

Lord Kerr

Clifford Chance Lecture¹, 25 January 2012

The UK Supreme Court

The modest underworker of Strasbourg?²

You will perhaps not be surprised to learn that it will be the central thesis of tonight's talk that we are not the modest underworker of Strasbourg. Like every cautious pleader, of course, I have an alternative defence – a sub-text. And that is that, if we *have been* the modest underworker, we should stop it at once. We should kick the habit. We should stiffen our sinews and stride forward confidently. And, it will also be my claim that, even if a case can be made that in the past we were excessively deferential to Strasbourg, there are recently clear and vigorous signals that we are no longer.

There are, I think, two interrelated themes to the central issue – first, has the Supreme Court considered itself, or should it consider itself, beholden to Strasbourg, dependent on it as the fount of all wisdom on the question of Convention rights and inhibited from striking out on its own to pronounce on those rights; the second theme is perhaps less directly related to the title of this evening's talk but is in no sense less important and that is, is there a role for the Human Rights Act to play in the development of a body of UK human rights law, which is not necessarily umbilically tied to the ECtHR's view of Convention rights?

¹ I am grateful to my judicial assistant, Frances McClenaghan for her invaluable help in preparing this lecture

² Richard Rawlings, 'Modelling Judicial Review', 61 *Current Legal Problems* (2008) 95 at 123.

I have, I readily accept, cast the first of those themes in a deliberately tendentious way. And it is right that I should declare at the outset that I do not bring what could be described as an open mind to the subject. I have what many would no doubt call “form”. So, I am not a dispassionate commentator. I have an agenda.

It all started with *Ullah*. Actually, it didn't really but *Ullah* certainly brought it into focus. In *R (Ullah) v Special Adjudicator*³ in 2004 the House of Lords had occasion to consider what the interpretive obligation under section 2(1) of the Human Rights Act entailed. It will, of course, be remembered that this provides that: -

“(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any ... judgment ... of the European Court of Human Rights ...”

The pilot, in its navigation through the House of Lords, of the Bill that became the HRA, the former Lord Chancellor, Lord Irvine, described this recently as a simple provision and he expressed surprise that it had given rise to significant difficulties of interpretation. That view is understandable, not least because of the legislative history of the Act. In a somewhat schizophrenic stance, during the passage of the Bill through Parliament, the opposition faced both ways at different stages on the question of how rigorous clause 2 should be. Initially it suggested that the clause should read:

‘A court ... determining a question which has arisen in connection with a Convention right shall be bound by a judgment etc of ECtHR’

Lord Irvine was adamant that a binding effect for Strasbourg judgments was inappropriate. And I consider that he was right to be so. Strasbourg is not a court

which considers itself bound by its own case-law in every circumstance. It would be anomalous for us to draw onto ourselves the obligation to follow a decision which might in short order itself be overtaken or explained by ECtHR, since it does not consider itself to be shackled by a system of binding precedent. It would be incongruous, indeed, unworkable for UK courts to be bound to follow a decision that might at any time change.

In any event, having lost the argument about making Strasbourg jurisprudence binding, the opposition did a swift *volte-face* and suggested that clause 2 of the Bill should be to the effect that domestic courts *may* take account of decisions of ECtHR but were not bound to do so. The government balked at that also. Its spokesman, Geoffrey Hoon, said that this was going too far. The purpose of section 2, he said, was to point British courts *towards* an interpretation of Convention rights that was consistent with their interpretation in Strasbourg.

So, where were we when the Bill became HRA? The courts had to have regard to relevant Strasbourg jurisprudence. They were emphatically not bound by it. They should strive to interpret Convention rights consistently with the way that they had been interpreted in Strasbourg but, again, they were not bound to do that. All seemed tolerably clear.

But was it? I am afraid that, despite Lord Irvine's view that this was a fairly simple provision, there lurked beneath it the potential for a fairly marked difference of approach to its application, depending on the disposition of the court that had to

³ [2004] 2 AC 323.

consider Strasbourg case-law. On the one hand, a court might take the view that the duty to strive to reach a decision consistent with decided European jurisprudence should be conscientiously, even if unwillingly, discharged. On the other hand, if I as a judge, did not especially like a particular trend of Strasbourg case-law, if I considered it inimical to or out of step with the common law or if I apprehended that it would create problems if translated to the domestic setting, I might well say, that's all very well; I have regard to Strasbourg case law but I do not have a great regard for where it has led and I am not going to follow it.

And I believe that it may very well have been apprehension that this latter approach could become widespread which underlay Lord Bingham's comments in *Ullah* about the nature of the obligation arising under section 2. The facts of that case are not material. But what Lord Bingham said at para 20 most certainly is. This is what he said:

“... the House is required by [UU s 2\(1\)](#) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [\[2001\] UKHL 23](#), [\[2003\] 2 AC 295](#), [\[2001\] 2 All ER 929](#), para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by s 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under s 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more

generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. *The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.*”

This passage gives rise to a number of deeply interesting questions, not all of them directly relevant to this evening’s talk. For instance, while, of course, it is for Strasbourg to provide the authoritative interpretation of the Convention, does it necessarily follow that *the content* of Convention rights must invariably and solely be prescribed by the ECtHR? And, even if the content of the right must be as determined by Strasbourg, does that mean that there can be no variation in the manner in which it is vindicated or finds expression in a particular member state of the Council of Europe? One obvious potential for diversity of application is in the area of proportionality. What may be deemed proportionate in one country may not be in another, depending on the economic and social conditions of each.

But, interesting though those topics are, as I have said, they are not directly germane to what I want to discuss tonight, so let me turn to the really critical question and, of course, it arises from the last sentence of the passage that I have quoted. What does the statement that “the duty of the national courts is to *keep pace* with Strasbourg” mean? Does it mean that we should not lag behind or does it mean that we should not stride ahead or does it mean both? Let us suppose that it means both and move on. The next question is the truly crucial one. Where Strasbourg has not taken a pace which would allow us to fall into step beside them, must we remain stationary?

I cannot believe that this is what Lord Bingham intended. The whole thrust of the earlier parts of the passage is that national courts must not weaken or dilute the effect of Strasbourg case-law. Lord Bingham was not concerned with the situation where Strasbourg had not yet pronounced. He was not addressing the question as to what a national court should – or, more pertinently, must - do when confronted by a claim to a Convention right where ECtHR had not dealt with a similar claim in the past. But, on one view, little by little, and case by case, his statement has been interpreted and developed and used as a justification and support for the proposition that, if Strasbourg has not spoken, it is not open to us to pronounce on a Convention right.

Let me say immediately that, although I have not found it possible to agree with it, the view that we should not anticipate Strasbourg has a plausible foundation. I recognise the argument that Convention rights should bear the same meaning throughout the Council of Europe and I also acknowledge the opinion, expressed by Lord Hope in the recent case of *Ambrose v Harris (Procurator Fiscal)*⁴, that Parliament did not intend to confer on the courts of this country the power to give a more generous scope to Convention rights than that found in the jurisprudence of the Strasbourg court. I do not agree with this proposition but I can at least understand why it might be said to be tenable.

As to the first of the arguments, if judicial decisions in our courts about the content of a Convention right had a distorting effect on its Council wide connotation, I agree that this might be a reason for reticence. But I do not believe that this will be the inevitable – or even the probable - consequence.

⁴ [2011] 1 WLR 2435

As Lord Irvine said in his lecture, 'A British Interpretation of Convention Rights', at the British Institute of International and Comparative Law, on 14 December⁵, domestic courts called upon to determine questions of high constitutional import must do so according to their understanding of our fundamental values and national interest. We should be astute to recognise the nature of that duty and we should not be slow to rise to its challenge. And we should certainly not be deterred from it by apprehension that we may be striking a discordant note. Our courts do not have power to bind the courts of any other member states of the Council of Europe or the Strasbourg court itself. A decision as to the content of a Convention right in UK does not, therefore, impose on, or require of, other countries in the Council of Europe any corresponding conclusion.

Of course, at a prosaic level, a decision as to the content of a Convention right, taken in the absence of any relevant Strasbourg jurisprudence, runs the risk that a contrary view may subsequently be expressed in ECtHR, but we are surely mature enough to regard that prospect with equanimity. The President of the ECtHR, Sir Nicolas Bratza, in a recent paper⁶, observed that a cautious approach minimised the risk of a domestic decision being the subject of a different conclusion by that court. But Sir Nicolas was quick to identify the disadvantages of an over deferential approach. He said that such a stance was destructive of effective dialogue between national courts and Strasbourg. Moreover, he was uncompromising in his view that it was right and

⁵ A lecture delivered under the auspices of the Bingham Centre hosted by UCL Judicial Institute at 6pm on Wednesday, 14 December 2011.

⁶ European Human Rights Law Review 2011 - The relationship between the UK courts and Strasbourg

positive that the national courts should sometimes consciously leap ahead of Strasbourg.

As it happens, I do not see this as a process of “leaping ahead”. Where a court of the UK is faced with a claim to a Convention right, it seems to me clear that it cannot refuse to examine its viability, simply because there is no relevant Strasbourg jurisprudence. As I said in *Ambrose* there are three reasons for this: the first practical, the second a matter of principle and the third the requirement of statute.

The practical reason is that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from ECtHR. It is simply not a practical option to adopt an attitude of agnosticism just because Strasbourg has not yet spoken.

The second reason, the reason of principle, is elementary. The Human Rights Act gives citizens of this country direct access to the rights which the Convention enshrines through their enforcement by our courts. It is therefore the duty of every court not only to ascertain “where the jurisprudence of the Strasbourg court clearly shows that it currently stands” (which is how Lord Hope characterised it in *Ambrose*); it is also, in my view, the court’s duty to resolve the question whether a claim to a Convention right is viable where there is no clear current view from Strasbourg to be seen. The duty to adjudicate on a claim to a Convention right cannot be extinguished or avoided by the fact that the jurisprudence of the ECtHR has so far failed to supply the answer.

The final reason, the statutory imperative, is also elementary. Section 6 of the Human Rights Act leaves no alternative to courts when called upon to adjudicate on claims to a Convention right. This section makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it.

By complying with that statutory injunction, the courts of this country do not leap ahead of Strasbourg. We may be stepping into what was hitherto unknown but, if that calls for courage, then we must be brave. And we must be brave, because, as I have said, we simply have no alternative.

How is it that we find ourselves debating the correctness of what I described (possibly wrongly, as it happens) in *Ambrose* as an “*Ullah-type reticence*”? I was perhaps wrong to describe it thus for I am, as I have said, convinced that Lord Bingham did not intend that what he said in *Ullah* should be taken as endorsing the notion that the courts of this country should feel inhibited from giving full effect to Convention rights unless they have been pronounced upon by Strasbourg. But, of course, as I have also said earlier, *Ullah* has been used in subsequent cases to underwrite the policy of reticence. Whatever may be the aptness of the phrase an *Ullah-type reticence*, there is clearly now a well articulated judicial view that to go further than Strasbourg has so far gone is impermissible. How did that view come to be formed?

The phrase, “clear and constant jurisprudence” seems to have made its first appearance in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*⁷, where Lord Slynn, having acknowledged that section 2 of HRA did not require that national courts consider themselves bound by Strasbourg decisions, said at para 26:

“In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights.”

The rubric, “clear and constant” was taken up by Lord Bingham in the passage from *Ullah* that I have already quoted. His by now well known aphorism that the “duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less” was given what I described as “a characteristically stylish twist” by Lord Brown in *R (Al-Skeini and others) v Secretary of State for Defence*⁸ where he said that the sentence “could as well have ended: ‘no less, but certainly no more.’” In explaining his suggested modification of Lord Bingham’s formula, Lord Brown said (at para 107):

“There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an Applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual *can* have the decision corrected in Strasbourg.”

⁷ [2001] UKHL 23, [2003] 2 AC 295

⁸ [2007] UKHL 26; [2008] 1 AC 153 at para 106

As a pragmatic approach, this might at first sight appear to have much to commend it but I respectfully suggest that it could not justify a court adopting a narrow construction of a Convention right, where there has been no relevant Strasbourg jurisprudence, simply because there remained the opportunity for a more generous interpretation by ECtHR at some later date. And, in fairness to Lord Brown, I do not understand him so to suggest. The answer, as a matter of principle, must surely be that the court must choose the interpretation that most closely accords with its reasoned view of the content of the Convention right. It should not be deflected from a “more generous” interpretation, if it considers that such an interpretation is the right one, solely because the matter can always be put right by Strasbourg.

The *Al-Skeini* case concerned the relatives of six Iraqi civilians killed as a result of British military action in Iraq. In the first five cases, the deceased had been shot in the course of operations. The sixth had been arrested and taken into custody at a British military base. He died there, allegedly as a result of torture by British soldiers. The claimants sought judicial review of the Secretary of State’s failure to conduct independent inquiries into or accept liability for their deaths. A central question was who, within the meaning of article 1 of the Convention, was to be regarded as “within [a contracting party's] jurisdiction” so as to require that state to “secure to [them] the rights and freedoms” defined in the Convention?

Lord Brown in para 107 of *Al-Skeini* suggested that the House of Lords should not construe article 1 of the Convention as reaching any further than the existing

Strasbourg jurisprudence clearly showed it to reach. And in *R (Smith) v Ministry of Defence and others*⁹ Lord Phillips at para 60 endorsed that approach. He said:

“We are here dealing with the scope of the Convention and exploring principles that apply to all contracting States. The contention that a State’s armed forces, by reason of their personal status, fall within the jurisdiction of the State for the purposes of article 1 is novel. I do not believe that the principles to be derived from the Strasbourg jurisprudence, conflicting as some of them are, clearly demonstrate that the contention is correct. The proper tribunal to resolve this issue is the Strasbourg Court itself, and it will have the opportunity to do so when it considers *Al-Skeini*.”

As it happens, of course, the Strasbourg court did indeed resolve the issue in *Al-Skeini* and it resolved it in favour of the claimants. But is it satisfactory to proceed in this way?

If a national court concludes that the Convention right does not extend as far as is contended for, plainly it should say so. But the absence of Strasbourg jurisprudence does not relieve the domestic court of its duty to confront the question of the content of the claimed right. While I do not suggest that courts in this jurisdiction have deliberately shied away from that duty, some judicial comments appear to betoken an attitude that, because this is a matter on which final authoritative guidance can only be obtained from Strasbourg, our courts’ duty to address the question of the extent of a disputed Convention right is in some sense mitigated or diluted. I could not accept that.

⁹ [2010] UKSC 29

Moreover, a reluctance to express a view and the effective handing over of the issue to the Strasbourg court would diminish the valuable dialogue that all (who have commented on it) are agreed should take place between ECtHR and national courts. In the paper by Sir Nicolas Bratza to which I have already referred, he paid particular tribute to the judgments of UK courts and the contribution that these had made to the development of Strasbourg case-law. This is what he said on this topic:

“... the Strasbourg Court has, in my perception, been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Human Rights Act and this [is] because of the very high quality of the judgments of these courts, which have greatly facilitated our task of adjudication. In many cases, the compelling reasoning and analysis of the relevant case-law by the national courts has formed the basis of the Strasbourg Court's own judgment.”

So there is every reason to expect that views on Convention rights expressed by our courts in advance of a decision in the relevant area by Strasbourg will be well received there. We should not be demure.

There seems to me also to be something of an inconsistency between, on the one hand, our current preparedness to question and indeed to refuse to follow decisions of the ECtHR, and, on the other hand, evincing a reluctance to reach an independent view where Strasbourg has yet to pronounce on a particular subject. It is entirely healthy that we should be ready to decline to be bound by decisions of ECtHR that we believe to be wrong. The Strasbourg court in the person of its President has expressly said so. It is equally healthy, in my opinion, that we should not feel ourselves constrained from forming our own judgment on a contested Convention right where

Strasbourg has not yet expressed a view. And we should be prepared to make that judgment forthrightly and to state it with clarity. After all, the decision of the House of Lords in *R v Horncastle*¹⁰ not to follow the judgment of the fourth section of ECtHR in *Al-Khawaja and Tahery v United Kingdom*¹¹, and, particularly, the explanation that Lord Phillips gave in *Horncastle* as to why it was considered that the decision of the fourth section was wrong were heavily influential in the Grand Chamber's decision to reverse the outcome in the *Al-Khawaja* case. There is no reason to suppose that a pre-emptive, properly reasoned opinion by our courts should not have the same effect. For a dialogue to be effective, both speakers should be prepared, when the occasion demands it, to utter the first word.

And, indeed, there are obvious examples from the past where our courts have been prepared to utter the first word. In *R (Limbuella) v Secretary of State for the Home Department*¹² the House of Lords held that article 3 of the Convention imposed a positive obligation which prevented the government from reducing asylum seekers to a state of destitution. It is widely acknowledged that that conclusion was not underpinned by any clear decision from Strasbourg. And in *R (G) (Adoption)*¹³ it was held that that a fixed rule which excluded unmarried couples from the process of being assessed as potential adoptive parents interfered with their article 8 and article 14 rights. In so finding, the House of Lords said that, given the developing state of its jurisprudence, it was *likely* that the European Court of Human Rights would hold that discrimination against a couple wishing to adopt a child on the ground that they were not married would violate article 14 of the Convention. The unmistakable implication

¹⁰ [2009] UKSC 14.

¹¹ (2009) 49 EHRR 1

¹² [2006] 1 AC 396

¹³ [2009] 1 AC 173

was that Strasbourg had not yet done so but the House of Lords was undeterred. Moreover, the Appellate Committee was clear in its view that it should not be inhibited, in any event, from going further than the European court had gone because a margin of appreciation was available to member states particularly in delicate areas of social policy. (Incidentally, the decision of the House of Lords in that case reversed that of a Court of Appeal in Northern Ireland in which I had given the lead judgment. A lesson to me to avoid timidity!)

Against the background of those decisions, how is that we have now arrived at a point where it is suggested that the national court's task is to identify where the jurisprudence of the Strasbourg court clearly shows that it currently stands and that we should not expand the scope of the Convention right further than the current jurisprudence of that court justifies? I have referred to the statements of Lord Brown in *Al-Skeini* and of Lord Phillips in *Smith*. These received further impetus in the decision of *Ambrose* to which I have also alluded. The majority in that case held that no rule could clearly be found in Strasbourg jurisprudence that police questioning of a suspect, who has not had access to legal advice, is unfair unless he is in custody. That conclusion appears to have at least played a part in the decision of the majority to dismiss the claim that interrogation should only be conducted after the suspect has been advised of his entitlement to legal advice. Just how significant a part that played, I shall discuss in a moment.

The forerunner of *Ambrose*, *Cadder v HM Advocate*¹⁴, had applied a decision of the ECtHR in *Salduz v Turkey*¹⁵ and had held that the Crown's reliance on admissions

¹⁴ [2010] UKSC 43

made by an accused without legal advice when detained under section 14 of the Criminal Procedure (Scotland) Act 1995 gave rise to a breach of his right to a fair trial.

So the issue in *Ambrose* was whether the fair trial right was breached if the suspect was questioned by police before being taken into custody. Lord Hope took the view that a decision by the Supreme Court that there was such a rule would have far-reaching consequences. For that reason he said that “if Strasbourg has not yet spoken clearly enough on this issue, the wiser course must surely be to wait until it has done so.” Lord Brown was of like mind. He said, “It would seem to me quite wrong for this court now to interpret article 6 of the Convention as laying down an absolute exclusory rule of evidence that goes any wider than Strasbourg has already clearly decided to be the case”. Lord Matthew Clarke agreed with Lord Hope that the unwelcome consequences that he foresaw for the recognition of such a rule prompted caution.

Regretfully, I found myself in disagreement with the majority on two counts. Firstly, I felt that the jurisprudence from Strasbourg was sufficiently clear to allow the following principle to be recognised: where a person becomes a suspect, questions thereafter put to him that are capable of producing inculpatory evidence constitute interrogation, as that expression is used in Strasbourg case-law. Before such interrogation may be lawfully undertaken, the suspect must be informed of his right to legal representation and if he wishes to have a lawyer present, questions must be asked of the suspect, whether or not he is in custody, in the presence of a lawyer.

¹⁵ (2008) 49 EHRR 421

Secondly, I concluded that it was the duty of every domestic court to resolve the question of whether a claim to a Convention right was viable or not, even where the jurisprudence of the Strasbourg court did not disclose a clear current view. The first area of disagreement is not relevant to tonight's discussion. The second is. But, having reflected on the disagreement between my colleagues and me on that second area, I am not now sure that there is quite the sharp divergence between us that initially I believed there to be. At least, I hope that there is not.

I have no objection to a mode of analysis which takes account of the fact that Strasbourg has not spoken, provided that this is by way of incidental observation or subsidiary reasoning, rather than being the sole basis for the decision to refuse to recognise the right. And, while this is not quite how the majority expressed themselves, their approach can perhaps be said to be consistent with that way of dealing with the question. I make that tentative claim because there can be detected in the judgments of my colleagues, particularly from their consideration of jurisprudence from America and Canada, clear indications that, irrespective of Strasbourg's silence, they did not consider that article 6 could have the breadth of application that was claimed for it. If the absence of Strasbourg jurisprudence on the point can be relegated to a subsidiary status, I would be much more comfortable with the decision.

And, on the subject of comfort, I derive some reassurance from the fact that Lord Dyson (after he had finished a painstaking dissection of my first conclusion) did not express complete disagreement with my second. He said that it was the court's duty to give effect to domestically enacted rights and at para 105 he observed that if it were

clear, whether from a consideration of the Strasbourg jurisprudence or otherwise, that the *Salduz* principle applied to statements made by suspects who are not detained, it would be our duty so to hold. I am perhaps over optimistic but I think that the use of the words, “or otherwise” signifies that Lord Dyson did not regard the absence of clear Strasbourg jurisprudence as necessarily determinative.

Both approaches (those of the majority and mine) can, I therefore believe, be accommodated by the recognition that the absence of clear Strasbourg jurisprudence will not alone supply the answer to whether a claimed Convention right has the content contended for.

Lord Dyson’s comment that it was the court’s duty to give effect to domestically enacted rights is a good departure point from this, what has been the main theme of my talk this evening, and prompts a return for a brief foray into the second, related topic, whether there is a role for the HRA to play in the development of a body of UK human rights law, which is not necessarily or directly linked to Strasbourg’s interpretation of Convention rights.

In the case *Re McKerr*¹⁶ in 2004 the House of Lords declared that “Convention rights” within the meaning of the 1998 Act were domestic and not international rights. In *G (Adoption)* the Appellate Committee took up this theme and at paras 33 and 34, Lord Hoffmann said this:

“... [Convention rights] are applicable in the domestic law of the United Kingdom and it is the duty of the

¹⁶ *McKerr, Re* [2004] UKHL 12, [2004] NI 212

courts to interpret them like any other statute. When section 6(1) [of HRA] says that it is unlawful for a public authority to act incompatibly with Convention rights, that means the domestic rights set out in the Schedule to the Act and reproducing the language of the international Convention.

34 In the interpretation of these domestic rights, the courts must "take into account" the decisions of the Strasbourg court. This language makes it clear that the United Kingdom courts are not bound by such decisions; *their first duty is to give effect to the domestic statute according to what they consider to be its proper meaning, even if its provisions are in the same language as the international instrument which is interpreted in Strasbourg.*" (emphasis added)

The status of the patriated Convention rights as domestic rights is, I believe, worthy of vigorous emphasis. They have been animated by a domestic statute. As Lord Hoffmann said, the primary duty of the national courts must therefore be to give effect to the rights that the domestic statute contains according to what the court considers is the proper meaning of the statute. Although regard should be had to Strasbourg jurisprudence, this is not the inevitable and ultimate source of all wisdom. The domestic rights which the statute provides for are rights which must find expression in a domestic setting. Ultimately, they are to be fashioned to meet the needs and standards of the citizens of this country. Although the language of the two instruments that embody the rights (the Convention and the Schedule to the Act) is the same, one must not lose sight of the fact that *there are two instruments*.

Strasbourg reaches its conclusions about the content of the rights on the supranational plane. Our courts consider those rights at the national level. It is therefore by no means inevitable that the conclusions reached by Strasbourg and our national courts will always coincide. We should recognise that, by the way Parliament has

structured the HRA, our courts have not been indissolubly tied to Strasbourg case-law. The opportunity exists for us to develop a brand and a body of human rights law which is different from the Strasbourg orthodoxy but which meets the needs of this country's citizens and reflects the standards that this country expects. Where those needs and those standards require it, that opportunity is also our obligation.

It is by reference to the HRA's structure that I must register my respectful disagreement with Lord Hope's view that Parliament did not intend to confer on the courts of this country the power to give a more generous scope to Convention rights than that found in the jurisprudence of the Strasbourg court. I am conscious (and am afflicted by a due sense of temerity) that in expressing my disagreement with so celebrated a jurist as Lord Hope, I must also accept that I am disagreeing with the iconic figure of Lord Bingham where he suggested in *Ullah* that "rights more generous than those guaranteed by the Convention ... should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it".

Let me try to explain, in however a halting and unconvincing manner, why I take a different view. By requiring of the courts of this country that we do no more (and no less) than have regard to Strasbourg jurisprudence, Parliament, it seems to me, must be taken to have recognised that, where appropriate, courts here would differ from Strasbourg. The scope that the courts have been given by Parliament is not necessarily more generous, but it is undoubtedly different. And by providing the charter of rights in a domestic dispensation, Parliament conferred on the courts a source for those rights that is distinct from the Convention and, on that account, when

occasion demands it, distinct from the Convention's court's perception of the content of the rights. Sometimes it may be more generous, on other occasions it may be more circumscribed. The scope available under HRA is not to be defined solely by reference to the jurisprudence of ECtHR.

Viewed in this way, it is not at all surprising that we have the recent history of disagreement between our courts and Strasbourg. Courteous and civilized disagreement, to be sure, but disagreement nevertheless. And it is entirely to be expected that there will be divergences of view in the future. We tend to forget that the relationship between our two institutions is still in its historical infancy. In the years ahead we will have much to say to each other and much, no doubt, to learn from each other. But the fundamentally important thing, as it seems to me, is that we should recognise that the two participants in the relationship operate from different perspectives.

In fact, on one view, it is remarkable that in the overwhelming percentage of cases, our conclusions are the same. Sir Nicolas Bratza gave some enlightening statistics in his article. In 2010 some 1,200 applications from the UK were considered by the Strasbourg Court. Of these 1,177 were declared inadmissible or struck out. Only 23--less than 3 per cent of the total--resulted in a judgment of the Court, several of which ended in findings of no violation, in other words, confirming the national court's determination.

In the recent past, there have been two high profile decisions of the Strasbourg court, one of which has excited much media comment. Criticism based on a superficial

consideration of the outcome of cases before ECtHR is easily voiced. Where the refutation of that criticism requires fairly close analysis of the reasoning underlying the impugned decisions it is not easy to present that in the sound bite way in which many media debates are conducted. I suggest, however, that both these cases, in their different ways, bear testament to ECtHR's responsiveness to national court decisions.

In the first of these, *Othman v United Kingdom*¹⁷, or as it is more commonly known, *Abu Qatada*, following hearings before the Special Immigration Appeals Commission (SIAC), the Court of Appeal and the House of Lords, Abu Qatada, a Jordanian national had been ordered to be deported to Jordan, there to stand trial (in fact re-trial for he had been earlier convicted after a trial *in absentia*) for a number of terrorist crimes. Abu Qatada had asserted that his deportation would involve breaches of his rights under articles 3, 5, 6 and 13 of ECHR. Although ECtHR differed from the conclusions of the House of Lords in relation to article 6, it did so on what I hope to demonstrate was a fairly narrow basis. More importantly in the context of this evening's discussion, it rejected Abu Qatada's complaints in relation to the other articles on essentially the same grounds as those adumbrated by SIAC and the House of Lords and drew heavily on the reasoning of both in formulating the reasons for the dismissal of those complaints.

In the House of Lords, Lord Phillips had encapsulated the reasons for the rejection of the complaint under article 6 in a short passage in para 154, as follows:

¹⁷ [2012] ECHR 8139/09

“The issue before SIAC was whether there were reasonable grounds for believing that if Mr Othman were deported to Jordan the criminal trial that he would there face would have defects of such significance as fundamentally to destroy the fairness of his trial or, as SIAC put it, to amount to a total denial of the right to a fair trial. SIAC concluded that the deficiencies that SIAC had identified did not meet that exacting test. I do not find that in reaching this conclusion SIAC erred in law.”

The Strasbourg court, in arriving at a different conclusion, summarised its reasons for doing so in this passage from para 267:

“... the Court considers that the admission of torture evidence is manifestly contrary, not just to the provisions of art 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial.”

Part of the reasoning underlying this part of the court’s decision was taken from the speech of Lord Bingham in *Re A (No 2)* where he said that torture evidence is excluded because it is “unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.”

And it seems to me, therefore, that so far from marking a significant difference of view between the courts of this country and ECtHR, *Abu Qatada* is notable for the convergence of reasoning in both – and, of course, the Strasbourg court specifically preferred the decision on article 6 of Buxton LJ in the Court of Appeal. In no sense can this be portrayed as the supra-national court interfering in the affairs of the

member state and ignoring or blandly overruling the national courts' judgments. Indeed, the most noteworthy aspect of the judgment in Strasbourg is its express and readily acknowledged reliance on judgments of the national courts – even on the point on which they differed from the House of Lords.

The second decision of ECtHR involved challenges under articles 3, 5(4) and 6 of the Convention by life sentenced prisoners, including Jeffrey Bamber, against the whole life tariffs that had been ordered in their cases. The decision is reported under the name *Vinter and others v UK*¹⁸. The complaints were rejected and, once again, there is unmistakable evidence in the Strasbourg court's judgment of direct reliance on the reasoning of the High Court which had rejected earlier challenges.

So there is, I believe, ample support for Sir Nicolas Bratza's claim that the relationship between the Supreme Court and the Strasbourg Court is sound and solid. There is no question of the one being the modest underworker of the other. And there is no reason to suppose that disagreements in approach, past or future, will put that solid relationship under intolerable strain. The Supreme Court in *Horncastle* has shown how it is possible by patient explanation to secure a change of view. Likewise, decisions of the Strasbourg court in cases such as *S and Marper v United Kingdom*¹⁹ have led to a change of direction on the part of the highest domestic court. These exchanges are not the product of a seigneurial imparting of wisdom on the part of either participant. They represent a conscientious mutual striving to fulfil the common aim of providing for the societies we serve the civilised human rights standards to which we all aspire.

¹⁸ [2012] ECHR 66069/09

In *Secretary of State for the Home Department v AF and others*²⁰ the late and much lamented Lord Rodger might be supposed to have been slightly less than wildly enthusiastic about the effect of the decision in Strasbourg in *A v UK*²¹ on the decision that the House of Lords felt forced to reach in *AF* when he said:

“Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice:
Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.”

Now that the Supreme Court has paved the way by its decision in *Horncastle*, but without suggesting that the result in *AF* would be any different, I propose that the final words of that wonderful judgment might now be amended to read,

“*Argentoratum locutum, nunc est nobis loquendum*”²² – Strasbourg has spoken, now it is our time to speak.

¹⁹ (2009) 48 E.H.R.R. 50

²⁰ [2009] UKHL 28

²¹ Application no 3455/05.

²² I am grateful to Hugh Flanagan, my judicial assistant in 2010/2011, and classics scholar, for this translation