Clayton Comments

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SMOKE AND MIRRORS: THE HUMAN RIGHTS ACT AND THE IMPACT OF THE STRASBOURG CASE LAW

The implications of the judgments of the European Court of Human Rights (ECtHR) for the development of the Human Rights Act (HRA) continue to be controversial. When Lord Phillips and Lord Judge gave evidence to the Select Committee on the Constitution in October 2011, Lord Phillips expressed the view that in the end Strasbourg is going to win because we have the HRA.[1] Lord Judge, on the other hand, stressed that it is, at least, arguable that, having taken account of the decisions of the ECtHR, our courts are not bound to follow them.[2] Lord Judge's views were given strong support from Lord Irvine, the former Lord Chancellor who presided over the enactment of the HRA, in his recent lecture, 'A British Interpretation of Convention Rights';[3] and in February 2012 the Supreme Court appeared to welcome the possibility of going beyond the Strasbourg case law.[4]

These different viewpoints reflect the fact that the English courts have evolved an approach which bears little relation to the language of section 2(1) of the HRA. Section 2(1) states that a court or tribunal must take account of the various decisions made by the European Commission and Court of Human Rights (the ECtHR). However, in ***R (Ullah) v Secretary of State for the Home Department*** Lord Bingham added a gloss to the statutory language: by stating that 'the duty of national courts is

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1 19 October, 2011-Q 164.

2 Ibid.

3 Lecture delivered under the auspices of the Bingham Centre hosted by UCL's Judicial Institute, 14 December 2011.

4 ***Sugar v BBC*** [2012] UKSC 4. In the leading opinion Lord Wilson said at para 59 'in ***Ullah*** ... para 20, Lord Bingham suggested that it was the duty of the House to keep pace with the evolving jurisprudence of the ... "the ECtHR") "no more, but certainly no less". It was in ***Al Skeini*** that, in para 106, Lord Brown suggested that its duty was to keep pace with it "no less, but certainly no more". I would welcome an appeal, unlike the present, in which it was appropriate for this court to consider whether, of course without acting extravagantly, it might now usefully do more than to shadow the ECtHR in the manner hitherto suggested – no doubt sometimes in aid of the further development of human rights and sometimes in aid of their containment within proper bounds'; Lord Mance agreed with his observation at para 113.

to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[5]

The ***Ullah*** principle therefore requires the UK courts under the HRA to mirror[6] the judgments of the Strasbourg court, but gives rise to a number of obvious difficulties. I shall argue that the mirror principle is fundamentally flawed. The rationale given by Lord Bingham for the principle is essentially twofold: first, that the purpose of the HRA is to bring rights home and secondly, that it is the duty of the courts in the Member States of the Council of Europe loyally to uphold the judgments of the ECtHR.

But the mirror principle cannot be derived from s 2(1) and does not reflect its legislative history. On analysis, the rationale for ***Ullah*** is difficult to sustain, is not consistently applied by the domestic courts and is out of step with the approach taken by the national courts in other Council of Europe countries. Nevertheless, I would argue that the UK courts must have some regard to clear and constant ECtHR case law when adjudicating claims under the HRA. I therefore suggest that the domestic courts should regard the ECtHR case law as a floor, but not a ceiling. The ECtHR sets the minimum that must be met because any unsuccessful HRA claim can ultimately be won in Strasbourg and the principle of judicial comity requires the domestic courts to give effect to the ECtHR judgments. However, I believe that there is no proper reason for insisting the ECtHR should also define the limits of the jurisprudence developed under the HRA; and there are sound policy grounds for permitting the domestic courts to expand beyond those parameters, as defined by the Strasbourg case law.

The terms of section 2(1)

Section 2(1) states that a court or tribunal 'must take account' of the various decisions made by the ECtHR. As a matter of language, the meaning of section 2(1) is plain. Had Parliament intended to make Strasbourg case law binding, it could easily have done so. However, Parliament did not take that approach. The starting point must therefore be that the weight to be given to the Strasbourg jurisprudence was a matter to be decided by the domestic courts; and that there was no statutory

5 [2004] 2 AC 323 para 20.
6 J Lewis 'The European Ceiling on Human Rights' [2007] PL 720.

bar on the English judiciary departing from decisions of the ECtHR. The same approach is supported by the legislative history of the HRA.

Bringing Rights Back Home

When the Labour Government introduced the Human Rights Bill in October 1997, it also published a White Paper explaining its purpose, ***Rights Brought Home: the Human Rights Bill***.[7] The White Paper has taken on an iconic character in the subsequent HRA cases; and is a central plank to Lord Bingham's rationalisation of the mirror principle.

It is therefore instructive to re-examine the case for incorporation that the Government actually made in ***Rights Brought Home***:[8]

> The effect of non-incorporation on the British people is a very practical one. The rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights. And enforcing them takes too long and costs too much. It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts - without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.

In other words, the Government described its purpose in enacting the HRA in wider terms than a desire to ensure remedies for Convention breaches were available in domestic courts. Statements in a White Paper are of course highly relevant to the construction of section 2(1). Enacting history may always be used to ascertain the mischief Parliament intended to remedy by an enactment although

7 CM 3782.
8 Ibid, paras 1.14-1.15.

it is of persuasive authority only, with its weight depending on its nature and the surrounding circumstances.[9]

This discussion is especially important since the rationale for the mirror principle is often said to be based on the Government's objectives in the White Paper, so that the domestic courts have focused exclusively on the goal of bringing rights back home.

The Parliamentary debates concerning section 2(1) of the HRA

The precise terms in which the Government sought to give effect to the Strasbourg jurisprudence are, again, illuminating. The legislative history demonstrates that it was not the Government's intention to require the domestic courts to be bound by Strasbourg decisions.

The idea that the English courts had a role in developing Convention jurisprudence was emphasised when the Bill was promoted by the Government spokesmen at its second reading, no doubt with an eye on ***Pepper v Hart*** principles.[10] At the beginning of his speech Lord Irvine gave the issue a particular prominence:[11]

> I chair many Cabinet committees, but none that has given me greater satisfaction than the committee whose labours have brought this Bill forward in the first legislative Session. It occupies a central position in our integrated programme for constitutional change. It will allow British judges for the first time to make their own distinctive contribution to the development of human rights in Europe.

The Home Secretary, Jack Straw, made the same point when opening the debate in the Commons for the second reading. After stressing the practical reasons for incorporating the Convention, he said:[12]

9 See, generally, Bennion on ***Statutory Interpretation*** (5 edn) section 227-230.
10 [1993] AC 593.
11 Hansard HL, 3 November, 1997, Vol 582, col 1227.
12 Hansard HC, 16 February 1998, Vol 307, col 769.

> There will be another benefit: British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights across Europe.

Furthermore, in the House of Lords the Conservative Party proposed an amendment to section 2, stating that domestic courts must be bound by the Strasbourg case law. Lord Irvine robustly rejected the suggestion:[13]

> We believe that Clause 2 gets it right in requiring domestic courts to take into account judgments of the European Court, but not making them binding. To make the courts bound by Strasbourg decisions could, for example, result in the Bill being confusing if not internally inconsistent when the courts are faced with incompatible legislation. In addition, the word "binding" is the language of precedent but the convention is the ultimate source of the relevant law. It is also unclear to me how "binding" would fit within the doctrine of margin of appreciation under the convention. I think that "binding" certainly goes further ... than the convention itself requires ....
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> We must remember that Clause 2 requires the courts to take account of all the judgments of the European Court of Human Rights, regardless of whether they have been given in a case involving the United Kingdom .... the United Kingdom is not bound in international law to follow that Court's judgments in cases to which the United Kingdom had not been a party, and it would be strange to require courts in the United Kingdom to be bound by such cases. It would also be quite inappropriate to do so since such cases deal with laws and practices which are not those of the United Kingdom. They are a source of jurisprudence, indeed, but not binding precedents which we necessarily should follow or even necessarily desire to follow.
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> The Bill would of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so, and it is possible they might give a successful lead to Strasbourg. For example, it would permit the United Kingdom courts to depart from Strasbourg decisions where there has been no precise

[13] Hansard Vol 18 November 1998 No 594 cols 514-515.

> ruling on the matter and a commission opinion which does so has not taken into account subsequent Strasbourg court case law.
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> These cases aside, it is not considered necessary to set out to provide that United Kingdom courts and tribunals are bound by Strasbourg jurisprudence, since where it is relevant we would of course expect our courts to apply convention jurisprudence and its principles to the cases before them. More fundamentally, this amendment, to my mind, suggests putting the courts in some kind of straitjacket where flexibility is what is required. That is what Clause 2 achieves, and, in my submission, our courts must be free to try to give a lead to Europe as well as to be led. The correct principle is to require our courts to take into account relevant European jurisprudence. That is what Clause 2 ... require[s] our courts to do.

Lord Bingham during the Parliamentary debates also expressed similar views:[14]

> 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

The initial approach taken under the HRA

The impact of section 2(1) was first expressly considered by the House of Lords in ***R (Alconbury Developments Ltd) v Environment Secretary*** where Lord Slynn, observed that:[15]

> 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,

14 Hansard, HL vol 582, col 1245 (3 November 1997).
15 [2003] 2 AC 295, para 26.

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.

As a result, the Court of Appeal in ***R (Anderson) v Secretary of State for the Home Department***[16] decided it had to apply the Strasbourg case law, even though the judges questioned its correctness, explaining their decision on the ground of the ECtHR's deeper understanding of the scope of Convention rights and the principle of judicial comity.[17] The limits of the ***Alconbury*** principle have been considered in several cases; and the 'special circumstances' which might entitle the domestic courts to depart from Strasbourg case law include: a decision of the ECtHR which 'compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution',[18] a decision in which the reasoning is 'unpersuasive'[19] or one in which it appeared that English law had been misunderstood.[20] And in ***R v Horncastle*** Lord Phillips held that there will be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process, so that it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course.[21]

However, as Lord Bingham pointed out, the duty to take account of Strasbourg jurisprudence under section 2(1) is a duty to treat the ECtHR as laying down principles, not mandating solutions to particular cases:[22] so that it is perilous to transpose the outcome of one case to another where the facts are different.[23] Even so, the idea that the domestic courts should apply 'clear and constant' case law of the ECtHR is not entirely straightforward.

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16 [2003] 1 AC 837. By the time the case was heard by the House of Lords, the Court had decided ***Stafford v United Kingdom*** (2002) EHRR 1121 which had reversed the approach previously taken by the ECtHR in a line of cases including, in particular, ***Wynne v United Kingdom*** (1994) 19 EHHR 333.

17 Ibid, paras 65, 66 per Simon Brown LJ; paras 88–93 per Buxton LJ.

18 ***Alconbury*** (above), para 76 (Lord Hoffmann).

19 ***R v Spear*** [2003] 1 AC 734, paras 12–13 (Lord Bingham) and paras 65–66 (Lord Rodger).

20 ***R v Lyons*** [2003] 1 AC 976, para 46 , where Lord Hoffmann observed that there might be room for dialogue between the English courts and the Court of Human Rights in such circumstances.

21 [2010] 2 AC 373

22 ***Secretary of State for the Home Department v JJ*** [2008] 1 AC 385, para 13.

23 ***R (Gillan) v Comr of Police of the Metropolis*** [2006] 2 AC 307, para 23

First, the courts under the HRA have considered many cases where there is no clear and constant ECtHR case law. The question of how the Court should proceed is a problem which I shall address below. Secondly, it is not entirely obvious what amounts to 'clear and constant jurisprudence'. A judgment will be 'clear and constant' if it has repeatedly been applied in subsequent cases[24] as will a unanimous or near unanimous Grand Chamber decision.[25] On the other hand, in an evolving field, it may be necessary to consider whether 'relatively elderly jurisprudence reflects the result that the [ECtHR] would still reach'.[26] But Lord Brown indicated in ***Horncastle*** that there is no need to apply a Chamber decision which was due to be reargued before the Grand Chamber (especially in a case where he questioned its reasoning).[27]

Nor is it clear whether a Grand Chamber decision must be followed. In ***Manchester City Council v Pinnock (Nos 1 and 2)*** the Supreme Court introduced some important caveats: Lord Neuberger said that Supreme Court was not actually bound to follow a decision of the Grand Chamber. However, where there was a clear and constant line of decisions whose effect of which is not inconsistent with some fundamental substantive or procedural aspect of English law, and the reasoning of which did not appear to overlook or misunderstand some argument or point of principle, the Supreme Court considered that it would be wrong for it not to follow that line.[28] By contrast, the obligation to apply a definitive Grand Chamber decision was reiterated in ***Cadder v HM Advocate***.[29]

More difficult still is the fact that sometimes the Strasbourg jurisprudence is, itself, unclear. For example, in ***N v Secretary of State for the Home Department***[30] the House of Lords had to address the decision by the ECtHR in ***D v United Kingdom***[31] that Article 3 was breached by deporting AIDS

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24 ***Cadder v Her Majesty's Advocate*** [2010] 1 WLR 2601, para 47 *per* Lord Hope DP.

25 ***R (Anderson) v Secretary of State for the Home Department*** [2003] 1 AC 837, para 18 *per* Lord Bingham; and see also ***Cadder v Her Majesty's Advocate*** [2010] 1 WLR 2601, paras 45-46 *per* Lord Hope DP.

26 ***Secretary of State for Work and Pensions v M*** [2006] AC 91, para 131 *per* Lord Mance.

27 [2009] 2 AC 373 paras 113-121.

28 [2011] 2 AC 104 para 48; and see, also ***In re Caughey*** [2011] 2 WLR 1279 at para 93 where Lady Hale suggested that the day might come when the Supreme Court found good reasons for departing from a Grand Chamber decision.

29 [2010] 1 WLR 2601.

30 [2005] 2 AC 296.

31 (1997) 24 EHRR 423.

sufferers who would not receive proper treatment where the facts of the case were very exceptional. Lord Nicholls described the Strasbourg authorities as 'in a not altogether satisfactory state'[32] and said that the case law 'lacked its customary clarity'.[33] Nevertheless, Lords Hope and Brown embarked on a detailed analysis of the case law but had some difficulty identifying any clear principles in the Convention.[34] By contrast, Lord Hope stressed:[35]

> It is not for us to search for a solution to [the appellant's] problem which is not to be found in the Strasbourg case law. It is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what extensions, if any, are needed to the rights guaranteed by the Convention. We must take its case law as we find it, not as we would like it to be.

This problem of identifying clear principles from the Strasbourg case law continues to trouble the domestic courts. In ***In re McCaughey*** Lord Hope held that a Grand Chamber decision prevailed over an earlier decision of the House of Lords, but commented that only the most starry-eyed admirer of the Strasbourg Court could describe the guidance the Grand Chamber offered as clear;[36] Baroness Hale said the relevant part of the Grand Chamber judgment was difficult to understand[37] and Lord Dyson described it as extremely obscure.[38] Even more recently, in ***Gale v Serious Organised Crime Agency***[39] Lord Phillips P[40] and Lord Brown said that it would highly desirable that the issues the appeal raised be considered by the Grand Chamber in order to clarify and rationalise what Lord Brown called 'this whole confusing area of the Court's jurisprudence'.[41]

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32 Above, para 9.
33 Above, para 11.
34 The Grand Chamber also dismissed the application: see (2008) 47 EHHR 885.
35 Above, para 14.
36 [2011] 2 WLR 1279, para 73.
37 Ibid, para 89.
38 Ibid, para 130-???.
39 [2011] UKSC 49.
40 Ibid, para 60.
41 Ibid, para 117.

The development of the mirror principle

In ***R (Ullah) v Secretary of State for the Home Department*** Lord Bingham went further than the ***Alconbury*** principle:[42]

> by section 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 (Alconbury Developments Ltd) v Secretary of State for the Environment***. 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 section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 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.

The application of the ***Ullah*** principle has of course had some important repercussions for the HRA. Lord Steyn in ***Marper*** rejected the idea that the scope of Convention rights should be determined by domestic cultural traditions (although he indicated that domestic cultural traditions were relevant to the application of the proportionality principle).[43] Lord Steyn therefore disagreed with some observations to the contrary made by Lord Woolf CJ when the case was heard in the Court of Appeal.[44] The mirror principle has also resulted in Lord Bingham expressing reservations about the

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42 [2004] 2 AC 323 para 20.

43 ***R (Marper) v Chief Constable of Yorkshire*** [2004] 1 WLR 2196, para 27.

44 ***R (Marper) v Chief Constable of Yorkshire*** [2002] 1 WLR 3223, para 34. Lord Woolf had said that he did not necessarily expect the English courts to apply the European Commission of Human Rights decision in ***Reytjens v Belgium*** (1992) 73 DR 136, 152 where it held that the obligation to carry

value of examining Commonwealth case law in HRA cases;[45] and explains his views on HRA damages where he held that the domestic courts had to look to the jurisprudence of the ECtHR for guidance.[46]

The rationale for the mirror principle was spelled out by Lord Bingham in ***Kay v Lambeth LBC***:[47]

> it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg court as governing the Convention rights specified in section 1(1) of the 1998 Act. That court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down.

He identified a further justification for it in ***R (SB) v Denbigh High School***:[48]

> the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg. This is clearly established by authorities such as ***Aston Cantlow v Wallbank***;[49] ***R (Greenfield) v Secretary of State for the Home Department***;[50] and ***R (Quark Fishing Ltd) v Secretary of State for Foreign Affairs***.[51]

However, in ***R (Al-Skeini) v Secretary of State for the Defence*** Lord Brown appeared to go further; he took the view that the domestic courts should not leap ahead of Strasbourg:[52]

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an identity card was not, as such, an interference with the right of respect for private life; Lord Woolf went on to say that there was nothing in the Convention which set a ceiling on the level of respect a jurisdiction is entitled to extend to personal rights.

45 ***Sheldrake v DPP*** [2005] 1 AC 264, para 33.

46 ***R (Greenfield) v Secretary of State for the Home Department*** [2005] 1 WLR 673, para 6.

47 [2006] 2 AC 465,para 28.

48 [2007] 1 AC 100, para 29; and see, also the rationale given by Lord Hoffmann in ***In Re G*** [2009] 1 AC 174 paras 35-36.

49 [2004] 1 AC 546, paras 6-7, 44.

50 [2005] 1 WLR 673, paras 18-19.

51 [2006] 1 AC 529, paras 25, 33, 34, 88 and 92.

52 [2008] 1 AC 153 para 106.

> 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.

Nevertheless, I would respectfully suggest that the rationale for the mirror principle is open to question on a number of grounds. First, the statutory language of section 2(1) and its legislative history show that the enactment of the HRA recognised that the domestic courts have an important role in formulating their own approach to scope of the Convention rights. Secondly, the narrow principle that the HRA was designed solely to enable Strasbourg rights to be pursued in the English courts gives rise to considerable difficulties of analysis and principle. Thirdly, the domestic courts do not apply the mirror principle consistently. Finally, the courts in other Council of Europe countries do not proceed on the basis they must loyally uphold Strasbourg case law on that ground that only the ECtHR can authoritatively expound the correct interpretation of Convention rights.

However, before I address these concerns, I want to draw an important distinction between regarding the Strasbourg case law as providing a floor for the HRA and for it also providing a ceiling.

The ECtHR cases as a minimum under the HRA

Whatever the merits of the justification for the mirror principle itself, the need to apply the Strasbourg jurisprudence as a minimum requirement under the HRA was identified by Lord Phillips in his evidence before the House of Lords' Constitution Committee. The justification is, ultimately, practical. As Lord Roger remarked in ***AF (No 3)***, even though the Supreme Court were dealing with rights under a United Kingdom statute, in reality, they had no choice: *Argentoratum locutum, iudicium finitum*—'Strasbourg has spoken, the case is closed'.[53]

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[53] Above, para 98; and see, also Lord Hoffmann at para 70 '***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

This reality has created a continuing dialogue between our highest court and the ECtHR in a number of important areas: in relation to the freestanding and autonomous procedural obligation under Article 2 to investigate death,[54] the impact of Article 6 on hearsay evidence in criminal trials[55] and in control order cases,[56] and the impact of Article 8 on possession proceedings,[57] on the choice concerning how an individual might spend the last days of his life[58] and on the retention of DNA,[59] As the ECtHR President, Sir Nicholas Bratza observed, in his concurring judgment in ***Al Kawaja***, when addressing the criticisms voiced in ***Horncastle*** 'the present case affords, to my mind, a good example of the judicial dialogue between national courts' and the ECtHR.[60]

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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."

54 ***In re McCaughey*** [2011] 2 WLR 1279 where the House of Lords considered the Grand Chamber decision in ***Silih v Slovenia*** (2009) 49 EHRR 966 and departed from the reasoning in ***In Re McKerr*** [2004] 1 WLR 807 and ***Jordan v Lord Chancellor*** [2007] 2 AC 226.

55 See the Grand Chamber decision in ***Al Kawaji v United Kingdom*** where it carefully considered the Supreme Court decision in ***Horncastle*** and modified the approach taken in the Chamber decision.

56 ***Secretary of State for the Home Department v AF (No 3)*** [2010] 2 AC 269 where the Supreme Court applied he Grand Chamber decision in ***A v United Kingdom*** (2009) 49 EHRR 625 and modifed the views expressed in ***Secretary of State for the Home Department v MB*** [2008] AC 440.

57 See ***Pinnock v Manchester City Council*** (2010) 3 WLR 1441 reversing ***Quasi v Harrow LBC*** [2004] 1 AC 983; ***Kay v Lambeth LBC*** [2006] 2 AC 465 and ***Doherty v Birmingham City Council*** [2009] 1 AC 357; and see ***Pinnock v Manchester City Council (No 2)*** [2011] 2 WLR 220 and ***Hounslow LBC v Powell*** [2011] 2 WLR 287.

58 ***R(Purdy) v DPP*** [2010] 1 AC 345.

59 ***R(GC) v Metropolitan Police Commissioner*** [2011] 1 WLR 1230 applying ***S v United Kingdom*** [2009] 48 EHRR 50 (GC) reversing House of Lords in ***Marper v Chief Constable of South Yorkshire*** [2004] 1 WLR 2196.

60 Judgment (GC), 15 December 2011, para 2.

Nevertheless, in his recent lecture, 'A British Interpretation of Convention Rights' Lord Irvine[61] powerfully argued that the domestic courts were entitled to depart from Strasbourg jurisprudence: because the resolution of any conflict must take effect at State, not judicial, level. Lord Irvine said that the problem was an issue concerning enforcement of judgment under Article 46 of the Convention,[62] rather than one which need concern the judges or the courts. However, his analysis is open to question. First, it is difficult to see how the Supreme Court can sensibly decline to apply the ECtHR case law where, for example, there has been an extended series of Strasbourg decisions which conflict with our highest court, as occurred with questions concerning the impact of Article 8 on possession proceedings. Fundamental principles of judicial comity and the rule of law require a more nuanced approach, especially where the rate at which cases are heard in the domestic courts may be so much faster than the process for executing Strasbourg judgments at state level.[63]

Secondly, Lord Irvine's approach conflicts with the solution favoured by Member States to remedy the current backlog of 165,000 applications to the ECtHR. The ***Interlaken Declaration and Action plan to reform the European Court of Human Rights*** signed by Council of Europe members in February 2010, supplemented by the ***Izmir Declaration*** in 2011, requires implementation of the Convention at domestic level;[64] and it is difficult to see how the current pressure from the Member

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61 Lecture delivered under the auspices of the Bingham Centre hosted by UCL's Judicial Institute, 14 December 2011.

62 Article 46 states that "the High Contracting Parties undertake to 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".

63 The protracted process of enforcing judgments is exemplified by the 2005 decision of the Grand Chamber in ***Hirst v United Kingdom (No 2)*** (2005) 38 EHRR 825 which has yet to be resolved.

64 Paragraph 4 of the Interlaken Declaration states that 'The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:

a) continuing to increase, where appropriate in co-operation with national human rights institutions or other relevant bodies, the awareness of national authorities of the Convention standards and to ensure their application;

b) fully executing the Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations;

c) taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system;

States to give greater effect to the subsidiarity principle will be facilitated if the domestic courts decline to apply Grand Chamber decisions.

Thirdly, we in the UK must be alert to the message we are sending to other signatories to the ECtHR. The UK Government is not alone is taking the view that some Strasbourg decisions do not stand up to scrutiny; it is a perspective shared by governments in Russia, the Ukraine and elsewhere.

I would therefore argue that there is an obligation on the English courts to apply Grand Chamber decisions as a floor; and more generally, a presumption that as a starting point the courts should follow the clear and constant jurisprudence of Chambers' decisions, unless there are compelling reasons to the contrary.

The ECtHR decisions as a ceiling

I also question the idea that the ECtHR defines the limits of Convention rights, as Lord Brown argued in ***Al-Skeini***, based on ***Ullah***. There are several reasons for suggesting that the mirror principle is profoundly flawed: it is based on the assumption that the HRA was designed to bring rights home which is both factually incorrect and results in unprincipled outcomes, the domestic courts do not, in any case, consistently apply the mirror principle; and the emphasis of English courts on ECtHR case law is out of step with the approach taken the courts in other Council of Europe countries.

The problems inherent in the principle that the HRA is designed to bring rights home

The HRA case law relies on the principle of bringing right home as the rationalisation for the mirror principle. Leaving to one side the language of section 2(1) and the legislative history, the principle of bringing rights home has obscured an important distinction between Convention rights taking

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d) ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate ….'

effect as (i) statutory rights under the HRA and as (ii) international rights under the Convention. In ***In re McKerr*** Lord Nicholls drew attention to this distinction: [65]

> These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the 1998 Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the 1998 Act, depends upon the proper interpretation of that Act.

Lord Nicholl's views were re-iterated by Lord Hoffmann in ***In re G (Adoption: Unmarried Couple)*** who observed:[66]

> 'Convention rights' within the meaning of the 1998 Act are domestic and not international rights. They are applicable in the domestic law of the United Kingdom and it is the duty of the courts to interpret them like any other statute. When section 6(1) 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 'Convention rights' within the meaning of the 1998 Act are domestic and not international rights. They are applicable in the domestic law of the United Kingdom and it is the duty of the courts to interpret them like any other statute. When section 6(1) 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.

65 [2004] 1 WLR 807, para 25.

66 [2009] 1 AC 38, para 33; see also, the remarks of Baroness Hale at para 117.

Importantly, however, this critical distinction was not made in ***R (Quark Fishing) v Secretary of Foreign Affairs*** where the House of Lords held that Convention rights as statutory rights under the HRA were identical to Convention rights under the Convention.[67] As Lord Bingham put it:[68]

> A party unable to mount a successful claim in Strasbourg can never mount a successful claim under sections 6 and 7 of the 1998 Act. For the purpose of the 1998 Act was not to enlarge the field of application of the Convention but to enable those subject to the jurisdiction of the United Kingdom and able to establish violations by United Kingdom public authorities to present their claims in the domestic courts of this country and not only in Strasbourg.

The problems which result from failing to distinguish domestic Convention rights and international rights were vividly revealed in ***R (Al-Jedda) v Secretary of Defence*** where the House of Lords appear to have conflated the two. [69] In ***Al-Jedda*** the House of Lords accepted that an HRA claim for breach of Article 5 by an individual who was detained at a detention centre operated by British forces in Iraq did not breach Article 5 because those rights were qualified by UN Security Council Resolution 1546 which had been made under Article 42 of the United Nations Charter. Importantly, however, the correctness or otherwise of ***Quark Fishing*** was not an issue before the House of Lords in ***Al-Jedda***.

The principle established by ***Quark Fishing*** cannot be sustained. First, it is a fundamental principle of public international law that, in a dualist state like the UK, rights conferred by international treaties cannot directly take effect in domestic law, unless incorporated by legislation. Secondly, it fails to recognise the significance of the incorporation of Convention rights by the HRA. Thirdly, the HRA contemplates that the use of a specific statutory procedure to derogate and make reservations under the HRA; and it is difficult to understand how the statutory procedure under the HRA can be bypassed merely by, for example, the UN Security Council making a resolution.

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67 [2006] 1 AC 529.

68 Ibid, para 25.

69 [2008] 1 AC 332. However, the Grand Chamber in ***Al-Jeddah v United Kingdom*** (2011) 30 BHRC 637 reversed the House of Lords, deciding amongst other things that the UN Resolution did not qualify Article 5.

The inconsistent application of the mirror principle

There have been a few instances where the mirror principle appears to require a particular outcome- which the domestic courts have declined to apply. Perhaps, the starkest example is the House of Lords decision in ***R (Animal Defenders International) v Secretary of State for Culture***.[70] The claimant in that case was a non profit making company whose aims included suppressing animal cruelty; it was prevented from placing an advertisement about the threat to the survival of primates on the ground that this would breach the ban on political advertising in section 321(2) of the Communications Act 2003.[71] The claimant then complained that Article 10 had been breached, and relied strongly on the ECtHR decision of ***VgT Verein v Switzerland***.[72] In ***VGT*** a campaigning body against animal experiments wished to broadcast a commercial criticising pig farming and asking viewers to eat less meat. The Swiss broadcasting authority declined to broadcast the commercial because of its clear political message. However, the ECtHR held that the refusal to broadcast the commercial breached Article 10.

The ***VgT*** case had a particular significance when the 2003 Act was enacted - the Secretary of State felt unable to make a statement of compatibility under section 19(1)(a) of the HRA. He, instead, made a statement under section 19(1)(b), stating the Government believed and had been advised that the ban on political advertising contained in clauses 319 and 321 of the Bill were compatible with Article 10, but because ***VgT*** it could not be sure.

Consequently, when ***Animal Defenders*** came before the House of Lords, it was argued that ***VGT*** was 'correctly decided, indistinguishable and all but conclusive'.[73] Nonetheless, the House took a different view, and held that the ban did not violate Article 10. But its treatment of the ***Ullah*** principle was not entirely convincing. Lord Bingham described as the facts in ***VGT*** as being 'very similar to those in the present case'[74] and said he 'did not think that full strength of the argument'

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70 [2008] 1 AC 1312.

71 Section 321(2) prohibits 'political advertising if it is— (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature; (b) an advertisement which is directed towards a political end ...'

72 (2001) 34 EHRR 159.

73 [2008] 1 AC 1312 , para 22.

74 Ibid, para 9.

that the risk that, essentially, political objects may come to be accepted by the public because they are conditioned by constant repetition, 'was deployed in ***VGT***'.[75] But Lord Bingham did not otherwise discuss the effect of the mirror principle, although he expressly declined to concur[76] with Lord Scott's trenchant criticisms of ***Ullah***:[77]

> The result of the present appeal to this House shows, therefore, no more than the possibility of a divergence between the opinion of the European court as to the application of article 10 in relation to the statutory prohibition of which [the appellant] complains and the opinion of this House. The possibility of such a divergence is contemplated, implicitly at least, by the 1998 Act. .... the incorporated articles are not merely part of domestic law. They remain, as they were before the 1998 Act, articles of a Convention binding on the United Kingdom under international law. In so far as the articles are part of domestic law, this House is . . . the court of final appeal whose interpretation of the incorporated articles will, subject only to legislative intervention, be binding in domestic law. In so far as the articles are part of international law they are binding on the United Kingdom as a signatory of the Convention and the European court is, for the purposes of international law, the final arbiter of their meaning and effect. Section 2 of the 1998 Act requires any domestic court determining a question which has arisen in connection with a Convention right to take into account, inter alia, 'any. . . judgment, decision, declaration or advisory opinion of the European court of Human Rights': subsection (1)(a). The judgments of the European court are, therefore, not binding on domestic courts. They constitute material, very important material, that must be taken into account, but domestic courts are nonetheless not bound by the European court's interpretation of an incorporated article. It is, in my opinion, important that that should be so and that its importance is not lost sight of.

Baroness Hale, on the other hand, said that decision in ***VgT*** should not lead the House of Lords to any different conclusion, pointing out that 'all Strasbourg decisions are fact-specific'. Similar though the organisations were, the advertisements were rather different: "eat less meat" was a rather

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75 Ibid, paras 28-29.
76 Ibid, para 37.
77 Ibid, para 44-45.

different message from "help us to stop their suffering';[78] and she went on strongly to defend the mirror principle.[79]

The House of Lords' conclusion will soon be tested by the Grand Chamber;[80] and its reasoning will likely be subjected to a strong criticism. The original decision in ***VGT*** has been applied in subsequent ECtHR cases;[81] and in 2009 the Grand Chamber reaffirmed its approach in ***VGT (No 2)***.[82]

By contrast, in ***In re G(Adoption: Unmarried Couples)*** the House of Lords explicitly took a more expansive approach- in suggesting that the domestic courts were entitled to go beyond the Strasbourg case law.[83] The case concerned a blanket prohibition which prevented an unmarried couple from adopting their 10 year old child where the ECtHR had yet to pronounce on this issue. Lord Hoffmann said that he did not think that the House of Lords should be inhibited if it went beyond the ECtHR cases;[84] and went on to emphasise that the House should not be inhibited in going beyond the ECtHR because the margin of appreciation is a matter for the national authorities to decide for themselves.[85] Lord Hope agreed with Lord Hoffman in holding that it would not be at all unlikely that the ECtHR would decide that Article 14 was breached,[86] observing that the Strasbourg jurisprudence is not to be treated as a straightjacket from which there is no escape.[87] Lord Mance took a similar approach.

A much more cautious stance was taken in ***Ambrose v Harris***.[88] In that case the Supreme Court declined to hold that a suspect is entitled to access to a lawyer before he is placed and in detention; and the Court held that the Strasbourg case law did not require such a conclusion, expressing the

78 Ibid, para 52.
79 Ibid, para 53.
80 Application no 48876/08 which will be heard on 7 March 2012.
81 See ***TV Vest v Norway*** Judgment 11 December 2008.
82 Judgment, 30 June 2009.
83 [2009] 1 AC 38.
84 Ibid, para 29.
85 Ibid, para31-32.
86 Ibid, para 53.
87 Ibid, para 50.
88 [2011] 1 WLR 2435.

view that an impending Strasbourg application dealing with the very point made it wise to wait for the judgment.[89] ***In re G*** was not cited to the Court or discussed in the opinions.

Furthermore, it is widely recognised that a number of House of Lords decisions go well beyond the Strasbourg precedents. For example, as Sir Nicholas Brazta, the President of the ECtHR pointed out, [90] under the HRA the domestic courts have leapt ahead of the Strasbourg case law in its analysis of the treatment of asylum seekers in ***R(Limbuela) v Secretary of State for the Home Department***,[91] in finding that there was discrimination prohibiting unmarried parents from adopting children in ***Re G (Adoption: Unmarried Couple)***[92] and in relation to the impact of Article 8 on the rights of a mother and child facing expulsion in ***EM (Lebanon) v Secretary of State for the Home Department***.[93]

Perhaps, the current position is most aptly described by Lord Brown in the 2012 case of ***Rabone v Pennine Care NHS Foundation Trust***:[94]

> Nobody has ever suggested that, merely because a particular question which arises under the Convention has not yet been specifically resolved by the Strasbourg jurisprudence, domestic courts cannot determine it – in other words that it is necessary to await an authoritative decision of the ECtHR more or less directly in point before finding a Convention violation. That would be absurd. Rather what the ***Ullah*** principle importantly establishes is that the domestic court should not feel driven on Convention grounds unwillingly to decide a case against a public authority (which could not then seek a corrective judgment in Strasbourg) unless the existing Strasbourg case law clearly compels this. Indeed, the more reluctant the domestic court may be to recognise in the circumstances a violation of the Convention, the readier it should be to reject the complaint unless there exists (as, of course, there existed in ***Secretary of State for the Home Department v AF (No 3)***[95] and in ***R***

89 Ibid where Lord Hope discusses the pending application of ***Abdurahman v United Kingdom*** App No 41351/09 at paras 47-49.
90 N Bratza 'The relationship between the UK courts and Strasbourg' [2011] EHRLR 505, 511
91 [2006] 1 AC 396.
92 [2009] AC 173.
93 [2009] AC 1198.
94 [2012] UKSC 2, para 112.
95 [2010] 2 AC 269.

> ***(GC) v Commissioner of Police of the Metropolis***[96] but did not exist in ***R v Horncastle***),[97] an authoritative judgment of the Grand Chamber plainly decisive of the point at issue. If, however, the domestic court is content (perhaps even ready and willing) to decide a Convention challenge against a public authority and believes such a conclusion to flow naturally from existing Strasbourg case law (albeit that it could be regarded as carrying the case law a step further), then in my judgment it should take that further step. And that, indeed, is to my mind precisely the position in this very case. Just as, I may add, it was the position in ***Limbuela***, ***In re G*** and ***EM***.

Lord Brown appears to be promoting a somewhat broad brush merits based approach. On his analysis, it is difficult to identify any principled justification or bright line distinction to be applied by the domestic courts in HRA cases.

The approach taken by the courts in other member states to Strasbourg case law

In the final analysis, the mirror principle appears to be based on the idea that the ECtHR is the authoritative exponent of Convention law; and the assumption that all member states are under a duty to defer to it. Lord Hope DP put it in ***Ambrose v Harris***:[98]

> Lord Bingham's point [in ***Ullah***], with which I respectfully agree, 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 .... It is not for this court to expand the scope of the Convention right further than the jurisprudence of the Strasbourg court justifies.

96 [2011] 1 WLR 1230.
97 [2010] 2 AC 373.
98 [2011] 1 WLR 2435, paras 19-20.

But there are at least two difficulties with this approach. First, as Lady Hale has stressed, the stated reason for restraint does not make much sense – that the interpretation of the Convention should be uniform throughout the member states. We cannot commit other Member States or the ECtHR to our interpretation of the rights – so why should they mind what we do, as long as we do at least keep pace with the rights as they develop over time?[99] More fundamentally, the courts in other Member States do not, in fact, seek to mirror the Strasbourg jurisprudence: so that there is no reason why our domestic courts should apply a self denying ordinance when courts in other Member States do not.

The approach taken to Strasbourg case law in other Member States

Any attempt to assess whether other Member States of the Council of Europe apply the mirror principle must address several complicating factors.[100] Unlike the UK, other Member States have a codified constitution, but national law varies concerning whether a Member States takes the monist view that an international instrument like the Convention directly takes effect in domestic law or whether, on the dualist view, the Convention requires specific implementation in domestic law. Where the Convention is implemented through domestic legislation, some countries accord the Convention a status higher than its Constitution (such as Belgium and the Netherlands), some treat the Convention as taking effect below the constitution but above ordinary law (such as France, Italy and Spain) and some regard the Convention as being on a par with ordinary domestic law (such as Germany and the UK). There is also considerable variation in the power of domestic courts to strike down legislation which is inconsistent with the Convention (such as Italy and Spain), those which disapply domestic law that are inconsistent with the Convention (such as France and the

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99 See Lady Hale's lecture to the Salford Human Rights Conference on 4 June 2010 and see also her Nottingham Human Rights lecture on 1 December 2011 'Argentoratum locutum\; is the Supreme Court supreme'.

100 See, generally, E Lambert Abdelgawad, A Weber, 'The Reception Process in France and Germany' in H Keller, A Stone Sweet (eds) ***A Europe of Rights: The Impact of the European Court of Human Rights on National Legal Systems*** (OUP 2008) 108; and see Oxford University's Pro Bono Publica Submission to the Commission on a Bill of Rights ***Reconciling domestic superior courts with the ECHR and ECtHR: a comparative perspective*** (24 November, 2011); I am very grateful to Eirik Bjorge for drawing this publication to my attention.

Netherlands) and those which impose a consistent interpretation (such as Germany and the UK). However, the UK is unique in having a declaration of incompatibility procedure.

It seems that the courts in, for example, Germany and the Netherlands regularly consider the ECtHR jurisprudence when deciding cases that concern Convention rights. The Greek courts have referred to Strasbourg jurisprudence, but have notably rejected its case law in public order cases. Belgium courts have tended not to refer to ECtHR cases explicitly, but the case law is still influential. In France the courts can now go beyond the Strasbourg case law whereas in Germany, the courts may take account of the ECtHR, but may depart from it if they have good reasons for doing so. It is therefore instructive to examine the position in France and Germany in a bit more detail.

Convention rights in France

France has a codified constitution and takes a monist approach to international instruments. The Convention was ratified under Article 53 of the Constitution[101] and has a status below the Constitution, but above ordinary domestic law. Ordinary judges have the power to disapply domestic law which does not comply with the Convention; however, any questions concerning the constitutionality of these laws are within the sole jurisdiction of the Constitutional Court. Traditionally, French judges have resisted the broad body of ECtHR jurisprudence, taking the view that the Convention, but not judgments against other Member States, is binding.[102] In practice, a new approach has emerged from the French courts where they appear to pre-empt defeats before the ECtHR by adopting more progressive interpretation of human right norms. For example, in the ***Boussouar***[103] and ***Planchenault***[104] cases the Council of State allowed judicial review of administrative decisions for alleged violations of prisoners' rights because 'to refuse to overturn the impugned decisions would be tantamount to accepting to close your eyes until Strasbourg opens them for

101 However, the right to petition the ECtHR was not recognised until 1981.

102 E Lambert Abdelgawad, A Weber, 'The Reception Process in France and Germany' in H Keller, A Stone Sweet (eds) ***A Europe of Rights: The Impact of the European Court of Human Rights on National Legal Systems*** (OUP 2008).

103 Conseil d'État, December 14, 2007, ***Boussoua***r.

104 Conseil d'État, December 14, 2007, ***Planchenault***.

you.'[105] As a result, French domestic judges interpret the provisions of the Convention independently, sometimes going beyond the requirements of the ECtHR, and in the absence of pre-existing jurisprudence, stimulating a dialogue with the ECtHR.[106]

Convention rights in Germany

Germany's constitution contains its Basic Law; and German law takes a dualist approach to international law. Nevertheless, the Convention is directly applicable in German law and can be invoked and enforced by ordinary German courts. In the important ***Görgülü*** decision, the Federal Constitutional Court held that, if:[107]

> [T]here are decisions of the European Court of Human Rights that are relevant to the assessment of a set of facts, then in principle the aspects taken into account by the European Court of Human Rights when it considered the case must also be taken into account when the matter is considered from the point of view of constitutional law, in particular when proportionality is examined, and there must be a consideration of the findings made by the European Court of Human Rights after weighing the rights of the parties.

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105 Translated from: 'Refuser de contrôler les décisions aujourd'hui attaquées reviendrait à accepter de fermer les yeux en attendant qu'on les ouvre pour vous à Strasbourg.' M Guyomar, Conclusions sur Conseil d'Etat, Assemblée, 14 décembre 2007, M Planchenault (1reespèce), et Garde des sceaux, ministre de la Justice c/ M. Boussouar (2e espèce) [Conclusions of the Conseil d'Etat, Assembly, December 14, 2007, ***Planchenault*** (First Case), and ***Minister of Justice v Boussouar*** (Second Case)], Revue Française de Droit Administrative 87 (2008) 100.

106 E Abdelgawad and A Weber The Reception Process in France and Germany' in H Keller, A Stone Sweet (eds) ***A Europe of Rights: The Impact of the European Court of Human Rights on National Legal Systems*** (OUP 2008).

107 ***BVerfGE 111***, 307 (2004), para 46. However, As a result of an adverse judgment in which the ECtHR found a German court's position to be in violation of Art 8 of the Convention (***Görgülü v. Germany***, Judgment, 26 February 2004), the Higher Regional Court in subsequent proceedings held it did not consider itself bound by the judgment of the ECtHR, since only the German State, as a Party to the Convention could be bound. The decision in ***Görgülü*** regarding *res judicata* was, itself, overturned in the 2011 Preventive Detention ruling ***BVerfG, 2 BvR*** 2365/09 'Preventive Detention') which concerned the question of preventive detention of sexual offenders.

The Federal Constitutional Court said that ECtHR judgments should not be enforced 'in an automatic way';[108] but German state bodies should enjoy latitude'. The obligation 'to take into account' an ECtHR ruling requires that courts must either comply with it or justify why they do not so comply- they must 'discernibly consider the decision and, if necessary, justify in an understandable manner why they nevertheless do not follow the international-law interpretation of the law.'[109] The Federal Constitutional Court has, in practice, treated Convention and the ECtHR jurisprudence as being at 'the level of constitutional law', as 'interpretation aids' for the determination of the content and scope of the fundamental rights and rule-of-law guarantees of the Basic Law.

The application of the *Ullah* principle in other Member States

The practice of how the courts interpret Convention law obviously varies in the different Member States. But one point emerges clearly- no court (other than those in the UK) seeks to mirror the jurisprudence of the ECtHR when considering cases which involve Convention rights.

An alternative approach

Accordingly, it is respectfully submitted that there is no reason in principle why the domestic courts should regard the ECtHR jurisprudence as a ceiling when interpreting Convention rights. The formulation of an alternative approach to ***Ullah*** is not difficult; there is no need to re-invent the wheel.[110] The HRA is a statute of constitutional significance since the Convention is effectively our Bill of Rights;[111]and the domestic courts could draw on the rich jurisprudence of the Privy Council

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108 ***BVerfGE 111***, para 47.

109 Ibid, para 50.

110 Echoing Lord Steyn's views concerning the principle of proportionality was to be defined under the HRA in ***R v A (No 2)*** [2002] 1 AC 45, para 38.

111 See eg the dicta in ***Brown v Stott*** [2003] 1 AC 681of Lord Bingham at 703 and Lord Steyn at 708, those of Lord Woolf CJ in ***R v Offen*** [2001] 1 WLR 253, 275 and the views of of Laws LJ in ***Thoburn v Sunderland City Council*** [2003] QB 151. Similarly, in ***McCartan v Times Newspapers*** Lord Steyn at [2001] 2 AC 277 at 296 said that the HRA was a constitutional measure designed to buttress freedom of expression, fulfilling the function of a Bill of Rights in our legal system. In ***R (Laporte) v Chief Constable of Gloucestershire Constabulary*** [2007] 2 AC 105 para 34Lord Bingham described the HRA in giving effect to Articles 10 and 11 as representing a 'constitutional shift'.

which gives a broad and generous interpretation of constitutional instruments.[112] Such an approach would entitle the domestic courts to consider human rights jurisprudence from sources other than Strasbourg (such as Canada, New Zealand and South Africa) and return to the approach exemplified by ***Derbyshire County Council v Times Newspapers***[113] and which is integral to the South African Constitution Act.[114]

This alternative approach would have some obvious benefits. First, it would allow judges to shape Convention law under the HRA so as to reflect our distinctive cultural and historical practices. Secondly, it would promote an indigenous human rights jurisprudence, as the architects of the HRA originally envisaged- thereby contributing to the development of European law in this field. Finally, such a perspective would ensure that the domestic courts adopted a broader, more teleological analysis which more closely resembled that actually employed by the ECtHR.[115] The Strasbourg court does not amplify its principles and reasoning in the discursive analytical style of the common law tradition; and principles are often extended- even if the reasoning for doing so is, sometimes, exiguous. For example, the principle from ***Z v Finland***[116] that Article 8 interferences with confidential medical information must be subject to important limitations and accompanied by effective and adequate safeguards against abuse has been applied in the rather different contexts of broadcasting a CCTV film showing a suicide attempt,[117] and releasing into the public domain telephone taps

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112 See eg ***Minister of Home Affairs v Fisher*** [1980] AC 319, ***A-G of The Gambia v Momodou Jobe*** [1984] AC 689, 700–701, ***Matadeen v Pointu*** [1999] 1 AC 98, 108 and ***Reyes v The Queen*** [2002] AC 235 para 26.

113 [1993] AC 534.

114 Section 39 of the 1996 Act states 'When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

115 Speaking for a moment a jobbing practitioner, the close textual analysis used when the domestic courts consider ECtHR decision in HRA cases is a very different experience for the advocate than dealing with a constitutional case where the broad and purposive approach used, both in the Privy Council and in the Caribbean courts.

116 (1997) 25 EHRR 37, para 103.

117 ***Peck v United Kingdom*** (2003) 36 EHRR 719, para 78.

concerning a well known Italian politician,[118] although the ECtHR did not provide detailed reasoning for that extension- a style of judicial reasoning which the domestic courts have had acknowledge when adjudicating in HRA cases.

Conclusion

The HRA has now grown of age and there are no self evident reasons for prohibiting the domestic courts from taking their own direction when deciding Convention cases.[119] In fact, there are powerful grounds for suggesting that the ***Ullah*** principle is not based on firm foundations and is ripe for reconsideration. Whilst, as a matter of judicial comity, it is necessary for the domestic courts to comply with Strasbourg jurisprudence as a minimum requirement, no principle requires the ECtHR to define the ceiling of Convention rights under the HRA.

118 ***Craxi v Italy (No 2)*** (2003) Judgment of 17 July 2003, para 74.

119 Hugh Tomlinson and I argued in "Lord Bingham and the Human Rights Act 1998: the search for democratic legitimacy during the 'war on terror'" in ***Tom Bingham and the Transformation of the law: a liber amicorum*** (eds) Mads Adenas and Duncan Fairgrieve (OUP, 2009) that the ***Ullah*** principle was developed to seek democratic legitimacy by means a self-denying ordinance which has the effect of severely restricting the domestic courts' ability to be "an international standard-bearer of liberty and justice", as envisaged by Lord Bingham in 1993 when he wrote "The European Convention on Human Rights: Time to Incorporate" published in ***The Business of Judging: Selected Essays and Speeches*** (OUP, 2000).