needs to be understood with its underlying principle, which in turn needs to be understood as one of those elements of the common good which the law of our constitution articulates and promotes.

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1 E.g. *A v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 A.C. 221 at [12], [51]; *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, {2006} 2 A.C. 307 at [1].

2 *Bray v Ford* [1896] A.C. 44 at 49; *Scott v Scott* [1913] A.C. 417 at 477 (Lord Shaw of Dunfermline); Church of England Assembly (Powers) Act 1919, s. 3(3); Wheeler *v Leicester City Council* [1985] A.C. 1054 at 1065 (CA, Browne-Wilkinson L.J., dissenting).

3 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 A.C. 1, [11] (Lord Bingham of Cornhill).

4 Counsel for seven of the nine appellant applicant detainees in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68 at 78.

The fundamentally equal protection which our law has long accorded aliens (foreigners)[5] within the realm is grounded on a venerable constitutional maxim of reciprocity: presence within the realm entitles foreigners to the protection of subjects and with it the obligations of subjects. Taken with the abolition of banishment as an option for dealing with risks posed by our own nationals, and the contemporaneous re-articulation of the liability of foreigners to be expelled when their presence is responsibly determined to be adverse to our public good, it yields a principle of constitutional weight:

> Risks to the public good that must be accepted when posed by the potential conduct of a national (citizen) need not be accepted when posed by a foreigner, and may be obviated by the foreigner's exclusion or expulsion.

Though a foreigner's legally cognizable misconduct, actual or reasonably apprehended, does not automatically nullify the onerous obligations of protection which our law and government accept as arising from his presence, the consequent damage or risk to the common good entitles public authority to prevent or terminate that presence by lawful process. A foreigner's recalcitrant failure to assimilate his conduct, in matters of weight, to the particular conceptions of common and public good that are embodied in our constitution and law can lawfully and appropriately be met by refusing him entry, or requiring his departure. These applications of the deep principle of reciprocity cohere with, support, and are supported by the mutual trust, the give and take, and tolerance of shared risks that are a precondition for democracy, social welfare, the defence of the realm, and the constitutional rule of law. The Lords in *A v Home Secretary* (2004)[6] were led away from these constitutional principles by argumentation which seems partly erroneous and partly *per incuriam*.[7]

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5 This article uses these two words interchangeably and synonymously, to mean non-national/ non-citizen.

6 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68.

7 In this the case resembles other notable cases where skilful advocacy led the House of Lords unanimously astray: e.g. *Haughton v Smith* [1975] A.C. 476, and again *Anderton v Ryan* [1985] A.C. 560. *A v Home Secretary* is not quite unanimous, but Lord Walker of Gestingthorpe's dissent scarcely challenges the six majority judgments at their questionable roots.

II

Aliens as conditional subjects

The maxim of reciprocity was articulated by Coke, with the Lord Chancellor and almost all England's judges, in *Calvin's Case* (1608): *protectio trahit subjectionem, et subjectio protectionem*: protection entails subjection, and the status of subject entails entitlement to protection by Crown, law and courts.[8] So the presence within the realm of a friendly (non-enemy) alien, by drawing with it the protection of those institutions, entails the alien's duty of allegiance during his stay.[9] Commenting on Littleton, Coke would ground the legal status of foreigners present within the realm upon their right to sue in personal actions, a right he was the first to assert firmly.[10] Magna Carta, regularly treated by Coke as declaring common law rights, had distinguished enemy from non-enemy foreigners (s. 41). So the supposed incapacity of aliens to pursue personal actions at law was limited, he concluded, to enemy aliens: subjects of a state at war with the Crown.

Thus, in the seventeenth-century doctrinal and political settlement which shapes the constitutions of English-speaking countries around the world, foreigners within the realm (speaking always of non-enemy aliens)[11] enjoy the subject's common law right to freedom from every act of a government servant or agent which if done by a private person would be a tort. Because the Crown can neither do nor authorize wrong, any such act of an official against an alien must be tortious unless demonstrably warranted by common law or statute.[12] And this inference will underlie both the doubt of eighteenth century lawyers about the existence of a prerogative of expelling aliens, and the Crown's long abstention from purported exercise of it. If expulsion were by royal proclamation, defiance of it must go without penalty since the Crown cannot make criminal what hitherto was not criminal.[13] But if it were by arrest, detention, and forcible movement towards the boundaries of the realm, would it not be mere assault, trespass and false imprisonment, axiomatically incapable of

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8 *Calvin's Case* (1608) 7 Co. Rep. 1a, 5a; *Joyce v D.P.P.* [1946] A.C. 347 at 366.

9 *Calvin's Case* at 5b-6a.

10 Coke, *Commentary on Littleton* (1628), 129b; Hale, *Historia Placitorum Coronae* (1678) I, 542 ratifies the doctrine; Holdsworth, *Hist.* ix, 95.

11 But "even alien enemies, if they were resident in this country with the express or even with the tacit permission of the Crown, must be treated as alien friends": Holdsworth, *Hist.* x, 396; ix, 101. Holdsworth's "must" takes for granted that Parliament can dispose otherwise.

12 Holdsworth, *Hist.* ix, 98.

13 *Case of Proclamations* (1611) 12 Co. Rep. 74 at 75, 76.

non-statutory authorization, and liable to the alien's personal action for damages against the officers and their agents? Dicey dramatized the constitutional position evocatively, in 1885: if "foreign anarchists come to England and are thought by the police on strong grounds of suspicion to be engaged in a plot, say for blowing up the Houses of Parliament", but the responsible minister is not in a position to put them on trial, there is "no means of arresting them, or of expelling them from the country". No rule of common or statutory law authorized interference with their liberty, Dicey implied, and their application for habeas corpus must succeed.[14]

But when Dicey last passed this passage for the press in 1908, the law had begun to leave him behind. In authorizing detention pending deportation, the Aliens Act 1905 did not deal with Dicey's unconvicted foreign terrorists.[15] But soon after its enactment, the Judicial Committee articulated constitutional foundations for doing so:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: *Vattel, Law of Nations* book 1 s. 231; book 2, s. 125."[16]

By carefully not specifying "the supreme power of the State", the Privy Council skirted the unresolved question whether *our* executive has any inherent power of excluding foreigners, or is altogether dependent upon Parliamentary authority for doing so.

Johnstone v Pedlar (1921) riveted into our constitution the fundamental and extensive equality, within the realm, of friendly aliens and British nationals. But each Law Lord pointed, without deciding, to a prerogative or inherent power of the Crown to "revoke its licence expressed or implied to an alien to reside".[17] The Crown having

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14 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed., 1885), 239-40; (7th ed., 1908), 226-7.

15 On the occasion and limited purpose of the Aliens Act 1905, see Jack Beatson, "Aliens, Friendly Aliens and Friendly Enemy Aliens", in J. Beatson and R. Zimmermann, *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (2004), 80.

16 *A-G for Canada v. Cain* [1906] A.C. 542, 546, quoted in the single judgment in *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 W.L.R. 3131, [31] and described there as "this principle"; quoted by Lord Bingham in *R (European Roma Rights) v Prague Immigration Officer* [2004] UKHL 55, [2005] 2 A.C. 1, [12].

17 [1921] 2 A.C. 263 at 283 *per* Lord Atkinson; see also 273 (Viscount Finlay), 276 (Viscount Cave), 293-4 (Lord Sumner, concessively), 297 (Lord Phillimore). Holdsworth, *Hist.* x, 393-400, assembles the seventeenth century practices and judicial dicta, and the eighteenth and

made no such purported revocation, its officer's seizure of the alien Pedlar's money was simply tortious, and actionable at his suit, despite all the trappings of a Secretary of State's ratification and the treasonable savour of the alien's activities. The issues, decided and undecided, rest today where the Privy Council left them in 1906 and 1921: there is constitutional authority, whether by prerogative or not,[18] to exclude an alien in the interests of the community's well-being. Since 1919, at latest, Parliament as the state's supreme authority has vigorously asserted, and ever more carefully regulated, our state's (nation's, political community's) capacity lawfully and rightfully to exclude.[19]

III

The developed constitutional differentiation and its principle

The legislation made by or under Parliamentary authority during the first twenty years of the twentieth century defines principal effects of the constitutional distinction between nationals and aliens. Aliens have no liberty to enter the realm without leave of an immigration officer, may be admitted subject to "such conditions as the Secretary of State may think fit",[20] and may be deported either (i) if a court sentencing them for an offence punishable only with imprisonment so recommends and the Secretary or State concurs or (ii) "if the Secretary of State deems it to be conducive to the public good".[21] Where a deportation order has been made, or a certificate has been given by a court with a view to the Secretary of State making such an order, a foreigner may be detained pending removal.[22] This basic pattern of duties and (Hohfeldian) liabilities is confirmed in the next great settling of status, the Immigration Act 1971, which begins with "General Principles":

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nineteenth century opinions of lawyers, firmly asserting a prerogative of both exclusion and expulsion.

18 Prerogative powers are preserved, if not asserted, in successive statutory saving clauses, e.g. Immigration Act 1971, s. 33(5).

19 See Aliens Restriction Act 1919, authorizing the Aliens Order 1920, S.R. & O. 1920/448 and 2262. The Order as amended remained in force until 1953, its provisions being eventually transformed into the Immigration Act 1971 and the associated Immigration Rules.

20 Aliens Order 1920, art. 1(4).

21 *ibid*., art. 12(6)(c).

22 *ibid*., art. 12 (4). Powers of detention pending actual removal from the realm were created by the Aliens Act 1905, e.g. s. 7(3) (detention in custody awaiting ship's departure or pending the Secretary of State's determination after certification by a court of conviction for a deportable offence).

> "1. (1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.
>
> (2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act…."

The right of abode, under the Act, is defined in the next section as belonging to British citizens and a now vestigial sub-class of Commonwealth citizens. The third section's "general provisions for regulation and control" provide first for exclusion – grant or refusal of leave to enter, and the conditions which may be attached to such leave, all regulated by Rules made under Parliamentary scrutiny -- and then for expulsion by deportation of any who overstay their leave of entry or fail to observe any of its conditions, or who obtain leave to enter by deception, or are recommended by a court for deportation on their conviction for an imprisonable offence,[23] or whose deportation the Secretary of State "deems to be *conducive to the public good*". More drastically, the British Nationality Act 1981, s. 40,[24] empowers the Secretary of State to make an order depriving of that status a British citizen who, he is satisfied, has done "anything seriously prejudicial to the vital interests of the United Kingdom or a British overseas territory", unless such deprivation would result in statelessness.

The constitutional scheme's main features embody two legal-constitutional principles, each resting on a moral-constitutional principle. (1) Subject to the limitations on employment or occupation that may have been imposed as conditions of their entry, and to liabilities which, for all foreigners, are entailed by the Crown's authority to expel them, non-enemy aliens present within the realm have all the rights and obligations that nationals have.[25] This rests on the justificatory (moral-

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23 For the principles on which the courts exercise this function, see *R v Nazari* [1980] 1 W.L.R. 1366; [1980] 3 All E.R. 880, C.A. A court's refusal to make such a recommendation creates no presumption that the Secretary of State should not order deportation, although the court's recommendation does create some presumption in favour of such an order: *M v. Secretary of State for the Home Department* [2003] EWCA Civ 146, [2003] 1 W.L.R. 1980.

24 As substituted by Nationality, Immigration and Asylum Act 2002, s. 4. On the wider (in certain respects) effect of s. 40 as enacted in 1981, see *Secretary of State for the Home Department v Hicks* [2006] EWCA Civ 400, [2006] I.N.L.R. 203.

25 *R v Secretary of State for the Home Department, ex p. Khawaja* [1984] 1 A.C. 74 at 111-112 *per* Lord Scarman. The alien's rights are subject to another exception: those rights that, as Aristotle said, define the central case and focal sense of citizenship, viz., rights of participation

constitutional) principle that resident aliens, having the duties of subjects, should reciprocally enjoy the rights of subjects. (2) The citizen, on the other hand, can never be excluded from the realm: this was the trajectory and principle[26] albeit not the letter[27] of our law long before the United Kingdom signed up to a strict articulation of that proposition in article 3 of the Protocol No. 4 (1963) to the European Convention on Human Rights ("ECHR").[28]

What principle underlies the executive's authority – now highly regulated both legislatively and judicially[29] -- to exclude foreigners? Connoted by "not conducive to the public good" (which doubtless means "in some way deleterious to, or putting at risk, the public good"), the principle is this: the political community, while it cannot shift to other communities the *risks* presented by one of its own nationals,[30] need not unconditionally accept the *risk presented by aliens*. That is, the presence in the community of an alien who, individually considered,[31] can fairly be said to present some genuine *risk*, even relatively slight, to the rights of others, or to national security, public safety, the prevention of crime, the protection of health or morals or maintenance of *l'ordre public*, or to anything else of "public interest in a democratic society", *need not be accepted*. Instead such risk can properly be sought to be

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in governing (electorally, legislatively, executively or judicially): *Politics* III.1, 2 & 7; Finnis, *Natural Law and Natural Rights* (1980), 253-4, 259.

26 See e.g. Co. Litt. 133a; Blackstone, *Commentaries* I, 133 [137]; Holdsworth, *Hist.* x, 393.

27 Provisions enacted in 1829 for the banishment or transportation for life of e.g. Jesuits were not repealed until the Roman Catholic Relief Act 1926, but had long been in desuetude. On expatriation, banishment and related concepts, see *Trop v Dulles* 356 U.S. 86 (1958) at 102.

28 Lest it confer a right of abode on certain classes of people belonging to present or former dependent territories, the United Kingdom has not yet ratified the Fourth Protocol, which subject to the usual kinds of authorized restrictions provides that "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national" and "No one shall be deprived of the right to enter the territory of the state of which he is a national."

29 Immigration Act 1971, s. 15(1), conferring rights of appeal against any deportation order except (by s. 15(3)) any order made purportedly "in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature"; that exception was disapproved by the European Court of Human Rights ("ECtHR") in *Chahal v United Kingdom* (1996) 23 E.H.R.R. 413, resulting in the rights of appeal to a Special Immigration Appeals Commission ("SIAC") established by the Special Immigration Appeals Commission Act 1997. See *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 A.C. 153.

30 Dual nationality would be accommodated by a more precise statement of the principle.

31 ECHR Protocol no. 6, art. 4: "Collective expulsion of aliens is prohibited." Exclusion (denial or permission to enter) of wide classes (collectivities) of foreigners on grounds of their numbers or their collective characteristics is a different matter.

prevented by exclusion, or terminated by expulsion, on the grounds that such presence within the community, even if it has not been already forfeited by commission of an imprisonable offence, is nonetheless "not conducive to the public good".

This principle is fully compatible with our moral and legal obligations to accept refugees or other immigrants, and to accept some costs and burdens in doing so. Vattel said that "the first general law to be found in the very end of the society of nations is that each nation should contribute as far as it can to the happiness and advancement of other nations,"[32] and that "no nation may, without good reason, refuse even a perpetual residence to one who has been driven from his country",[33] or to a body of fugitives or exiles unless its own territory "could scarcely supply the needs of its own citizens".[34] We might accept all this and more – even an extensive immigration programme, adopted as a duty of justice[35] -- and yet justly demand of the foreigners that, at peril of being expelled (even if only to make way for others), they abstain from conduct (act or omission) that damages or puts at risk the public good.. Indeed, we might hold that the more extensive the nation's willingness to accept newcomers, the less willing it need be to accept dangers created by the presence, especially the actual or reasonably foreseeable conduct, of particular foreigners (or, indeed, particular kinds of foreigners).

IV

Detention pending (with a purpose of) removal

The principle that *risks to the public good which must be accepted when arising from the presence of a national need not be accepted from the presence of an alien and may be obviated by the alien's exclusion or expulsion* has long been

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32 Emerich de Vattel, *The Law of Nations* (1758), trans. Fenwick (1916), Introduction sec. 13.

33 *ibid.*, book 1 sec. 231.

34 *id*.

35 The original commonality of all the Earth's resources, as available in justice for all and each of Earth's human inhabitants, is abrogated neither by the instituting of private property (see *infra* at n. 103) nor by the appropriation of territories to states; and just as property rights are subject to a kind of moral trust or "social mortgage" (a requirement of justice not merely of charity) for the benefit of the poor in their necessity (see Finnis, *Aquinas: Moral, Political and Legal Theory* (1998) ("*Aquinas*"), 188-196; Finnis, *op. cit. supra* n. 25, 169-73), so the right of states to exclude aliens from their territory is subject in principle to an analogous qualification or burden. See Finnis, "Commentary on Weithman & Dummett", in Barry & Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of Peoples and of Money* (1992), 203-10; "Natural Law & the Re-making of Boundaries" in Buchanan and Moore (eds.), *States, Nations & Borders* (2003), 171-80; cf. text *infra* at nn. 103-107.

recognized as having an immediate practical consequence. Foreigners who are to be lawfully removed from the country may be detained pending their removal. Indeed, where reasonable grounds appear for investigating and deciding whether to remove particular foreigners, they may be detained pending the decision and its execution. Provision for such detention was made in the Aliens Act 1905 and more fully in all later enactments governing expulsion. The ECHR provides in art. 5(1)(f) that the right to liberty and security of person is not infringed by "(f). the lawful … detention of a person … against whom action is being taken with a view to deportation…".

The key concept in art 5(1)(f) is of ongoing purposive activity: the detention must at all times be part of action being taken "with a view to" the non-citizen's removal from the territory. Likewise, in the governing provision of the Immigration Act 1971, Sched. 3, para. 2(3): "Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom…". Here an ongoing purpose of removal is connoted not only by the word "pending" but by the provision on which Schedule 3 depends, s. 5(5).[36]

As judicially interpreted, these provisions for detention "pending" and "with a view to" deportation, like similar provisions in other countries, fall far short of providing that an alien against whom a deportation order has been made may be detained for as long as ministers wish and regardless of their purposes and methods. The *locus classicus* is a *dictum*, largely if not wholly *obiter*, of Woolf J. in *ex parte Hardial Singh* (1984). The case concerned very dilatory arrangements for a deportation, but there was little or no suggestion that deportation might even temporarily be "impossible", in the sense of prevented by obstacles immovable for the foreseeable future. However, Woolf J.'s statement concerns itself mainly with that hypothesis, although it does not neglect to give primacy to *purpose of removal*:

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained ... pending his removal. *It cannot be used for any other purpose*. Secondly, as the power is given in order to

[36] Immigration Act 1971, s. 5(5) "The provisions of Schedule 3…shall have effect with respect to … the detention … of persons *in connection with deportation*" (emphasis added).

> enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is *reasonably necessary for that purpose*. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention."[37]

Woolf J. here assumes that inability to deport "within a reasonable period" is somehow incompatible with maintaining and acting on a purpose of deporting, and/or with that being reasonable. As will become apparent, such an assumption is questionable and has been challenged both legislatively and judicially.

Woolf J.'s *dicta* were treated as a sound guide in interpreting Hong Kong's more elaborate statutory provisions in *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* (1996).[38] The Judicial Committee ruled that "if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorized". But *dicta* and ruling alike were treated as implications of a governing principle: "in conferring such a power to interfere with individual liberty the legislature intended that such power could only be exercised reasonably."[39] The Judicial Committee expressed agreement with the trial judge's findings that, although the period during which the applicant Vietnamese boat people had been in detention pending deportation (in one case over five years in all)[40] was "truly shocking" and "at first blush, an affront to the standards of … civilized society", it was *nonetheless reasonable* and lawful, given circumstances such as the policies and practices of the Vietnamese authorities, the refusal of some detainees to apply for repatriation, and in another case the detainee's apparent withdrawal of his application.[41]

Detention for removal was subjected to a "reasonable length of time" limitation, by constitutionally motivated statutory interpretation, in the United States

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37 *R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 W.L.R. 704 at 706 (emphases added). The suggestion that detention might be improper *ab initio* goes wider than the treatment of art. 5(1)(f) in *Chahal v. United Kingdom* 23 E.H.H.R 413; see *infra* nn. 55-57.

38 [1997] A.C. 97.

39 *ibid.*, at 111.

40 By the time of the determination of the appeal, 40 months "pending removal".

41 [1997] A.C. at 109, 114-5 (no need to decide, since applicants successful on another ground).

Supreme Court's decision in *Zadvydas v Davis* ten weeks before 9/11 (the New York and Washington atrocities of 11 September 2001).[42] The statute provided for a 90-day removal period, after which certain categories of foreigners (criminals, security risks, persons certified likely to abscond or a risk to the community, etc.)[43] "may be detained beyond the removal period and, if released, shall be subject to … supervision". By majority the Court held that this post-"removal period" detention could[44] continue only "for such time as is reasonably necessary to secure the alien's removal", and presumptively only for a further 90 days, after which even criminal or risky aliens would be entitled to release if they "provide good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future".[45] Reasonableness is to be measured "primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal".[46] The consequent risks to the public could be obviated: "the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions".[47] The Court seems to imply that such conditions of supervision, perhaps stringent, might equally be "indefinite and potentially permanent", so long as the certified flight risk or danger to the community persists and is reaffirmed from time to time with procedural due process, and provided always that the Government's purpose remains to deport this person as soon as possible.

Into the notably more severe[48] Australian statutory scheme -- mandatory removal of all unlawful non-citizens "as soon as reasonably practicable" and *mandatory* detention "until… removed" -- the High Court read restrictions pertaining to the purpose of the detention as ancillary to the purpose of removal. Although *Al*

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42 533 U.S. 678, 150 L. Ed. 2d 653 (2001).

43 But in the case of terrorist aliens ordered to be removed but whom "no country is willing to receive", Congress had authorized the Attorney-General "notwithstanding any law, [to] retain the alien in custody" on six-monthly administrative review, a provision noted without adverse comment by the Court (533 U.S. at 697).

44 The Court (at 696) seems to accept that, notwithstanding the resident alien's constitutionally significant liberty interest, Congress could have authorized (if sufficiently explicit about its intent) the indefinite detention of a deportee for whom there was no reasonable prospect of finding any receiving country within a reasonable period.

45 533 U.S. at 701.

46 533 U.S. at 699.

47 533 U.S. at 700.

48 Note, however, that ECHR art. 5(1)(f), on its face, authorizes detention without limit of time "to prevent [a person's] effecting an unauthorized entry into the country".

Kateb v. Godwin[49] (6 August 2004) declines to read into the statute a temporal limitation of the *Hardial* or *Zadvydas* type (terminating detention when there is "no real likelihood or prospect of removal in the reasonably foreseeable future"), it implicitly accepts[50] the Solicitor-General's submission that "detention cannot continue indefinitely without bona fide efforts being made to remove the detainee, and the court has power to order that reasonable efforts be made" and to "review… whether reasonable efforts are being made to effect removal".[51] The majority Justices[52] vigorously reject the claim that extended or even indefinite delay is incompatible with maintaining the indispensable *purpose* of deporting the detainee. As Hayne J. (Heydon J. agreeing) puts it:

> "the most that could ever be said in a particular case where it is not now, and has not been, reasonably practicable to effect removal, is that there is *now* no country which will receive a particular non-citizen whom Australia seeks to remove, and it cannot *now* be predicted when that will happen. … That is not to say that it will *never* happen."

Even a finding of "'no real likelihood or prospect of removal in the reasonably foreseeable future'… does not mean that continued detention is not for the purpose of subsequent removal" or that the purpose of detention for removal is spent.[53] What matters is that the executive keep trying to carry out their duty to remove, by taking

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49 [2004] HCA 37, (2004) 219 C.L.R. 562, decided simultaneously with *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Khafaji* [2004] HCA 38, (2004) 219 C.L.R. 664, with the same majority (McHugh, Hayne, Callinan and Heydon JJ) and minority.

50 See [224-5] (Hayne J., Heydon J. agreeing), [294] (Callinan J., who at [290-91], however, goes further and treats the purpose as presumable unless "formally and unequivocally abandoned" – perhaps too narrow a version of the implied limitation by purpose).

51 219 C.L.R. at 567 per Bennett S-G., who prefaced this with: "Removal will never be impossible because it is always possible that there will be a change of regime or a change of mind in the subject country or that some other country will take an altruistic view".

52 Gleeson C.J., dissenting, also accepted that "it cannot be said that it will never be reasonably practicable to remove [the detainee]". But he considered that where removal is not "currently practicable, and is not likely to become practicable in the foreseeable future", the detention's primary purpose of removal is "in suspense" [18], and that in respect of such cases the statute should be presumed not to have intended to authorize indefinite detention regardless of "the circumstances of individual cases, including, in particular, danger to the community and likelihood of absconding" [22].

53 219 C.L.R. at [229], [231]. To the same effect is Callinan J. at [290], [291] and in *Al Khafaji* 219 C.L.R. at [45]: "The reference of [the trial judge] to reasonable practicability and reasonable foreseeability was directed to the situation 'at present'. The Migration Act imposes no such temporal qualification. It is to purpose [that] attention must be paid, and the purpose of deportation has not been abandoned. As I have observed in *Al-Kateb*, in the nature of human and international affairs, long periods may be involved just as circumstances may change very quickly."

what reasonable steps they can to accomplish what may at present seem not reasonably practicable.

Had *Al Kateb* been cited in *A v Home Secretary* (argued in October 2004), neither counsel nor Law Lords could have been as carefree as they were in treating the appellant detainees as persons who "*cannot*" be deported, a simplification which reaches its extreme in Baroness Hale of Richmond's summary: "These foreigners are only being detained because they cannot be deported. They are just like a British national who cannot be deported"![54] The Australian majority judges, like the dissenters in *Zadvydas*, demonstrate that what is "temporarily impossible", or "not possible for the indefinite future", may tomorrow become possible because of some change of regime abroad, or a breakthrough in negotiations with some other state; and that therefore it would be quite wrong to treat either of these phrases (or other similar phrases) as equivalent to "[simply] impossible [in practice]". Removal in such a situation (assuming always that the executive had not begun to treat removal as impossible, and ceased trying to work around the obstacles) would better be said to be "prevented (temporarily or indefinitely)". And that was the language of the statutory provision condemned, with no attention to the spectrum of situations it signified, in *A v Home Secretary*.

That condemnation took the form of a declaration of incompatibility with ECHR arts. 5 and 14, made effective in the United Kingdom by the Human Rights Act 1998 ("HRA"). So the requirements stated in *Hardial* are now reinforced by art. 5(1)(f), permitting detention while "action is being taken with a view to deportation". In *Chahal v. United Kingdom* (1996), the ECtHR had held that, if action is being taken with due diligence[55] with a view to deportation, art. 5(1)(f) does *not* require that the detention be considered necessary, "for example to prevent his committing an offence or fleeing".[56] It held, moreover, that the proceedings for Chahal's deportation had been conducted with such diligence that four (indeed, over six) years' detention of the alien deportee was compatible with art. 5(1)(f). And this despite the fact that, so the Court also held, the purpose of deporting him to his national territory, India, was at all relevant times incompatible with the requirements of art. 3, prohibiting

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54 *A v Home Secretary* [2004] UKHL 54, [2005] 2 A.C. 68, [235]; see also [222] and [228]; the simplification is explicit in [9] and [13] (Bingham), [84] (Nicholls), [126] (Hope), [162] and [188] (Rodger), and [210] (Walker).

55 23 E.H.H.R 413 at [113].

56 At [112].

torture and ill-treatment. It was not unreasonable for the Secretary of State to have taken over 13 months to deliberate about the alien's claim that his deportation to India would contravene art. 3. Thus the question whether an alien "cannot be deported" (because there is a "real risk" of torture or ill-treatment) is not open and shut, but "involves considerations of an extremely serious and weighty nature" and decisions that should not "be taken hastily, without due regard to all the relevant issues and evidence".[57]

Since 1998, of course, deportation "contrary to" art. 3 as read or misread by *Chahal*[58] is now "impossible", if not strictly as a matter of law (though that is how the courts unhesitatingly treat it), at least as a matter of treaty obligation. But even as it articulated this rule, *Chahal* made it clear that the rule's application to particular cases may involve contingencies which preclude, as unacceptably simplistic, any notion that deportation is from the outset impossible. Rather, the existence of a "real risk" that the deportee would be tortured or ill-treated will in various cases not be so indisputable as to render deportation (and thus detention with a view to removal) impossible from the outset or at any definable moment thereafter. So this is yet another way in which the "possibility" or "impossibility" of removal, and of having a purpose of removing, is often relative, provisional, qualified and arguable. We will find the same relativity in relation to "necessity", and even to what is "*strictly* required" (see part VI(a) below).

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57 At [117]. And see *infra* n. 78.

58 If *Chahal*'s rulings on art. 5 are unhelpfully terse, its pronouncements on art. 3, both in the majority and the principal dissenting judgments, are notably ill-reasoned. The absoluteness of a state's obligation not to engage in torture and other practices contrary to art. 3 in no way entails that the person with such an absolute right has thereby the right not to be subjected to any form of treatment (e.g. deportation) that might have the foreseeable but unintended and unwelcome side-effect of his being tortured or ill-treated by some other persons. All who seriously reflect upon normative absolutes recognize that they would entail intolerable paradoxes and deliberative incoherence unless their exceptionless prohibitions define the excluded conduct by reference to the *proximate intentions* (or *object*) of the person(s) they bind: see Finnis, *Moral Absolutes* (1991), 68-74, 81-3. It is one thing for a state to deliver persons to another state *so as* to enable the latter to torture them, and quite another matter to remove/deliver them to another state with all practically possible precaution against their being tortured thereafter and with the sole object of removing the real threat their presence poses to the lives of people in the removing state. *Chahal*'s art. 3 ruling treats the intentions of the removing state as completely irrelevant and declares that the deportee's activities, "*however undesirable or dangerous*, cannot be a material consideration" ([80] emphasis added). Taking into account art. 3's extension beyond torture to "degrading treatment", and the breadth of that concept in recent ECtHR jurisprudence, *Chahal*'s ruling on art. 3 is juridically unsound by over-breadth, and shocking to conscience by its indifference to the human rights threatened *by* the would-be deportee.

V

A v Home Secretary*: a failure of interpretative method and duty*

In the wake of 9/11 the United Kingdom Parliament, by s. 22 of the Anti-Terrorism, Crime and Security Act 2001 ("ACSA"),[59] provided that where the Secretary of State has certified under s. 21 that he suspects an alien to be an international terrorist and believes his presence in the realm is a risk to national security, a deportation order under the Immigration Act 1971 may be made "(1)…despite the fact that (whether *temporarily or indefinitely) the action cannot result in his removal* because of – (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration". By s. 23 Parliament authorized the detention of such suspected terrorists *under para. 2 of Schedule 3 to the Immigration Act 1971*, "(1)…despite the fact that [their] removal or departure… is prevented (whether temporarily or indefinitely)" because of such a point of law or practical consideration.[60] The relevant "point of law" was *Chahal*'s art. 3 ruling.

How should s. 23 have been interpreted? Obviously, it should have been read in the light, first, of the authorities reviewed in the preceding section of this article. For s. 23's authorization of detention was explicitly defined by reference to the Immigration Act's long-standing concept of detention "pending removal". "Detention pending removal": the words were on the face of s. 23(2) – a fact that no-one can discover by reading the argument and judgments in *A v Home Secretary* – and characterize the kind of detention it purported to authorize. Those words' entailment, as *Hardial* emphasized, is that there must be an ongoing *purpose* of removal. If s.

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59 After *A v Home Secretary*, ACSA ss. 21-32 were repealed; Prevention of Terrorism Act 2005 replaces them with provisions for control orders against suspected international terrorists, British or foreign. See *infra* n. 90.

60 Since s. 23(2) is not set out in any of the Lords' judgments in *A v Home Secretary* (though its effect is stated by paraphrase and cross-reference by Lord Bingham, [2004] UKHL 56 at [8] and [14]), it is worth setting out the entire statutory provision declared incompatible with the ECHR:

"23 (1) A suspected international terrorist may be detained *under a provision specified in subsection (2)* despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by –

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration.

(2) The provisions mentioned in subsection (1) are –

(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and

(b) paragraph 2 of Schedule 3 to that Act (detention *pending deportation*)" (emphases added).

23(1) lifted temporal restrictions (removal "within a reasonable period"),[61] s. 23(2) plainly implied that detention would nonetheless be or become unlawful if the purpose of removing the alien were absent or abandoned, or reduced to mere idle wish.

This implication of s. 23(2) was greatly reinforced by HRA s. 3(1) 's command that, "so far as it is possible to do so", all legislation be read and given effect to "in a way which is compatible with the Convention rights". So ACSA s. 23 should so far as possible have been read compatibly with the *active purpose* requirement inherent in art. 5(1)(f)'s authorization of detention while "action is being taken *with a view to* deportation". Thus read, s. 23 made good sense. It meant that, provided *bona fide* and duly diligent efforts were being made to remove the alien terrorist-suspect detainee (and provided he remained a reasonably certified threat), conceptions of "a reasonable period of time" could be set aside -- especially conceptions developed in and for non-emergency circumstances. So too could time-related rules of thumb or presumptions such as the US six-month norm.[62]

Astonishingly, the House of Lords in *A v. Home Secretary* certified s. 23's incompatibility with the HRA while giving no visible consideration, however brief, either to s. 3(1)'s interpretative command,[63] or to s. 23(2)'s importation of an implied ongoing-purpose restriction on detention under s. 23. This key part of the Lords' decision must respectfully be considered *per incuriam*.

How could so many judges overlook both the bearing of HRA s. 3(1) and the implications of ACSA s. 23(2)? Counsel for both sides led them to focus on the making of the Derogation Order on the day the ACS Bill was introduced into Parliament. But no Law Lord quotes the Order's wording:

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61 To grant that the phrase "within a reasonable period" imports a "temporal restriction" is by no means to concede that, in the concrete circumstances of an ongoing threat involving the deportee and ongoing efforts to deport, there is some identifiable length of time beyond which detention has exceeded "a reasonable period". In circumstances of such a kind, *such* detention might *reasonably* last even, in principle, indefinitely: see *Charkaoui v Canada* [2007] SC 9, [105], [110], and *infra* n. 91.

62 As to the implications of such a reading of s. 23 for the validity of the Derogation Order, see *infra* n. 70.

63 HRA s. 3(1) is referred to only by Lord Scott of Foscote, who at [147] includes it in a synopsis of provisions of the HRA relevant to his solitary wrestle, in [146]-[150], with a "puzzle" about why HRA s.14 makes provision for designating derogations; [147] articulates a parallel doubt about the purpose of declarations of incompatibility under HRA s. 4(2), given that s. 3(2)(b) makes clear that such a declaration "does not affect the validity… of any incompatible primary legislation". His reference to s. 3(1) seems merely preliminary to this reference to s. 3(2), and to all appearances s. 3(1) plays no part whatever in his understanding of ACSA s. 23.

> "there *may* be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that "action is being taken with a view to deportation" within the meaning of Article 5(1)(f) as interpreted by the Court in the Chahal case. To the extent, therefore, that the exercise of the extended power *may* be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation…"[64]

These hypothetical cases in which detention "might" not be consistent with art. 5(1)(f) were described elsewhere in the Order:

> "If no alternative destination is *immediately* available then removal or deportation *may* not, for the time being, be possible even though the ultimate[65] intention remains to remove or deport the person once satisfactory arrangements can be made."[66]

No basis was suggested for this pessimistic abbreviation of *Hardial*'s "within a reasonable time", recited a few sentences earlier in the Order, into "immediately" or again (in the Explanatory Note) into "not for the time being possible". But even if the Order took too concessive a view of the restraints on detention under art. 5(1)(f) as interpreted in *Hardial* and *Chahal*, it did not concede that any of the deportation orders and detentions envisaged *would* transgress those restraints.

Lord Scott suggested that the 1998 Act's provision for designated derogations from Convention rights may have been intended "simply to enable it to be made clear that the inconsistency was deliberate and not inadvertent, and thereby to constitute an aid to the courts in construing the statutory provision".[67] He appears to have inferred,

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64 Human Rights Act 1998 (Designated Derogation) Order 2001, S.I. 2001/3644, Sch. (emphases added).

65 In the evidence of the Head of the Terrorism and Protection Unit in the Home Office, it was affirmed perhaps more strongly that "it remains the Home Secretary's intention to remove the persons concerned from the United Kingdom, at a future date, using the United Kingdom's immigration powers." See [2005] 2 A.C. 68 at [180]. Also see text *infra* at n. 74.

66 S.I. 2001/3644, Sch., emphasis added.

67 [2005] 2 A.C. 68 at [147]. Equally questionably, Lord Rodger at [163] reasoned: "For the purpose of these proceedings the Home Secretary accepts that, normally, the detention power in section 23 would violate the detained suspects' rights under article 5(1) of the Convention. Section 23 therefore purports to derogate from article 5(1)." Even if the legal effect and meaning of a statute could be inferred from a concession made expressly for the purposes of the instant proceedings *only* (the Attorney-General having "reserved the right to argue in another place…that it was not necessary to derogate" [51]), it would not be right to conclude that such was Parliament's actual, deliberate or expressed intent, and in that sense the "purport" of its provision. *A fortiori* when the Derogation Order put before Parliament at the

accordingly, that Parliament intended s. 23 to be inconsistent with ECHR art. 5; the other Law Lords appear to have agreed. But the inference is invalid, and the conclusion implausible. So far from "deliberately" intending to contravene art. 5(1)(f)),[68] Parliament, sensibly pessimistic about how courts would construe its enactment, may well have intended – and certainly should be taken[69] to have intended -- no more than to add belt to braces. That is, Parliament should be taken to have had the following conditional intention: *if* ACSA s. 23 (even when read as mandated by HRA s. 3(1)) contravenes art. 5(1)(f), then *to the extent of that inconsistency* s. 23 is to take effect notwithstanding art. 5(1)(f).[70]

Moreover, the making of a designated derogation could not properly displace, and in no way need be intended to displace, s. 3(1)'s interpretative command. Here the Lords proceeded as if they assumed that, were the Derogation Order a nullity and thus unavailable to support s. 23 read as transgressing art. 5(1)(f), it must follow that s. 23 could have no meaning or effect compatible with art. 5(1)(f). But braces failure leaves belt intact. Reading s. 23 in line with s. 3(1)'s command would have left s. 23 effective to authorize detentions which, in the statutory and security context of 2001-2004, could well be compliant with both art. 5(1)(f) and *Hardial* even when current and foreseeable obstacles prevented immediate or even early deportation of those so detained.

But the consequences of the Lords' (mis)reading s. 23 through the lens of the Derogation Order – indeed through a misty reading of the Order -- are more far-

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outset of the process of enacting ACSA made no such assertion or concession of necessity, and when the HRA s.3(1) directs that Parliament's relevant enactments be read as compatible "so far as is possible."

68 Lord Scott's statement [144] that "Parliament has expressed its intention to enact a provision inconsistent with the ECHR article in question" is either simply erroneous or a misleading way of stating that Parliament expressed the conditional intention that if its provisions proved inconsistent with art. 5(1)(f) they should be applied notwithstanding.

69 The language (quoted *supra* at n. 64) of the Derogation Order (lying before each House throughout their deliberations on the ACS Bill) is the language of belt and braces.

70 Indeed, the duty to interpret in line with HRA s. 3(1) would have remained even if Parliament, believing s. 23 to be simply inconsistent with ECHR art. 5(1)(f), had intended the inconsistency and had directed *unconditionally* that s. 23 should take effect notwithstanding its inconsistency. For Parliament's (and the executive's) belief that there was inconsistency might well be a mistake, one which might come to light in the course of ordinary judicial interpretation or of the more strenuous interpretative exercise mandated by s.3(1). (Notice, incidentally, that the conditional intention formulated in the text and the unconditional intention formulated in this footnote are each compliant with the ECHR, by virtue of art. 15 as implicitly incorporated in HRA s. 14. Since the Derogation Order was concerned only to validate a provision with the content of s. 23 read as in the text *supra* at n. 62, there were no good grounds for quashing it.)

reaching. The annulling of the Order by SIAC and the Lords should have left s. 23 intact (compatible). And a proper reading of s. 23 would have defeated the arguments (from disproportion and discrimination) for annulling the Order. That will be the burden of part VI below.

If the neglect of HRA s. 3(1) is astonishing, there is special interest in the moment when the leading judgment averts its eyes from s. 3(1). The provision had been mentioned briefly and vaguely by SIAC, but in connection only with a quite different, marginal and hypothetical issue.[71] In its remarks on that issue, the Court of Appeal merely mentioned that SIAC had here "referred to section 3".[72] In the Lords, only Lord Bingham attended to the marginal issue:

> "[33] …The Attorney-General conceded that sections 21 and 23 could not lawfully be invoked in the case of suspected international terrorists other than those thought to be connected with Al-Quaeda, and undertook that the procedure would not be used in such cases. A restrictive reading of the broad statutory language might in any case be indicated: *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997. The appellants were content to accept the Attorney-General's concession and undertaking. It is not however acceptable that interpretation and application of a statutory provision bearing on the liberty of the subject should be governed by implication, concession and undertaking."

Thus HRA s.3(1) has simply disappeared. All that urges a "restrictive reading" is a venerable administrative law authority.

Let it be supposed that counsel for the Secretary of State, albeit tacitly and by omission, conceded away the possibility (and reality) that s. 23 could, quite independently of any derogation, be read compatibly with art. 5. It is indeed "not acceptable that interpretation and application of a statutory provision bearing on the liberty of the subject" -- and on the rights of that subject's potential victims, rights

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71 Namely whether ACSA ss. 21-23 were applicable to alien terrorist suspects not connected with the (Al Qaeda) terrorist threat which caused the public emergency foundational to the Derogation Order. The two reasons accepted by SIAC for holding those sections inapplicable to wider classes of alien international terrorist suspects included: "…HRA s. 3(1) … would tend to prevent the powers of detention being exercised in the absence of a connection with the state of emergency": [2002] H.R.L.R. 45, [48].

72 [2004] Q.B. 335 at [42] (Lord Woolf CJ).

implicit in the anodyne phrase "risk to national security" – "should be governed by … concession and undertaking". It was not for the Crown to settle the reading and effect of Parliament's s. 23, and the Lords need not have been deflected by the concessions and oversights of counsel, even a Law Officer and minister. But it is surely acceptable, desirable and constitutionally ineluctable that the interpretation of such provisions be governed by "implications" of the kind that have long been constitutional principles and are now, additionally, at the core of HRA's interpretative strategy and directive.

Properly read, s. 23 and art. 5(1)(f) would – quite apart from any derogation -- have allowed detention without time limit but subject to the maintenance, verified by regular judicial review, of a purpose of removal and of activity with a view to effecting that purpose. SIAC stated with an apparent studied ambiguity that "Since no removal can (or so it is believed) be effected, it is apparent that no action is being taken with a view to deportation".[73] But this finding, if finding it was, may have been based on no more than an inference from studiously vague statements such as the Attorney-General would make in opening his response in the Lords:

> "Since the Secretary of State would wish to deport the appellants when he can do so compatibly with the United Kingdom's obligations under article 3 of the European Convention…, he reserves his position that their detention is in any event compatible with article 5(1)(f) and derogation under article 15 is unnecessary."[74]

In conformity with HRA s. 3(1), SIAC and the Lords should have required counsel for the Secretary of State to argue for this compatibility there and then, not "at another place and another time".[75] That done, they would have been in a position to direct that the outcome of subsequent SIAC proceedings about these applicants' detention should depend upon whether or not action was being taken to enable the detainees to be deported as soon as practicable, however long-drawn out that action might need to be.

It has since emerged that, eighteen months before the Lords' decision in *A v Home Secretary*, ministers began a process of securing, from a number of states,

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73 [2002] H.R.L.R.45 at [6].
74 [2005] 2 A.C. at 84.
75 [2005] 2 A.C. at [51].

arrangements and undertakings sufficient to remove "real risk" that a suspected terrorist deportee would be treated inhumanely after deportation.[76] The conducting of such negotiations in good faith would have sufficed to satisfy art. 5(1)(f) as applied in *Chahal*, and equally to satisfy the *Hardial* doctrine as partially amended by ACSA s. 23. The proposition that s. 23 "reversed the effect of the decisions in *Hardial* and *Chahal*",[77] accepted by counsel and judges in *A.* as uncontroversial and correct, was inherently controversial and, I suggest, quite incorrect. ACSA s. 23 reversed no more than one aspect of *Hardial* (temporal limitation as such) and the same one aspect, if any,[78] of *Chahal*, leaving intact all that the HRA's adoption of art. 5 requires.

Indeed, on a perhaps better reading of *Hardial* and *Chahal*, ACSA s. 23 reversed no aspect of those decisions, and thus involved no derogation from the ECHR. For the rule articulated in those cases makes the lawfulness of continuing detention depend on what duration is reasonable in all the circumstances. It is reasonable to allow the executive, properly supervised, more time to secure removal, perhaps a long or even "indefinitely" extended time, where (a) the detainee is reasonably suspected of being a terrorist menace to the rights of people in our country, and (b) the authorities are definitely taking action (besides the detention itself) to secure his removal to another state where he will not be at real risk of ill-treatment.

The perverse effect of the Lords' inattention to the courts' interpretative duties is that, while issuing a declaration devoid of direct legal effect, they passed up an

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76 See *Abu Qatada v Home Secretary* [2007] UKSIAC 15/2005 (26 February 2007), [171]-[177] and Annex 1A (text of Memorandum of Understanding between the United Kingdom and Jordan). Partly in view of the arrangements provided for in that agreement, SIAC's careful judgment concluded, [490]-[521], [539], that there was no real risk of ill-treatment or persecution of Qatada if deported to Jordan.

77 [2005] 2 A.C. at [31], [32] per Lord Bingham, approving the first step in the argument for the applicants.

78 Lord Bingham's statement at [9] of what *Chahal* decided about art. 5(1)(f) is mistaken or at best elliptical: "[the ECtHR] reasserted (para 113) that 'any deprivation of liberty under article 5(1)(f) will be justified only for as long as deportation proceedings are in progress'. In a case like Mr Chahal's, where deportation proceedings are precluded by article 3, article 5(1)(f) would not sanction detention because the non-nationals would not be 'a person against whom action is being taken with a view to deportation'." In fact, however, the Court held that, although Chahal's deportation was precluded by art. 3, his detention for four or six years *was sanctioned* by art. 5(1)(f) while the authorities took action to ascertain whether or not his deportation could be carried out compatibly with the United Kingdom's obligations. No doubt those authorities did not have the clear view of art. 3 imposed in that case by the Court. But even if they had had such a view, they might reasonably have taken steps, with all deliberate speed (on the part of the United Kingdom authorities) but perhaps lengthy in duration (not least if lengthened by the dilatoriness of foreign governments), to ascertain the risks and seek ways of obviating them by agreement with India or some other state.

opportunity to give real legal protection to the rights of the detainees, the protection of requiring the Home Secretary to satisfy SIAC that he had acted and was continuing to take action for the purpose of securing that they could and would lawfully be deported.

VI

A v Home Secretary: *a neglect of constitutional principle*

The Lords' neglect both of HRA s. 3(1) and of constitutional principle is even more evident in their positive arguments for holding that s. 23 detention (a) was not sufficiently "necessary" and (b) was discrimination made unlawful by ECHR art. 14.

(a) *Strictly necessitated by the threat to the life of the nation?*[79]

SIAC judged it irrational to limit the detention power to foreign suspects, and concluded that, accordingly, the power could not be 'strictly required' in terms of ECHR art.15(1)'s authorization of derogations from the ECHR.[80] This reasoning was adopted, with variations of emphasis, by the majority of the Lords. Thus Lord Rodger:

> "Proceeding on the same basis as the Government and Parliament, that detention of the British suspects is not strictly required to meet the threat to the life of the nation, I have come, however, to the conclusion that the detention of foreign suspects cannot be strictly required, either, to meet the comparable threat that they pose."[81]

Likewise Lord Hope of Craighead:

> "the indefinite detention without trial of foreign nationals cannot be said to be strictly required to meet the exigencies of the situation, if the indefinite detention without trial of those who present a threat to the life of the nation

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79 This high-hurdle criterion of proportionality came from ECHR art. 15, which the courts and parties (despite Lord Scott's doubts at [149] and [152]) assumed to control the validity of the Derogation Order. For reasons already set out, s. 23's compatibility with the HRA should not have been held to depend upon the Derogation Order or its declaration of emergency or the provisions of art. 15.

80 Lord Rodger's paraphrase of SIAC's holding: [2005] 2 A.C. 68 at [187].

81 *ibid.*, at [189]; also [168].

because they are suspected of involvement in international terrorism is not thought to be required in the case of British nationals."[82]

The fundamental unsoundness of this plausible line of thought, centrepiece of the appellants' argument, can be made clear by asking *why* the appellant foreign terrorist suspects were being detained. The only judgment which directly considers this is Lord Rodger's.[83] He accepted that the sworn evidence of the minister's intent to remove the persons concerned was "plainly right", for the minister had wished to remove them even before September 2001. But:

> "*since they were previously at liberty, the reason for detaining them under section 23 cannot be that the Secretary of State would like to deport them*. The reason is that, after 9/11, they are suspected of presenting a threat to the life of the nation. In this, the relevant, respect they are comparable to the British suspects."[84]

The inference here italicized is neither logical nor realistic. Before 9/11 and ACSA's conferral of extended powers to certify dangerousness and detain pending deportation, the costs and benefits of attempting deportation (with related detention), assessed against the risks and costs of not attempting deportation, might well lead a Home Secretary to judge deportation not worth attempting: under *Hardial*, the courts' measure of a "reasonable" period of detention pending deportation would probably not exceed six months, and the pre-9/11 estimated level of risk posed by the suspects could well seem insufficiently high or urgent to motivate securing even so short a period of detention while undertaking international diplomatic efforts to make deportation lawfully feasible. But after 9/11 and ACSA ss.21-23, the same Home Secretary might well assess the risks consequent on not attempting deportation as unacceptably high, and reasonably hope that the courts would agree that detention pending deportation could now "reasonably" extend for a substantially longer period in view of the altered perceived risks of not deporting the same persons – persons now

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82 *ibid.* at [129]; also [132]. Likewise [77] - [78] (Lord Nicholls of Birkenhead); [228] – [231] (Baroness Hale of Richmond); and, in the leading judgment of Lord Bingham, with which Lord Carswell simply concurred, [33] - [44].

83 Baroness Hale [222] says: "These people are not detained under art. 5(1)(f) 'with a view to deportation or extradition' because they cannot be deported… They are detained on suspicion of being international terrorists…." Her premise, that deportation was simply impossible (a premise that pervades her judgment [228], [235]), ignores all the possibilities that risks (of torture etc.) which prevented or seemed to prevent deportation might abate or be circumvented.

84 *ibid.* at [180] (emphasis added), referring back to a substantially identical passage in [171].

specifically certifiable as international terrorist suspects whose presence in the country endangers national security – and of not detaining them while action was being taken to make their removal *Chahal*-compliant by international negotiations and arrangements of the kind alluded to by all the judges in *Zadvydas*[85] and actually being pursued by the United Kingdom government.[86]

In short, Lord Rodger's inference that behind the appellants' detention there was not, indeed could not be, a purpose of deporting them was quite unsupported by the premise or basis which he offered for it. Their being a suspected threat to national security (indeed, to the life of the nation) is and was a *reason* for the authorities to wish to deport them. The Home Secretary through his official witness testified that he had the intention of deporting them; had SIAC or the appellate courts considered that intention too abstract or ineffectual they could and should have ruled that the detention's lawful continuance was conditional on ongoing action to put the intention into effect notwithstanding the obstacles to its fruition. Such a ruling would have been no more than a sound application of s. 23 and of *Hardial* itself.

The failure of Lord Rodger's inference is important because, without his conclusion -- that the Home Secretary lacked a purpose of deporting-- there is no ground for the Lords' main argument that detaining foreign terrorist suspects while not detaining British ones either was irrational or, at least, demonstrated the absence of any strict necessity to detain. The thought "If preventive detention is not necessary for nationals it cannot be necessary for foreigners" has no rational force -- indeed, is fallacious -- if the statutorily authorized primary purpose of the action taken against the foreigners is to deport them, and their detention is for the usual purposes of detention "while action is being taken with a view to deportation". Those purposes routinely include reducing the risk of disappearance into the community, and reducing the risk of criminal activity destructive of the rights of other persons within the realm. They do not change their character as purposes when the period reasonably to be allowed for effecting them is extended by reason of the gravity of the risk of criminal activity, nor because that graver risk is described (ACSA s. 21) as risk to national security posed by the intended deportee's presence in the realm.

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85 533 U.S. 678 at 696, 700, 702 (Breyer J. for the majority), 711-12, 725 (Kennedy J. for the minority).

86 See *supra* n. 76.

Thus it seems evident that the majority erred in two decisive ways. (1) Their pervasive characterization of the appellants' detention, and of s. 23 detention in general, without reference to its primary and essential purpose, so as to make out that it was sheer indefinite preventive detention of dangerous foreigners, was a mischaracterization grounded on fallacious inference from the circumstances (Lord Rodger), from the ambiguous statements and quasi-concessions of the Attorney-General (Lord Bingham), or from mere over-simplification (Baroness Hale). (2) They failed to advert to the principle that the nation does not have to accept from foreigners the same degree of risk[87] as it accepts from its nationals (who by reason of their nationality are undeportable), and may obviate the risk from foreigners by their deportation and detention *ancillary to* deportation.

Neglect of that principle is particularly evident in the leading judgment's attempted response to SIAC's reasons for finding the deportation and ancillary detention a rational response to the emergency threatening the life of the nation. Lord Bingham's statement of the two primary reasons, and his responses, are as follows [44]:

> (1) that there is advantage to the UK in the removal of a potential terrorist from circulation in the UK because he cannot operate actively in the UK whilst he is not in the country or not at liberty. Response (in its entirety): "The first reason does not explain why the measures are directed only to foreign nationals."
>
> (2) that the removal of potential terrorists from their UK accomplices disrupts the organization of terrorist activities. Response: "The second reason no doubt has some validity, but is subject to the same weakness [as the first]".

But taken with the principle, or any similar explanation of the state's right to exclude and remove foreigners, each of SIAC's reasons explains why the measures were directed only to foreign nationals.[88] Lord Bingham's response entails that if a

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87 My discussion assumes throughout that the level of risk posed by nationals was in fact the same as that posed by foreigners. Events subsequent to the judgment in *A v Home Secretary* suggest that the Law Lords had better judgment than the Government had (or professed) when they greeted with some scepticism the argument -- put in the foreground of the Government's submissions – that the threat from foreigners in the United Kingdom was more serious and immediate.

88 As Lord Rodger demonstrates, [173]-[174], SIAC itself held, later in its judgment, that ACSA's distinction between foreigners and nationals was irrational. But this was because

foreigner and a national each present the same risk to the community, the executive *cannot even deport* the foreigner (straightforwardly, without detention) unless it at the same time takes comparable measures (what?) against the national.[89] But Lord Bingham's judgment taken as a whole, like the others, of course intends no challenge to the right of the Secretary of State to deport unhampered by any such pre-condition. So the response is internally inconsistent or fails by *reductio ad absurdum*.

Lord Scott denied s. 23's strict necessity not by the indirect ("If no British, why foreign detainees?") approach, but by direct challenge [155]. He put it in two forms. (1) Why incarceration, rather than less severe restrictions such as monitoring or movement restrictions?[90] The question gets most of its forcefulness from the pervasive misconception that the case concerned simple preventive detention of foreigners for security reasons in a state of emergency. When s. 23 is correctly interpreted, Lord Scott's question has little force, for actions (including ancillary detention) taken to effect deportation can be lawful and legitimate even when neither *necessary* for security nor *strictly necessary* for any other aspect of the common good. (2) "Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed is the stuff of nightmares, associated … with France before and during the Revolution, [and] with Soviet Russia in the Stalinist era…" This characterization of ACSA ss. 21-36 is similar to Lord Hoffmann's suggestion that they authorized "arbitrary arrest and detention" on the basis of no more than suspicion of being a

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SIAC made the same error of law and constitutional principle as the Lords, reading s. 23 as authorizing detention unhinged from any purpose of deportation..

89 Lord Bingham's many statements to the effect that it is inappropriate to use "an immigration measure to address a security problem" ([43]; also [44], [53], [54]; similarly Lord Hope at [134]) would likewise entail that even simple deportation on security grounds would be disproportionate and discriminatory. There is nothing in the least incongruous or unusual in using deportation or other "immigration measures" to address security problems, and in this case, as points (1) and (2) exemplify, SIAC upheld the reasonableness of using deportation to protect national security. Similarly, Lord Hope draws a false contrast when he says [103] that the case was "not about the right to control immigration" but "about the aliens' right to liberty". Art. 5(1)(f) shows that aliens' right to liberty is subject to the right to control "immigration" (or rather, the entry, stay or removal of aliens). See also *infra* at n. 99.

90 This thought also makes a somewhat mysterious appearance, apparently unconnected with its immediate and wider context, in Lord Bingham's judgment at [35]. There Lord Bingham sketches a regimen whereby the threat from the suspected terrorists "could be addressed *without infringing their right to personal liberty*" ([31](5), emphasis added). The regimen involves a set of restrictions amounting to a very rigorous and isolating form of house arrest. But *Secretary of State for the Home Department v J* [2006] 3 W.L.R. 866, [2006] EWCA Civ 1141, upholding Sullivan J's decision [2006] EWHC 1623 (Admin.), holds [23] that control orders considerably less stringent than those envisaged by Lord Bingham are a "deprivation of liberty contrary to [ECHR] Art. 5", and outside the special context of art. 5(1)(f) that holding is convincing.

supporter of terrorists "on the basis of some heated remarks overheard in a pub". In truth, 23 authorized detention only if the Secretary of State "reasonably" certified not only suspicion of terrorist activities, membership or links (including support) but also risk to national security from the person's presence in the realm. The certificate was subject to appeal to a superior court of record (SIAC) and to review after the first six months and *thereafter three-monthly*; the operation of ss. 21 to 23 was subject to more or less annual review by a person whose report was to be laid before Parliament; the sections and the detentions they supported would expire after little more than a year unless renewed by resolution of each House of Parliament, and after five years would expire definitively unless re-enacted by a new Act. Moreover, this being neither pre-revolutionary France nor Stalin's Soviet Union, both Parliament and, more especially, the courts would require that the risk to national security – risk which the Home Secretary must convince SIAC he was reasonable in continuing to apprehend -- be at a level commensurate to the burden to detainees of continued indefinite detention.[91] These Law Lords' argument substitutes an inexact rhetoric for the normal (and HRA s. 3(1)) responsibility of courts to interpret legislation consistently with all constitutional rights, including the rights, not quite identical, of both nationals and friendly aliens.

(*b*) *Discrimination in violation of art. 14?*

That detention of alien deportees under s. 23 was discrimination in violation of ECHR art. 14 is affirmed by all seven majority Law Lords,[92] and with most verve by Baroness Hale:

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91 The frequent judicial review of each certificate, and thus each detention under s. 23, like the multiple time limits on the legislation, all make questionable the Canadian Supreme Court's statement in *Charkaoui* that s. 23 had authorized "permanent" detention. This statement, together with the Supreme Court's summation of the Lords' reasoning in *A v Home Secretary* – "Absent the possibility of deportation, [s. 23] lost its character as an immigration provision, and hence constituted unlawful discrimination" – is offered as the ground for distinguishing *A v Home Secretary*. But in truth the Canadian decision differs substantially from the Lords by accepting that there *need* be no breach of human or constitutional rights in open-ended detention for the purposes of deportation, provided that regular review keeps all factors in view, not least the burden on the detainee compared with any remaining danger he presents to national security or the safety of any person. *Charkaoui v Canada* 2007 SC 9, [110], [126-7].

92 I do not here pursue the question – treated all too lightly by counsel and judges alike in *A v Home Secretary* -- what significance should be attributed to the omission of "nationality" (certainly not equivalent to "national origin") from art. 14's list of proscribed grounds of discrimination.

> "If the situation really is so serious, and the threat so severe, that people may be detained indefinitely without trial, what possible legitimate aim could be served by only having power to lock up some of the people who present that threat?[93] …. substitute 'black', 'disabled', 'female', 'gay', or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up that group but not the 'white', 'able-bodied', 'male' or 'straight' suspected international terrorists. The answer is clear."[94]

Likewise Lord Scott: the right of residence is "irrelevant to the issue as to what measures are required in order to combat the threat" posed by the presence of suspected terrorists, national or alien;[95] applying anti-terrorist measures only to persons with no right of residence is as "irrational and discriminatory" as applying them only to Muslims, or to men; for just as some terrorist suspects "might well not be professed Muslims" or "might well be women", some "may well be home-grown".[96]

The argument ignores the constitutional principle on which Parliament, well aware of the risk of home-grown terrorism, was proceeding: when non-nationals present a significant risk to the public good they, unlike nationals, can entirely properly be required to leave the country. As no Law Lord acknowledged, this principle authorizes and justifies extensive consequential (side-effect) disruption of such non-nationals' art. 8 interests in private and family life, disruption of a kind that someone who is not a foreigner cannot, even if imprisonable, be made to undergo. Such disruption, though it has limits beyond which it is deemed to unlawfully violate the art. 8 right to private life, has been held by the Strasbourg Court to involve no discrimination (no *improper* distinction in treatment).[97] Since members of one group

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93 A *v Secretary of State for the Home Department* [2004] UKHL 56, [236].

94 *ibid.*, [238].

95 *ibid.*, [157].

96 *ibid.*, [158].

97 *Moustaquim v Belgium* (1991) 13 E.H.H.R. 193, [48]: "Mr Moustaquim [a Moroccan juvenile delinquent deported from Belgium after being lawfully resident in Belgium for most of his life] claimed to be the victim of discrimination [by being ordered to be deported] on the ground of nationality, contrary to Article 14 taken together with Article 8, vis-à-vis juvenile delinquents … who possessed Belgian nationality, since they could not be deported… [49] Like the Commission, the Court would reiterate that Article 14 safeguards individuals placed in similar situations from any discriminatory differences of treatment in the enjoyment of the rights and freedoms recognised in the Convention and its Protocols…. In the instant case *the*

have the right of abode, and members of the other do not, terminating the abode here of a member of the latter is non-discriminatory (involves no improper distinction in treatment).

Responding to an Islamist terrorist threat to national security by imprisoning national and alien blacks, females or "gays" would be unlawful discrimination. Responding to it by deporting alien blacks, females, or "gays" would equally be unlawful discrimination. Responding to it by deporting all (or randomly selected) alien Muslims would be presumptively unreasonable discrimination, too.[98] But responding to it by deporting individual aliens reasonably certified, under judicial scrutiny, to be terrorist threats to national security could not be held to be discriminatory without abandoning the core constitutional distinction between nationals and aliens.

No Law Lord or indeed appellant suggested that such deportation would be unlawful.[99] Indeed, no-one argued that it would be unlawful to detain them "while action is being taken with a view to deportation or extradition", under the long-standing provisions integral to ACSA s. 23 and plainly permitted by art. 5(1)(f). The only remaining question is whether it was unlawfully *discriminatory* to extend such (and only such) detention of deportees "indefinitely" so long as both (1) the purpose of removing them as soon as possible remained in each case judicially discernible, and *bona fide* attempts to arrange removal were blocked by the unwillingness or current unsuitability of the relevant foreign countries to receive them, and (2) the deportees remained a terrorist threat to people in our country. When the question is framed thus, the answer seems clear.

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applicant cannot be compared to Belgian juvenile delinquents. The latter have a right of abode in their own country and cannot be expelled from it…"

98 Cf. Finnis. "Religion and State…", Am. J. Juris. 51 (2006) 107-130 at 127.

99 Lord Scott's statement [157] that the fact that "one group has the right of residence and the other group does not, seems to me to be irrelevant to the issue as to what measures are required in order to combat the threat of terrorism that their presence in this country may be thought by the Secretary of State to present" entails the *absurdum* (doubtless unintended) that deportation of foreign terrorist suspects (without detention) could not be an ECHR-compatible measure at all. See also *supra* n. 89.

VII

The constitutional principle's rationale

What, then, is the rationale or, in the more rigid language of ECHR jurisprudence, "legitimating aim", of the principle of nationality-differentiated risk-acceptability? What basic aspect of the common good does it represent, promote or protect?

The principle informs two undoubted rules, not merely one: foreigners can be deported; nationals cannot. Associated with the latter is the rule that nationals cannot be deprived of their citizenship if doing so would leave them without a nationality. The rules signal a fundamental understanding: the human community is politically and juridically organized into states, groups that are national political communities ("nations"). Whoever and wherever one may be, one is both entitled and bound to regard oneself as belonging to one of them: statelessness is an anomaly, a disability, and presumptively an injustice, to be systematically minimized.[100]

What constitutes such a political community? Aristotle famously tried out the hypothesis that a *polis* (state) is a set of people given identity-establishing *form* by a constitution (*politeia*), with the entailment that the identity of the *polis* (state) changes when its constitution changes, say from a tyranny to a democracy. But this will not do, as Aristotle tacitly concedes by concluding his discussion with the question whether agreements entered into and debts incurred by the state under the previous constitution can rightly be repudiated (or regarded as nullities) by the new state – a question which he promises but fails to try to answer.[101] Working out the implications of Kelsen's and Hart's accounts of legal systems, Joseph Raz and I, quite independently, concluded that a legal system's subsisting unity through time cannot be explained without foundational reference to the group whose legal system it is.[102]

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100 Measures for rectifying the anomaly are instituted by the Convention relating to the Status of Stateless Persons 1954 (ratified by the United Kingdom in 1959 and in force 1960), which provides for the state of their lawful residence to treat them so far as possible as other aliens, and looks (art. 32) towards eventual "assimilation and naturalization", subject (art. 2) to the stateless person's duties "to the country in which he finds himself", in particular to "conform to its laws and regulations as well as to measures taken for the maintenance of public order".

101 *Politics* III.3: 1276a7-b15; Finnis, *Aquinas*, 28, 53.

102 Raz, *The Concept of a Legal System* (1970, 2nd ed. 1980), 101-5, 188, 210; Finnis, "Revolutions and Continuity of Law" in Simpson (ed.), *Oxford Essays in Jurisprudence: Second Series* (1971), 44-76 at 44-53, 55-61, 65-76.

To be sure, groups with a complex and far-reaching membership and purpose such as a world-wide and ecclesial religion may reasonably organize and count themselves as having a legal system, parallel to and in principle compatible with the legal systems of the states in which their adherents are citizens. And those states are appropriately many and particular, not universal. For just as experience shows compellingly that the resources on which human life and well-being depend are best husbanded, developed and made available by a system of appropriation of particular resources to particular owners,[103] so experience compellingly shows – and the *international* order by its structures and regulating principles confirms -- that human persons need to live in polities or states, political communities which hold as their own a defined territory subject to a national legal system defining, *inter alia*, a national constitution.

About this need we can and should be still more specific. Addressing an ethnically and culturally diverse audience in Germany, Raz showed why political societies need a common bond. They authoritatively require individuals to make sacrifices for the benefit of other members: witness redistributive taxation and all the other institutions of the welfare state But "the willingness to share is not purchased easily. Without it political society soon disintegrates, or has to rely on extensive force and coercion." And this willingness to share itself cannot be maintained without a common culture, grounding the needed "ability of people to feel for others", which "depends on their ability to understand and empathise with other people's experiences, aspirations and anxieties". Thus the political unity presupposed by any welfare state "depends on people's free and willing identification with the political society they belong to: on the fact that they feel German, that their sense of their own identity as German is totally instinctive and unproblematic. And it depends on the fact that they are proud to be German."[104]

States, occupying valuable territory as they do, can be confronted, moreover, with challenges more urgent and far-reaching, more existential, than maintaining the welfare state. These challenges too will call upon their members' sense of

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103 See Finnis, *op. cit. supra* n. 25, 170-171 (and see *supra* n. 35 on the defeasibility of all such appropriations).

104 Raz, "Multiculturalism", Ratio Juris 11 (1998) 193-205 at 202-3. Since policies of assimilation or integration may be intended precisely to preserve the benefits, for all, of national solidarity which are so cogently described by Raz, his further thesis that such policies insult the members of immigrant cultures is mistaken.

identification with their fellow members – upon the "solidarity among citizens that", as David Miller argues, "democratic politics requires".[105] Much recent political theory shows how equal laws, public probity, impartial government, social justice, and democratic deliberation towards the undertaking of collective commitments and obligations and international action all depend upon – and in turn foster -- a generalized trust sufficient to outweigh *competing* bonds of kin, caste, religion or ethnicity, a level of trust and common sympathies attainable only within bounded political communities, nation states.[106] The distinction between nationals and aliens is an indispensable framework for articulating, expressing, ratifying, and demanding such willingness to share, such awareness of being part owner of a shared inheritance and future,[107] such integration in and assimilation to *this* nation state rather than some other.

But that willingness, as joint and common inheritors, to share a common fate, promote a common life, and accept and contribute towards common burdens and benefits, should not be conceived as suppressing the liberties of individuals, families and other associations to occupy their own space and enjoy, as of right, their own freedom of initiative, self-direction, and self-determination. Such freedoms entail, as a side-effect, the unintended but real creating of risks to others and to the common life. (This reciprocity underpins the reciprocity of protection and subjection which *Calvin's Case* articulated in the language of allegiance, which should not obscure the duties of governors and everyone's root political and legal-moral obligations, not so fundamentally to our ruler or institutions of governance as to our fellow subjects.[108]) The benefits of those politically (legally) respected and defended freedoms, and the burdens of the attendant risks, are part of what we share as members of this political community. And this is the rationale of the principle that we should be willing to accept from fellow members a level of adverse risk that we need not accept from non-members.

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105 Miller, *Citizenship & National Identity* (2000), 62.

106 See Margaret Canovan, *Nationhood & Political Theory* (1996), 44 and *passim.* To witness an unabashedly national pride – patriotism -- being rooted in history and used as a ground of judicial reasoning and decision, see e.g. *A v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 A.C. 221, at [82], [99], [152], [171]; or again *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68 at [86], [96] (Lord Hoffmann).

107 See Canovan, 54-75; also Raz, *Ethics in the Public Domain* (1994), 172-3, on a common culture as needed for the civic solidarity which in turn is "essential to the existence of a well-ordered political society" (172).

108 Finnis, *op. cit. supra* n. 25, 359.

Here our constitutional law intervenes to remind us that while they are among us, non-members are to be treated as members so far as is compatible with maintaining the core of the distinction between members and non-members – between members by right and members by revocable permission. So our justifiable lesser willingness to accept risks from non-members warrants, not a set of special duties, liabilities or disabilities of foreigners within the realm, but only their liability to be removed from the nation's territory and, with a view to and pending that removal, to be kept apart from the community by humane detention or control.[109]

The problem of the indefinitely "irremovable" foreigner, as in *Zadvydas v Davis*, in *Al Kateb v. Godwin* and in *A v Home Secretary*, is a boundary problem of the intersection of these two building blocks of our constitutional scheme. The argumentation in the American and Australian judgments, majority and minority alike, reveals the problem's contours perceptively;[110] *A v Home Secretary* does not.

Beyond that boundary problem there lies, of course, the deeper challenge to constitutional order and theory posed by *nationals* who regard their nationality as a form of alienage because, doubtless like some if not all the detainees in *A v Home Secretary*, they believe their true Nation lies altogether beyond -- but is ordained to have dominion over -- the bounds and territories, and the constitutional principles and rights,[111] that frame and structure our nation's common good.

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109 The liability of *enemy aliens* – a category not considered in this article, and hitherto conceived of as nationals of a state at war with ours -- to statutorily authorized detention in time of war might be understood as a form which that liability to removal reasonably takes when circumstances prevent (or make unreasonable) actual removal.

110 So too does the Canadian Supreme Court's decision in *Charkaoui v Canada* [2007] SC 9 (see *supra* n. 91).

111 See the Cairo Declaration on Human Rights in Islam, unanimously approved by 45 states at the Nineteenth Islamic Conference of Foreign Ministers, Aug. 5, 1990, English trans. U.N. Doc. A/CONF.157/PC/62/Add.18 (U.N. GAOR, World Conference on Human Rights., 4th Sess., Agenda Item 5) (1993), especially preamble and arts. 10, 19, 22-25; and generally Finnis, "Religion and State: Some Main Issues and Sources", Am. J. Juris. 51 (2006) at 122-7.