by LAWRENCE BAXTER

# SECTION 29 OF THE INTERNAL SECURITY ACT AND THE RULE OF LAW

Of all those who fall prey to the powers exercised under the Internal Security Act 74 of 1982 surely the most wretched are those detained under section 29. If a policeman of or above the rank of lieutenant-colonel "has reason to believe" that someone has committed or intends to commit one of certain offences referred to in section 54 of the Act, or is withholding information relating to the commission or intended commission of such an offence, he may arrest and detain that person without warrant. The relevant provisions of section 54 create a number of widely-defined crimes ranging from terrorism to the promotion, by certain specified means, of constitutional, political, social or economic change in South Africa.

The detainee may be held indefinitely, subject only to the requirement that he or she be held in accordance with the general or specific directions of the Minister of Law and Order, that a detention of more than 30 days be authorised by the minister (every 30 days), and that the minister must entertain (though not necessarily follow) the advice of an administrative review board if the detention extends beyond six months. The Commissioner of Prisons must order the release of the detainee when satisfied that the latter has satisfactorily answered all questions or if he decides that no further purpose will be served by the detention. No one other than the minister or a properly authorised state official is entitled to any information concerning the detainee, and the only visitors he or she may have without the permission of the minister or commissioner of prisons are a magistrate and district surgeon, who must visit every 14 days, and an inspector of detainees, who must visit "as frequently as possible". In effect, the detainee languishes in solitary confinement and at the mercy of his or her gaolers, enjoying only the token protections prescribed by the Act.

Yet the Act does not even guarantee that its provisions will be observed. As in the case of its infamous predecessor, section 6 of the Terrorism Act 83 of 1967, it was clearly the government's intention to preclude any form of judicial intervention on behalf of the detainee. Not only does subsection 1 of section 29 place the decision as to whether the detainee has breached the relevant provisions of section 54 in the discretion of an official, but subsection 6 states that "no court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section".

Section 29 rudely mocks the Rule of Law; it flouts the principle that individuals should be governed according to clearly formulated rules, that breaches of these rules should be determined in courts of law, and that personal liberty should be safeguarded by habeas corpus. In short, section 29, if left to our executive-controlled Parliament alone, would violate the most fundamental principles upon which Western legal systems are based.

Fortunately, the law is not left to Parliament alone. It has to be interpreted by the courts. And, as it turns out, section 29 is not all that it would appear to be. Acting Deputy Judge President Leon's courageous decision in the Kearney case[1] has placed significant curbs upon the operation of the section, thereby ameliorating, at least in part, its vicious operation.

## THE KEARNEY CASE

Gerald Patrick Kearney is the director of DIAKONIA, an agency established by eight churches for the purpose of fostering Christian social concern among their congregations. On 26th August 1985 Mr Kearney was detained on the instructions of a Colonel Coetzee of the Security Branch. The colonel thought he had "reason to believe" that Mr Kearney had committed an offence contemplated by section 54.

A few days later the Chairman of DIAKONIA, Archbishop Denis Hurley, and Mr Kearney's wife, Carmel Rickard, successfully brought an urgent application in the Durban and Coast Local Division of the Natal Provincial Division of the Supreme Court for his release. They made numerous averments in their affidavits as to the detainee's background, character, personal beliefs and current activities, and they averred that no reasonable person could possibly conclude that Mr Kearney had committed an offence contemplated by section 54. Hence, they claimed, Colonel Coetzee could not have "reason to believe" that such an offence had been committed, that he had therefore failed to satisfy a vital requirement of section 29, and that the detention was accordingly invalid and unlawful. They averred, further, that subsection 6 did not prevent the court from drawing the same conclusions and ordering Mr Kearney's release. In his reply, Colonel Coetzee stated that, having carefully considered the facts known to him (which, for security reasons, he could not divulge), he had reason to believe that the detainee had indeed committed a section 54 offence. He averred, moreover, that subsection 6 absolutely precluded the court from either reviewing the matter or ordering the detainee's release.

Lay readers may be forgiven for assuming that the applicants faced a well-nigh impossible task in persuading the court to agree with them. After all, they had no evidence (and did not claim) that Colonel Coetzee was lying, and it is difficult to imagine a clearer ousting of jurisdiction than that contained in subsection 6. If Parliament is sovereign, surely the applicants had no hope of success?

But there was indeed a way out. It had been taken by the courts in other areas of the law, and writers such as Tony Mathews had long argued that it should be adopted in the present context[2]. Nevertheless, it was recognised that to follow such a course when interpreting security legislation would require considerable judicial courage. Most South African judges have shown exceptional restraint when reviewing security matters.[3] Judge Leon was therefore faced with a daunting decision.

## THE ISSUES

He had to deal with three main issues :

(i) given the wording of subsection 6, could the court possibly have jurisdiction to review the legality of the detention and order Mr Kearney's release?;

(ii) if so, was the Colonel's "reason to believe" that Mr Kearney had committed a section 54 offence subject to judicial evaluation?; and

(iii) if so, was the Colonel's belief indeed invalid?

The success of the application required an affirmative answer to all three questions.

Despite its appearance, the ouster clause was perhaps the least difficult obstacle. Under the South African system of judicial review, the roots of which lie deeply imbedded in English constitutional history, the Supreme Court derives its power to review not from any statute but from its role as a high court of law possessing general jurisdiction. The function of such a court is to interpret and apply the law in the case of concrete disputes, whether between individuals alone or between individuals and the state, and to award appropriate remedies. If action does not comply with the law, the court cannot recognise it as valid. Hence the power of review is a logically inherent feature of the court's jurisdiction.

This principle applies to a statutory ouster clause as well. Since the court's jurisdiction exists independently of such statute, an ouster clause can only be recognised by the court if its statutory preconditions are met. If they are not, the ouster clause is ineffective. Ouster clauses are therefore simply tautologous! And this is more or less what Leon ADJP concluded – on the basis of very respectable judicial authority. It will be recalled that subsection 6 refers to "action taken in terms of this section". Yet the very basis of the challenge to the validity of the detention was that the action had *not* been taken in terms of section 29. It therefore followed that if this claim could be proved, the ouster clause could not prevent the court from declaring the detention invalid and unlawful and ordering the release of the detainee.

## SECOND ISSUE

The second issue is more complex. There are two broad methods by which one might show that the Colonel's action was invalid: first, if he had failed to comply with some objectively ascertainable requirement of section 29; or, secondly, if he had abused his discretionary powers in some way (eg. by acting improperly or dishonestly, by taking into account completely irrelevant factors when reaching his decision, or by reaching a conclusion that no reasonable person could possibly have taken). The latter form of challenge is usually difficult to sustain because the necessary evidence is hard to come by, especially where the official concerned is under no duty to give reasons for his decision. On the other hand, the first basis of challenge is easier to establish if the statutory prerequisites are clear. But even here difficulty can arise if the prerequisites have been placed within the discretionary assessment of the official himself: objective factors shade over into subjective ones and the degree to which the court can evaluate the action concerned becomes uncertain. What the court cannot do, as part of its inherent jurisdiction, is directly substitute its own opinion on a matter clearly committed to the official's personal discretion.

In the **Kearney** case the Court took the view that the requirement in section 29 that the policeman should "have reason to believe" that the individual had committed or intended to commit a section 54 offence was a prerequisite that was subject to objective review. In other words, the mere assertion on the part of the officer that he *had* such reason to believe is insufficient: the court has to satisfy itself that this belief has some objective basis.

In reaching this conclusion, Leon ADJP joined a number of other South African judges in rejecting an English wartime decision to the contrary, **Liversidge v Anderson.**[4] In that case, the majority of judges in the House of Lords took the view that the subjective opinion of the official is sufficient to satisfy the legislative requirements. The majority decision in **Liversidge** has since been completely rejected in the English courts and the celebrated dissent of Lord Atkin, which Leon ADJP endorsed, is now accepted as the law. As Lord Atkin observed in his speech, the words "If a man has" cannot mean "If a man thinks he has", just as "If A has a broken ankle' does not mean and cannot mean " if A thinks that he has a broken ankle'". Hence "if he has reason to believe" cannot mean "if he thinks he has reason to believe".

In terms of this approach, the mere *ipse dixit* of the official is insufficient to establish compliance with the section; what is required is some evidence tending to show that the belief has a reasonable basis, though, as Judge Leon observed, "they do not need to go the distance of producing additional information to show that their belief is correct".

Judge Leon placed great importance upon the precise wording of section 29 (1) ("has *reason* to believe"). This, he contended, connotes a greater degree of objectivity insofar as the belief is concerned, and serves to distinguish the requirements of section 29 from those of other statutory provisions, including section 28 of the Internal Security Act,[5] in which phrases such as "if he is satisfied" or "if in his opinion" are employed. The former phrase, unlike the latter phrases, connotes "belief based upon reason" and, hence, said the Judge, is objectively reviewable.

Here Judge Leon was unnecessarily cautious, I think. All of these phrases are designed by Parliament to confer discretion upon officials, and in all of them one must

surely assume that the "belief", "opinion" or "satisfaction" is intended to be "based upon reason", not arbitrary whim,[6] as section 28, for example, itself makes clear.[7] The difference in wording seems purely semantic. This has now been recognised in the English decisions that have rejected **Liversidge v Anderson,** including, ironically, one which Leon ADJP cited in his support.[8] What really matters is the *degree* to which the elements of the discretionary decisions are susceptible to objective determination: the more factual and clear cut they are, the more they are subject to objective review; the more dependent they are upon personal evaluation, assessment and opinion, the more the challenger must rely upon review for abuse of discretion.

## FINAL ISSUE

Be that as it may, the way had been cleared for the resolution of the final issue, namely, whether the applicants had succeeded. Here the Judge had to consider the question of *onus:* did the applicants have to establish that the prerequisite *had not* been met, or did the Colonel have to establish that it *had* been?

Two opposing views are to be found in the cases. One favours individual liberty, holding that the person infringing liberty must show that he is entitled to do so, beyond merely asserting such entitlement in his affidavit. The other applies the principle that "he who alleges must prove", thereby casting the *onus* of showing that the action was unlawful upon the party who makes such assertion. The difference can be of great practical importance. Leon ADJP appeared to favour the former approach. Indeed, that view might well be an automatic consequence of the conclusion that "reason to believe" is subject to objective review. In the end, however, Judge Leon did not have to make a choice because he found that the applicants had, in any event, made out a strong *prima facie* case which Colonel Coetzee had simply not attempted to controvert. As the latter had furnished no evidence of his own, the *prima facie* proof became conclusive.

## THE DECISION

Mr Kearney's detention was accordingly declared unlawful and he was ordered to be released. A few days later Wilson J, also sitting in the Durban and Coast Local Division, followed the **Kearney** decision and ordered the release of three members of the End Conscription Campaign who had also been detained (purportedly under section 29).[9]

It is no exaggeration to say that Judge Leon's decision is one of the most important ever to be given in the field of human rights in South Africa. It has done what many believed impossible. By increasing the degree of judicial control over the decision to detain, and by clarifying the effect of the ouster clause, it has resurrected, even if only in part, some of the most important elements of the Rule of Law. The decision, together with Judge Wilson's, forms part of a group of recent rulings by a number of Natal judges, as well as some judges in other divisions, which have gone some way to restoring the credibility of the South African judiciary as defenders of liberty in the face of an arrogant government and autocratic Parliament.

One must be realistic and recognise the decision's limitations. Section 29 still authorises extremely far-reaching powers of detention, even when its provisions are strictly complied with. And, of course, there is a possibility that the Kearney decision will be reversed on appeal. But it demonstrates a deeper aspect of our constitution which the dogma of parliamentary sovereignty has long tended to obscure: for as long as the Supreme Court remains the final oracle of the law there is always scope for ameliorating, and sometimes even emasculating, the cruder manifestations of executive and legislative power. The judges are able to interpret legislation against the background of a "higher" or "fundamental" law[10] over which Parliament can never have complete control.

Short of abolishing the independence of the courts altogether, which was indeed once unsuccessfully attempted,[11] there is a little that Parliament or the government can do in response. □

1. **Hurley and Rickard v The Minister of Law and Order, the Commissioner of Police, and the Divisional Commissioner of Police for Port Natal,** DCLD, 11 September 1985.

2. Anthony S. Mathews **Law, Order and Liberty in South Africa,** Jutas, Cape Town, 1971, pp 148–149; "Public Safety", in W.A. Joubert (ed) **The Law of South Africa,** Volume 21, Butterworths, Durban, 1984, para 361.

3. Ibidem; John Dugard **Human Rights and the South African Legal Order,** Princeton University Press, Princeton, NJ, 1978, p 119.

4. (1942) AC 206 (HL).

5. Which provides for "preventative detention".

6. See Lawrence Baxter **Administrative Law,** Jutas, Cape Town, 1984, p 468, esp in n 535, where cases supporting this view are discussed.

7. Section 28 (3) (b) requires the minister to state his "reasons" for issuing a detention order.

8. **Secretary of State for Education and Science v Metropolitan Borough of Tameside** (1977) AC 1014 (HL), where the phrase was "is satisfied". See also **Attorney-General of St Christopher, Nevis and Anguilla v Reynolds** (1980) AC 637 ("is satisfied").

9. **Steel, Kromberg and Brittion v The Minister of Law and Order, the Commissioner of Police and the Divisional Commissioner of Police for Port Natal** DCLD, 20 September 1985.

10. Cf Marinus Wiechers "The Fundamental Laws Behind Our Constitution" in Ellison Kahn (ed) **Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner,** Jutas, Cape Town, 1983, p 383.

11. See **Minister of the Interior v Harris** 1952 (4) SA 769 (A) (the "High Court of Parliament" case).