HOUSE OF LORDS SESSION 2003–04
[2004] UKHL 43

on appeal from: [2003] EWCA Crim 762
and [2003] EWHC 273 (Admin)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Attorney General's Reference No 4 of 2002 (On Appeal from the Court of Appeal (Criminal Division))

Sheldrake (Respondent) *v.* Director of Public Prosecutions (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice)
(Conjoined Appeals)

ON
THURSDAY 14 OCTOBER 2004

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Steyn
Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Lord Carswell

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LORD BINGHAM OF CORNHILL

My Lords,

1. Sections 5(2) of the Road Traffic Act 1988 and 11(2) of the Terrorism Act 2000, conventionally interpreted, impose a legal or persuasive burden on a defendant in criminal proceedings to prove the matters respectively specified in those subsections if he is to be exonerated from liability on the grounds there provided. That means that he must, to be exonerated, establish those matters on the balance of probabilities. If he fails to discharge that burden he will be convicted. In this appeal by the Director of Public Prosecutions and this reference by the Attorney General these reverse burdens ("reverse" because the burden is placed on the defendant and not, as ordinarily in criminal proceedings, on the prosecutor) are challenged as incompatible with the presumption of innocence guaranteed by article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). Thus the first question for consideration in each case is whether the provision in question does, unjustifiably, infringe the presumption of innocence. If it does the further question arises whether the provision can and should be read down in accordance with the courts' interpretative obligation under section 3 of the Human Rights Act 1998 so as to impose an evidential and not a legal burden on the defendant. An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant.

2. Before turning to the facts of these two cases it is necessary to place them in their legal context. To this end I shall briefly review the pre-Convention law of England and Wales, the Strasbourg jurisprudence as it has so far developed and some of the leading cases decided in the United Kingdom since the Convention was incorporated into our domestic law by the Human Rights Act 1998.

The pre-Convention law of England and Wales

3. The governing principle of English criminal law, memorably affirmed by Viscount Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481, is that the onus lies upon the prosecution in a criminal trial to prove all the elements of the offence with which the accused is charged. This principle has been regarded as supremely important, but not as absolute. Viscount Sankey acknowledged (p 475) the authority of *M'Naghten's Case* (1843) 10 Cl & Fin 200 which had "definitely and exceptionally" placed an onus on the accused to establish a defence of insanity. He further acknowledged (p 481) that his statement of principle was "subject also to any statutory exception".

4. One form of statutory exception arose where a defendant sought to rely, in answer to a criminal charge on indictment, on any statutory exception, exemption, proviso, excuse or qualification. It was clearly established that the burden of proving such ground of exoneration, on a balance of probabilities, lay on him: *R v Edwards* [1975] QB 27; *R v Hunt (Richard)* [1987] AC 352. When courts of summary jurisdiction in recognisably modern form were established in 1848, this rule of practice was extended to them and remains the law: see section 14 of the Summary Jurisdiction Act 1848; section 39(2) of the Summary Jurisdiction Act 1879; section 81 of the Magistrates' Courts Act 1952; and (now) section 101 of the Magistrates' Courts Act 1980. Thus, on a charge of selling intoxicating liquor without a justices' licence, it is not for the prosecutor to prove that the defendant had no licence but for the defendant to prove that he had: *R v Edwards*; *R v Hunt (Richard).*

5. It is not only in cases such as these, and cases of insanity, that a burden may be placed upon the defendant to prove (on a balance of probabilities) a special statutory defence. Thus in *Mancini v Director of Public Prosecutions* [1942] AC 1, 11, Viscount Simon LC referred, as an exception to the rule in *Woolmington's* case, to "offences where onus of proof is specially dealt with by statute". In *Jayasena v The Queen*

[1970] AC 618, 623, Lord Devlin also recognised "a statutory defence" as an exception to the *Woolmington* rule, and Lord Templeman in *R v Hunt (Richard)* [1987] AC 352, 364, referred to "statutory defences which must be proved by the accused". Far from condemning the placing of a burden on the accused to prove (on the balance of probabilities) a ground of exoneration, judges of high authority have, in cases judged by them to be appropriate, advocated such a course. Lord Pearce did so in *R v Warner* [1969] 2 AC 256, 307 and again in *Sweet v Parsley* [1970] AC 132, 157. In the latter case, at p 150, Lord Reid also said:

> "Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method".

A further example may be given. When, in 1987, it was proposed to criminalise the possession of a bladed or sharply pointed article, other than a small pocket knife, "without good reason or lawful authority", Lord Denning suggested that the burden of proving good reason or lawful authority by way of defence should be expressly placed on the defendant (Hansard, (HL Debates) vol 489, 3 November 1987, cols 923-924). The suggestion was accepted (Hansard, (HL Debates) vol 490, 23 November 1987, cols 474, 475), and section 139(4) of the Criminal Justice Act 1988, as enacted, provides:

> "It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place".

In practice, Parliament has been very ready to impose legal burdens on, or provide for presumptions rebuttable by, the defendant: see Ashworth and Blake, "The Presumption of Innocence in English Criminal Law" [1996] Crim LR 306, 309. But the language of the statute may not, in some cases, make it plain whether a ground of exoneration must be established by the defendant or negatived by the prosecutor. In *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 the House was divided on the question. In such a case, as Lord Griffiths said in *R v Hunt (Richard)* [1987] AC 352, 374:

> "the court should look to other considerations to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute".

6. One further point may conveniently be noted at this stage. In *Sweet v Parsley* [1970] AC 132, 148-149, Lord Reid stated that

> "there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea ….. it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary".

Thus, in interpreting an offence-creating statutory provision, the starting-point for the court is, as Lord Nicholls of Birkenhead put it in *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 460,

> "the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication".

Effect was given to the presumption in that case, as it was in *R v K* [2002] 1 AC 462. It is a strong presumption, not easily displaced. The more serious the crime, and the more severe the potential consequences of conviction, the less readily will it be displaced. But it is of course the ordinary duty of the courts to give effect to what Parliament has by clear words or necessary implication enacted, and it is not hard to find

instances in which Parliament has clearly intended to attach criminal consequences to proof of defined facts, irrespective of an individual's state of mind or moral blameworthiness. Many such instances are found in legislation regulating the conduct of economic and social life: see *Smith & Hogan, Criminal Law*, 10th ed (2002), chapter 7, "Crimes of strict liability". Offences against such regulations are often regarded as not truly criminal, since the penalty inflicted is not dire and little or no stigma attaches to conviction. Not all offences of strict liability, however, fall within this sterile regulatory area. An old instance which may be thought not to do so is found in section 12 of the Licensing Act 1872, which (as amended) remains in force:

> "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding level 1 on the standard scale.
>
> Every person ….. who is drunk while in charge on any highway or other public place of any carriage, horse, cattle, or steam engine, or who is drunk when in possession of any loaded firearms, may be apprehended and shall be liable to a penalty not exceeding level 1 on the standard scale or in the discretion of the court to imprisonment …. for any term not exceeding one month".

7. Until the coming into force of the Human Rights Act 1998, the issue now before the House could scarcely have arisen. The two statutory provisions which it is necessary to consider are not obscure or ambiguous. They afford the defendant (Mr Sheldrake) and the acquitted person a ground of exoneration, but in each case the provision, interpreted in accordance with the canons of construction ordinarily applied in the courts, would (as already noted) be understood to impose on the defendant a legal burden to establish that ground of exoneration on the balance of probabilities. Until October 2000 the courts would have been bound to interpret the provisions conventionally. Even if minded to do so, they could not have struck down or amended the provisions as repugnant to any statutory or common law rule. Domestic law would have required effect to be given to them according to their accepted meaning. Thus the crucial question is whether the European Convention and the Strasbourg jurisprudence interpreting it have modified in any relevant respect our domestic regime and, if so, to what extent.

The Convention and the Strasbourg jurisprudence

8. Article 6 of the Convention provides, so far as relevant:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

9. The right to a fair trial has long been recognised in England and Wales, although the conditions necessary to achieve fairness have evolved, in some ways quite radically, over the years, and continue to evolve. The presumption of innocence has also been recognised since at latest the early 19th century, although (as shown by the preceding account of our domestic law) the presumption has not been uniformly treated by Parliament as absolute and unqualified. There can be no doubt that the underlying rationale of the presumption in domestic law and in the Convention is an essentially simple one: that it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation, the more objectionable it is likely to be. To ascertain the scope of the presumption under the Convention, domestic courts must have regard to the Strasbourg case law. It has there been repeatedly recognised that the presumption of innocence is one of the elements of the fair criminal trial required by article 6(1): see, for example, *Bernard v France* (1998) 30 EHRR 808, para 37.

10. The applicant in *X v United Kingdom* (1972) 42 CD 135 had been convicted of knowingly living on the earnings of prostitution contrary to section 30(1) of the Sexual Offences Act 1956. He complained of subsection (2) of that section which provided that

> "a man who lives with or is habitually in the company of a prostitute, or who exercises control, direction or influence over a prostitute's movements in a way which shows he is

> aiding, abetting or compelling her prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution unless he proves the contrary."

The Commission rejected as manifestly ill-founded the applicant's challenge to this provision as incompatible with article 6(2). It created a rebuttable presumption which the defendant could disprove, and was not a presumption of guilt. A provision could, if widely or unreasonably worded, have the same effect as a presumption of guilt, and it was not sufficient to examine only the form in which it was drafted. The substance and effect must also be examined. In the present instance, the presumption was restrictively worded, and was neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible.

11. The leading Strasbourg authority on the presumption of innocence is *Salabiaku v France* (1988) 13 EHRR 379. The applicant, a Zaïrese national living in Paris, went to the airport to collect, as he said, a parcel of foodstuffs sent from Africa. He could not find this, but was shown a locked trunk, which he was advised to leave alone. He however took possession of it, went through the green customs channel and was detained. The trunk was opened and found to contain drugs. He was charged with the criminal offence of illegally importing narcotics and with the customs offence, also criminal, of smuggling prohibited goods. At trial the applicant was convicted of both offences: on the first he was sentenced to a term of imprisonment and was prohibited from residing in France; on the second he was fined. On his appeal, his conviction of the first offence was set aside: the facts were not sufficiently proved, and he was given the benefit of the doubt. His conviction of the second offence was upheld since

> " … any person *in possession* (*détention*) of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of *force majeure* exculpating him; such *force majeure* may arise only as a result of an event beyond human control which could be neither foreseen nor averted ….." (p 382)

This was an application of article 392(1) of the French Customs Code, as elaborated by judicial decisions, and was held by the Court of

Cassation, on further appeal, to be proper. It appeared that the severity of an apparently irrebuttable presumption had been to some extent moderated by court decisions upholding the trial court's unfettered power of assessing evidence and giving a broad meaning to *force majeure*. The trial court could also take account of extenuating circumstances when imposing penalties. In the result the Strasbourg court rejected the applicant's complaint that article 392(1) infringed the presumption of innocence, relying on the features just noted and the courts' freedom to give an accused the benefit of the doubt even where the offence was one of strict liability. It was noted that the French courts had been careful to avoid resorting automatically to the presumption laid down in article 392(1), and had exercised their power of assessment on the basis of the evidence adduced by the parties before them. Thus the French courts had not applied article 392(1) in a way which conflicted with the presumption of innocence.

12. The Court's decision in *Salabiaku* is important less perhaps for what it decided than for the indications it gives of the correct approach in principle. First of all, it is recognised that member states may, generally speaking, attach criminal consequences to defined facts:

> "27. As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States."

It also sanctions, but in a qualified way, the application of factual and legal presumptions:

> "28. … Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission

> would appear to consider, paragraph 2 of article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law.
>
> Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. The Court proposes to consider whether such limits were exceeded to the detriment of Mr Salabiaku."

Thus the question in any case must be whether, on the facts, the reasonable limits to which a presumption must be subject have been exceeded.

13. Article 392(1) of the French Customs Code, was again the subject of challenge, as were other provisions of the Code, in *Hoang v France* (1992) 16 EHRR 53. Opinion in the Commission was divided, a majority upholding the applicant's conviction of a customs offence on grounds similar to those relied on in *Salabiaku*. The Court unanimously agreed, ruling (para 36) that the Paris Court of Appeal had based its finding of guilt on the evidence: it had refrained from any automatic reliance on the presumptions created in the relevant provisions of the Customs Code and had not applied them in a manner incompatible with article 6(1) and (2) of the Convention. One of the articles of the French Customs Code mentioned in *Hoang* was article 373, which provided:

> "In any proceedings concerning a seizure of goods, the burden of proving that no offence has been committed shall be on the person whose goods have been seized."

In argument before the Commission the Government (para 50, p 68-69) dismissed this article as irrelevant, since the applicant's goods had not been seized, and the Court did no more than mention it. If, however, it had been relevant and had been interpreted and applied entirely literally by the French courts, its compatibility with article 6(2) would surely have been questionable.

14. In *H v United Kingdom* Appn No 15023/89, 4 April 1990 (unreported) there was found by the Commission to be no infringement of article 6(2) in requiring a defendant to establish a defence of insanity. That requirement was not unreasonable or arbitrary. The application was manifestly ill-founded.

15. The provision challenged in *AG v Malta* Appn No 16641/90, 10 December 1991 (unreported) imposed criminal liability on a director of a body which had committed a criminal offence "unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence". The Commission found the application to be manifestly ill-founded. It referred to the *Salabiaku* judgment, noted that the applicant was provided under the legislation with the possibility of exculpating himself, found that the Maltese courts enjoyed a genuine freedom of assessment and concluded that the provision had not been applied to the applicant in a manner incompatible with the presumption of innocence. A similar decision was reached by the Court more recently in *Brown v United Kingdom* Appn No 44223/98, 2 July 2002 (unreported): article 6(2) of the Convention was not violated by a provision which enabled a newspaper proprietor or publisher to escape strict liability under section 4(5) of the Sexual Offences (Amendment) Act 1976 only if he proved, on the balance of probabilities, that he was in no way at fault in connection with the offending publication.

16. In *Bates v United Kingdom* Appn No 26280/95, 16 January 1996 (unreported) the Commission held inadmissible a challenge to the rebuttable presumption as to the breed of a dog enacted in section 5(5) of the Dangerous Dogs Act 1991. It was noted that the applicant had been entitled but, although represented, had failed, to call evidence to prove at trial that his dog was not of the breed proscribed by the Act, and that the court had relied on an admission by him that the dog was of the breed proscribed. The section was held to fall within reasonable limits.

17. An emergency anti-terrorist enactment was held in *Heaney and McGuinness v Ireland* (2000) 33 EHRR 264 to violate the article 6(1) right of the applicants to remain silent and not incriminate themselves, and also to violate the presumption of innocence guaranteed by article 6(2) because (para 59) of the close link, in this context, between it and the rights guaranteed by article 6(1). The Court rejected (para 58) the Irish Government's contention that the enactment in question was justified by its security and public order concerns since the enactment extinguished the very essence of the applicants' rights to silence and against self-incrimination.

18. A violation of article 6(2) was again found in *Telfner v Austria* Appn No 33501/96, 20 March 2001 (unreported). The victim of a motor accident was able to identify the offending car, but not its driver, even to the extent of saying whether the driver was male or female. The car was owned by the applicant's mother, but he denied that he had been driving at the time and there was no evidence that he had been driving beyond police observations (not, it seems, the subject of oral evidence at the trial) that the car was mainly driven by the applicant. His conviction at trial was upheld on appeal. It was, the Court held (para 15), for it to ascertain that the proceedings as a whole were fair, which in a criminal trial included observance of the presumption of innocence. A court should not start with the preconceived idea that the accused had committed the offence charged. The burden of proof was on the prosecution and any doubt should benefit the accused. The presumption of innocence is infringed where the burden of proof is shifted from the prosecution to the defence. The case was not one (para 17-18) in which adverse inferences could properly be drawn from the silence of the accused. This decision is in accord with that given in *Barbera, Messegué and Jabardo v Spain* (1988) 11 EHRR 360 some years earlier, in which the Court observed (para 91) that the presumption of innocence would be violated if, without the accused having previously been proved guilty according to law, a judicial decision concerning him reflected an opinion that he was guilty. The burden of proof is on the prosecution and any doubt should benefit the accused (para 77).

19. In *Porras v Netherlands* Appn No 49226/99, 18 January 2000 (unreported) the applicant was convicted of intentionally importing cocaine and complained that the burden of proof had been reversed by imposing on him an obligation, which he found impossible to discharge, to prove that he was not and could not have been aware that persons unknown to him had hidden a significant quantity of the drug in his luggage. The Court rejected this complaint, holding that no irrebuttable presumption of guilt had been applied. Although accepting a normal

assumption that a person who packs his own luggage and takes it with him knows of the contents, the Dutch court had had regard to the possibility that this might not be so, had considered all the circumstances, had weighed all the evidence and had not therefore relied automatically on any presumption. On the somewhat involved procedural facts of *Selvanayagam v United Kingdom* Appn No 57981/00, 12 December 2002 (unreported) the Court found that any presumption of law which had operated against the applicant had been within reasonable limits, had taken account of the importance of what was at stake and had maintained the rights of the defence.

20. The decision of the Court in *Janosevic v Sweden* (2004) 38 EHRR 473 rejected a complaint that the imposition of tax surcharges was incompatible with article 6(2) because (para 99) "an almost insurmountable burden of proof" was imposed on the taxpayer. The opportunity was taken to re-state established principles. There was no need for the Swedish authorities to prove intent or negligence, but states might, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it resulted from criminal intent or from negligence (para 100). There was, on the facts, an effective presumption against the taxpayer (para 100), and as decided in *Salabiaku* (para 101),

> "in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved".

The Court acknowledged (para 102) that it was difficult for the taxpayer to rebut the presumption in question, but he was not without means of defence (para 102), and the Court had regard to the financial interests of the state in tax matters and its dependence on the provision of correct and complete information by taxpayers (para 103) in concluding (para 104) that the presumption was confined within reasonable limits.

21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be

arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.

The leading United Kingdom cases since the Human Rights Act 1998

22. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 the applicants challenged the compatibility of section 16(A) of the Prevention of Terrorism (Temporary Provisions) Act 1989 with article 6(2) of the Convention. The relevant provisions read:

> (1) A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with …. acts of terrorism ….
>
> (3) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his possession for such a purpose ….”

The Divisional Court concluded that the section did violate article 6(2) since if the defendant failed to discharge the legal burden placed upon him by subsection (3) he could be convicted of a crime punishable by 10 years’ imprisonment on grounds of reasonable suspicion, and even if there were a reasonable doubt whether he did possess the articles for purposes of terrorism. The House did not find it necessary to resolve this question. Lord Steyn, in an opinion with which Lord Slynn of Hadley (p 362) and Lord Cooke of Thorndon (p 372) agreed, pointed out (p 370) that section 16(A) might be upheld if it were read as

imposing an evidential and not a legal burden on the defendant. Lord Cooke (p 373) saw great force in the view that on the natural and ordinary interpretation of the provision there was repugnancy, but also pointed to the possibility of reading down subsection (3). Lord Hope of Craighead (p 387) considered that the compatibility of the provision was still open to argument. Lord Hobhouse of Woodborough (p 397) considered that there might be a justification for the terms in which the legislation was drafted even though on its face it appeared to be contrary to the Convention. Parliament paid attention to these observations: when section 16A was re-enacted as section 57 of the Terrorism Act 2000 it was provided (with reference to the defence now in subsection (2) and some other subsections) in section 118(2):

> "If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not"

23. The decision of the Privy Council in *Brown v Stott* [2003] 1 AC 681 does not call for detailed examination. It concerned the implied Convention right not to incriminate oneself, which the Strasbourg Court described in *Saunders v United Kingdom* (1996) 23 EHRR 313, para 68, as "closely linked to the presumption of innocence contained in Article 6(2) of the Convention". For present purposes the decision is noteworthy for its reiteration of important but uncontroversial principles: that a defendant has a right to a trial which, viewed overall is fair (pp 704, 708, 719, 727, 730); that the constituent rights listed or implied in article 6, although important, are not absolute (pp 704, 708, 719, 728, 730); that substantial respect should be paid by the courts to the considered decisions of democratic assemblies and governments (pp 703, 710-711); that the Convention requires a fair balance to be struck between the rights of the individual and the wider interests of the community (pp 704, 707-708, 718-720, 730); and that the justifiability of a legislative measure must be judged with close regard to the particular social problem or mischief which the measure has been enacted to address (pp 705-706, 709-710, 722, 728, 731-732).

24. In *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, the challenge was to a recent statutory provision which, it was held, strictly interpreted, could have the effect of excluding relevant evidence and thus of compromising a defendant's right to a fair trial. Much of the argument was devoted to the scope and application of the interpretative obligation imposed on the courts by section 3 of the Human Rights Act

1998. The ratio of the decision was summarised in para 46 of Lord Steyn's opinion, which was expressly accepted by Lord Slynn of Hadley (para 15), Lord Hope of Craighead (para 110), Lord Clyde (para 140) and Lord Hutton (para 163), but it is relevant to cite also paragraph 44 of his opinion in which the courts' interpretative obligation under section 3 is more fully explained:

> "44. On the other hand, the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, per Lord Cooke of Thorndon, at p 373F; and my judgment, at p 366B. The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see 'Rights Brought Home: The Human Rights Bill' (1997) (Cm 3782), para 2.7. The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that 'in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility' and the Home Secretary said 'We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention': Hansard (HL Debates), 5 February 1998, col

840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of section 3 *against* the executive: '*Pepper v Hart*; A Re-examination' (2001) 21 Oxford Journal of Legal Studies 59; see also Professor J H Baker, 'Statutory Interpretation and Parliamentary Intervention' (1993) 52 CLJ 353. In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise: *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132A-B, per Lord Hoffmann. There is, however, no limitation of such a nature in the present case.

45. In my view section 3 requires the court to subordinate the niceties of the language of section 41(3)(c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under section 3 to read section 41, and in particular section 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, section 41 will have achieved a major part of its objective but its excessive reach will have been attenuated

> in accordance with the will of Parliament as reflected in section 3 of the 1998 Act. That is the approach which I would adopt.
>
> *VIII. The task of trial judges*
>
> 46. It is of supreme importance that the effect of the speeches today should be clear to trial judges who have to deal with problems of the admissibility of questioning and evidence on alleged prior sexual experience between an accused and a complainant. The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded."

This opinion must now be read in the light of the later decision of the House in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 3 WLR 113.

25. The appellant in *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, was convicted of possessing a class A controlled drug (cocaine) with intent to supply contrary to section 5 of the Misuse of Drugs Act 1971. His defence at trial in 1999 was that he did not know that the duffle bag in his possession contained drugs. The trial judge, correctly applying section 28(2) of the 1971 Act as previously interpreted, directed the jury that the burden lay on him to make good this defence on the balance of probabilities. He was convicted, and on appeal contended that knowledge of the contents of a container was an ingredient of the offence which the prosecution had to prove and that imposition of a legal burden on a defendant to prove lack of knowledge violated the presumption of innocence. The Criminal Division of the Court of Appeal rejected these arguments ([2002] QB 1112), but gave its ruling as if the Human Rights Act 1998 had been in force at the time of the trial. In the House, a majority held that the Act did not operate retrospectively, and the appeal failed on that ground. The appellant's

arguments of principle were, however, considered in some detail. A majority of the committee held that knowledge of the contents of the duffle bag was not an ingredient of the offence which the prosecution had to prove: Lord Slynn, para 16; Lord Hope, para 61; Lord Clyde, para 126; Lord Hutton, para 181. A majority also held that imposition of a legal burden on a defendant to prove lack of knowledge undermined the presumption of innocence to an impermissible extent; that section 28(2) could be read down under section 3 of the Human Rights Act so as to impose only an evidential burden; and that it should be read down in that way: Lord Slynn, para 17; Lord Steyn, paras 41-42; Lord Hope, paras 84, 91, 94; Lord Clyde, paras 156-157. It is the opinions of the majority on this point which are relevant for present purposes. The dissenting opinion of Lord Hutton on this issue is not, of course, authoritative.

26. The opinions of the majority on this second point are, inevitably, of some complexity. They must be read with reference to the particular case with which the House was dealing. The importance of the presumption of innocence was recognised: see, for example, paras 34 and 131. It was emphasised that attention should be paid to the substance, not the form, of an enactment (paras 35, 150) and to the particular facts (paras 34, 152). In considering justifiability, the need for a balance between the interests of the individual and those of society was recognised (paras 17, 88). Where some infringement of the presumption of innocence is justified, it should not be greater than necessary to achieve its legitimate object (para 37). Decisive in the majority's conclusion on the facts of the case was recognition that, on a charge carrying a maximum of life imprisonment and in circumstances where Parliament, by enacting section 28(2), had recognised the importance of knowledge, a defendant could be convicted even though the jury thought it as likely as not that he was ignorant of the contents of a container in his possession: see, for example, paras 38, 89, 154, 156. Such an outcome was plainly regarded as seriously unfair, since a conviction might rest on conduct which was not in any way blameworthy.

27. The defendant in *R v Johnstone* [2003] UKHL 28, [2003] 1 WLR 1736, was convicted of possessing some 500 bootleg recordings in breach of section 92 (1)(c) of the Trade Marks Act 1994. Subsection (1) of that section provides:

> "(1) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to

> another, and without the consent of the proprietor–(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or (b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or (c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b)."

The section goes on to provide in subsection (5):

> "It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark."

The defendant's appeal was allowed by the Court of Appeal on other grounds ([2002] EWCA Crim 194) with which the House in large measure agreed. The Court of Appeal however read subsection (5) as imposing no more than an evidential burden on the defendant, and on this point (not determinative of the appeal) the House disagreed. In his leading opinion, with which the other members of the committee agreed, Lord Nicholls of Birkenhead (para 46) interpreted section 92(5) as imposing, on a conventional interpretation, a legal burden on the defendant. As such he accepted (para 47) that it prima facie derogated from the presumption of innocence. Therefore (para 48), taking account of *Salabiaku* and the balance to be struck between the public interest and the interests of the individual, it was for the state to justify the derogation and to show that the balance struck was reasonable. Identifying the requirements of a reasonable balance was not, he accepted (para 49), easy:

> " … all that can be said is that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence."

He continued, in paras 50-51:

"50. The relevant factors to be take into account when considering whether such a reason exists have been considered in several recent authorities, in particular the decisions of the House in *R v Director of Public Prosecutions, Ex p Kebilene* [2002] 2 AC 326 and *R v Lambert* [2002] 2 AC 545. And there is now a lengthening list of decisions of the Court of Appeal and other courts in respect of particular statutory provisions. A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused: see Dickson CJ in *R v Whyte* (1988) 51 DLR (4^{th}) 481, 493. This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.

51. In evaluating these factors the court's role is one of review. Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence. I echo the words of Lord Woolf in *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 975:

> 'In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime.'

The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right

> of an individual to be presumed innocent until proved guilty."

He concluded (para 53) that there were compelling reasons why subsection 92(5) should place a legal burden on the defendant. These reasons included (para 52) the urgent international pressure, in the interest of consumers and traders alike, to restrain fraudulent trading in counterfeit goods, the framing of offences against section 92 as offences of "near absolute liability" and the dependence of the subsection (5) defence on facts within the defendant's own knowledge. The considerations which particularly weighed with him as compelling reasons were however (paras 52 and 53) that

> "Those who trade in brand products are aware of the need to be on guard against counterfeit goods. They are aware of the need to deal with reputable suppliers and keep records and of the risks they take if they do not."

and that

> " … it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators, are unlikely to be co-operative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place."

Thus Lord Nicholls substantially agreed (para 54) with the Court of Appeal decision in *R v S (Trade mark defence)* [2003] 1 Cr App R 602, which made it unnecessary to consider the courts' interpretative obligation under section 3 of the 1998 Act, about which he had earlier voiced (para 46) some reservations.

28. The interpretative obligation of the courts under section 3 of the 1998 Act was the subject of illuminating discussion in *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113. The majority opinions of Lord Nicholls, Lord Steyn and Lord Rodger in that case (with which Lady Hale agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretative obligation under section 3 is a very strong and far reaching

one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R(Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 and *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "So far as it is possible to do so …". While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify.

29. I intend no disrespect to the Court of Appeal by failing to discuss a number of cases in which that court has considered, in relation to various statutes, the presumption of innocence. But I cannot overlook the decision of an enlarged Court of Appeal (Lord Woolf CJ, Judge LJ, Gage, Elias and Stanley Burnton JJ) in *Attorney General's Reference No 1 of 2004* [2004] EWCA Crim 1025 and four appeals heard at the same time. In its judgment the court considered much of the authority to which I have referred (although not *Ghaidan v Godin-Mendoza*, which had not been decided) and detected (para 38) a "significant difference in emphasis" between the approach of Lord Steyn in *R v Lambert* [2002] 2 AC 545 and that of Lord Nicholls in *R v Johnstone* [2003] 1 WLR 1736. Making plain its preference for the latter, the court prefaced its guidance to the courts of England and Wales by ruling that (para 52A):

> "Courts should strongly discourage the citation of authority to them other than the decision of the House of Lords in *Johnstone* and this guidance. *Johnstone* is at present the latest word on the subject."

Relying on this judgment, Mr Perry, for the Director of Public Prosecutions and the Attorney General, submitted in his printed case and (more tentatively) in argument that there was clearly a difference of emphasis between the approach of Lord Steyn in *R v Lambert* and that of Lord Nicholls in *R v Johnstone*, and that the latter was to be preferred. Mr Turner QC, for Mr Sheldrake, made a submission to the opposite effect, that the reasoning of the House in *R v Johnstone* should not be followed.

30. Both *R v Lambert* and *R v Johnstone* are recent decisions of the House, binding on all lower courts for what they decide. Nothing said in *R v Johnstone* suggests an intention to depart from or modify the earlier decision, which should not be treated as superseded or implicitly overruled. Differences of emphasis (and Lord Steyn was not a lone voice in *R v Lambert*) are explicable by the difference in the subject matter of the two cases. Section 5 of the Misuse of Drugs Act 1971 and section 92 of the Trade Marks Act 1994 were directed to serious social and economic problems. But the justifiability and fairness of the respective exoneration provisions had to be judged in the particular context of each case. I have already identified the potential consequence to a section 5 defendant who failed, perhaps narrowly, to make good his section 28 defence. He might be, but fail to prove that he was, entirely ignorant of what he was carrying. By contrast, the offences under section 92 are committed only if the act in question is done by a person "with a view to gain for himself or another, or with intent to cause loss to another." Thus these are offences committed (if committed) by dealers, traders, market operators, who could reasonably be expected (as Lord Nicholls pointed out) to exercise some care about the provenance of goods in which they deal. The penalty imposed for breaches of section 92 may be severe (see, for example, *R v Gleeson* [2001] EWCA Crim 2023, [2002] 1 Cr App R (S) 485, but that is because the potential profits of fraudulent trading are often great.

31. The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence. It may nonetheless be questioned whether (as the Court of Appeal ruled in para 52D) "the assumption should be that Parliament would not have made an exception without good reason". Such an approach may lead the court to give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed on it by section 3.

32. The House was not addressed on the cases decided in *Attorney General's Reference No 1 of 2004*. In the absence of argument, I would incline to agree with the Court of Appeal's conclusion in each case and would in particular agree that *R v Carass* [2002] 1 WLR 1714 was wrongly decided. I would not endorse the guidance given by the Court of Appeal in para 52 of its judgment save to the extent, that it is in accordance with the opinions of the House in these cases which must, unless and until revised or supplemented, be regarded as the primary domestic authority on reverse burdens.

33. On a number of occasions the House has gained valuable insights from the reasoning of Commonwealth judges deciding issues under different human rights instruments: see, for example, Lord Steyn in *R v Lambert*, paras 34, 35 and 40, and Lord Nicholls in *R v Johnstone*, para 49. I am accordingly grateful to counsel for exploring in detail, and addressing the House on, the treatment of reverse burdens in other jurisdictions. In the result, I do not think I should be justified in lengthening this opinion by a review of the cases relied on. Some caution is in any event called for in considering different enactments decided under different constitutional arrangements. But, even more important, the United Kingdom courts must take their lead from Strasbourg. In the United Kingdom cases I have discussed our domestic courts have been trying, loyally and (as I think) successfully, to give full and fair effect to the Strasbourg jurisprudence.

Director of Public Prosecutions v Sheldrake

34. On 26 June 2001 Mr Sheldrake was convicted by justices sitting at Colchester of being in charge of a motor car in a public place on 9 February 2001 after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 5(1)(b) of the Road Traffic Act 1988. He was well over the limit: he was arrested at 8.40 pm, and on an average rate of elimination of alcohol would not have been below the limit until 11.40 am the next day.

35. Section 5 of the 1988 Act, so far as material, provides:

> "(1) If a person— (a) drives or attempts to drive a motor vehicle on a road or other public place, or (b) is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his

> breath, blood or urine exceeds the prescribed limit he is guilty of an offence.
>
> (2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit."

36. Mr Sheldrake gave evidence of his efforts to arrange alternative transport home, but the justices were unconvinced. On his behalf it was argued that section 5(2) infringed the presumption of innocence guaranteed by article 6(2) if it were interpreted so as to impose a legal burden upon him. He argued that once the prosecutor had proved that he was in charge of a motor car in a public place while over the prescribed limit, it was presumed that he would have driven the car while over the limit unless he proved otherwise. If he failed to discharge the legal burden he would be convicted on the basis that he would have driven the car whilst over the limit. The risk of driving was an essential element of the offence, and the prosecution should be required to prove the presence of that risk beyond all reasonable doubt. Section 5(2) should be interpreted as imposing upon him an evidential burden only. The justices were of opinion that he had not proved, on a balance of probabilities, that there was no likelihood of his driving whilst in excess of the prescribed limit. They concluded, for reasons which they gave, that section 5(2) did not interfere with the presumption of innocence but that, if it did, it pursued a legitimate aim and was proportionate. The justices appear to have been very expertly advised. At the request of Mr Sheldrake the justices stated a case for the opinion of the High Court which by a majority (Clarke LJ and Jack J, Henriques J dissenting) allowed the appeal and quashed Mr Sheldrake's conviction because the justices had not applied the correct test to the facts found: [2003] EWHC 273 (Admin); [2004] QB 487.

37. The area of disagreement in the High Court was narrow. All three members held that the likelihood of the defendant driving whilst over the limit was the gravamen of the offence under section 5(1)(b). All three members considered that section 5(2), read with section 5(1)(b), violated the presumption of innocence because it enabled a defendant to be convicted even though the court was not sure that there was a likelihood of his driving. All three members held that section 5(2) pursued a legitimate aim, since the likelihood of a defendant driving usually involved consideration of his present or future intention to drive,

a matter which was particularly within his knowledge and difficult for the prosecution to counter unless there was at least some burden on the defendant to put forward his case. The majority concluded (contrary to the view of Henriques J) that it was not necessary to accomplish the objective of the 1988 Act to impose a legal burden on the defendant to show that there was no likelihood of his driving whilst over the limit, and therefore it was disproportionate to do so. All members were agreed that, if it were necessary and appropriate, section 5(2) could be read down so as to impose an evidential burden only.

38. The lineal ancestor of section 5(1)(b) is section 12 of the Licensing Act 1872, quoted in para 6 above. To establish an offence against that provision it was plainly unnecessary to prove any likelihood that the defendant would drive the carriage (or, for that matter, discharge the firearm). The offence was based on the obvious risk of mishap if a person were drunk in the situations specified. Section 15(1) of the Road Traffic Act 1930 made it an offence to drive or attempt to drive or to be in charge of a motor vehicle on a road or other public place when under the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle. The maximum penalty did not vary according to whether the offence was driving, attempting to drive or being in charge. No special defence was provided. But a person liable to be charged under this section was not to be liable under section 12 of the 1872 Act. Section 9 of the Road Traffic Act 1956 recast this offence in relation to a person in charge of a car on a road or other public place but not driving it while unfit. It was also provided that a person should be deemed for purposes of the section not to have been in charge of the car if he proved that at the material time the circumstances were such that there was no likelihood of his driving the car so long as he remained unfit. These provisions were re-enacted in section 6 of the Road Traffic Act 1960 and were elaborated in the Road Traffic Act 1962. The Road Safety Act 1967 introduced the now familiar breathalyser regime. Section 1(1) was directed to those driving or attempting to drive while over the limit, section 1(2) to those in charge of a motor vehicle while over the limit. On a second conviction, or if convicted on indictment, the former were liable to more severe penalties than the latter. To the latter, a ground of exoneration was made available to the effect now found in section 5(2) of the 1988 Act. There were thus parallel regulatory provisions in force applicable to those in charge of vehicles on roads or public places, one based on unfitness to drive (section 6 of the 1960 Act, derived from section 9 of the 1956 Act and section 15 of the 1930 Act) and one based on exceeding the prescribed limit (section 1 of the 1967 Act). This dichotomy was preserved in sections 5 and 6 of the Road Traffic Act 1972 and endures in sections 4 and 5 of the 1988 Act.

39. In *Director of Public Prosecutions v Watkins* [1989] QB 821, 829, Taylor LJ said, with reference to section 5 of the 1972 Act (the equivalent of section 4 of the 1988 Act):

> "In regard to that section two broad propositions are clear. First, the offence of being 'in charge' is the lowest in the scale of three charges relating to driving and drink. The two higher in the scale are driving and attempting to drive. Therefore a defendant can be 'in charge' although neither driving nor attempting to drive. Clearly however the mischief aimed at is to prevent driving when unfit through drink. The offence of being 'in charge' must therefore be intended to convict those who are not driving and have not yet done more than a preparatory act towards driving, but who in all the circumstances have already formed or may yet form the intention to drive the vehicle, and may try to drive it whilst still unfit."

In his submissions on behalf of Mr Sheldrake, Mr Turner QC relied on this passage, the ratio of which (he suggested) applied equally to section 5 of the 1988 Act, with which this appeal is concerned. Since the mischief aimed at by section 5(1)(b) is to prevent driving when unfit through drink, the likelihood of a person driving is (as the High Court held) the gravamen of the offence. The effect of section 5(2) is accordingly to impose on the defendant a burden to disprove an important ingredient of the offence which, if not disproved, will be presumed against him. Thus the presumption of innocence is seriously infringed.

40. This analysis is in my opinion too simple and only partly correct. There is an obvious risk that a person may cause death, injury or damage if he drives or attempts to drive a car when excessive consumption of alcohol has made him unfit (I use that adjective compendiously) to do so. That is why such conduct has been made a criminal offence. There is also an obvious risk that if a person is in control of a car when unfit he may drive it, with the consequent risk of causing death, injury or damage already noted. That is why it has been made a criminal offence to be in charge of a car in that condition. Taylor LJ was right that "the mischief aimed at is to prevent driving when unfit through drink". But the ingredients of the offence make no reference to doing a preparatory act towards driving or forming an intention to drive. The 1872 and 1930 Acts criminalised the conduct of those who were in charge of carriages and cars respectively when drunk or unfit, but made no reference to the

likelihood of driving. There could, as I understood counsel to accept, be no ground of complaint if the offence of being unfit when in charge of a motor vehicle, as laid down in 1930, had remained unaltered. As has been shown, Parliament has modified that provision in favour of the defendant. If he can show that there was no likelihood of his driving while unfit, he is deemed not to have been in charge for purposes of section 4 of the 1988 Act and has a defence under section 5(2). There appears to be no very good reason (other than history) for the adoption of these different legislative techniques, but the outcome is effectively the same. The defendant can exonerate himself if he can show that the risk which led to the creation of the offence did not in his case exist. If he fails to establish this ground of exoneration, a possibility (but not a probability) would remain that he would not have been likely to drive. But he would fall squarely within the class of those whose conduct Parliament has, since 1930, legislated to criminalise. In *DPP v Watkins* [1989] QB 821 it was recognised, in my view rightly, that the offence does not require proof that a defendant is likely to drive: see pp 829D, 832E, 833A. This is not in my view an oppressive outcome, since a person in charge of a car when unfit to drive it may properly be expected to divest himself of the power to do so (as by giving the keys to someone else) or put it out of his power to do so (as by going well away). It may be, as was submitted in argument and suggested by Taylor LJ in *DPP v Watkins* at p 830, that the words "in charge" have been too broadly interpreted and applied, but that is not a question which falls for decision in this appeal.

41. It may not be very profitable to debate whether section 5(2) infringes the presumption of innocence. It may be assumed that it does. Plainly the provision is directed to a legitimate object: the prevention of death, injury and damage caused by unfit drivers. Does the provision meet the tests of acceptability identified in the Strasbourg jurisprudence? In my view, it plainly does. I do not regard the burden placed on the defendant as beyond reasonable limits or in any way arbitrary. It is not objectionable to criminalise a defendant's conduct in these circumstances without requiring a prosecutor to prove criminal intent. The defendant has a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would. I do not think that imposition of a legal burden went beyond what was necessary. If a driver tries and fails to establish a defence under section 5(2), I would not regard the resulting conviction as unfair, as the House held that it might or would

be in *R v Lambert*. I find no reason to conclude that the conviction of Mr Sheldrake was tainted by any hint of unfairness.

42. In seeking to uphold the majority decision of the High Court, Mr Turner relied on the Eleventh Report of the Criminal Law Revision Committee (Evidence (General), Cmnd 4991, 1972, para 140) to urge that all burdens on the defence, including that in section 5(2), should be evidential only. Whatever the merits of this sweeping proposal, its adoption is not mandated by Strasbourg authority as it now stands. Lord Griffiths' observation in *R v Hunt (Richard)* [1987] AC 352, 376 remains apposite:

> "My Lords, such a fundamental change is, in my view, a matter for Parliament and not a decision of your Lordships' House."

43. As an alternative fall-back submission Mr Turner argued that a presumption could be justified only if the facts presumed flow inexorably from the facts proved or if there was a rational connection between the fact proved and the fact presumed. Here, the likelihood of Mr Sheldrake driving did not, he said, flow inexorably from his being drunk and in charge of the car in a public place nor was there a rational connection between the latter fact and the likelihood of his driving. I am not sure that these propositions find much support in the Strasbourg jurisprudence, although sometimes the fact presumed would flow all but inexorably from the fact proved (as perhaps in the case of knowingly living on immoral earnings: see para 10 above) and the closer the connection between the fact proved and the fact presumed the more reasonable the presumption would usually be. Conversely, the more far-fetched a presumption is, the more suspect it is likely to be. But it cannot be necessary that the facts presumed flow inexorably from the facts proved, since in such an event there would scarcely be a need for any presumption, and rarely, if ever, would a statutory presumption lack a rational connection with a fact proved. I do not however think that Mr Sheldrake's conviction, properly analysed, rested on a presumption that he was likely to drive. It rested on his being in charge of a car while unfit in a public place. If it rested on a presumption that he was likely to drive, that did indeed flow directly from proof of his unfitness while in charge and his inability to show, despite a full opportunity to do so, that there was no likelihood of his driving.

44. I would allow the Director's appeal, reinstate the justices' decision and answer the certified question by saying that the burden of proof provision in section 5(2) of the Road Traffic Act 1988 imposes a legal burden on an accused who is charged with an offence contrary to section 5(1)(b) of that Act.

Attorney General's Reference No 4 of 2002

45. This reference by the Attorney General under section 36 of the Criminal Justice Act 1972 was prompted by the acquittal of A (as I shall call the defendant) in the Crown Court on 22 May 2002. He had been indicted (so far as relevant to the reference) on two courts, both charging offences against section 11(1) of the Terrorism Act 2000: being a member (count 1) of a proscribed organisation, namely Hamas-Izz al–Din al-Qassem Brigades ("Hamas IDQ"); and (count 2) professing to be a member of that organisation. It was common ground at trial that section 11(2) imposed on the defendant an evidential burden only. But despite this, at the conclusion of the evidence and following legal argument, the trial judge ruled that there was no case to answer on these counts and a verdict of not guilty was entered on each. The questions referred by the Attorney General for the opinion of the Court of Appeal were twofold:

> (1) What are the ingredients of an offence contrary to section 11(1) of the Terrorism Act 2000?
>
> (2) Does the defence contained in section 11(2) of the Terrorism Act 2000 impose a legal, rather than an evidential, burden of proof on an accused, and if so, is such a legal burden compatible with the European Convention and, in particular, articles 6(2) and 10 of the Convention?

In its judgment given on 21 March 2003 ([2003] EWCA Crim 762, [2003] 3 WLR 1153, Latham LJ, Hunt and Hedley JJ) the Court of Appeal answered (1) that the ingredients of the offence were set out fully in section 11(1), and (2) that the defence in section 11(2) imposed a legal rather than an evidential burden and was compatible with article 6(2) of the Convention and would not, save perhaps in circumstances difficult to envisage in the abstract, infringe a person's rights under article 10. On application made by counsel for A, the Court of Appeal referred the Attorney General's questions to the House under section 36(3) of the 1972 Act.

46. The Terrorism Act 2000 is a far-reaching measure enacted to counter the all-too-familiar scourge of international terrorism. Part II (sections 3-13) provides a regime for the proscription (and deproscription) of terrorist organisations. Part III (sections 14-31) is entitled "Terrorist Property". These two Parts of the Act provide for a wide range of criminal offences relating to proscribed organisations and terrorist property: inviting support for a proscribed organisation (section 12(1); knowingly arranging meetings to support or further the activities of a proscribed organisation, or to be addressed by a member of such an organisation (section 12(2)); addressing a meeting to encourage support for such an organisation (section 12(3)); wearing or carrying insignia suggesting membership or support of such an organisation (section 13(1); soliciting or receiving or providing money or other property for purposes of terrorism (section 15(1), (2) and (3)); using or possessing money or other property for the purposes of terrorism (section 16(1) and (2)); making an arrangement for money or other property to be made available for purposes of terrorism (section 17); making an arrangement which facilitates the retention or control of terrorist property by concealment, removal from the jurisdiction, transfer to nominees or in any other way (section 18(1)). Further offences relating to terrorism are enacted by sections 39(2), 54(1), (2) and (3), 56(1), 57(1), 58(1) and 59. These offences supplement existing criminal offences such as causing an explosion (section 2 of the Explosive Substances Act 1883) or conspiracy to cause an explosion (section 3 of the 1883 Act) or conspiracy to commit a crime abroad (section 1A of the Criminal Law Act 1977, inserted by section 5(1) of the Criminal Justice (Terrorism and Conspiracy) Act 1998). Where the prosecutor has evidence implicating the defendant in the commission of any of these offences, all of which (save that under section 13 of the 2000 Act) expose a defendant tried on indictment to very severe maximum penalties, it would be standard practice to charge the defendant with whichever offence was supported by the available evidence.

47. The indictment preferred against A did not charge him with any of the foregoing offences but with belonging to and professing to belong to a proscribed organisation. Section 11(1) of the 2000 Act, so far as relevant, provides:

> "**11 Membership**
>
> (1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.
>
> (2) It is a defence for a person charged with an offence under subsection (1) to prove—

(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and

(b) that he has not taken part in the activities of the organisation at any time while it was proscribed.

(3) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

(4) In subsection (2) 'proscribed' means proscribed for the purposes of any of the following—

(a) this Act; ….."

Section 11(1), considered on its own, is a provision of extraordinary breadth. It would cover a person who joined an organisation when it was not a terrorist organisation or when, if it was, he did not know that it was. It would cover a person who joined an organisation when it was not proscribed or, if it was, he did not know that it was. It would cover a person who joined such an organisation as an immature juvenile. It would cover someone who joined such an organisation abroad in a country where it was not prosribed and came to this country ignorant that it was proscribed here (as illustrated by *R v Hundal and Dhaliwal* [2004] EWCA Crim 389). It would cover a person who wished to dissociate himself from an organisation he had earlier joined, perhaps in good faith, but had no means of doing so, or no means of doing so which did not expose him to the risk of serious injury or assassination. If section 11(1) is read on its own, some of those liable to be convicted and punished for belonging to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions. Mr Owen QC, for A, pointed out that no international convention directed to countering terrorism requires the criminalisation of nominal membership of a proscribed organisation; only a minority of states seek to penalise nominal membership; and Lord Lloyd of Berwick in the Report of his *Inquiry into Legislation against Terrorism* (Cm 3420, October 1996, paragraph 6.11) did not recommend that course.

48. "Profess" is a strange expression to find in a criminal statute, and it is not defined. Of various meanings given to it by the Oxford English Dictionary it is far from clear, in my opinion, whether it should be understood to denote an open affirmation of belonging to an organisation or an acknowledgement of such belonging, and whether (in either case) such affirmation or acknowledgement, to fall within section 11(1), would have to be true. This was a material consideration in the case of A, who arrived in this country in April 2001, some three weeks after Hamas IDQ had been duly proscribed under the 2000 Act. There was evidence that he had said, more than once, "I am Hamas", which may well have been a reference to Hamas IDQ, the proscribed organisation, rather than to a charitable organisation, not proscribed, known simply as Hamas. But those to whom he said this were far from sure whether he spoke seriously or in jest, and the trial judge concluded that on the evidence "a jury could reasonably conclude that [A] was perhaps some latter day Walter Mitty or Billy Liar". The scope of "profess" is in my view so uncertain that some of those liable to be convicted and punished for professing to belong to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions.

49. Recognition of the risk that subsection (1) might cover conduct which was not blameworthy or such as properly to attract criminal sanctions may very well have led Parliament to provide the defence enacted in subsection (2). The effect of this subsection is not, in my opinion, to make participation in the activities of the organisation while proscribed an ingredient of the offence. A majority of the House in *R v Lambert* [2002] 2 AC 545 found that knowledge of the contents of the container was not an ingredient of the section 5 offence, despite the defence of ignorance in section 28. I have concluded above (para 40) that the likelihood of driving is not an ingredient of the section 5(1)(b) offence, despite the defence provided in section 5(2). By parity of reasoning, section 11(2) adds no ingredient to section 11(1), and I would reject Mr Owen's contrary submission. I would accordingly answer the first of the Attorney General's questions in the same way as the Court of Appeal.

50. There can be no doubt that Parliament intended section 11(2) to impose a legal burden on the defendant, since section 118 of the Act lists a number of sections which are to be understood as imposing an evidential burden only, and section 11(2) is not among those listed. There is also, in my opinion, no doubt that subsections (1) and (2) are directed to a legitimate end: deterring people from becoming members

and taking part in the activities of proscribed terrorist organisations. The crucial question is therefore whether, as the Court of Appeal held, imposition of a legal burden on a defendant in this particular situation is a proportionate and justifiable legislative response to an undoubted problem. To answer this question the various tests identified in the Strasbourg jurisprudence as interpreted in the United Kingdom authorities fall to be applied.

51. A number of considerations lead me to a conclusion different from that reached by the Court of Appeal. They are these:

(1) As shown in paras [47] and [48] above, a person who is innocent of any blameworthy or properly criminal conduct may fall within section 11(1). There would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities. It is the clear duty of the courts, entrusted to them by Parliament, to protect defendants against such a risk. It is relevant to note that a defendant who tried and failed to establish a defence under section 11(2) might in effect be convicted on the basis of conduct which was not criminal at the date of commission.

(2) While a defendant might reasonably be expected to show that the organisation was not proscribed on the last or only occasion on which he became a member or professed to be a member, so as to satisfy subsection (2)(a), it might well be all but impossible for him to show that he had not taken part in the activities of the organisation at any time while it was proscribed, so as to satisfy subsection (2)(b). Terrorist organisations do not generate minutes, records or documents on which he could rely. Other members would for obvious reasons be unlikely to come forward and testify on his behalf. If the defendant's involvement (like that of *Hundal and Dhaliwa:* see paragraph [47] above) had been abroad, any evidence might also be abroad and hard to adduce. While the defendant himself could assert that he had been inactive, his evidence might well be discounted as unreliable. A's own case is a good example. He arrived as a stowaway. He described himself on different occasions as Palestinian and also as Jordanian. An immigration adjudicator concluded that he was Moroccan. The judge, as already noted, thought he might well be a fantasist. He was not a person whose uncorroborated testimony would carry weight. Thus although section 11(2) preserves the rights of the defence, those rights would be very hard to exercise effectively.

(3) If section 11(2) were held to impose a legal burden, the court would retain a power to assess the evidence, on which it would have to exercise a judgment. But the subsection would provide no flexibility and there would be no room for the exercise of discretion. If the defendant failed to prove the matters specified in subsection (2), the court would have no choice but to convict him.

(4) The potential consequence for a defendant of failing to establish a subsection (2) defence is severe: imprisonment for up to ten years.

(5) While security considerations must always carry weight, they do not absolve member states from their duty to ensure that basic standards of fairness are observed.

(6) Little significance can be attached to the requirement in section 117 of the Act that the Director of Public Prosecutions give his consent to a prosecution (a matter mentioned by the Court of Appeal in para 42 of its judgment) for the reasons given by the Court of Appeal in para 91 of its judgment in *Attorney General's Reference (No 1 of 2004)* [2004] EWCA Crim 1025.

52. I would accept that, in a case where the prosecutor is unable to charge the defendant with any offence related to terrorism other than under section 11, and where the defendant has raised an evidential issue under subsection (2), the prosecutor may well be unable to disprove the facts specified in subsection (2) (a) and (b). But if so, that will be because he cannot point to any conduct of the defendant which has contributed to the furtherance of terrorism. It is not offensive that a defendant should be acquitted in such circumstances.

53. It was argued for the Attorney General that section 11(2) could not be read down under section 3 of the 1998 Act so as to impose an evidential rather than a legal burden if (contrary to his submissions) the subsection were held to infringe, impermissibly, the presumption of innocence. He submitted that if the presumption of innocence were found to be infringed, a declaration of incompatibility should be made. I cannot accept this submission, which Mr Owen contradicted. In my opinion, reading down section 11(2) so as to impose an evidential instead of a legal burden falls well within the interpretative principles discussed above. The subsection should be treated as if section 118(2) applied to it. Such was not the intention of Parliament when enacting the 2000 Act, but it was the intention of Parliament when enacting section 3 of the 1998 Act. I would answer the first part of the Attorney General's second question by ruling that section 11(2) of the Act should

be read and given effect as imposing on the defendant an evidential burden only.

54. In penalising the profession of membership of a proscribed organisation, section 11(1) does, I think, interfere with exercise of the right of free expression guaranteed by article 10 of the Convention. But such interference may be justified if it satisfies various conditions. First, it must be directed to a legitimate end. Such ends include the interests of national security, public safety and the prevention of disorder or crime. Section 11(1) is directed to those ends. Secondly, the interference must be prescribed by law. That requirement is met, despite my present doubt as to the meaning of "profess". Thirdly, it must be necessary in a democratic society and proportionate. The necessity of attacking terrorist organisations is in my view clear. I would incline to hold subsection (1) to be proportionate, for article 10 purposes, whether subsection (2) imposes a legal or an evidential burden. But I agree with Mr Owen that the question does not fall to be considered in the present context, and I would (as he asks) decline to answer this part of the Attorney General's second question.

LORD STEYN

My Lords,

55. I have read the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it. I would also make the order which he proposes.

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

56. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it and with the order that he proposes.

LORD RODGER OF EARLSFERRY

My Lords,

57. These appeals relate to reverse burden of proof provisions in two statutes. The provisions are said to be incompatible with the defendants' Convention right under article 6(2) to be presumed innocent until proved guilty according to law. I have had the privilege of considering the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. I agree with his general exposition of the applicable case law of the European Court of Human Rights relating to article 6(2) and with his proposal that the appeal by the Crown in the case of Sheldrake should be allowed for the reasons he gives. I also agree with the answer that he proposes should be given to the first question in the Attorney General's Reference, but I have the misfortune to differ from him on the second question. I confine my observations to that matter. Like Lord Bingham, I shall refer to the acquitted person as A.

58. In para 30 of his speech Lord Bingham emphasises that, when considering the article 6(2) Convention right, British courts must take their lead from the decisions of the European Court in Strasbourg and that caution should be exercised when considering authorities decided under provisions of Commonwealth constitutions which are not modelled on the European Convention. I respectfully agree with that observation, which mirrors what Lord Steyn and Lord Hope of Craighead said in *Brown v Stott* [2003] 1 AC 681, 708b – c and 724c. For the purposes of article 6(2) there may indeed be particular need for caution in drawing on Commonwealth authorities which, despite the apparent similarities, may turn out to be *faux amis*. It is noticeable that in *Bates v United Kingdom*, application no 26280/95, the European Commission on Human Rights were presented with a number of

Commonwealth authorities on the presumption of innocence, but found it unnecessary to look at them because they preferred to be guided by the established jurisprudence of the European Court of Human Rights. Therefore, if article 6(2), as interpreted by the European Court, lays down what appears to be a different test, our courts must apply that test since the Convention rights in our domestic law are intended to march with the rights under the Convention.

59. The European Court has frequently pointed out that the guarantee in article 6(2) is a specific aspect of the right to a fair trial set forth in article 6(1): e g *Barberà, Messegué and Jabardo v Spain* (1988) 11 EHRR 360, 384, para 67 and *Janosevic v Sweden* (2004) 38 EHRR 473, 505, para 96, with citations. It follows that, where an accused has a fair trial in terms of article 6(1), the presumption of innocence is not violated. The Court's broad description of the requirements of article 6(2) in *Barberà*, at para 77, is consistent with that approach:

> "Paragraph 2 embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him."

So far as the Attorney General's Reference is concerned, it is not suggested that there was in fact any breach of article 6(1) or (2) at the trial, since, by agreement, the proceedings were conducted on the basis that section 11(2) of the Terrorism Act 2000 was to be read as imposing on A an evidential, as opposed to a persuasive, burden. The contention for A is, however, that article 6(2) would have been infringed if section 11(2) had been interpreted as requiring him to prove the matters in question on a balance of probabilities – failing which, he would have been convicted of the offence in terms of section 11(1).

60. Section 11(1) and (2) of the Terrorism Act 2000 provide:

"(1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.

(2) It is a defence for a person charged with an offence under subsection (1) to prove -

(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and
(b) that he has not taken part in the activities of the organisation at any time while it was proscribed."

In considering the arguments advanced by counsel, it is worth remembering that these provisions represent no innovation in the law. Being a member of, or professing to belong to, a proscribed organisation was first made an offence under primary legislation in section 19 of the Northern Ireland (Emergency Provisions) Act 1973 and a measure to the same effect has been part of the law of Great Britain since the Prevention of Terrorism (Temporary Provisions) Act 1974. Section 1(1) and (6) of that Act provided inter alia:

"(1) Subject to subsection (6) below, if any person –

(a) belongs or professes to belong to a proscribed organisation;
...

he shall be liable –

(i) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £400, or both, and
(ii) on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both.

…

(6) A person belonging to a proscribed organisation shall not be guilty of an offence under this section by reason of belonging to the organisation if he shows that he became a member when it was not a proscribed organisation and that he has not since then taken part in any of its activities at any time while it was a proscribed organisation.

In this subsection the reference to a person becoming a member of an organisation shall be taken to be

> a reference to the only or last occasion on which he became a member."

The provisions in the two Acts are drafted differently. In the 2000 Act section 11(2) makes it a defence for the defendant to prove the matters in question, whereas in the 1974 Act section 11(6) says that a person belonging to a proscribed organisation shall not be guilty of an offence if he shows the matters in question. I doubt whether the draftsman intended any change in the operation of the provision but, in any event, the current provision is clearly to be regarded as a defence.

61. As under section 1(1) of the 1974 Act, a person commits an offence under section 11(1) of the 2000 Act if he does one of two things: if he belongs to a proscribed organisation or if he professes to belong to a proscribed organisation. Both limbs merit consideration for present purposes.

62. The first alternative is that the defendant is a member of the proscribed organisation. The legislature has made it a crime for people simply to belong to such a murderous terrorist organisation. Criminalising membership serves a legitimate purpose by making it difficult for members of the organisation to demonstrate publicly in a manner that affronts law-abiding members of the public. Moreover, not only do people by their mere membership give credence to the claims of the organisation but, in addition, members are a potential network of people who may be called on to act for the organisation at some time in the future, even if they have not yet done so. It follows that it is no defence for most members of the organisation to show that they have never taken an active part in the activities of the organisation. The crime is being a member, not being an active member.

63. The second alternative in section 11(1) is designed to catch not only members of the proscribed organisation but people who, though not members, profess to belong to it. As the terms of subsection (2)(a) ("began to profess") indicate, professing to be a member of an organisation is regarded as something which is not complete when the declaration is made, but continues thereafter. So once a person has begun to profess to belong to an organisation, other things being equal, he is regarded as continuing to do so after the organisation is proscribed - just as a person who joins is treated as continuing to be a member thereafter. That is the basis upon which such persons are convicted, in conformity with article 7 of the Convention. I take it to be clear,

however, that a person can be convicted of professing to belong to a proscribed organisation, even if he is not a member or the prosecution cannot prove that he is. So, for example, if the present proceedings had run their course, the jury could competently have acquitted A of being a member of Hamas IDQ (count 1), while convicting him of professing to belong to that organisation (count 2). It is not hard either to see why the legislature would wish to prevent people from falsely claiming to belong to a proscribed organisation. By making such claims, especially as part of a public demonstration, people are liable to contribute to an exaggerated impression of the strength of the organisation in question. In this way they will tend to raise the morale of the actual members of the organisation, while lowering that of the law-abiding members of the community and of the forces of law and order.

64. Claims to belong to an organisation will not have this effect, however, unless they are made to other people and in such a manner as to be capable of belief. So, if it were obvious that someone was only making a joke and was not meaning to be taken seriously when he said that he belonged to a proscribed organisation, this would not amount to "professing" to belong to the organisation for purposes of section 11(1). In para 22 of his ruling that there was no case to answer, the trial judge in the present proceedings noted that A's "audience was never sure whether he was serious or making a joke when he said what he did." Had the case gone to the jury, in my view it would have been proper for the judge to direct them that, if they had a reasonable doubt whether A was serious or was only making a joke when he said what he did, then he should be acquitted.

65. It follows that, in order to achieve a conviction under section 11(1), the Crown must lead evidence that satisfies the magistrate or jury beyond a reasonable doubt either that the defendant is a member of the proscribed organisation or that he professes - in the sense of claiming to other people and in a manner that is capable of belief - that he belongs to the organisation. If the Crown leads the necessary evidence to prove these matters, then the defendant is liable to be convicted of the offence. It is important to notice that the burden of proving these facts lies entirely on the Crown. Moreover, as in most criminal trials, the Crown enjoys no presumption of fact or law to help it to prove them. The issue is tried as in any other ordinary criminal trial: the Crown leads the evidence to prove the relevant facts; it is open to the defence to cross-examine the Crown witnesses, to make a submission of no case to answer, to lead any contrary evidence and to make submissions on the evidence to the magistrate or jury. There is a right of appeal. Nothing

in such proceedings could possibly be regarded as infringing the defendant's Convention rights under article 6(1) or (2).

66. If the prosecution establishes that the defendant is a member of a proscribed organisation or professes to belong to it, then in one sense it proves a simple objective fact. And, with one exception, section 11(1) makes that fact an offence, irrespective of how or why it came about. There is nothing in the Convention to prevent states enacting and prosecuting offences of this kind, as the European Court of Human Rights emphasised in *Salabiaku v France* (1988) 13 EHRR 379, 387, para 27:

> "As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence."

In the present case, for the reasons given by Lord Bingham, the criminalisation of professing to belong to a proscribed organisation does not violate any article 10 Convention right of the defendant. Similarly, the nature of the offence created by section 11(1) does not engage any right of the defendant under article 6, since that article is concerned with the fair trial of offences and not with the substance of the offences themselves. I am accordingly satisfied that, given the murderous aims of the proscribed organisations, it is open to the legislature, without in any way infringing a defendant's rights under the Convention, to make it a punishable offence for someone simply to be a member of, or to profess to belong to, such an organisation in the United Kingdom.

67. As Lord Bingham points out, section 11(1) is apt to catch people who joined the organisation before it was proscribed – at a stage, perhaps, when it was not even a terrorist organisation. It could catch someone who joined the organisation without knowing that it was proscribed, or when he was an immature youth. And it would cover someone who joined the organisation abroad, where it was legal, and came to this country without being aware that it was illegal here. All

these are factors which may be relevant in at least three ways. First, and very importantly, under section 117(1) and (2) they will be relevant to the decision of the Director of Public Prosecutions – for these purposes a senior Crown Prosecutor – or of the Attorney General to consent to the instituting of proceedings. Secondly, they will be relevant to any decision whether such proceedings should be summary or on indictment. Lastly, in the event of a conviction, they will fall to be considered by the court in mitigation of penalty. But, with one alleged exception, in my respectful opinion these are not matters which raise any issue whatever as to the compatibility of section 11 with article 6(2) of the Convention.

68. The alleged exception is the case, envisaged by section 11(2), where the defendant joined the organisation or began to profess to belong to it before it was proscribed. In this kind of case, from the Northern Irish legislation of 1973 onwards, Parliament has always made provision for the defendant to have a defence if he establishes two points: that he joined or began to profess to belong to the organisation when it was not proscribed and that he has not taken part in any of its activities while it has been proscribed. The form of this defence is designed precisely to meet the objection that terrorist organisations are not likely to have mechanisms by which people can safely give up their membership or dissociate themselves from the organisation. So it applies after the Crown has established that, at the relevant time, the defendant remains a member of the organisation or professes to belong to it and where, accordingly, in any other case he would fall to be convicted under section 11(1). Exceptionally, in this particular situation the defendant is to be acquitted if he proves that he has not taken an active part in any of the activities of the organisation while it was proscribed. Plainly, if section 3 of the Human Rights Act is left on one side, the wording of section 11(2) places the burden of proving the defence on the defendant.

69. By enacting section 11(2) Parliament has singled out for favourable treatment those defendants who became members or began to profess to belong to the organisation before it was proscribed. As I pointed out in para 65, there could have been no question of an infringement of the defendant's article 6 rights if this defence had not been included in section 11. On that hypothesis, whatever the circumstances of his initial involvement in the organisation, he could have had a fair trial in terms of article 6 and could have been convicted of an offence under section 11(1) if the Crown had proved that he was a member or professed to belong to the organisation after it was proscribed. All that has happened is that, without changing the definitional elements of the offence, Parliament has given these

particular defendants the additional benefit of a defence if they can prove the two elements in subsection (2). The introduction of the defence does not involve the introduction into the proceedings of any presumption in favour of the Crown: the magistrate or jury decides the matter by considering and weighing the evidence led, unconstrained by any presumption of any kind. Parliament requires, however, that, before a defendant who has otherwise been proved to be guilty of the offence under section 11(1) is excused, the magistrate or jury must actually be satisfied that he did indeed join, or begin to profess to belong to, the organisation before it was proscribed and that he did not thereafter take any part in its activities. Parliament can lay down these preconditions for the defendant's acquittal in such a case without infringing article 6(2) as interpreted by the European Court in *Salabiaku* and the other authorities. And, when Parliament does so, it must inevitably be for the defendant to satisfy the magistrate or jury that the preconditions have been met. Who else could do it? If the defendant fails to establish either of the preconditions, the defence is to fail and the defendant is to be duly convicted – because, ex hypothesi, the Crown will already have proved all that is necessary to secure a conviction under section 11(1).

70. In this respect the defendant under section 11(1) is in precisely the same position as a defendant, such as Mr Sheldrake, who is proved to have been in charge of a vehicle when over the prescribed alcohol limit in terms of section 5(1) of the Road Traffic Act 1988 and who fails to prove, for the purposes of section 5(2), that there was no likelihood of his driving while in that condition. He is convicted of the offence under section 5(1) because, again ex hypothesi, the Crown has proved all the constitutive elements of the offence. As the House holds, there is no violation of the defendant's right under article 6(2). Moreover, the fact that the court has no "discretion" in either case to acquit the defendant raises no issue in terms of article 6(2): guilt or innocence can never depend on the exercise of discretion by the tribunal which assesses the evidence and pronounces the verdict.

71. The defence in section 11(2) can be seen as relaxing the rigour of the offence in section 11(1) for defendants in these particular circumstances. If section 11(1) itself contains nothing to infringe article 6(1) or (2), then nothing in section 11(2), which serves only to improve the defendant's situation, can precipitate a violation of article 6(1) or (2). If that were not so, Parliament could remove the violation by deleting the defence – and yet this would be to the defendant's obvious disadvantage. Counsel for A contends, however, that article 6(2) is infringed because section 11(2) imposes a persuasive burden on the defendant to prove the necessary elements of the defence. The idea of

evidential and persuasive burdens is very much a product of the adversarial system of criminal procedure favoured in English-speaking countries. The distinction has no direct counterpart in civil law systems and is, of course, not mentioned, one way or the other, in any guarantee in article 6 of the Convention. It is clear, however - not least from the decision of the European Court in *Salabiaku v France* (1988) 13 EHRR 379 – that, if the law provides for a defence and the defendant is free to deploy his case in support of that defence before the trial court, then the mere fact that the onus is on him to establish the facts giving rise to the defence does not constitute a violation of article 6(2) or make his trial unfair for the purposes of article 6(1).

72. In *Salabiaku v France* the defendant went to Roissy Airport to collect a parcel of food from an Air Zaïre flight. He could not find it, but an airline official directed him to a padlocked trunk which had not been collected from an earlier Air Zaïre flight. The official, acting on the advice of police officers who were watching the trunk, suggested that M Salabiaku should leave it where it was since it might contain prohibited goods. Despite this warning, the defendant took possession of the trunk and passed through customs with it. He was detained and, when the trunk was opened, 10 kilogrammes of herbal and seed cannabis were found concealed in a false bottom underneath the food. The defendant was charged inter alia with the customs offence of smuggling prohibited goods, contrary to articles 414 and 417 of the Customs Code. Article 392(1) of that Code provided that "the person in possession of contraband goods shall be deemed liable for the offence." The defendant was convicted of the smuggling offences and, when his appeal against conviction was rejected, he applied to the European Commission, alleging that the way that article 92(1) had been applied to him infringed his rights under articles 6(1) and (2). The European Court of Human Rights found that there had been no violation of either paragraph of article 6.

73. As I pointed out in para 66, the Court started from the position that under the Convention there was no objection to a state penalising an objective state of fact, such as being in possession of prohibited goods. So, if M Salabiaku had been charged with an offence of being in possession of prohibited goods, viz the cannabis, it is clear that there would have been no conceivable violation of article 6. What raised the article 6(2) question was that the defendant was not charged with possession of the cannabis but, rather, under article 392(1), as the person in possession of the cannabis, he was deemed to be liable for smuggling it into France. This provision gave rise to a presumption of law by virtue of which the French courts had found the defendant guilty of

smuggling the prohibited goods, contrary to articles 414 and 417 of the Customs Code.

74. What the European Court had to consider was whether these proceedings violated article 6(2). In holding that they did not, the Court observed, 13 EHRR 379, 388, at para 28, that article 6(2) does not regard presumptions of fact or law with indifference:

> "It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

The Court noted that the presumption in article 392(1) did not mean that the defendant is left entirely without any means of defence. The competent court trying the offence may accord him the benefit of extenuating circumstances, and it must acquit him if he succeeds in establishing a case of *force majeure.* The Court went on, in para 29, to refer with approval to a judgment of the Paris Court of Appeal, holding that the specific character of customs offences does not deprive the offender of every possibility of defence since "the person in possession may exculpate himself by establishing a case of *force majeure*" ("le détenteur peut s'exonérer par la preuve de la force majeure").

75. As this analysis shows, what gave rise to the issue in relation to article 6(2) in *Salabiaku* was the presumption of guilt of smuggling prohibited goods which article 392(1) drew from proof of the objective state of fact, viz that the defendant was in possession of the goods. Even then, the Court held that there was no violation of article 6(2) since, first, the presumption did not apply in the circumstances where the defendant proved that his possession was due to *force majeure* and, further, the defendant was free to deploy that defence and the court was equally free to consider it on its merits.

76. The present case involves no presumption of any kind. So the entire basis upon which the question of article 6(2) arose in *Salabiaku* is missing. In particular, since no presumption is involved, no question arises as to whether a presumption has been kept within reasonable limits. Moreover, as para 29 of the decision of the European Court of Human Rights plainly shows, the mere fact that the onus is on the defendant to establish a defence in this situation does not in itself give rise to any breach of article 6(2). What matters is that the tribunal

assesses the facts with an open mind, without any preconception of the defendant's guilt. In addition, in a case like the present, the rights of the defence are fully respected. The defendant is free to give evidence himself, and to lead the evidence of other witnesses, in support of the defence. Of course, this will involve him in having to prove a negative, viz that he has not taken part in any activities of the organisation since it was proscribed. The point is rightly made that, given the nature of proscribed organisations, the defendant may well have difficulty in finding witnesses to support his evidence that he has taken no part in the activities of the organisation. But, by the same token, the Crown is likely to have difficulty in finding witnesses to contradict anything that he says. More particularly, if the defendant has actually taken no part in the activities of the organisation, then the Crown is unlikely to have any evidence – and will, at any rate, have no sound evidence - on which it can properly invite the jury to reject the defendant's account. If such evidence is led, the defendant's counsel will be able to cross-examine the witnesses and to make submissions about the quality of their evidence.

77. The present case illustrates the point. As the trial judge recorded, "the Crown cannot point to one overt act that has been designed to further the cause of Hamas IDQ." Counsel for the Crown was reduced to arguing that A was in the United Kingdom as a "sleeper" - a suggestion that the judge rightly regarded as fanciful, speculative and not supported by the evidence at all, not least because A had been announcing to the world at large that he was Hamas. The evidence available to the Crown would have remained exactly the same if the case had been conducted on the footing that the burden of proving the defence lay on A. Therefore, given that there was in fact no evidence available to the Crown of any single overt act by A designed to further the cause of Hamas IDQ, in accordance with proper professional practice, prosecuting counsel could not have challenged the credibility of the defence evidence that he had not taken part in the activities of the organisation since 29 March 2001. In the absence of any such challenge by the Crown or of any Crown evidence to the contrary, it is likely that A's evidence on this point would have been accepted. There is accordingly no reason to believe that in this, or any similar, case where there is no evidence to show that the defendant took part in the activities of the organisation, he would fail to establish the defence simply because the onus of proof lay on him. In any event, simply placing the onus of proving this defence on the defendant involves no violation of his article 6(2) Convention rights. Therefore if the trial had been conducted on the footing that A had to establish the defence, there would have been no violation of his Convention rights under either article 6(1) or 6(2).

78. For these reasons, as well as those in the speech to be delivered by my noble and learned friend, Lord Carswell, I would hold, first, that section 11(2) of the Terrorism Act 2000 imposes a legal, rather than an evidential, burden of proof on an accused and, secondly, that the legal burden is compatible with articles 6 and 10 of the Convention. I would answer the Attorney General's second question accordingly.

LORD CARSWELL

My Lords,

79. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry. I agree with his reasons and conclusions and wish to add only a few observations of my own.

80. The issue common to these appeals is whether it is unfair to the accused to have to undertake the burden of proving the defence provided for in the governing legislation and, if so, whether the relevant provisions should be "read down" as an evidential rather than a legal or persuasive burden. My noble and learned friend, Lord Bingham of Cornhill, has reviewed in detail in his opinion the applicable provisions of the European Convention on Human Rights and the decisions of the European Court of Human Rights, together with the domestic decisions which affect the issues before us, and I do not wish to add anything to the discussion of the law set out in his opinion and that of Lord Rodger of Earlsferry. I shall consider in this opinion the application of the law to the two appeals before us, observing only that the objective of article 6 of the Convention is to require a fair trial and that the presumption of innocence contained in article 6(2) is one aspect of that requirement, rather than constituting a free-standing obligation. For that reason, as accepted by the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379, inroads into the obligation of the prosecution to prove beyond reasonable doubt all the matters in issue in a criminal trial may be permissible in certain circumstances. The reversal of the ordinary burden of proof resting upon the prosecution may accordingly be justified in some cases and will not offend against the principle requiring a fair trial. Where the question arises, it has to be determined, first, whether it is fair and reasonable in the achievement of a proper statutory objective for the state to deprive the defendant of the protection normally guaranteed by the presumption of innocence

whereby the burden of proof is placed upon the prosecution to prove beyond reasonable doubt all the matters in issue. Secondly, one must determine whether the exception is proportionate, that is to say, whether it goes no further than is reasonably necessary to achieve that objective.

81. Mr Sheldrake was on 26 June 2001 convicted by a magistrates' court of an offence, contrary to section 5(1)(b) of the Road Traffic Act 1988, of being in charge of a vehicle in a public place after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit. He relied upon the defence available under section 5(2), which provides:

> "It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle while the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit."

He had been arrested at 8.40 pm on 9 February 2001, and it was established that at the average rate of elimination of alcohol that proportion would not have fallen below the limit until approximately 11.40 am the following day. Mr Sheldrake gave evidence that he had made efforts to arrange transport home by other means, but the justices held that he had not established on the balance of probabilities that there was no likelihood of his driving his vehicle.

82. The issue which formed the subject of the appeal before the House was whether the imposition on a defendant of a legal or persuasive burden of proof of the matters specified in section 5(2) constituted an interference with the presumption of innocence provided for by article 6(2) of the Convention which was unfair and contrary to the requirements of article 6. His counsel argued, unsuccessfully before the magistrates' court but successfully on appeal to the Queen's Bench Division of the High Court, that the imposition of a persuasive burden constituted a breach of article 6 and accordingly section 5(2) of the 1988 Act should be read in such a way as to impose only an evidential burden. If this were done, then once the issue was raised the prosecution would be required to prove beyond reasonable doubt that some likelihood (interpreted by the Divisional Court as a "real risk") existed of the defendant's driving the vehicle. The majority of the Divisional Court accepted the argument advanced on behalf of Mr

Sheldrake and held that the magistrates had been wrong to regard section 5(2) as imposing a persuasive burden.

83. The offence of being in charge of a motor vehicle when unfit to drive or over the prescribed limit is, as Taylor LJ observed in *Director of Public Prosecutions v Watkins* [1989] QB 821, 829, the lowest in the scale of three charges relating to driving and drink, coming after driving and attempting to drive. It was argued on behalf of Mr Sheldrake and accepted by the Divisional Court that the likelihood of his driving was the gravamen of the offence and, once raised as an issue in the case, was an essential element in the matters to be proved by the prosecution. For the reasons set out by Lord Bingham of Cornhill, I am unable to accept this. I agree with the proposition stated by Taylor LJ in *DPP v Watkins* that proof of being in charge of a vehicle does not necessitate proof of a likelihood of the defendant driving the vehicle. Since that issue does not require to be proved by the prosecution in order to establish a case of being in charge, to hold that the burden of proof on the defendant in propounding the defence under section 5(2) is merely an evidential burden would be to require the prosecution to prove a matter dehors the elements of the offence itself. This in my opinion is a material factor in determining whether it would be fair and reasonable and proportionate to make it a persuasive burden.

84. The ultimate risk may be that the defendant may elect to drive the vehicle, but it is not in my view the gravamen of the offence. Being in charge of a vehicle while over the limit is in itself such an anti-social act that Parliament has long since made it an offence. A person who has drunk more than the limit should take steps to put it out of his power to drive. Section 5(2) gives him an escape route, which it is quite easy for him to take in a genuine case, as he is the person best placed to know and establish whether he was likely to drive the vehicle. Conversely, the prosecution might be able readily enough to establish that the defendant was in a position to drive the vehicle if he elected to do so, but it could well be difficult to prove beyond reasonable doubt that there was a likelihood of his driving it.

85. An example may be posed to test these propositions. The owner of a car, who has drunk enough alcohol to take him over the limit, decides to wash the car. He takes his keys with him, which he uses to open the doors to get access to all the surfaces to be washed and to clean the inside. It is indisputable that during this process he is in charge of the vehicle. He may have started off with the sole intention of confining himself to cleaning the car, but the possibility exists that he may change

his intention and drive it on some errand, perhaps to fill the tank with petrol. The person who knows best whether there was a real risk of that occurring is the defendant himself. I see nothing unreasonable or disproportionate in requiring him to prove on the balance of probabilities that there was no likelihood of his doing so. He should in my opinion have to do so, by adducing evidence which may be duly tested in court.

86. For these reasons and for those contained in the opinion of Lord Bingham of Cornhill I would allow the appeal of the Director of Public Prosecutions, reinstate the magistrates' decision and answer the certified question in the terms proposed.

87. I turn then to the Attorney General's Reference. I have set out my reasons in relation to Mr Sheldrake's case in rather more detail than might otherwise be necessary, given my agreement with those expressed by Lord Bingham of Cornhill, because I think that they give some grounds for comparison when considering the issues in the reference.

88. Section 11(1) of the Terrorism Act 2000 is a provision of some breadth, but it has legislative precedents, as Lord Rodger of Earlsferry has pointed out in para 60 of his opinion, and so also has the defence contained in section 11(2). It may be unusual to find the verb "professes" in a criminal statute, but I do not myself consider that its inclusion is likely to result in the conviction of defendants who would not properly be regarded as blameworthy. If a defendant who had told other persons that he was a member of a proscribed organisation advances the defence that he was merely joking or was a fantasist or a compulsive liar, then the jury will, quite correctly, be directed to acquit him if they have a reasonable doubt whether this might be the case. It would not be sufficient for the Crown to say that since had made the statement, he was without more guilty of professing membership; in order to convict such a person, it will be necessary to prove beyond reasonable doubt that his profession was seriously made. I therefore do not share the fear that a "latter day Walter Mitty or Billy Liar" is unreasonably at risk of conviction of professing to be a member of a proscribed organisation.

89. A specific defence is provided by section 11(2) of the 2000 Act, whereby a person charged with an offence under subsection (1) may prove

> "(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and
>
> (b) that he has not taken part in the activities of the organisation at any time when it was proscribed."

The defence will apply in a variety of situations. The organisation concerned may be started in the United Kingdom with terrorist objectives ab initio, and the defendant, knowing its objectives, may have become a member before the Secretary of State became aware of its existence and proscribed it. He may have joined it in another jurisdiction when it was not proscribed in this country, then found subsequently that it became the subject of a proscription order under section 3(3)(a) of the 2000 Act. Alternatively, the organisation may, as has occurred in Northern Ireland, have started out as one with lawful objectives, but have later evolved into one concerned with terrorism.

90. It was represented that a defendant might find it difficult to adduce sufficiently convincing evidence that he refrained from taking part in the activities of the organisation after it was proscribed, given that he may be dependent solely on his own testimony, which may be less than impressive and could well be regarded as unreliable. I would not myself place a great deal of weight on this consideration. Naturally the defendant will be highly unlikely to obtain any documentary evidence in support of his case, nor is the organisation likely to furnish him with assistance – indeed, some proscribed organisations visit severe consequences upon members who seek to leave their ranks. Nevertheless, such a person is better placed than anyone to testify whether he has taken any part in the organisation's activities. He can give that evidence on oath and it can be tested by the ordinary process of proper cross-examination. Since it is most unlikely that contrary evidence will be available to the prosecution, the jury (or in Northern Ireland the judge sitting without a jury) or magistrates will ordinarily have to decide whether or not to believe the defendant's testimony and determine accordingly whether he has proved his case on the balance of probabilities. It does not seem to me that that places a defendant at an unfair disadvantage.

91. On the other side of the scale, one must place several considerations:

(a) It is not easy to determine what is to be proved and by whom in respect of the date when the defendant joined the organisation. If

he raises the issue, it would hardly be appropriate for the prosecution to have to prove that he became a member before the date on which it was proscribed. The only sensible answer must be that the defendant has to establish this fact, but it would be a strange procedure if the onus then reverted to the prosecution to prove that he had taken part in the activities of the organisation.

(b) If subsection (2) were construed as imposing only an evidential burden, the prosecution, once the issue is raised, would have to prove a matter dehors the elements of the offence specified in subsection (1), that the defendant was not only a member but had taken part in activities of the organisation. As I stated when considering Mr Sheldrake's appeal at para 83 of this opinion, I would regard that as a material factor in determining whether it is fair and reasonable and proportionate to interpret the provision in subsection (2) as imposing a persuasive burden upon the defendant.

(c) The prosecution may in many cases face substantial difficulties in proving that the defendant had taken part in activities of the organisation after it was proscribed.

(d) New organisations not infrequently spring up as offshoots of existing terrorist organisations, but with different names (for a summary of the history of such developments in the case of the Irish Republican Army see *R v Z* [2004] NICA 23, paras 28 and 29). They may not all fall within section 3(1)(b) as organisations operating under the same name as one listed in Schedule 2 to the 2000 Act, which the court held to apply in respect of the Real IRA. One could see this giving rise to difficulties of proof for the prosecution if the burden on defendants under section 11(2) is held to be evidential only.

92. For these reasons and for those given by Lord Rodger of Earlsferry I consider that it is fair and reasonable and proportionate to regard the burden of proof under section 11(2) as a legal rather than an evidential burden. I would hold accordingly and answer the Attorney General's second question in the terms proposed by Lord Rodger of Earlsferry.