

Letting Human Rights Slide

University of Melbourne Academic Says House of Lords is Failing to Properly Uphold Human Rights Standards

By Lisa Lee

Recent decisions by the House of Lords show that the United Kingdom's highest court is narrowing the definition of human rights to accommodate the country's anti-terrorism laws, according to Dr Joo-Cheong Tham. Dr Tham, a Senior Lecturer at the University of Melbourne Law School, made the comments during a recent Castan Centre lecture on counter-terrorism laws, control orders and the UK Human Rights Act.

The UK *Prevention of Terrorism Act 2005* empowers the Home Secretary to issue "control orders" for people who allegedly pose a terrorist risk to the public. A control order enables restrictions or prohibitions, such as "house arrest", to be placed on a person's movements, associations and communications. Additionally, under the *Prevention of Terrorism Act*, non-derogating control orders can be issued when there are "reasonable grounds for suspecting that the individual is or has been involved in terrorism related activity". Thus, according to Dr Tham, a lesser standard is required when granting a control order than when convicting a person of a crime. Existing simultaneously with the *Prevention of Terrorism Act* is the UK *Human Rights Act 1998* which was enacted to "give effect to rights and freedoms guaranteed under the *European Convention on Human Rights*." In particular, Article 5 of the Convention provides protection against deprivations of liberty.

Dr Tham then discussed three recent decisions of the House of Lords, handed down on the same day, which considered the compatibility of 'house arrest' under control orders with Article 5. In *Secretary of State for the Home Department v JJ.*, the House of Lords determined that an 18 hour curfew was a deprivation of liberty and therefore a breach of Article 5. On the other hand, in *Secretary of State for the Home Department v E.*, it was held that no deprivation of liberty resulted from a daily curfew of 12 hours. Finally, in *Secretary of State for the Home Department v A.F.*, a 14 hour curfew was similarly held not to amount to a deprivation of liberty. Thus, it appears that a 14 hour house arrest control order is compatible with an individual's freedom of liberty and security of person under the *Human Rights Act*.

Dr Tham, in his overview of these decisions, pointed out that Article 5 of the *European Convention on Human Rights* has been read down by the House of Lords to protect deprivation of liberty for a sufficient period of time rather than, as the text of Article 5 insists, protecting against all deprivations of liberty. Furthermore, it appeared that in making its decisions in the above cases, the House of Lords treated decisions of the European Court of Human Rights as a ceiling, being unwilling to expand human rights obligations beyond what was laid down by the Strasbourg Court. The *Human Rights Act*, according to Dr Tham, however, treats these decisions as a floor rather than a ceiling. The approach of the House of Lords in the control orders cases, Dr Tham argued, gives rise to a diluted commitment to human rights and the rule of law.

Dr Tham concluded that the control orders decisions provide 'a cautionary tale to Australian advocates of Charters of Rights who portray courts as protectors of human rights in the area of national security'. In his view, they highlighted how courts, instead of advancing the protection of human rights, can legitimise breaches of human rights.

Dr Tham's lecture raised some provocative questions and highlighted the important role of the judiciary in protecting human rights in the domestic realm. From the cases highlighted by Dr Tham, it appears that while bills of rights are touted as being the base of human rights protections, such bills will not pass muster without a judiciary willing to enforce them.

The lecture was based on a forthcoming article, Keith Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] *Public Law* 668-693

Book Review: Australian Bills of Rights

By Philippa Ross and Jian Voon

Given the recent inception of human rights legislation in Victoria and the ACT, the discussion about how to best legally protect human rights is more relevant than ever.

Australian Bills of Rights, by Associate Professor Carolyn Evans and Associate Professor Simon Evans, both of Melbourne University, gives an authoritative analysis of Australian human rights legislation. The Victorian *Charter of Human Rights and Responsibilities Act 2006* and the ACT *Human Rights Act 2004* provide the basis for this comprehensive work which guides the reader through these detailed new laws while highlighting key issues and points of interest in human rights legislation generally.

In a thorough analysis, Evans and Evans discuss what rights are protected under the Acts, how the Acts impact on government conduct, and whether they will have a substantial effect on our domestic legal systems. The authors also discuss both the legislative limitations of each Act and more general limitations: for example, the Acts protect only a certain class of rights and are statutory bills of rights (similar to the UK and New Zealand) rather than constitutional bills of rights (as is the case in Canada and South Africa).

Throughout the book there are comparisons of Human Rights legislation in other common law jurisdictions. Case studies further illustrate key provisions and issues and allow for later reflection by the reader. *Australian Bills of Rights* provides an excellent opportunity to compare and contrast the handling of this complex area of law and allows a consideration of the future direction of Australian bills of rights.