ADDRESS BY JAMES EADIE QC TO ALBA

HUMAN RIGHTS IN THE LAST YEAR

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1. This year has seen some significant changes in the way in which human rights issues are hammered out and decided in the courts. Three deserve mention:

1.1. From the Government's perspective, the Praetorian guard has exchanged its armour for a zip up toga. Messrs Justice Burnett and Sales have left the Emperor only lightly defended – the latter after demonstrating stamina the proportions of which I am only now beginning to understand.

1.2. Next Monday, the Supreme Court will hear its first case. It will do so after extensive preparations following its creation by s 23 of the Constitutional Reform Act 2005. The barristers will have to find other corridors in which to pace off the adrenalin. The debate, which still occasionally resurfaces, as to whether its establishment was an expensive exercise in window dressing, conceived over a glass of whisky, or an essential and significant, Article 6 driven, constitutional reform will no doubt drift into the background. Jeremy Bentham at least would be pleased. He did not approve of judges sitting in the House of Lords. It would have been better, he wrote in 1790, if "a horse should have voice in that house, than that a judge should". That was because "neighing in the house would not make a horse the worse for riding; but sitting and voting there makes a judge very much the worse for judging". To put a court in Parliament was to expect of a man the act of "judging under one name what he has been doing under another". That imposes conflicts of interest on the judge and "your hope is that he will not be soiled by it". Bentham concluded that "if this be wisdom, put your daughter to board in Drury Lane to teach her chastity".

1.3. Thirdly, and perhaps most significantly, 2009 saw the retirement of Lord Bingham. It is hard indeed to underestimate his contribution to the development of human rights law in the domestic jurisdiction. His, it might be thought, was the principal wise and steadying hand on the judicial tiller in the early days of the Human Rights Act. He found imaginative legal answers to human rights problems in cases in which the text of the ECHR did not at first blush seem to admit of the obviously sensible and right answer – cf *Brown v Stott* [2003] 1 AC 681 in which the balance inherent in the Convention between individual rights and the

general interests of the community was deployed to mitigate the apparent rigour of Article 6 in the context of speed cameras and the compulsion to state whether the owner was the driver. But, as the major cases he presided over in later years plainly indicated, he had a deep sense of justice and was unwavering in the defence of what he perceived as being the core tenets of fairness. He led the House to quash the derogation permitting suspected foreign national terrorists to be indefinitely detained; he set his face against the use of evidence that might have been obtained by torture. It is some measure of the respect in which his judgement is held that one can count on less than the fingers of one hand the cases which have gone to Strasbourg in which the ECtHR has disagreed with his reasoning or conclusions.

2. That respect is perhaps most clear from the first major case which I wish to touch on this evening. *AF (no 3)* [2009] UKHL 28 was heard by a Committee of the nine most senior law lords. It arose out of the confusion created by the House's previous decision in a case called *MB* [2008] 1 AC 440. The issue was whether the special advocate system used to test closed material in cases in which control orders had been imposed was compatible with Article 6 ECHR. When I was first instructed at the tail end of last year, there were essentially three possible answers in a context such as this:

   - The system was in principle acceptable. This, in the red corner, was the Lord Hoffmann approach. He dissented in *MB.* His conclusion was that Parliament had fairly struck the balance – all that could be opened up consistently with national security would be opened up; the rest needed to remain secret in order to protect vital national security interests; and given that fact, the special advocate system was the best that could be done to enable that material to be tested – the court also playing a vital role in ensuring fairness.
   - The system was not in truth acceptable at all. It was fundamentally flawed by the fact that the controlled person would be unlikely to know or to be able to predict what the core allegations against him were. It might be that there would be some cases where he could do so or where the control order could be upheld on the open evidence alone; but they would be rare. This in the blue corner, was the Lord Bingham approach.
   - In the role of UN peacekeepers in *MB* were Baroness Hale, Lord Brown and Lord Carswell. Their conclusion was that fairness was fact specific; and that a number of matters could affect the conclusion whether proceedings viewed as a whole had been fair (such as the extent to which the Special Advocate had in fact been able to mount an effective challenge; the balance between the open and closed material and, particularly from Lord Brown, whether disclosure would in any event have been likely to

have made any real difference). Their conclusion was that in most cases the system could and would operate fairly.

3. The lower courts could not agree on the correct reading of *MB*. The particular issue that divided them was whether, in construing the speeches, the House had or had not concluded that there was a irreducible minimum of disclosure that needed to be given. The consequence, if so, was potential serious damage to the legislative regime. That was because such a principle would result in the Secretary of State having to choose in some cases that he simply could not disclose material that the courts considered essential, in fairness, to be disclosed. The division was between Mitting and Stanley Burnton JJ on the one hand (irreducible minimum) and Ouseley and Silber JJ (no such minimum) on the other. In fairness, given the developments it is right to point out that the issue was whether the House of Lords in *MB* had decided that there was such an irreducible minimum; not whether in principle that was the right answer. The Court of Appeal, interpreting the House's speeches in *MB* (and by a majority, Sedley LJ dissenting), agreed with Ouseley and Silber JJ.

4. The Secretary of State considered that Lord Hoffmann was correct. That was the primary submission run in the Case. The House was invited in its new expanded form to revisit the issue and disagree with the majority in *MB* and with Lord Bingham's stricter approach. Alternatively, the House was invited to agree with the Secretary of State's reading of the majority in *MB;* and, now, the majority of the Court of Appeal.

5. Then, some two weeks before the hearing, Strasbourg produced *A v the United Kingdom* (no. 3455/05). That was the Belmarsh/derogation case gone to the ECtHR. The ECtHR took the opportunity to opine in detail on the Article 6 issues. Their reasoning provides perhaps the clearest indication possible of the respect in which Lord Bingham is held in that body. Even in a minority of one, they took his word as law.

6. The essence of the remaining argument, in the devastation to the case caused by *A v the United Kingdom*, was that Strasbourg had consistently recognised that differences of context could lead to different ingredients of fairness, that Strasbourg had itself encouraged Special Advocates as an appropriate way of striking the balance in cases involving (for good reason) secret evidence, that the consequences of putting the State to its election would be potentially very serious in terms of public protection, and that critically the context in control orders (not involving deprivations of liberty) was significantly different to the context of indefinite detention under the ATCSA.

7. It is of interest, and provides a crumb of comfort, that the Lords went out of their way to say that the Court of Appeal (and the Secretary of State) had correctly understood the majority's reasoning in *MB*. That goes to prove that it is possible for a judge to be entirely right about what the law should be and entirely wrong about what it is.

8. The speeches ran to 54 pages. But the essence is in the single sentence of reasoning produced by Lord Rodger: "*Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed". The House held, that it was a necessary component of fairness, at least in the context of the cases before it, that the person concerned should have, as a minimum, sufficient of the allegations against him to enable him to give effective instructions to the special advocate. That was an absolute rule that was to be complied with despite the special advocate system, whether or not it would have made any difference to disclose and despite any national security concerns about disclosure.

9. The case is of considerable interest and some controversy:

   9.1. Of interest because it indicates that the section 2 HRA duty to take account of decisions is in truth not so dissimilar from a rule of precedent. Strasbourg on appeal from the House of Lords.
   9.2. Of interest also because at heart it confronts again the dilemma in the age of terrorism: where to strike the balance between national security (with its central purpose of protecting the public) and fairness to the individual. Proponents see it as an important confirmation that fairness has minimum components that cannot be compromised even on the altar of public protection. Opponents view with alarm the enforced withdrawal of the orders judged necessary in order to enhance that protection.

10. The case is of considerable importance. It is important because of the significant impact it has had and may continue to have on the control order regime. Given that there are obvious and good reasons for the State simply not being in a position to disclose secret information, it is predictable that the election to which *AF* puts them will be resolved in some cases by having to abandon the control order. That has already occurred I believe in two of the cases that were before the House. Questions have been raised by respectable (if in some cases not wholly independent) voices as to whether the regime as a whole can survive.

11. It is also important because of its potential ramifications. Those will need to be worked through in the series of inevitable follow up challenges. No doubt there will be others, but here are a few issues that seem likely to arise:

11.1. Is *AF (no 3)* authority for the proposition that whenever A6 rights are engaged, it is impermissible for the State to rely on closed material? That, it might be thought, would be a surprising and sweeping proposition – even if some support for it might be derived from reading the speeches of Lords Phillips and Hope. It would, it might be thought, undermine the long established principle that the ingredients of fairness were dependent on the particular context including the seriousness of what is at stake in the process involved.

11.2. How far does *AF* travel, if somewhere short of the whole way based only on Article 6 engagement? Does it extend beyond cases of liberty or something very close indeed to liberty?

11.3. Of particular importance, does it extend to the situation in which the State is seeking to defend itself as opposed to relying on the secret material? If so, what is the equivalent of putting the State to its election? The only option appears to be not to defend itself and to pay – or rather for the taxpayer, in these straightened times, to pay what may be thoroughly unmeritorious claims.

11.4. Is there a distinction between the concepts of common law fairness and Article 6 fairness – *Othman* [2008] 3 WLR 798 suggests that that may be so in this respect.

12. The battleground is marked.

13. What other areas have engaged the Courts domestically and in Strasbourg in the last year?

14. The operations in which the armed forces are engaged continues to throw up a series of legal problems. The traditional view was that war was the province of the prerogative. The Courts would not get too close. No longer. War and military operations more generally have thrown up and continue to throw up difficult and complex legal issues.

15. The Courts are still working through the fundamental question: when is someone "within the jurisdiction" of the UK for the purposes of the HRA and the ECHR? *Al Skeini* [2008] 1 AC 153 in the House of Lords remains the high water mark in terms of judicial consideration of this issue. The House accepted, based on *Bankovic v the UK* (no. 52207/99), that the notion of jurisdiction was essentially territorial – the exceptions to it were also essentially territorial. So a person might be within the jurisdiction in a British run military camp in Iraq – but would not be outside, even if detained by or affected by the operations of the armed forces. So Baha Mousa, now the

subject of a major public inquiry, was within the jurisdiction. The other appellants were not.

16. But that principle has increasingly been questioned. The opponents of it suggest that the principle should be based on the concept of control by agents of the State and not territory. As usual in Strasbourg, a Court heavily influenced by the merits of cases and prepared to squeeze its broad mantra of principle up to and sometimes beyond their limits to accommodate the facts, the authorities do not speak with a clear, single voice. The most difficult cases, again as usual, involve Turkey.

17. The principles and approach in *Al-Skeini* have also been held by the Court of Appeal recently in the *Smith* [2009] EWCA Civ 441 case not to apply to British servicemen operating abroad. That case is off to the Supreme Court. It is at least possible that *Smith* will also raise the extremely important issues that arise if such servicemen, anywhere in the world, are indeed within the jurisdiction. What principles should then apply to govern the application of Article 2 in the context of military operations? Is there room for the protective aspects of Article 2, derived from *Osman* (87/1997/871/1083), to apply in times of war when the risks to life are not merely real and immediate but obvious and inevitably matters of deliberate choice? How, if at all, do the principles of combat immunity developed by the common law fit into the ECHR scheme in this sort of context?

18. The possible nuances that exist depending on the precise basis on which the UK's forces are present in foreign states have also been explored and will continue to be so. So for example:

    18.1. The recent case of *Al-Saddoon* [2009] EWCA Civ 7 was decided by the Court of Appeal in December last year. The Court held that the persons concerned were not within the jurisdiction of the United Kingdom because they were, in effect, held for and on behalf of the Iraqi courts now operating in the sovereign state of Iraq. A chamber in Strasbourg gave judgement in the summer. They disagreed. The reasoning will I have no doubt be the subject of intense debate both here and in the Grand Chamber.

    18.2. If the relationship with the State on whose territory the military and peacekeeping operations are being carried out remains a live issue, so too does the relationship between the countries providing troops to the multi-national force and the UN. Some but only some of those states are of course signatories to the ECHR. All are operating to a greater or lesser extent under the authority of the UN Sanctions Committee. The significance of this fact, and the impact it has on attempts to invoke the

ECHR to impugn the actions of forces so operating, was initially considered by the ECtHR in *Behrami* (no. 71412/01) and *Saramati* (78166/01) (joined cases) in the context of Kosovo. They held in summary that such forces, given the legal structures in place, were in effect operating in right of the UN; and that accordingly the ECHR did not apply to their actions. The House of Lords in *Al-Jedda [2008] 2 WLR 31*, in the context of Iraq, considered a similar point and distinguished *Behrami*. Their solution was to hold that the ECHR applied but its provisions might need to be modified by other provisions of international law tailored to the circumstances of war and overseas military operations. The issue is about to resurface again in the context of Afghanistan. *Al-Jedda* is currently before the ECtHR, along with *Al-Skeini*. Tickets for the Grand Chamber hearing should be booked now.

19. Last, on the reach of the ECHR, the clear indications from recent cases is that Claimants who cannot bring themselves within the jurisdiction for ECHR purposes are increasingly resorting to reliance on international law – and notably customary international law. The case law here is also developing and fluid. The most imaginative attempt I have come across in the last year was the *Al Haq* case [2009] EWHC 1910 (Admin) in which the claimant sought to persuade the court to grant declarations that the UK had failed to comply with its (pure) international obligations by not publicly denouncing the activities of Israel in Gaza. The Court realized that it was a rat that they smelt when they arrived at the relief sought which included 15 items of mandatory relief in effect dictating the terms of the proposed denunciation and otherwise dictating UK foreign policy in that sensitive area. But, that extreme example aside, the coming year will I suspect see the Courts having to grapple with the question what are rules of customary international law and in what circumstances, even assuming one can be established, should the rule form part of the common law – the latter as the Court pointed out in *Al-Haq* does not follow automatically once such a rule has been identified?

20. Finally, two other cases – both under Article 8 which are likely to reverberate through the system in the coming months.

21. In *Purdy v the DPP* [2009] UKHL 45 the House of Lords revisited the legal issues surrounding assisted suicide. The same word, "valiant" was used to describe the submissions of Dinah Rose QC, Counsel for the DPP, as had been used to describe mine in *AF (no. 3)*. The same result followed, indicating that even at the highest level judges cannot resist the temptation to flatter those they are about to cast down. The issue under Article 8 was whether the law was sufficiently accessible and foreseeable in the absence of a dedicated policy statement from the DPP as to the sorts of factors he would be likely to

have regard to in exercising his discretion whether or not to prosecute the assister. Unanimously, the House held that it was not and thus that the 'in accordance with law' requirement was not satisfied. Their reasoning was that the Code for Crown Prosecutors provided little applicable guidance in the special context before them – in particular on how the public interest test would be applied. The 11th hour attempt to provide more specific guidance by publishing the public interest reasoning that had led to a no prosecution decision in a recent case was also deemed insufficient.

22. It might be thought that the decision and the reasoning is a fair way from the indications of what will amount to satisfaction of these components of lawfulness. That case law has in the past accepted matters as broad as "in the interests of justice" as compliant. The Guidance in the Code and the specific case that the DPP published provided at least a significant measure of guidance on relevant factors in what was acknowledged to be a fact specific context. However, the context was on any view highly unusual and one likely, as Lord Phillips extra judicial remarks afterwards confirmed, to invoke a highly sympathetic judicial response. No doubt attempts will be made to widen the reasoning; but I suspect that the Courts will not have any great difficulty ring-fencing the context so as to restrict its application into other contexts, and specifically other criminal offences.

23. In the event, as is sometimes the case after a battle royal founded in part on the thorough undesirability of providing further guidance or information, the policy has now been published and on its face seems clear, sensible and helpful.

24. *Marper v the UK*, Decision of the Grand Chamber of 4 December 2008 (nos. 30562/04 and 30566/04), is the final case. This was a decision of the Grand Chamber effectively reversing the House of Lords. They held that the retention for an indefinite period of DNA and fingerprint information about suspects who were acquitted, irrespective of the nature of the offence was an unjustified interference with Article 8 rights. The case is of particular interest because it provides a clear example that the ECtHR is itself becoming more proactive, at least in some contexts, in developing human rights standards by reference to the highest standards amongst member states; rather than finding a violation only in cases of national isolation. The case, like *Purdy*, also indicates (again subject to context) that the requirements of foreseeability and accessibility may be strict. In the context of that case what was required was "clear detailed rules governing the scope and application of the measures, as well as minimum safeguards concerning inter alia duration, storage, usage, access of third parties, procedures for preserving the integrity

and confidentiality of the data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness".

25. In conclusion, it is nine years, almost to the day, since the HRA came into force; and there is no appreciable let up in the interest for those of us engaged in the task of seeking to assist the Courts to strike the permissible and the correct balances between the rights of the individual and the general interests of the community.