The Case of Liversidge v. Anderson: The Rule of Law Amid the Clash of Arms†

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I am very grateful to the ABA and its officers for giving me the opportunity to speak this evening.

I propose to talk, quite briefly, about a single dissenting judgment given nearly 70 years ago. The judgment was given in a case (Liversidge v. Anderson [1942] AC 206) which has no international, and no U.S., dimension. But it has something to say about the problems of terrorism, public emergencies, threats to national security and the detention of suspects without charge or trial. It may perhaps be seen as a legal morality tale apt for our times.

To understand what the case was all about, we must go back to the summer of 1939. During that summer, war with Germany had not begun but was widely believed in this country to be imminent. Contingency plans were being made. It was feared that if war came there would be people in the country—spies, agents, Nazi sympathisers—willing to help the Germans and undermine the security of the British state. A Bill was presented to Parliament to provide emergency powers to meet this crisis. Under the Bill, Defence Regulations could be made which would

“(a) make provision for the...detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the Realm”.

There was some opposition on 24 August 1939, in the House of Commons, but the objections were not pressed, and this clause became law. Defence Regulations were then made, and the relevant regulation was famously numbered 18B. As originally drafted this said:

† This address was given by Lord Bingham on 5 October 2007, as his ‘Closing Remarks’ at the Meeting in London of the Section of International Law of the American Bar Association and is based on a paper given at the Reform Club in London on 16 October 1997.

* Lord Bingham read Modern History at Balliol College, Oxford and was called to the English Bar in 1959. He was appointed as Queen’s Counsel in 1972 and became a High Judge in the Queen’s Bench Division in 1980. He was a Lord Justice of Appeal from 1986 to 1992 when he became Master of the Rolls (the Head of Civil Justice in England and Wales). In 1996 he was appointed Lord Chief Justice of England and Wales a position he held until he became in 2000 the Senior Law Lord in the Judicial House of Lords. He retired from the Bench in 2008.
"The Secretary of State, if satisfied with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the public safety or the defence of the Realm it is necessary to do so, may make an order" to detain that person.

I draw attention to the words "if satisfied". That wording made plain that the judgment was one for the Secretary of State alone, so a person who might be wholly innocent could be locked up, indefinitely, without trial, because the Secretary of State was satisfied that it was necessary to do so for purposes of public safety or defence. I am sure everyone present here this evening will recognise this as a very far-reaching and extraordinary power to give to any Minister. It was the sort of power exercised by the Stuart kings; in France before the Revolution; in Stalin's Russia; in Nazi Germany; and, today, in Zimbabwe and many other countries. But it was utterly contrary to the libertarian tradition of Britain and the United States. That was how it struck some MPs at the time. On 31 October 1939, after the war had begun, the regulation was strongly attacked from the Liberal benches. The Home Secretary, Sir John Anderson, failed to satisfy the critics, and the Lord Privy Seal (Sir Samuel Hoare), to save the day, offered all-party consultations. A meeting was held on 8 November 1939. No adequate note of the meeting was made, and there is doubt what occurred. It is, however, clear that an amended draft regulation was agreed which thereafter became law. As altered its wording was:

"If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety or the defence of the Realm or in the preparation or instigation of such acts and that by reason thereof, it is necessary to exercise control over him, he may make an order against that person directing that he be detained".

Thus in the earlier draft the language was "The Secretary of State if satisfied" and in the new draft "If the Secretary of State has reasonable cause to believe...".

We must now move on in time. It is difficult today to recall quite how dire the situation was here in the spring and summer of 1940. France had fallen. The British army in France had been destroyed or captured except for the remnant which escaped by the skin of its teeth through Dunkirk. German invasion was expected daily. It was the gravest national crisis in the life of anyone alive in the UK then or since. There was high anxiety about the risk of German collaborators in the United Kingdom.

It is not therefore surprising that orders were made under Regulation 18B as amended. Between May and August 1940 Sir John Anderson made 1428 orders. One of them was against Mr. Robert Liversidge, who was serving in the British forces as a volunteer Pilot Officer in the Royal Air Force at the time. His real name was Jack Perlzweig. He had changed his name to Robert Liversidge. And now I come to the case itself.

Mr. Liversidge was arrested on 29 May 1940, taken to Brixton prison and there detained. No accusation of criminal conduct was made against him, as ordinarily when a suspect is arrested and detained in prison. There was no prospect of any trial at which his guilt or innocence could be investigated. The warrant for his arrest and detention, issued on the order of the Home Secretary, began
"Whereas I have reasonable cause to believe Jack Perlzeig alias Robert Liversidge to be a person of hostile associations and that by reason thereof it is necessary to exercise control over him... ."

That was all that Liversidge knew about the reasons for his arrest and detention.

Nine months later, on 14 March 1941, Liversidge issued a writ claiming that his detention in prison was unlawful and claiming damages for false or wrongful imprisonment. The defendants were Sir John Anderson and his successor as Home Secretary, Mr. Herbert Morrison. In his claim, Liversidge’s lawyers set out the order of the Home Secretary detaining him and contended that the order and the detention were unlawful. The Home Secretary admitted the making of the order and made a general challenge to Liversidge’s claim. Liversidge’s lawyers then asked for details of the grounds upon which Sir John Anderson had reasonable cause to believe what he had stated. The Home Secretary refused to give details. So Liversidge asked the court to order the defendants to do so. The first judge refused to make an order that details be given. Liversidge appealed to a more senior judge, a judge of the High Court, who also refused. The issue at this stage could be seen as a rather narrow legalistic question: was it for Liversidge to prove that Sir John had had no reasonable cause to believe, as the Home Secretary argued? Or was it for the Home Secretary to prove that he had had reasonable cause, as Liversidge argued? It was because Liversidge contended that the Home Secretary had to justify his order that he requested the disclosure of details.

There was a further appeal by Liversidge to the Court of Appeal, which agreed with the lower judges, and so no details were ordered. Liversidge then appealed to the Lords of Appeal in Ordinary sitting in the House of Lords. There was a hearing lasting three days in September 1941. The war was at a very low point. Hitler’s armies had conquered the nation states of Europe from the Spanish border to central Russia. The Russian army was being driven back towards Moscow and St. Petersburg. The United States had not yet entered the war on the allied side. Night after night London and other cities were being severely bombed. Our merchant shipping in the Atlantic was suffering terrible losses. The collapse of our empire in the Far East was only a few months away, although no one knew that at the time. It was as grave a situation as could well be imagined. And that was the background to Liversidge’s lawsuit.

There is room for two possible views. The first is that this was a typical lawyers’ quibble, hair-splitting, play on words, the playing of legal games. What is the difference between being satisfied and having reasonable cause to believe? For goodness’ sake, the future of the nation was in jeopardy. War cannot, as a British judge said in 1918, be conducted on the principles of the Sermon on the Mount or Magna Carta. The other view is that the liberty of one individual was at stake. The lawfulness of government action was being challenged. Even at such a time the law of the land should be observed.

The case came, as usual, before five Law Lords. A former Lord Chancellor, Viscount Maugham, was in the chair. Lord Atkin, the second in order of seniority, sat to his right. Judgment was given on Monday 3 November 1941, in the King’s Robing Room in the Houses of Parliament, since the House of Commons’ chamber had been destroyed by a bomb in May, and the Commons were using the chamber of the Lords. Four of the judges decided against Liversidge. I need not go into their detailed reasoning. The effect of it was to hold that an order for arrest and detention was lawfully made if the Secretary...
of State honestly asserted that he had reasonable cause to believe that one of the necessary conditions existed and that, if he did so, no court could investigate whether he had reasonable grounds or cause for his belief. Thus the question was whether a person could be lawfully imprisoned on the mere statement of a Minister—a member of the executive—or whether the courts had a role to investigate, if an order was challenged, whether the power had been lawfully exercised.

Lord Atkin alone spoke out in favour of Liversidge, in one of the most celebrated dissenting judgments in our history, powerfully expressed and beautifully written. I first of all quote a passage towards the beginning of his speech:

"It is surely incapable of dispute that the words 'if A has X' constitute a condition the essence of which is the existence of X and the having of it by A. If it is a condition to a right (including a power) granted to A, whenever the right comes into dispute the tribunal whatever it may be that is charged with determining the dispute must ascertain whether the condition is fulfilled. In some cases the issue is one of fact, in others of both fact and law, but in all cases the words indicate an existing something the having of which can be ascertained. And the words do not mean and cannot mean 'if A thinks that he has.' 'If A has a broken ankle' does not mean and cannot mean 'if A thinks that he has a broken ankle.' 'If A has a right of way' does not mean and cannot mean 'if A thinks that he has a right of way.' 'Reasonable cause' for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right".

Atkin then went through numerous examples of earlier enactments to show that the requirement of reasonable cause had always in the past been understood as requiring proof of an objective fact, not a mere subjective belief, and showing that even within these Defence Regulations the language was sometimes "If it appears to the Secretary of State"—a subjective test—and sometimes, as in Regulation 18B, an objective test, requiring the existence of a fact.

Towards the end of his speech, Atkin summed up his opinion in a passage so powerful, so well-written and at the time so controversial that I hope you will bear with me if I quote three full paragraphs:

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time leaning towards liberty, but following the dictum of Pollock C.B. . . . 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.' In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister. To recapitulate: The words have only one meaning. They are used with that meaning in statements of the common law
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and in statutes. They have never been used in the sense now imputed to them. They are used in the Defence Regulations in the natural meaning, and, when it is intended to express the meaning now imputed to them, different and apt words are used in the regulations generally and in this regulation in particular. Even if it were relevant, which it is not, there is no absurdity or no such degree of public mischief as would lead to a non-natural construction.

I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' ("Through the Looking Glass", c. vi) After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has.' I am of opinion that they cannot, and that the case should be decided accordingly."

It would be an understatement to say that Atkin's speech was not universally popular. The Lord Chancellor of the day, who saw the judgment in draft before delivery, suggested that the Lewis Carroll reference should be removed, as wounding to colleagues and exposing them to ridicule. In this, at least, the Lord Chancellor was certainly right. Atkin was cold-shouldered and ostracised by his colleagues. Viscount Maugham was stung into writing a letter of protest to The Times and later made a personal statement to the House of Lords. The Lord Chief Justice, a former Lord Chancellor and Attorney General, wrote to Atkin to express his shock at being told that he was more executive-minded than the executive.

Even outside professional legal circles the judgments of the House of Lords, particularly Atkin's eloquent dissent, attracted wide public notice. The press was divided. The Manchester Guardian, the Spectator and the New Statesman supported Atkin. The Times, the Daily Telegraph and The Economist characteristically supported the judgments of the majority. A number of prominent churchmen and lawyers wrote to Atkin expressing support. Mr. Justice Stable, an independent-minded King’s Bench judge, wrote:

"I venture to think the decision of the House of Lords has reduced the status of the Judiciary with consequences the nation will one day bitterly regret. Bacon, I think, said the judges were the lions under the Throne, but the House of Lords has reduced us to mice squeaking under a chair in the Home Office".

A number of leading academic lawyers supported Atkin, but the leading English legal academic journal, the Law Quarterly Review, was at first against him. This view was, however, strongly rebutted by a noted authority, C K Allen:

"Generations of Englishmen have been brought up to regard it as one vital aspect of the Rule of Law (for which, among other things, this country is now fighting the most crucial war in its history), that all persons are equal before the law and that for any unjustified infringement of the liberty of the subject the liability of a Minister of State is no whit different from that of a policeman, or indeed, from the meanest of the King's subjects".

The debate about the merits of the majority and minority judgments rolled on for years. But in the end the tide turned decisively, and I trust irreversibly, in Atkin's favour. In 1964 a leading judicial member of the House of Lords described the majority decision as

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"the very peculiar decision of this House". Finally, in 1980, another leading member of the House of Lords said, with the support of all his colleagues:

“For my part I think the time has come to acknowledge openly that the majority of this House in Liversidge v Anderson were expediently and, at that time, perhaps, excusably wrong and the dissenting speech of Lord Atkin was right”.

In a strictly legal sense, therefore, Lord Atkin has prevailed. But in a much more important sense his judgment has been triumphantly vindicated. At one of the lowest moments of our national history, it was no doubt easy to feel that exceptional circumstances called for exceptional remedies, that it was no time for legal niceties, that it was expedient to intern one man that the whole nation perish not, that the safety of the people was the supreme law. But we are entitled to be proud that even in that extreme national emergency there was one voice—eloquent and courageous—which asserted older, nobler, more enduring values: the right of the individual against the state; the duty to govern in accordance with law; the role of the courts as guarantor of legality and individual right; the priceless gift, subject only to constraints by law established, of individual freedom. It would be hard to express these values more shortly, more simply, more memorably than in Atkin’s neatly turned Ciceronian allusion, which in closing I venture to repeat:

“In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom...that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law”.

Perhaps his words may serve as an epitaph for your conference.