

The Bingham Centre for the Rule of Law

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

This is the first time that Lord Irvine, architect of the Human Rights Act, has publicly commented on his intent behind section 2, and its subsequent interpretation.

A BRITISH INTERPRETATION OF CONVENTION RIGHTS¹

by Lord Irvine of Lairg

This Lecture is given under the auspices of the Bingham Centre for the Rule of Law, represented this evening by Sir Jeffrey Jowell QC and is hosted by the UCL Judicial Institute, in the person of Dame Hazel Genn QC. I am most grateful to both organisations.

The hostility towards human rights and the Human Rights Act 1998 (“**the HRA**”) within some sections of the press, and their very mixed record of reporting on these issues, impels me, for the avoidance of any possible misunderstanding, to reaffirm my unswerving support both for the international system of human rights protection that the European Convention on Human Rights (“**the ECHR**”) provides and for the provisions of the HRA under which our own Judges protect those rights in domestic law.

This Lecture will invite our Supreme Court to re-assess all its previous statements about the stance it should adopt in relation to the jurisprudence of the ECHR. My objectives are:

- (a) to ensure that the Supreme Court develops the jurisdiction under the HRA that Parliament intended;
- (b) that, in so doing, it should have considered and respectful regard for decisions of the ECHR, but neither be bound nor hamstrung by that case-law in determining Convention rights domestically;

that, ultimately, it should decide the cases before it for itself;

- (d) that if, in so doing, it departs from a decision or body of jurisprudence of the ECHR it should do so on the basis that the resolution of the resultant conflict must take effect at State, not judicial, level; and
- (e) by so proceeding, enhance public respect for our British HRA and the development and protection of human rights by our own Courts in Britain.

Section 2(1) of the HRA directs the domestic Courts how they are to treat decisions of the Strasbourg Court when interpreting and giving effect to the ‘Convention rights’ domestically.

¹ I am grateful to Joseph Barrett, of 11 King’s Bench Walk Chambers, for his assistance in preparing this Lecture.

This provision is fundamental to the pivotal new relationships which the Act establishes between our domestic Courts, Parliament and the ECHR. A proper understanding of what the carefully chosen language of s.2(1) requires is essential to an appreciation of the Constitutional nature of the HRA and the adjudicative task which our Courts perform under the Act.

Section 2(1) provides:

“(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 terms of this provision are simple. It is surprising that they have given rise to any significant difficulties of interpretation. What the provision says, in terms, is that whenever a Court determines a question connected with a ‘Convention right’² it must “take into account”, amongst other things, any judgment of the ECHR that it considers relevant to the proceedings.

The part of this provision which has proved most controversial, is the phrase “take into account”. This would surprise the man in the street. Having to take something into account is a common experience in many different contexts. It can be paraphrased as ‘have regard to’, ‘consider’, ‘treat as relevant’ or ‘bear in mind’.

The complexity which the simple language of s.2(1) masks is the weight which the domestic Court is entitled (and indeed obliged) to give to a judgment of the ECHR when it decides for itself what the Convention rights require in domestic law. This raises two inter-linked questions:

- (1) If there is a decision of the ECHR which is clearly relevant, and (at least potentially) dispositive is a UK Court obliged to follow that decision? Or, does it have the right (or indeed is it obliged) to reach its own view of what fundamental human rights require, and (if appropriate) reject the conclusions of the Strasbourg Court?
- (2) If a question concerning Convention rights arises where the ECHR has not yet addressed itself to the issue, or where its jurisprudence remains nascent, what is the role of the UK Court? Can it ‘leap beyond’ the Strasbourg jurisprudence, determining the case according to its interpretation of the fundamental values which the ECHR and the HRA are designed to protect? Or, is it limited to giving loyal effect only to those principles which the Strasbourg Court has unequivocally established?

The answers to these questions define the domestic Courts’ relationship with Parliament and the Strasbourg Court. They also define the nature of the role which the Court is performing when adjudicating under the HRA. What precisely is it that our domestic Courts are doing when adjudicating under the HRA? Are they merely seeking to predict and mimic what the decision of the Strasbourg Court would be if presented with the facts of the case before them – in effect, are they simply agents or delegates of the ECHR ? Or are they doing something quite different (and more profound) – interpreting and explaining the content and meaning of the Convention rights within the sovereign legal systems of the United Kingdom?

Section 4 of the HRA (which provides for the domestic Courts to issue a Declaration of Incompatibility, notifying Parliament of their view that a provision of primary legislation is incompatible with the Convention rights) is best known as the cardinal provision of the Act

² Meaning one of the textual guarantees taken from the European Convention on Human Rights and incorporated in the HRA.

which explicitly preserves the principle of Parliamentary sovereignty³. However, s.2(1) is equally important in understanding the nature of the new powers (and responsibilities) conferred on our Courts by the HRA.

The starting point is the language. 'Take account of' is not the same as 'follow', 'give effect to' or 'be bound by'. Parliament, if it had wished, could have used any of these formulations.

It did not. The meaning of the provision is clear. The Judges are not bound to follow the Strasbourg Court: they must decide the case for themselves.

This interpretation is confirmed by the Parliamentary and legislative history. In the House of Lords, the late Lord Kingsland from the Opposition Front Bench moved an amendment to change the wording of s.2 so that the domestic Courts would be bound to follow Strasbourg. That amendment was rejected. Moreover, both the White Paper which preceded the Act and the Parliamentary debates are replete with statements affirming that s.2 does not bind a UK Court to follow a decision of the ECHR⁴.

The structure of the HRA draws an important contrast between the domestic Courts' relationship with Parliament, on the one hand, and with the Strasbourg Court, on the other. Section 4 recognises and gives effect to Parliament's supremacy. If the domestic Court considers that an Act of Parliament cannot be 'read down' to make it comply with *its* interpretation of the Convention rights then its only power is to issue a Declaration of Incompatibility⁵.

It is then a matter for Parliament to determine what, if any, action is appropriate to address the issue which the domestic Court has identified. Parliament, if it deems it necessary, can legislate in a manner which is inconsistent with the Courts' view of what the Convention rights require. If Parliament expresses its will in clear terms then the domestic Courts remain bound to give effect to its intention.

This can be contrasted sharply with the carefully chosen language of s.2(1). Decisions of the Strasbourg Court need only be 'taken into account'. Parliament's endorsement of this language means that it is simply untenable to suggest that the Judges are *entitled* to treat themselves as bound by decisions of the Strasbourg Court. It is Parliament, and not the Strasbourg Court, which is supreme. When introducing the Human Rights Bill to Parliament, I said:

*"[the HRA] will allow British judges for the first time to make their own distinctive contribution to the development of human rights in Europe."*⁶

The Parliamentary record confirms that this was understood by the Judges. The late Lord Bingham said⁷:

"it seems to me highly desirable that we in the United Kingdom should help to mould the law by which we are governed in this area ... British judges have a significant contribution to make in the development of the law of human rights. It is a contribution which so far we have not been permitted to make"

³ Other provisions of the HRA are also of critical importance in this regard, in particular s.6(2)(b) (which provides a defence for public authorities against HRA claims when they are acting pursuant to primary legislation that cannot be 'read-down' under s.3).

⁴ See e.g. Hansard, HL, Vol 585, col 755 (5 February 1998); Vol 582, col 1228 (3 November 1997); Vol 583, cols 511-515 (8 November 1997); Vol 584, cols 1270-1271. See also Rights Brought Home: The Human Rights Bill, CM 3782, October 1997 at paras 1.14, 2.4 and 2.5.

⁵ See s.4, HRA.

⁶ Hansard HL, 3 November 1997, col 1227.

⁷ Hansard, HL vol 582, col 1245 (3 November 1997).

Yet, this is not how the domestic Courts have interpreted the requirements of s.2(1) in practice. While there are variations of approach between different cases and Judges, the domestic Courts have strayed considerably from giving effect to Parliament's intention as expressed in s.2. They have done so by proceeding on the false premise that they are bound (or as good as bound) to follow any clear decision of the ECHR which is relevant to a case before them.

The genesis of this can be traced to the speech of Lord Slynn in **R (Alconbury)**⁸ in which the claimant challenged the compatibility of the Secretary of State's power to call in and determine planning applications with Article 6 of the ECHR. Addressing himself to s.2(1), Lord Slynn said:

"...Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. 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. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence." (emphasis added)

Lord Slynn's dictum imposes an unwarranted gloss on the statutory wording. What seems to be contemplated is that, subject to some sort of exceptionality qualification, the domestic Courts are bound to follow Strasbourg. This is plainly not what s.2(1) says. The report of the case does not indicate that the House had any extended argument on the proper interpretation of s.2(1).

The starkest example of this approach is **AF v Secretary of State for the Home Department**⁹. There, the House had to determine how to respond to the Grand Chamber's very recent judgment in **A v UK**¹⁰, where it held that Article 6 imposed an absolute requirement that a terrorist suspect (rather than a Court appointed special advocate) be informed of the 'gist' or essence of the case against him. The House unanimously allowed the appeal, and in doing so clearly proceeded on the premise that it was obliged to do so. Lord Hoffmann, a not uncritical supporter of the Strasbourg Court¹¹, said:

"A v United Kingdom requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit. It is true that section 2(1)(a) of the Human Rights Act 1998 requires us only to "take into account" decisions of the ECHR. As a matter of our domestic law, we could take the decision in A v United Kingdom into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so." (emphasis added)

The late Lord Rodger put it even more shortly (and, typically, in Latin):

"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."

I beg to differ. Section 2 of the HRA means that the domestic Court *always has a choice*. Further, not only is the domestic Court *entitled* to make the choice, its statutory duty under

⁸ **v Secretary of State for the Environment, Transport and the Regions** [2003] 2 AC 295 at §26.

⁹ [2009] 3 WLR 74.

¹⁰ Application no 3455/05.

¹¹ The Universality of Human Rights, 19 March 2009.

s.2 *obliges* it to confront the question whether or not the relevant decision of the ECHR is sound in principle and should be given effect domestically. Simply put, the domestic Court must decide the case for itself.

A more nuanced approach, which allows for some possibility of the domestic Court declining to follow Strasbourg in certain (relatively narrowly defined) circumstances, is provided in the judgment of Lord Neuberger (on behalf of a unanimous nine Justice Supreme Court) in ***Pinnock v Manchester City Council***¹²:

“This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law...Of course, we should usually follow a clear and constant line of decisions by the European court: R (Ullah)..But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in Doherty...section 2 of the 1998 Act requires our courts to “take into account”

European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.” (emphasis added)

Pinnock was the culmination of the notorious line of cases¹³ in which the House of Lords initially resisted, but eventually submitted to, the ECHR’s insistence that Article 8 (the right to respect for private life) required that before any public sector tenant could be evicted the tenant must have the opportunity of having an independent and impartial court consider the case and determine whether the eviction is ‘proportionate’. ***Pinnock*** held that the Strasbourg Court’s requirement must be met even where Parliament had established a tenancy regime which was specifically intended to provide for an expedited eviction procedure in order to protect the rights of those in greater need of the public sector accommodation and the rights of neighbours not to be subjected to anti-social behaviour.

There is no magic in the mantra ‘clear and constant line of jurisprudence’. The phrase has no statutory warrant in the HRA and is not a term of art. It derives from Lord Slynn’s judgment in ***Alconbury***. Obviously, if a principle or holding has been repeatedly endorsed by the ECHR in its judgments then it will be all the clearer that it represents that Court’s considered view of what the Convention requires. However, it must be equally obvious that the fact the ECHR has repeatedly endorsed a particular proposition does not through some process of alchemy transform the nature of the domestic Court’s duty under s.2(1). That obligation is ‘to take into account’. This does not change, irrespective of how many times the Strasbourg

Court may repeat itself. This is unsurprising. Why, after all, would Parliament direct our Courts to follow what may in their view, on proper analysis, be no more than an extended repetition of error?

If the ECHR has overlooked or misunderstood some important fact, argument or point of principle then the domestic Court should not regard itself as bound to follow it. This is obviously correct and uncontroversial. Well-known examples of this type of case concern the law of negligence and court martial¹⁴.

¹² [2010] 3 WLR 1441 at §48.

¹³ ***Qazi v Harrow LBC*** [2004] 1 AC 983; ***Kay v Lambeth LBC*** [2006] 2 AC 465; ***Doherty v Birmingham City Council*** [2009] 1 AC 367; ***Kay v United Kingdom*** (37341/06) [2011] HLR 2.

¹⁴ ***Cooper v UK*** (48843/99) (2004) 39 EHRR 8; ***R v Spear (John)*** [2002] UKHL 31; ***Morris v UK*** (38784/97) (2002) 34 EHRR 52; ***Osman v UK*** (2000) 29 EHRR 245; ***Z v UK*** (29392/95) (2002) 34 EHRR 3.

Where Strasbourg has not yet spoken its final word and the domestic Court wishes to urge it to reconsider the issue or have regard to matters which have previously not been given sufficient attention, it may ask Strasbourg to revisit the question. The most striking example is the Supreme Court's recent unanimous judgment in **R v Horncastle**¹⁵, where it effectively asked the Grand Chamber to reconsider the Fourth Section's previous judgment in **Al-Khawaja v UK**¹⁶ (which held that Article 6 requires as an absolute rule that no conviction can be based solely or to a decisive extent on hearsay evidence, even where the accused has successfully intimidated the primary witness or the witness has died¹⁷).

Lord Neuberger suggests that even where there is a clear and constant line of Strasbourg jurisprudence it may not be followed if it is 'inconsistent with some fundamental feature of our [domestic] law'. This raises the question of substance: when Strasbourg has clearly spoken must (or should) the domestic Court bend the knee, irrespective of how misconceived it considers Strasbourg's reasoning to be ?

Pinnock suggests that unless the domestic Court can point to some obvious objective error or identify some *fundamental* feature of domestic law which is transgressed, the answer is yes. It is said that it would be 'wrong' not to do so. But, whilst obviously straining against the limitations imposed by prior authority, even this approach proceeds on the incorrect basis that s.2 directs the domestic courts to follow Strasbourg, absent some exceptional circumstance.

Lord Neuberger does not explain why he considers that it would be 'wrong' for the domestic Court to decide not to follow Strasbourg. Three reasons, however, are typically offered by proponents of this position.

First, it is said that Parliament's intention in enacting the HRA was to 'bring rights home' and ensure that any claimant who would succeed in Strasbourg would have a remedy in the domestic courts. The UK Court must therefore 'mirror' the judgment which the ECHR would give in the case.

Certainly, the intention of Parliament was that the 'Convention rights', that is those rights incorporated in the text of the HRA, be enacted in domestic law so that they would be enforceable before our Courts. However, this simply begs the questions of by whom and in what manner these rights are to be interpreted and applied domestically. I repeat that it is plain that Parliament intended that the interpretative exercise was a task for the domestic Courts, and that they are not bound by Strasbourg's views. As Lord Scott observed in **R (Animal Defenders International) v Secretary of State for Culture, Media and Sport**¹⁸: "[t]he possibility of such a divergence is contemplated, implicitly at least, by the 1998 Act."

I would add only that the implication is one which is very clear.

Second, Article 46 of the ECHR provides that "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are a party". Thus, so it is said, the domestic Court must not place the UK in breach of its international obligations by consciously departing from what the Strasbourg Court has held the Convention to require.

This is a substantial argument. It is no small thing for the UK *qua* sovereign state not to comply with international law obligations which it has freely accepted under a multilateral treaty. It is clear that this concern has weighed heavily with the Judges. It was of great significance to Lord Hoffmann's decision in **AF** that he must treat himself as bound to follow

¹⁵ [2009] UKSC 14.

¹⁶ (26766/05 and 22228/06) (2009) 49 EHRR 1.

¹⁷ The Grand Chamber of the ECHR heard argument in **Al-Khawaja** in 19 May 2010 and its judgment currently remains pending.

¹⁸ [2008] 1 AC 1312 at §44.

the Strasbourg Court, although he believed its decision to be wrong and damaging to our national interest.

My own view is that excessive preoccupation with this consideration has led the Courts into error. A Judge's concern for the UK's foreign policy and its standing in international relations can never justify disregarding the clear statutory direction which s.2 of the HRA provides.

It goes without saying that a recent and closely analogous decision of the Grand Chamber should always be afforded great respect by our Courts. Such a judgment would inevitably be regarded as highly persuasive in interpreting the content of the Convention rights as a matter of domestic law. However, the existence of such a decision can never absolve the domestic Judge from the high Constitutional responsibility incumbent upon him under s.2. He must decide the case for himself and it is not open to him simply to acquiesce to Strasbourg.

A number of the Judges in **AF** profoundly disagreed with the decision of the ECHR and believed that it fundamentally failed to strike the right balance between the Article 6 rights of the terrorist suspects and the Article 2 and 3 rights of the potential victims of any terrorist atrocity. If that disagreement and their estimation of its likely adverse consequences for the national security of the UK were serious enough, then under s.2 the Judges were not obliged to follow, and should not have followed, the Strasbourg Court's decision. This point is of foundational importance. It would strike at the very heart of the integrity of our Courts if the HRA obliged them to declare our law to be something which they regard as fundamentally unsound in principle and damaging to the interests of the people of Britain simply because of the latest decision of the Strasbourg Court¹⁹. Section 2 emphatically does *not* impose upon our Judges so invidious an obligation.

It cannot be assumed that such differences of view between our Courts and Strasbourg about how the balance is to be struck between competing fundamental rights will necessarily be rare. Recently there has been a proliferation of important cases in which the Strasbourg Court has rejected the balance struck by our own Courts. Notable recent examples of unanimous decisions of the House of Lords which have been rejected by the Strasbourg Court include **Marper v UK**²⁰ (retention of DNA samples in the absence of criminal conviction) and **Gillan and Quinton v UK**²¹ (prevention of terrorism stop and search powers without demonstrating grounds for reasonable suspicion).

In **Marper**, the House unanimously concluded that the indefinite retention of DNA samples obtained from those suspected of committing a criminal offence was a justified interference with the right to respect for privacy under Article 8. The House's conclusion was based upon the fact that mere retention of personal DNA data did not directly harm or prejudice the subject and the great benefits which a comprehensive national data base offered both in detecting and apprehending criminals and exonerating those wrongly accused of involvement. The ECHR viewed the matter differently, holding that the indefinite retention of DNA samples in respect of those not convicted of criminal offences was disproportionate. Some of the reasoning employed in support of this conclusion was surprising, not least the assertion that (unidentified, and entirely speculative) future developments in technology (perhaps of the type commonly encountered in works of science fiction) could be relied upon to demonstrate that the degree of the interference with Article 8 rights was substantially greater than the House of Lords had suggested²².

Gillan concerned anti-terrorism powers given to the police to designate certain areas, in which there was deemed to be a heightened risk of terrorist attack, so that police officers could conduct stop and search operations without needing to establish grounds for

¹⁹ Which is currently producing in the region of 2000 judgments, of varying quality and coherence, per year.

²⁰ (30562/04 and 30566/04) (2009) 48 EHRR 50.

²¹ (4158/05) (2010) 50 EHRR 45.

²² at §71.

'reasonable suspicion'. The House held unanimously that any interference with Article 8 rights was a proportionate means of achieving a legitimate aim i.e. protecting the citizens of the UK from the risk of terrorist atrocity. Lord Bingham cited eleven safeguards provided in the legislative scheme and our domestic law that guarded against the risk of the police abusing their power²³. The ECHR reached the opposite view, asserting that the requirement to comply with (even a relatively superficial) police search was an *exceptionally* serious interference with Article 8 rights and that none of the safeguards identified by Lord Bingham were sufficient to render the operation of the power 'in accordance with law'.

These differences in outcome have arisen because of the different *weights* which our domestic Courts and the ECHR place on the vital interests at stake. The implications of the difference of approach in *Marper* have been pithily summarised by Lady Hale²⁴:

"Rape victims and people wrongly suspected of rape would surely prefer [the Supreme Court's] approach, although rapists would surely prefer the approach in Strasbourg."

Parliament contemplated that the domestic Courts would not follow Strasbourg in all cases. In doing so it implicitly approved the domestic Courts reaching an outcome which might result in non-compliance with the UK's Treaty obligations. The Judges should not abstain from deciding the case for themselves simply because it *may* cause difficulties for the UK on the international law plane.

When the dualist nature of the UK's legal system and the sharp distinction between domestic law and public international law obligations is appreciated this is unsurprising. Treaty obligations only bind the State as an actor in public international law. They are not directly incorporated in, or enforceable under, our domestic legal system. Absent the HRA, no claim could be brought in our Courts because an individual alleges that his Convention rights have been breached. Treaty obligations bind the UK only because the UK *qua* State has consented to it. If the UK does not comply with its obligations then the consequences which *may* follow are a matter of international relations, and inter-State diplomacy.

It is the UK as a State, and in particular Parliament, which are principally responsible for the UK's compliance with its Treaty obligations. If Parliament considers that a decision of our domestic Courts is inconsistent with the UK's Treaty obligations then it can legislate to remedy that situation. An example of Parliament doing precisely that is provided by the swift legislative response²⁵ to *YL v Birmingham District Council*²⁶, where the House of Lords held by a majority²⁷ (in my view incorrectly²⁸) that care homes for the elderly were not public authorities and so not obliged under the HRA to protect the human rights of their aged and vulnerable residents.

It is not the Courts' function under the HRA to determine cases of high Constitutional importance, with far-reaching consequences for our democracy and the citizens of the UK, on the basis of their view of the importance of the UK's standing as a good global citizen. That is an issue far better left to the Foreign and Commonwealth Office and Parliament. The consequence of the domestic Courts not following a judgment of the Strasbourg Court is that, if Government and Parliament consider it appropriate, then they can legislate to reverse the position.

If this does not occur, however, then an application *may* follow to the ECHR. Depending on

²³ at §14.

²⁴ Salford Human Rights Conference 2010, 4 June 2010.

²⁵ Health and Social Care Act 2008, s.145.

²⁶ [2008] 1 AC 95.

²⁷ Lords Neuberger, Mance and Carsewell (Lord Bingham and Lady Hale dissenting).

²⁸ The reasoning of the majority places undue emphasis on the fact that the care home provider was a privately owned company engaging in the provision of public services for profit; as opposed to the intrinsic nature of the services being provided and the legal powers and duties being exercised

its view of the merits of the UK Courts' decision, the ECHR may (or may not) hold that UK domestic law is not compliant with the requirements of the Convention. At this stage, the UK *qua* State may either determine what steps are necessary to remedy the identified breach of its Treaty obligations or, in what would probably be a very rare case, decide that the UK's pressing national interest means that the judgment of the ECHR should not be implemented.

Importantly, it is the Council of Ministers of the CoE which is primarily responsible for the execution of ECHR judgments and determining whether the steps taken to implement Strasbourg judgments are adequate. Any implementation action is consequently a matter for political decision within the CoE and is not of a judicial character²⁹. This is a forum in which diplomacy and statecraft can be brought to bear in order to ensure that the Government's and Parliament's views are fully incorporated in the eventual response to any adverse judgment. It follows that I deprecate an approach to adjudication on the part of our domestic judges which short-circuits or pre-empts this process.

Third, it is said that a decision by the domestic Court to decline to follow Strasbourg may create a bad example for other less enlightened CoE member states, whom the UK would wish to abide faithfully by all of the ECHR's judgments, without exception or qualification.

This plainly is of importance, but again essentially involves the domestic Courts straying into questions of foreign relations and statecraft. The UK *qua* State may well regard the continued institutional legitimacy and good reputation of the ECHR as a matter of considerable importance, not least because of the persuasive influence which Strasbourg may have upon CoE member states that do not provide the same high level of human rights protection enjoyed in the UK. However, this cannot justify the Supreme Court treating itself as bound by the Strasbourg jurisprudence. To the extent that it is legitimate for our Courts to have any regard to this consideration at all under s.2, their duty is entirely satisfied by giving considered and respectful regard to any relevant ECHR judgment.

There is a further cultural point. This is the importance of our Judges' own perceptions, conscious or unconscious, of the relationship between our Courts and Strasbourg. Our Judges are steeped in a system of binding precedent and a linear judicial hierarchy. The Court of Appeal loyally follows the judgments of the House of Lords (now Supreme Court) and the High Court is bound by the Court of Appeal etc. This paradigm has exerted a powerful, unstated, influence over our Courts' approach to s.2(1) and decisions of the

Strasbourg Court. Many of our Judges have all too easily slipped into the mind-set that the domestic Courts, even the Supreme Court, are effectively subordinate (in a vertical relationship) to the ECHR.

Moreover, there are major advantages in our domestic Courts' adopting a more critical approach to the Strasbourg jurisprudence.

It is our own Judges who are embedded in our culture and society and so are best placed to strike the types of balance between the often competing rights and interests which adjudication under the HRA requires. Put shortly, more often than not we should trust our own judges to reach a 'better' answer.

In terms of fostering a 'dialogue' with Strasbourg about the development of its own case-law, the standing of our Courts is likely to be enhanced if their position is more rather than less assertive. A Court which subordinates itself to follow another's rulings cannot enter into a dialogue with its superior in any meaningful sense. Importantly, this will influence

²⁹ See for example, the current debate concerning execution of the ECHR's controversial judgments in *Hirst v UK* (74025/01) (2006) 42 EHRR 41 and *MT and Greens v UK* (60041/08) (2011) 53 EHRR 21. If nothing else, these cases demonstrate that Parliament remains Sovereign and is free to determine whether any judgment of the Strasbourg Court should be implemented, and if so, in what manner.

Strasbourg's approach to decisions of our Supreme Court. If Strasbourg always proceeds secure in the knowledge that our Judges will inevitably "roll-over", we should not be at all surprised if we find ourselves being "rolled over" with increasing regularity. An appropriately critical, but respectful, approach on the part of our own Courts will have positive influence in encouraging Strasbourg to observe the appropriate limitations inherent in its own role, and to respect the State's margin of appreciation.

This approach would enhance our Courts' own institutional prestige and credibility domestically, both with the man in the street and Parliament. The domestic Court must act, and be seen to act, as an autonomous institution which determines cases of high Constitutional import according to *its* interpretation of our fundamental values and national interest. It would be damaging for our Courts' own legitimacy and credibility if they are perceived as merely agents or delegates of the ECHR and Council of Europe ("CoE"). A perception that our Judges regard it as their primary duty to give effect to the policy preferences of the Strasbourg Court should not be allowed to take root, since this would gravely undermine, not enhance, respect for domestic and international human rights principles in the UK. This risk can be obviated by holding fast to the obvious intention of s.2(1).

In short, there is much to gain from our Courts re-appraising their stance on this issue, and potentially much to lose if they persist on their current path. There are some encouraging signs. In *R (Animal Defenders)*³⁰ the House declined to follow a judgment of the ECHR which would have required the abandonment of the UK's strict rules on media neutrality prior to elections. This is a valuable example of our Courts exhibiting resolve. However, in that case the relevant ECHR decision did not involve the UK and was only a Chamber-level judgment.

The recent approach of the Supreme Court in *Horncastle* is also to be welcomed. Interestingly, the President of the ECHR has hinted that the Supreme Court's new assertiveness may, on this occasion at least, reap dividends³¹.

However, we have not yet been called upon to grasp the nettle. What if the Strasbourg Court were to prove deaf to the Supreme Court's entreaties in *Horncastle*, or if it issues further judgments which our Courts conclude strike the wrong balance between fundamental rights? This is not a fanciful prospect. Indeed, precisely this prospect was foreshadowed in the recent evidence given before the Parliamentary Joint Committee on Human Rights by the Lord Chief Justice and the President of the Supreme Court³². Judgment in *Al-Khawaja* cannot be deferred by the Strasbourg Court indefinitely, not least because of the uncertainty which is perpetuated in the interregnum; and if Sir Nicholas Bratza's recent expression of optimism proves misplaced then our Courts will soon have to confront this issue directly. I believe that judgment in *Al-Khawaja* will be delivered tomorrow – unfortunately a day too late for me to comment.

Should that moment come, s.2 of the HRA provides that the domestic Court must make the decision for itself. If it considers that the Strasbourg Court is wrong then it must say so. That, no more and no less, is the constitutional duty which Parliament has imposed upon it. If our domestic Courts do take this step, then they will not lack support within Government or Parliament.

Thus far I have been addressing the first question I posed at the outset of this Lecture: essentially, is our Supreme Court bound by Strasbourg's decisions? I now turn to the second, related but different, question: where there is no Strasbourg decision in point may

³⁰ *v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312.

³¹ Sir Nicholas Bratza, *The Relationship between the UK Courts and Strasbourg*, 2011 EHRLR 505.

³² Transcript of Uncorrected Oral Evidence, To be published as HC 873-ii.

our Courts “leap beyond” the existing Strasbourg jurisprudence and decide the case for themselves?

What turns on the answer to this question is whether my statement in introducing the Human Rights Bill to Parliament that “the HRA will allow British judges for the first time to make their own distinctive contribution to Human Rights in Europe” and Lord Bingham’s statement in the same Debate that British judges should be enabled by the HRA “to mould the law by which we are governed in this area”, hold good.

Alconbury was decided in 2003, **R (Ullah) v Special Adjudicator**³³ in 2004. **Alconbury** was the source of the proposition that ‘in the absence of some special circumstances’ we should follow any ‘clear and constant jurisprudence of the ECHR’. Lord Bingham in **Ullah** addressed this proposition and declared that it:

“...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 section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law...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” (emphasis added)

This is the prevailing orthodoxy amongst the Judges – that s.2 directs them to do no more than faithfully apply clear decisions that the Strasbourg Court has already made. This is the so-called ‘mirror’ principle. The enervating effect of this reasoning is captured by Lord Brown’s well known reworking of Lord Bingham’s dictum in **R (Al-Skeini)**³⁴ in 2008:

“Lord Bingham made two further points... whilst member states can of course legislate so as to provide for rights more generous than those guaranteed by the Convention, national courts should not interpret the Convention to achieve this: the Convention must bear the same meaning for all states party to it. Para 20 ends: “The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less...I would respectfully suggest that the last sentence could as well have ended: “no less, but certainly no more...” (emphasis added)

In practice, this self-abnegating stance means that our domestic Courts regard any claim which relies upon Convention rights as bound to fail unless the claimant can point to a ‘clear and constant’ line of Strasbourg jurisprudence which vindicates his case.

A particularly troubling example of this approach is provided by the Supreme Court’s very recent decision in **Ambrose v Harris (Procurator Fiscal)**³⁵. **Ambrose** arose out of the Supreme Court’s previous decision in **HMA v Cadder**³⁶ where, applying the judgment of the Grand Chamber in **Salduz v Turkey**³⁷, it held that Article 6 required that a criminal suspect must have access to legal advice before being interrogated at a police station. Prior to the **Cadder** judgment, Scots law, unlike English law, had provided no such procedural guarantee.

The issue in **Ambrose** was whether the Article 6 analysis in **Salduz** and **Cadder** meant that the same approach must follow in respect of interrogations conducted *before* the suspect

³³ [2004] 2 AC 323.

³⁴ **v Secretary of State for Defence** [2008] 1 AC 153.

³⁵ [2011] 1 WLR 2435.

³⁶ [2010] 1 WLR 2601.

³⁷ (36391/02) (2009) 49 EHRR 19

was taken to a police station for interview. The Supreme Court held by a 4-1 majority that it did not. However, the Court did not reach this conclusion based upon a careful assessment of the considerations weighing for and against such an extension of the right of access to legal advice to these new circumstances (notwithstanding that all of the judgements acknowledge the various principled arguments and policy consideration that could be deployed on both sides of the debate). Rather, the *essential* reasoning of the majority was that because Strasbourg had not yet considered such a factual situation, with an accused person being interrogated before being taken to a police station, the claim could not succeed. In his leading judgment, Lord Hope said³⁸:

“Lord Bingham's point...was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation.

That is why, the court's task in this case, as I see it, is to identify as best it can where the jurisprudence of the Strasbourg court clearly shows that it stands on this issue. It is not for this court to expand the scope of the Convention right further than the jurisprudence of the Strasbourg court justifies.” (emphasis added)

This interpretation of the Court's role under s.2 of the HRA is to be contrasted with the analysis of the sole dissenter, Lord Kerr, who argued:

“... some judges in this country have evinced what might be described as an Ullah -type reticence. On the basis of this, it is not only considered wrong to attempt to anticipate developments at the supra national level of the Strasbourg court, but there is also the view that we should not go where Strasbourg has not yet gone. Thus, in the present case Lord Hope says that this 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 believe that, in the absence of a declaration by the European Court of Human Rights as to the validity of a claim to a Convention right, it is not open to courts of this country to adopt an attitude of agnosticism and refrain from recognising such a right simply because Strasbourg has not spoken” (emphasis added)

To my mind, Lord Kerr plainly has the better of the argument.

First, there is no legislative warrant for our Courts abdicating their Constitutional role in determining the content of the relevant Convention right under domestic law. A policy of

‘wait and see’ what Strasbourg may or may not do, if and when an appropriate case comes before it, simply will not do. Under s.2 it is the *duty* of the domestic Court to decide the matter for itself.

Second, the realities of life and litigation mean that our domestic Courts are inevitably called upon to consider issues in circumstances and contexts where the Strasbourg case-law will not provide any definitive answer or assistance. Sitting on our hands in such a case is most certainly not what Parliament intended.

Third, it is this type of case – where the Strasbourg case-law does not offer any clear answer – that gives our Courts the greatest scope to enter into a productive dialogue with the ECHR, and thus shape its jurisprudence. It is through our own Judges grappling with the difficult issues which human rights adjudication poses and cogently stating their reasoning that there is the most potential to influence the approach which the Strasbourg Court ultimately adopts.

³⁸ See to similar effect, Lord Brown at §86 and Lord Dyson at §§103-105.

The President of the ECHR has himself recently noted that the persuasive judgments of our Courts play an invaluable role in illuminating the workings of the UK's legal system(s) and influencing his colleagues³⁹ when they consider cases involving the UK. It is not difficult to point to examples where the powerful reasoning of our domestic Courts has proved influential in Strasbourg concluding that our domestic law is Convention compliant⁴⁰.

Are there any compelling considerations pointing to the contrary conclusion? A number of justifications have been mooted in support of the so-called '**Ullah** principle' but they cannot bear scrutiny.

Lord Bingham's own stated reasoning in **Ullah** was that the Convention rights should bear the same meaning throughout the CoE. However, even Homer can nod. This justification elides two distinct concepts. The UK Courts have no power to bind any other CoE member state, and the Strasbourg Court is of course not bound by their decisions. The domestic Courts do not interpret the content of the ECHR as an international Treaty; they interpret the Convention rights under domestic law.

Ambrose holds that the domestic Courts lack any mandate to go beyond what Strasbourg has clearly held. The answer to this is that the HRA, and in particular s.2, is *that* mandate. Parliament has decreed that, subject to the careful measures taken to preserve Parliamentary sovereignty, the domestic Courts should exercise this important new jurisdiction.

And if Parliament should ever conclude that our Courts have gone too far it can trim the excess.

Finally, I note that there are arresting examples where our Courts have forged ahead and, in practice, rejected **Ullah** abstentionism.

In **R (Limbuella)**⁴¹, the House held that Article 3 must be interpreted to impose a positive obligation prohibiting the Government from deliberately reducing asylum seekers to a state of destitution. This was not a conclusion which could be said to derive clear support from the Strasbourg case-law at that time.

Where a mother and child would inevitably be separated upon their return to their country of origin if deported, the House held that they must be allowed to remain in the UK because otherwise their Article 8 rights would be 'flagrantly breached': **EM (Lebanon)**⁴². There was no ECHR case which held that such a flagrant breach could be relied upon to resist deportation successfully.

Most strikingly, in **R (G) (Adoption)**⁴³ the House held that the Northern Ireland Assembly's blanket ban on homosexual couples jointly adopting, even where it would be in the best interests of the child for them to be allowed to do so, was incompatible with the claimants' Article 8 and 14 rights. The Strasbourg case-law was equivocal. If the **Ullah/Ambrose** approach were to be applied, the claim should have been doomed to fail. But this was not the outcome.

As far as I know, the judgments in **Limbuella**, **EM (Lebanon)** and **R(G)** have not been subjected to any criticism by politicians (of any persuasion), the press or the public. Nor has Parliament considered it necessary to reverse the effect of the judgments. This is unsurprising. These are good examples of sound judicial decision-making in action.

³⁹ See Fn 31, above.

⁴⁰ See **Brown v Stott** [2001] 2 WLR 817 and the ECHR's subsequent judgment in **O'Halloran and Francis v UK** (15809/02 and 25624/02) (2008) 46 EHRR 21.

⁴¹ **v Secretary of State for the Home Department** [2006] 1 AC 396.

⁴² **v Secretary of State for the Home Department** [2009] 1 AC 1198.

⁴³ [2009] 1 AC 173.

There is a further vice of the **Ullah** principle. In too many cases in which it is invoked, perhaps including **Ambrose**, it is deployed as a convenient justification for dismissing the HRA claim without having to engage with, and explain the reasons for qualifying or dissenting from the judgments of the Strasbourg Court.

I can understand this temptation. For a Judge faced with an insufficiently reasoned or aberrant decision (or line of decisions) of the ECHR, **Ullah** is the path of least resistance. It is only too easy to shelter behind **Ullah** rather than to confront the issue head on and make the case explaining why the Strasbourg Court's decision is flawed and should not be followed.

This temptation must be rejected. Section 2 of the HRA means that it is our Judges' duty to decide the cases for themselves and explain clearly to the litigants, Parliament and the wider public why they are doing so. This, no more and certainly no less, is their Constitutional duty.