



Tension Between Human Rights And National Security

RB (Algeria) (FC) and another v Secretary of State for the Home Department; OO (Jordan) v Secretary of State for the Home Department

By Michael Beloff QC

RB and U are Algerian citizens. OO (better known as Abu Qatada) is a citizen of Jordan. Each had been served with notice of deportation to his country of origin on grounds of national security pursuant to section 3(5) of the Immigration Act 1971. Each claimed that, if returned, he would face a real risk of ill-treatment contrary to Article 3 of the ECHR and in OO's case denial of fair trial rights contrary to Article 6. All three had claimed asylum status. RB's claims were unresolved. U's claim was rejected. OO's claim was successful. The House of Lords *RB v Home Office* [2009] UKHL 10 ('RB') upheld the Secretary of State's decision to deport, which had originally been endorsed by the Special Immigration Appeals Commission (SIAC) but (in OO's case) overturned by the Court of Appeal. The cases highlighted the tension between human rights and national security.

Asylum seekers have always enjoyed special protection under UK immigration law. *Prima facie*, such status when established provides a bypass around ordinary immigration law or rules. In *ex parte Bugdaycay* [1987] 1 AC 524, in which I appeared for the Tamil claimant, it was held that judicial review of a Secretary of State's refusal of refugee status where the seeker claimed that removal threatened life "must surely call for the most anxious scrutiny". In the domestic Courts, however, it was recognised that even a well-established claim to refugee status should be subordinated to considerations of domestic national security (See *ex p. Chahal* ([1995] 1 All ER 658) in which I appeared for the Home Department).

Nonetheless when the then Attorney General led for the UK in Strasbourg, the ECHR determined that Article 3 was an absolute right ([1996] 23 EHRR 413). As Lord Phillips noted in RB: "*The European Court of Human Rights made it plain that the question of whether Article 3 prevented deportation was not influenced by the ground of deportation, even if this were that the individual under threat of deportation posed a threat to national security*".

Chahal compelled the Government to resort to a number of expedients: internment of foreign nationals under the Terrorism Act 2000, which was held in *A v Home Office* [2005] 2 AC 68 to be unlawful, disproportionate and discriminatory contrary to the ECHR; control orders, circumscribed by the House of Lords in JJ [2008] 1 AC 389, E [2008] 1 AC 499 and under frontal challenge in *AF, AN, AM and AE v Secretary of State for the Home Department* (the House of Lords has reserved judgment); and finally

Memoranda of Understanding with the receiving countries. In essence in RB, the House of Lords held whether or not these Memoranda were effective raised a question not of law, but of fact; and that SIAC's decision that they could be relied upon was impregnable.

A particular point, raised in the *OO* Appeal was the ambit of Article 1F(c) of the Refugee Convention. That provision disentitles a person to rely on the Convention where that person has "*been guilty of acts contrary to the purposes and principles of the United Nations*". This was contended, on the basis of a decision of the Canadian Supreme Court in *Pushpanathan v Canada* [1998] 1 SCR 982 to refer only to acts committed **before** the admission of the person claiming refugee status to the country.

This argument foundered on the contrast between the provisions of Articles 1F(c) and 1F(b): the latter refers in express terms to the disentanglement of someone to claim protection under the Convention where he had committed a serious non-political crime outside the country of refuge "*prior to admission to that country as a refugee*".

The House of Lords also noted that in any event *OO* would have been prevented from relying upon the prohibition of refoulement (expulsion) imposed by Article 33(1) by reason of the proviso in Article 33(2), which denies its benefit to someone "*whom there are reasonable grounds for regarding as a danger to the security of the country in which he is*". However, had the three succeeded in their Article 3 argument, the ECHR would have trumped the Refugee Convention. Since a stay of deportation has been procured from the European Court of Human Rights, it will be Strasbourg not the Supreme Court which ultimately resolves the conflict between the private and public interests involved.

Michael Beloff QC appeared for the Home Department in OO; Guy Goodwin-Gill appeared for Mr Othman; Lord Pannick QC and Tom Hickman appeared for Justice and Human Rights Watch.