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STRASBOURG JURISPRUDENCE IN DOMESTIC COURTS  
UNDER THE HUMAN RIGHTS ACT

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## ABSTRACT

Section 2 of the Human Rights Act 1998 enjoins UK domestic courts to ‘take into account’ Strasbourg jurisprudence but does not bind them to it. Neither does s.2 oblige domestic courts to follow it, imitate it or restrict themselves to it. However, judicial guidance to ‘follow’ the ‘clear and constant’ Strasbourg jurisprudence has fed a restrictive interpretation of the s.2 duty. The eagerness to maintain consistency with the Strasbourg Court and the central importance of the House of Lords’ guidance to ‘keep pace’ with Strasbourg jurisprudence ‘no more, no less’ has placed obvious limits on judicial reasoning under s.2. Further, this Strasbourg focus overly inflates the value of Strasbourg jurisprudence, which is often affected by a number of factors that make following it undesirable or simply impossible. In the end, ‘taking into account’ Strasbourg jurisprudence may require more than simply ‘keeping pace’ with or following the ‘clear and constant’ decisions of that court. For many reasons – not least related to the scheme of the Human Rights Act to ‘bring rights home’ – domestic courts may better address their duty under s.2 by focusing primarily on the cases as they arise in the specific context of domestic law, being guided by Strasbourg jurisprudence but not reliant upon it.

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# ABBREVIATIONS

- CLJ: Cambridge Law Journal
- CUP: Cambridge University Press
- ECHR: European Convention on Human Rights
- ECtHR: European Court of Human Rights
- EHLR: European Human Rights law Review
- HC: House of Commons
- HL: House of Lords
- HRA: Human Rights Act 1998
- HRLJ: Human Rights Law Journal
- ICCPR: International Covenant on Civil and Political Rights
- ICLQ: International and Comparative Law Quarterly
- JR: Judicial Review
- LQR: Law Quarterly Review
- LS: Legal Studies
- MLR: Modern Law Review
- NILQ: Northern Ireland Legal Quarterly
- OJLS: Oxford Journal of Legal Studies
- OUP: Oxford University Press
- PL: Public Law
- SJ: Solicitors Journal
- Stat LR: Statute Law Review
- UDHR: Universal Declaration on Human Rights

# INTRODUCTION

Under section 2 of the Human Rights Act 1998 domestic courts are enjoined to ‘take into account’ Strasbourg jurisprudence when addressing ‘a question which has arisen in connection with a Convention right’.<sup>1</sup> The words ‘take into account’ were carefully designed, heavily debated, and overtly intended to afford a measure of ‘flexibility and discretion’<sup>2</sup> to domestic courts discharging that duty. Exactly how far this discretion extends is a complex question and thus the focus of chapter I.

In the absence of any normative guidance, domestic courts have guided themselves to ‘follow any clear and constant’ Strasbourg jurisprudence ‘in the absence of special circumstances.’<sup>3</sup> In practice, however, several factors may make the focus on *prima facie* ‘following’ Strasbourg jurisprudence inappropriate. As the Lord Chancellor explained during the Parliamentary debates, ‘[t]here may ... be occasions when it would be right for the United Kingdom courts to depart from Strasbourg decisions ... [and] it is important that our courts have the scope to apply that discretion so as to aid the development of human rights law’.<sup>4</sup>

For example, enjoining domestic courts to follow Strasbourg jurisprudence which is outdated, affected by a margin of appreciation or based on a misunderstanding of domestic law, may serve to apply an overly restrictive interpretation of Convention rights domestically and would be difficult to reconcile with judicial reasoning which seeks to ‘aid the development of human rights law’. Domestic courts have identified these particular situations as ‘special circumstances’ feeding departure from Strasbourg jurisprudence but it is unclear that simply ‘departing’ from (or declining to ‘follow’) that jurisprudence is enough. Since a domestic court applying jurisprudence of this kind risks placing domestic law below compatibility with the Convention, chapter II

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<sup>1</sup> Section 2(1) Human Rights Act 1998.

<sup>2</sup> Hansard HL vol 584 col 1270 (19 January 1998).

<sup>3</sup> *R v Secretary of State for the Environment, Transport and the Regions ex p. Alconbury Developments Limited and others* [2001] UKHL 231; *R (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26 [20] (Lord Bingham); *R (On The Application of Animal Defenders International) v Secretary of State For Culture, Media and Sport. (Respondent)* [2008] UKHL 15.

<sup>4</sup> *Ibid.*

addresses the importance of courts 'escaping' that jurisprudence altogether and deciding the matter for themselves.

This in turn feeds the possibility that domestic courts are able to depart from Strasbourg in order to apply a more generous interpretation of Convention rights domestically. In large part the debate around this question turns on the purpose with which the HRA 1998 is perceived to have been enacted and chapter III accordingly frames discussion of the question in these terms. Plainly, however, guidance focused on following or maintaining consistency with the Strasbourg jurisprudence is unlikely to support a generous interpretation of Convention rights beyond that given by the Strasbourg Court.

In a similar vein, the value ascribed to decisions of the Strasbourg Court raises a specific quandary as to the status of jurisprudence outside the Convention remit. Where Strasbourg jurisprudence is not helpful or simply nonexistent it may be possible - even preferable - that domestic courts look outside the Convention for comparative assistance. The specific duty to take into account *Strasbourg* jurisprudence (both in judicial guidance and the language of s.2) therefore makes the ambit of comparative study the focus of Chapter IV.

Finally, chapter V will question the effect of a backdrop of concerns external to the Strasbourg jurisprudence itself. The type of Convention right in point (qualified or unqualified) may alter the discretion under s.2, as may the source of an alleged incompatibility (be it statute or common law). Whether Parliament has itself considered the issue(s) in play and the existence of the domestic system of precedent may also significantly circumscribe the discretion under s.2 HRA. Lastly, the institutional position of the Strasbourg Court and the effect of its own reforms may detract from the value of relying on Strasbourg jurisprudence as a measure of Convention compatibility at all. In any or all of the situations discussed in these chapters, 'bringing rights home'<sup>5</sup> and 'taking into account' Strasbourg jurisprudence may require more than simply 'keeping pace'<sup>6</sup> with or following the 'clear and constant' decisions of that Court.

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<sup>5</sup> *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997).

<sup>6</sup> *Ullah* (n 3).



# CHAPTER I

## INTENTIONS, APPROACHES AND CRITICISMS

Before any meaningful analysis can be presented on the effect of s.2 Human Rights Act 1998,<sup>7</sup> it will be useful to introduce the basis of the arguments. This chapter will accordingly deliver a synopsis of the thinking on s.2 to date. In doing so, attention will be given to the legislative intentions at the time of the passing of the Act, the drift of judicial reasoning and guidance on the s.2 obligation and the academic commentary on the interpretations and approaches to date.

### LEGISLATIVE INTENTIONS

Section 2(1) of the Human Rights Act 1998 reads as follows:

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
- (d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

Contrasted with s.3 of the European Communities Act 1972 - which has the effect of binding English courts to the jurisprudence of the European Court of Justice - the scheme under s.2 HRA is comparatively weak. That English courts must merely 'take into account' the Strasbourg jurisprudence seems, on the face of it, to afford a wide discretion and flexibility in the hands of the domestic judiciary. The stipulation that domestic courts *must* take into account relevant jurisprudence indicates that ignoring such material altogether is not an option but where there is relevant jurisprudence to 'take into account' the options open for a domestic court range from following the Strasbourg jurisprudence in the manner of precedent, considering but ultimately not

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<sup>7</sup> Herein 'HRA' or 'The Act'.

applying a relevant judgment, or simply formally acknowledging the relevant jurisprudence and making no further mention of it. As Leigh and Masterman have written:

In deceptively simple terms s.2(1) creates a significant judicial discretionary power to apply Strasbourg jurisprudence directly, to take it 'into account' but fail to apply it, or to come to a decision somewhere between the two extremes by either applying (or being influenced by) the Convention jurisprudence to a greater or lesser degree.<sup>8</sup>

The effect was intentional: s.2 was expressly designed *not* to tie domestic courts to decisions of the Strasbourg Court. The White Paper prior to the enactment of the HRA clarified that the scheme of s.2 would require domestic courts to 'take account of relevant decisions ... (although these will not be binding)'.<sup>9</sup> The then Lord Chancellor added that

... the word 'binding' is the language of precedent but the convention is the ultimate source of the relevant law ... [t]hey are a source of jurisprudence indeed, but not binding precedents which we necessarily should follow or even necessarily desire to follow.<sup>10</sup>

Conversely, Conservative peers could not 'see the difficulty in enjoining that English courts should follow [a Strasbourg] decision' and considered that it may in fact be 'in every way advantageous in saving an unnecessarily expensive and extremely dilatory visit to Strasbourg'.<sup>11</sup> Pursuant to such an aim, the importance of facilitating a judicial interpretation of Convention rights that is consistent with the interpretation of the Strasbourg Court is very clear. After all, the Strasbourg Court is intended to be 'an international court of last resort, rather than a court of first recourse in British cases'.<sup>12</sup> It is also obvious that the most straightforward way in which to ensure compatibility with the Strasbourg standard might be to follow the decisions of the Strasbourg Court in the manner of a precedential system - that Court being the most authoritative - yet the problems with such a construction are equally obvious.

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<sup>8</sup> I. Leigh, R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, Oxford 2008) 52; R. Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law' in H. Fenwick, R. Masterman, G. Phillipson (eds), *Judicial Reasoning Under the UK Human Rights Act* (CUP, Cambridge 2007) 62.

<sup>9</sup> *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997) [2.4].

<sup>10</sup> Hansard HL vol 583 col 515 (18 November 1997).

<sup>11</sup> *Ibid* (Lord Simon of Glaisdale).

<sup>12</sup> A. Lester, 'The utility of the Human Rights Act: a reply to Keith Ewing' [2005] PL 249, 256.

Firstly, under the ECHR the UK is only bound to abide by decisions of the Strasbourg Court to which it was a party<sup>13</sup> and, crucially, such cases do not have any special weight in domestic courts.<sup>14</sup> As Lord Hoffman outlined in *Re McKerr*:

Under the Convention, the United Kingdom is bound to accept a judgment of the Strasbourg Court as binding: Article 46(1). But a court adjudicating in litigation in the United Kingdom about a domestic 'Convention right' is not bound by a decision of the Strasbourg court. It must take it into account.<sup>15</sup>

An amendment to bind domestic courts to Strasbourg jurisprudence would have the effect of binding domestic courts to judgments against all other High Contracting Parties to the Convention (with different legal and cultural traditions)<sup>16</sup> when, as Lord Irvine noted during the Parliamentary debates, '[t]here may ... be occasions when it would be right for the United Kingdom courts to depart from Strasbourg decisions'.<sup>17</sup>

Secondly, carbon copies of Strasbourg reasoning would sit uneasily with the Government's declared intention to provide domestic judges with the opportunity to 'make a distinctively British contribution to the development of the jurisprudence of human rights in Europe'<sup>18</sup> and 'help to influence the development of case law on the Convention by the European Court of Human Rights'.<sup>19</sup> The Lord Chancellor, Lord Irvine, firmly upheld that domestic judges required 'flexibility and discretion'<sup>20</sup> since 'the Courts will often be faced with cases that involve factors perhaps specific to the United Kingdom which distinguish them from cases considered by the European Court

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<sup>13</sup> Art.46(1) ECHR provides: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are the parties'. Art.46(2) provides the task of supervising the execution of such a judgment is exercised by the Committee of Ministers.

<sup>14</sup> M. Amos, *Human Rights Law* (Hart Publishing, Oxford 2006) 20.

<sup>15</sup> *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [66] (Lord Hoffman).

<sup>16</sup> Cf. E Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' [2005] EPL 405, 407 doubting the strength of this argument alone as indicative of legislative intentions, Wicks suggests that 'this unwanted consequence could easily have been removed by careful redrafting of the clause'. Respectfully, it is difficult to envisage a linguistic construction which would result in binding domestic courts to the decisions of the Strasbourg court without binding it also to the outcomes of cases not involving the United Kingdom and Wicks offers no suggestion to that end (A construction that binds UK courts only to decisions in cases to which it is a party is already provided for by Art.46 ECHR).

<sup>17</sup> Hansard HL vol 584 col 1271 (19 January 1998).

<sup>18</sup> *Rights Brought Home* (n 3) [1.14].

<sup>19</sup> *Ibid* [1.18].

<sup>20</sup> Hansard HL vol 584 col 1270 (19 January 1998).

... it is important that our courts have the scope to apply that discretion so as to aid the development of human rights law'.<sup>21</sup>

Thirdly, (where relevant Strasbourg jurisprudence exists) it would rule out domestic reliance on a wealth of jurisprudence from jurisdictions outside the ECHR such as the commonwealth systems which arguably have more in common with the English legal system than some of the European Convention states.<sup>22</sup>

Perhaps most importantly, Parliament did not enact the HRA in order to incorporate the ECHR directly, or to make it directly enforceable in UK courts. Parliament instead retained the power to make any substantial changes to domestic law to itself, as well as the possibility that it may legislate incompatibly with the Convention; treating Strasbourg jurisprudence in the manner of binding precedent would clearly sit uncomfortably next to the HRA as a statute which specifically reserves sovereignty for Parliament. Since section 3 HRA is carefully worded to require domestic courts to interpret domestic law compatibility with the Convention *only* 'so far as it is possible to do so' and declarations of incompatibility under section 4 are discretionary (which ultimately need not be acted upon), it would be strange if section 2 compelled a particular result where sections 3 and 4 did not.<sup>23</sup> The Lord Chancellor thus upheld the view that '[t]o 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'.<sup>24</sup>

To these ends, when a Conservative amendment to replace the words 'must take into account' with 'shall be bound by' was debated in the House of Lords, Lord Browne-Wilkinson concluded that 'the doctrine of stare decisis ... does not find much favour north of the Border, finds no favour across the Channel and is an indigenous growth of

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<sup>21</sup> Ibid cols 1270-1271.

<sup>22</sup> By virtue of dualist relationships with international law (rather than the monist systems employed by many European states) and a shared legal heritage. This topic is discussed to in more breadth and detail in chapter III.

<sup>23</sup> The HRA does not require declarations of incompatibility to be remedied with legislative change; Parliament is free to note the declaration and effect no change at all.

<sup>24</sup> Hansard HL vol 583 col 514 (18 November 1998).

dubious merit'.<sup>25</sup> Similarly, Lord Lester took the view that any stronger obligation than to 'take into account' would be to go 'further than the European Convention itself requires'<sup>26</sup> and be 'quite inappropriate ... since such cases deal with laws and practices which are not those of the United Kingdom'.<sup>27</sup> Lord Irvine thought it would give way to becoming 'more European than the Europeans'<sup>28</sup> and that it was important to avoid 'putting the courts in some kind of straitjacket where flexibility is what is required'.<sup>29</sup>

Before further speculation it is important to clarify the proper weight of this evidence. It is certainly inappropriate to paraphrase clarifications or opinions given during Parliamentary debates in support of any argument without placing them in context. As Lord Steyn has put it, '[l]anguage is a labyrinth ... words in a legal context can never be understood except in relation to the circumstances in which they were used'.<sup>30</sup> Moreover, the possibility that one can even consider the collective intentions of a legislative body may itself need some qualification.

Firstly, an important distinction might be made between Government intentions and Parliamentary intentions. As Lord Steyn put it, '[w]hat is constitutionally unacceptable is to treat the intentions of the government as revealed in debates as reflecting the will of Parliament'.<sup>31</sup> Aileen Kavanagh has also outlined a significant distinction between what she terms 'enacted intentions' and 'unenacted intentions'.<sup>32</sup> 'Enacted intentions' are those that 'are manifest and expressed in the words of the statute itself'<sup>33</sup> and, importantly, 'Parliament has an institutionalized system for expressing these intentions in an authoritative way and for registering the degree of support for them, i.e. through a statutory text which has gone through all the required stages of the enactment

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<sup>25</sup> Hansard HL vol 583 col 513 (18 November 1997).

<sup>26</sup> Hansard HL vol 584 col 1269 (19 January 1998).

<sup>27</sup> Ibid.

<sup>28</sup> Hansard HL vol 583 col 514 (18 November 1997).

<sup>29</sup> Hansard HL vol 583 col 515 (18 November 1997).

<sup>30</sup> Lord Steyn, '*Pepper v Hart*: A Re-examination' [2001] OJLS 59, 60.

<sup>31</sup> Ibid 68; although it is suggested that the conception of the HRA put forward by the Government in the White Paper may be useful for the purposes of identifying the scheme (and thus the context) within which a provision was enacted.

<sup>32</sup> A. Kavanagh, 'The role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) OJLS 179, 181.

<sup>33</sup> Ibid.

process'.<sup>34</sup> That the judiciary is given discretion and flexibility by virtue of the language in s.2 (enjoining courts only to 'take into account' Strasbourg jurisprudence) might accordingly be described as an 'enacted intention'. By contrast, 'unenacted intentions' are those perceivable from the debates but not included in the text of the statute. Since these have no institutionalized equivalent, identifying what the *unenacted intentions* are, or for eliciting the degree of support for them, may be problematic.<sup>35</sup>

'Unenacted intentions' are of particular interest since many commentators rely on exactly this brand of evidence, either to support a restrictive interpretation of the ECHR domestically, or one that allows domestic development beyond the Strasbourg standard.<sup>36</sup> For instance, supporters of the latter approach usually point to pronouncements during the Parliamentary debates describing the Convention rights as 'a floor of rights',<sup>37</sup> that 'this is a Bill which only gives and does not take away'.<sup>38</sup> Indeed, some members of the senior judiciary have also made use of this type of evidence in the course of their reasoning.<sup>39</sup> Masterman has suggested that this kind of evidence 'confirms the possibility that domestic courts could legitimately depart from the Strasbourg jurisprudence to enhance domestic rights protection',<sup>40</sup> while Jonathan Lewis has been highly critical of the failure to realise this potential:

... For so long the UK courts have clung to parliamentary intention as a necessary 'fairy tale' to justify judicial creativity and activism. Here they were presented with unusually explicit evidence of parliamentary intention which provided a potent catalyst with which to advance human rights protection and they have not *fully* taken advantage of it...<sup>41</sup>

Yet, as Kavanagh notes, 'MPs may have had a variety of intentions regarding specific sections of the Bill, both in terms of how they would be applied and the aims they

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<sup>34</sup> Ibid 182.

<sup>35</sup> Ibid.

<sup>36</sup> Eg E. Wicks, 'Taking Account of Strasbourg?' (n 10).

<sup>37</sup> Hansard HL vol 583 col 510 (18 November 1997) (Lord Irvine).

<sup>38</sup> Ibid.

<sup>39</sup> Eg Baroness Hale in *Re P and Others* [2008] 3 WLR 76 [119]. After some reference to statements given in the Government's White Paper as well as those of the Home Secretary and the Lord Chancellor as reported in Hansard, Baroness Hale felt it 'clear' that Parliament intended domestic courts 'at least in some cases, to be able to go further'.

<sup>40</sup> R. Masterman, 'Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?' [2004] PL 725, 730.

<sup>41</sup> J. Lewis, 'The European Ceiling on Human Rights' [2007] PL 720, 726.

would fulfil',<sup>42</sup> and 'it is well known that voting on legislation in the House of Commons is frequently influenced by factors which have more to do with the political consequences of the vote for the MP, than with intentions or beliefs about the substance of the Bill'.<sup>43</sup> It is hard to disagree. Since the objective of Parliamentary debate is to air competing views, it is difficult to ascribe any particular view to the intentions of Parliament as a whole. In fact, the idea that such material might uncover the intentions of Parliament during the enactment of a particular provision may itself be a fiction. While the well known *Pepper v Hart*<sup>44</sup> case indicated that statements made in Parliamentary debates could contain 'a clear indication of what Parliament intended in using those words',<sup>45</sup> it is not always clear that the prized collective intention is discernible, or even tangible.<sup>46</sup> Thus, while a more generous interpretation of Convention rights *may* be possible ('at least in some cases')<sup>47</sup> 'unenacted intentions' alone may be insufficient to support this.

However, the *rejection* of specific amendments (such as the Conservative amendments discussed above) may be distinguishable from the category of 'unenacted intentions' for which Kavanagh advocated caution; straightforward rejections of certain statutory language are, at least, a clear indication of what Parliament certainly did *not* intend.<sup>48</sup> With this view, it is possible to explore certain possibilities which would have been ruled out had the binding amendments above been passed: that domestic courts are not obliged to follow the decisions of the Strasbourg Court; that judges are probably free to develop human rights jurisprudence under the Convention in keeping with domestic traditions (rather than being restricted exclusively to the Strasbourg approach); and that

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<sup>42</sup> A. Kavanagh, 'The role of Parliamentary Intention' (n 26) 181; This has been described as the distinction between *application intentions* and *further purposes*, see A. Marmor, *Interpretation and Legal Theory* (Clarendon Press, Oxford 1992) 165ff; see also G. MacCallum, 'Legislative Intent' in R. Summers (ed.) *Essays in Legal Philosophy* (Blackwell, Oxford 1968) 237.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Pepper v Hart* [1993] AC 593.

<sup>45</sup> *Ibid* 634-635 (Lord Browne-Wilkinson).

<sup>46</sup> E.g. M Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal profession', in Clements and J Young (eds), *Human Rights Act: Changing the Culture* (Blackwell, Oxford 1999) 93.

<sup>47</sup> *Re P* (n 33) [119].

<sup>48</sup> Equally, official reports and white papers may identify significant omissions in the enacted legislation so as to indicate the negatively defined intentions in much the same way. Eg *Pepper v Hart* (n 38) 635 (Lord Browne-Wilkinson).

courts are not prohibited from referring to judicial jurisdictions outside the Convention remit. On this basis, drawing from reasons given for the rejection of the binding amendment – eg that domestic courts ‘must be free to try to give a lead to Europe as well as to be led’<sup>49</sup> – may support a generous view of the Convention in domestic courts.

On the other hand, these possibilities must be balanced with the rejection of further amendments made by the opposition, purporting to give an even wider discretion to domestic courts. The opposition in the House of Commons (rather inconsistent with the arguments made in the House of Lords) tabled an amendment to suggest that the word ‘must’ in s.2 should be substituted with ‘may’, alongside an amendment to replace ‘take into account’ with ‘have regard to’.<sup>50</sup> The amendments were thought to be ‘more suited to the circumstances in guiding the relationship between United Kingdom and European law’.<sup>51</sup> It was said that the approach of domestic courts should be ‘within the general framework of the jurisprudence of the European Court, but not to be too tightly bound by it’;<sup>52</sup> Strasbourg jurisprudence should be ‘persuasive rather than prescriptive’.<sup>53</sup> However, it was thought that the effect of the word ‘may’ could be that domestic courts ‘might produce, on the same set of facts, different results because some may take the jurisprudence into account and some may not’.<sup>54</sup> As Mr. Douglas Hogg contributed, the word ‘may’ would be inappropriate for the aims of the provision, thinking it ‘right that the courts of the United Kingdom should take into account the stated decisions and opinions, although it is for the courts to determine their relevance and appropriate weight’.<sup>55</sup> The rejection of this amendment would thus indicate that domestic courts at least have some limits on their discretion, although, resisting too much speculation at this early stage, a conservative conclusion must be that Parliamentary intentions (alone) make it difficult to determine more specifically what these are.

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<sup>49</sup> Hansard HL vol 583 col 510 (18 November 1997) (Lord Irvine)

<sup>50</sup> Hansard HC vol 313 col 389 (3 June 1998) (Mr Clappison).

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid col 390.

<sup>54</sup> Hansard HC vol 313 col 402 (3 June 1998) (Mr Hoon).

<sup>55</sup> Ibid col 395.



The only certain conclusions that can be drawn (other than those plainly given in the text of the provision itself) must be negatively defined. While domestic courts are obliged to ‘take into account’ any ‘relevant’ Strasbourg jurisprudence, they *are not* obliged to follow it, imitate it, restrict themselves to it or expand upon it. Paradoxically, and despite intuitive misgivings, the so-called ‘unenacted intentions’ may in this way provide the clearest indication of the *intentional* discretion given in s.2.

### **JUDICIAL APPROACHES AND ACADEMIC COMMENTARY**

On a purely semantic level the words ‘take into account’ are entirely discretionary and offer no guidance as to how domestic courts ought to discharge the duty. Moreover, concerns that the guidance given by those words was too vague were dismissed by the Lord Chancellor on the grounds that domestic courts might simply be trusted to ‘use their commonsense’.<sup>56</sup> Predictably, the range of possibilities arising from such ambiguity has prompted a range of judicial approaches from following the Strasbourg jurisprudence *simpliciter* to consciously departing from that jurisprudence, and this range of judicial approaches has, generally speaking, been afforded little sympathy by commentators: courts demonstrating an over inclusive approach are accused of ‘blindly following’ or abdicating judicial responsibility to Strasbourg, while courts showing more modest reference to Convention jurisprudence, or indeed no reference at all, have come under fire for circumventing the obligation altogether.<sup>57</sup>

This section does not seek to provide an analysis of every case in which s.2 has been given mention; s.2 is potentially engaged in every case brought under the HRA and space prohibits such a comprehensive study. Attention will instead be focused toward outlining the most prevalent or significant judicial approaches: following Strasbourg jurisprudence, departing from Strasbourg jurisprudence with reasons and departing from Strasbourg jurisprudence without giving reasons for doing so.

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<sup>56</sup> Hansard HL vol 584 col 1271 (19 January 1998).

<sup>57</sup> Eg E. Wicks, ‘Taking Account of Strasbourg?’ (n 10) 410; The latter approach may, at any rate, fall foul of s.6 HRA 1998.

## I. FOLLOWING STRASBOURG JURISPRUDENCE: (THE ‘MIRROR PRINCIPLE’)<sup>58</sup>

Despite the evident legislative intentions (of Government and Parliament, enacted and unenacted) not to bind domestic courts to the Strasbourg jurisprudence through s.2, the dominant approach in judicial reasoning has tended to interpret the Convention case law as more than merely persuasive authority. The prevailing fear appears to be that a court failing to follow clear Strasbourg case law runs the obvious risk of appeal, and ultimately challenge in Strasbourg. Apart from reflecting badly on the judicial image, the result is costly and one which the HRA 1998 is usually said to have been designed to avoid or prevent altogether.<sup>59</sup> Lord Slynn paid attention to the concern in *Alconbury*,<sup>60</sup> being careful to outline that domestic courts should usually follow the ‘clear and constant’ Strasbourg jurisprudence ‘in the absence of special circumstances’ in order to avoid such a result: ‘[i]f [a court] 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’.<sup>61</sup> Similarly in *Anderson*,<sup>62</sup> Lord Bingham stressed that ‘the House will not ‘without strong reasons’ depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber’<sup>63</sup> and set out authoritative guidance on the s.2 duty in *Ullah*:<sup>64</sup>

[C]ourts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court ... 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 ... 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

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<sup>58</sup> J. Lewis, ‘The European Ceiling on Human Rights’ (n 35).

<sup>59</sup> *Rights Brought Home* (n 3) [1.14]; K. Starmer, *European Human Rights Law. The Human Rights Act 1998 and the European Convention on Human Rights* (LAG, London 1999) 26.

<sup>60</sup> *R. (On the Application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23.

<sup>61</sup> *Ibid* [26].

<sup>62</sup> *R. (On the Application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46.

<sup>63</sup> *Ibid* [18].

<sup>64</sup> *Regina (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26.

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.<sup>65</sup>

This dicta has been given repeated judicial endorsement,<sup>66</sup> and the drift of judicial guidance on s.2 has been to stress the so-called ‘mirror principle’<sup>67</sup> that the Convention must be given the same meaning as that given by the Strasbourg Court by reason of it being ‘the highest judicial authority on the interpretation of those rights’:<sup>68</sup> ‘the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down’.<sup>69</sup>

That the dominant approach courts have taken to s.2 is to follow Strasbourg jurisprudence is almost unanimously recognised by commentators on the provision. Fenwick’s conclusion was that ‘the obligation under s.2 as interpreted by the House of Lords comes close to affording binding force to the jurisprudence’,<sup>70</sup> and Merris Amos added that ‘[i]n the majority of cases, the obligation to take into account Strasbourg jurisprudence is construed as an obligation to follow it as well’.<sup>71</sup> Paul Kearns has suggested that this type of loyalty to the jurisprudence of the Strasbourg Court is ‘a practice that is becoming gradually habitual for our judiciary ... the effects of which would be difficult to reverse’.<sup>72</sup> Nico Krisch recently agreed, writing that ‘the House of

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<sup>65</sup> Ibid [20] (Lord Bingham).

<sup>66</sup> Eg *R v Lambert* [2001] UKHL 37 [28] (Lord Steyn); *Anderson* (n 56) [18] (Lord Bingham); (*R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653 [44]; *Kay and others v London Borough of Lambeth* [2006] UKHL 10 [28] (Lord Bingham); *R (On The Application of Animal Defenders International) v Secretary of State For Culture, Media and Sport (Respondent)* [2008] UKHL 15; Baroness Hale, ‘Who Defines Convention Rights?’ (JUSTICE Tom Sargant Memorial Annual Lecture, 15 October 2008) <<http://www.justice.org.uk/trainingevents/annuallecture/index.html>> accessed 7 November 2008.

<sup>67</sup> J. Lewis, ‘The European Ceiling on Human Rights’ (n 35).

<sup>68</sup> *Kay* (n 60) [28] (Lord Bingham).

<sup>69</sup> Ibid.

<sup>70</sup> H, Fenwick, *Civil Liberties and Human Rights* (Cavendish, London 2007) 193.

<sup>71</sup> M. Amos, *Human Rights Law* (n 8) 18.

<sup>72</sup> P. Kearns, ‘United Kingdom Judges in Human Rights Cases’, in E. Özücü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, Birmingham 2003) 82.

Lords has refused to make use of this space: the dominant position among the judges is instead one of close attention and loyalty to Strasbourg judgments'.<sup>73</sup>

Nevertheless, while the approach is criticised by some as overly deferential, it may also be characterised as a pragmatic one. Firstly, it has also been suggested that while s.2 manifestly does not oblige domestic courts to *follow* relevant ECtHR case law, s.6 HRA - which provides that it is unlawful for courts (as public authorities) to act in a way which is incompatible with a Convention right - does have the binding effect that s.2 lacks.<sup>74</sup> It is generally agreed that s.2 leaves it open for a domestic court to 'take account' of but ultimately not apply Strasbourg jurisprudence, but a court failing to take account of 'relevant' jurisprudence arguably fails to discharge the s.2 duty and may fall foul of illegality under s.6 of the Act.

Secondly, plausibly the most reliable way to 'bring rights home' and ensure compatibility with the Convention would be to take account of the approach that the Strasbourg Court itself applies. It is at least arguable that this is the purpose of s.2 HRA in requiring domestic courts to 'take into account' the jurisprudence of that Court. Just as it was anomalous to deny individuals their Convention rights in domestic courts but give them the right to have them vindicated in Strasbourg before the HRA, there is clearly something anomalous in refusing to apply Strasbourg jurisprudence which would be applied by the ECtHR itself.<sup>75</sup> The Strasbourg Court in *Goodwin v United Kingdom*<sup>76</sup> lent some support to this kind of reasoning, saying of its own approach to previous jurisprudence:

While the court is not formally bound to follow its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.<sup>77</sup>

As Elizabeth Wicks has conceded '[a] domestic evolution of rights barely distinguishable from that which has evolved at Strasbourg will ... avoid (or, at least,

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<sup>73</sup> N. Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 MLR 183, 202-3.

<sup>74</sup> I. Loveland 'Making it up as they go along? The Court of Appeal on same sex spouses and succession rights to tenancies' [2003] PL 222, 233.

<sup>75</sup> Ibid. See also P.Greatorex, 'The Human Rights Act: s.2(1): Duty to Take into Account Strasbourg Jurisprudence [2001] JR 220, 221.

<sup>76</sup> *Goodwin v United Kingdom* (2002) 35 EHRR 18.

<sup>77</sup> Ibid [74].

lessen) the need for Britain to wash its dirty laundry in the public arena of Europe'.<sup>78</sup> Further, Loveland has actually considered that ECHR decisions are *so* important as to be considered as authority even where they did not 'argue the point through in a coherent and thorough manner'.<sup>79</sup>

Yet, while following Strasbourg jurisprudence will usually shelter UK law from the realms of incompatibility, it is clear that loyalty to Strasbourg will do little more. The approach is effective where following Strasbourg jurisprudence has the effect of bringing domestic standards *up* to a Strasbourg minimum, but commentators have been quick to question how the justification lends weight to following Strasbourg with the effect of *limiting* the development of human rights jurisprudence to that 'floor'.<sup>80</sup> In fact, writing before the HRA was in force, Iain Leigh in fact felt that the argument probably supported a generous, rather than 'mirror', view of the Convention:

It is implicit that in any given case UK judges might adopt a more rigorous approach than Strasbourg and declare legislation incompatible that the Strasbourg court would find to be within the margin of appreciation. Moreover, if a higher standard of human rights protection operated domestically, it would also staunch the flow of successful applications at Strasbourg.<sup>81</sup>

Nevertheless, the further importance that the House of Lords has attached to the Strasbourg jurisprudence is apparent from the reluctance to depart from the Strasbourg line even where the Strasbourg jurisprudence lacks clarity or is in an unsatisfactory state. In *N v Secretary of State for the Home Department*<sup>82</sup> the House of Lords considered the appeal of a woman who, after her arrival in this country from Uganda, was found to have an AIDS-defining illness. The appellant claimed that the treatment that she needed would not be available to her in Uganda and that she would die within a matter of months if she were to be returned to that country. The House considered the relevant decisions of the Strasbourg Court as enjoined to do by s.2 HRA but struggled to find clarity in the guidance and were clearly unwilling to depart from the Strasbourg

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<sup>78</sup> Eg E. Wicks, 'Taking Account of Strasbourg?' (n 10) 414.

<sup>79</sup> Ibid 227.

<sup>80</sup> Eg N. Krisch, 'The Open Architecture of European Human Rights Law' (n 67) 202-3; R. Masterman, 'Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?' (n 34); E. Wicks 'Taking Account of Strasbourg?' (n 10); J. Lewis, 'The European Ceiling on Human Rights' (n 35).

<sup>81</sup> I. Leigh, L. Lustgarten 'Making Rights Real: The Courts Remedies, and the Human Rights Act' (1999) 58(3) CLJ 509, 517.

<sup>82</sup> *N v Secretary of State for the Home Department* [2005] 2 WLR 1124.

decisions in order to answer the problem domestically. The ECtHR had held in *D v United Kingdom*<sup>83</sup> and subsequent cases that Article 3 was breached by deporting AIDS sufferers who would not receive proper treatment *where the facts of the case were very exceptional*. Lord Nicholls analogised the appellant's position in this case to having a life-support machine switched off,<sup>84</sup> but had difficulty with the Strasbourg jurisprudence, describing the Strasbourg authorities as 'in a not altogether satisfactory state'<sup>85</sup> and concluding that the available decisions 'lacked [the ECtHR's] customary clarity'.<sup>86</sup> Lords Hope and Brown also analysed the ECtHR's case law but had trouble identifying any clear principles. Nevertheless, Lord Hope expressed the view that the task of domestic courts was to 'take [the Strasbourg] case law as we find it, not as we would like it to be' and the House, 'with considerable misgivings',<sup>87</sup> dismissed her appeal.

In large part this reluctance on the part of domestic courts to decide the matter for themselves may be attributable to an understanding about the purpose of the HRA as a statute which *only* provides remedies in domestic courts that would otherwise be found in Strasbourg. Lord Roger seemed to explain his construction of the duty in s.2 on this basis, feeling that bringing Strasbourg remedies into domestic courts required a certain loyalty to the meaning of the Convention as given by the Strasbourg Court:

... Parliament's purpose in enacting the Human Rights Act 1998 so as to 'bring rights home' was to provide remedies in the British courts for the violations of people's Convention rights ... The Convention rights themselves were not to be altered as they passed through customs at Dover and entered our domestic law with its particular system of remedies.<sup>88</sup>

This particular point has emerged as a matter of some debate, dividing judges and academics alike. Contrary to the construction given by Lord Roger (quoted above) the House of Lords in *Re P and Others*<sup>89</sup> recently explained that "'Convention rights' within the meaning of the 1998 Act are domestic and not international rights. They are

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<sup>83</sup> (1997) 24 EHRR 423.

<sup>84</sup> *N* (n 76) [4].

<sup>85</sup> *Ibid* [11].

<sup>86</sup> *Ibid* [14].

<sup>87</sup> *EM (Lebanon) v Secretary of State for Home Department* [2008] UKHL 64 [8] (Lord Hope).

<sup>88</sup> *Attorney General's Reference No 2 of 2001* [2003] UKHL 68 [162].

<sup>89</sup> [2008] 3 WLR 76.

applicable in the domestic law of the United Kingdom and it is the duty of the courts to interpret them like any other statute'.<sup>90</sup>

Ultimately, whether a court views the Convention rights arising under the HRA as (a) rights as defined by Strasbourg but given effect in United Kingdom law; or (b) rights defined by United Kingdom law within the parameters defined by Strasbourg<sup>91</sup> may directly affect the impact of Strasbourg jurisprudence under s.2 HRA. Specifically it may affect the possibility that a court will follow the decisions of the Strasbourg Court 'no more, no less', or progressively develop human rights jurisprudence *beyond* the Strasbourg approach. If the correct construction of Convention rights is that given in (b) above (and most recently preferred by the House of Lords in *Re P*) the hitherto reluctance of domestic courts to depart from or build upon Strasbourg jurisprudence may become less frequent.<sup>92</sup>

## II. 'DEPARTING'<sup>93</sup> FROM STRASBOURG JURISPRUDENCE (WITH REASONS)

It will be recalled that the Conservative amendment purporting to bind domestic courts to Strasbourg jurisprudence was emphatically opposed on the grounds that any stronger obligation than to 'take into account' would go 'further than the European Convention itself requires'<sup>94</sup> and be 'quite inappropriate to do so since such cases deal with laws and practices which are not those of the United Kingdom'.<sup>95</sup> It was in this way envisaged that Convention rights would be 'subtly and powerfully woven into our law',<sup>96</sup> simultaneously creating opportunity for the development of a so-called (and essentially) 'domestic law of human rights'.<sup>97</sup>

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<sup>90</sup> Ibid [33] (Lord Hoffman).

<sup>91</sup> The question was put in these terms by Baroness Hale in *Re P* (n 33) [84].

<sup>92</sup> The debate around the construction of Convention rights in domestic law is returned to at greater length in Chapter III.

<sup>93</sup> 'Departure' is used loosely in this context. Since under s.2 a domestic courts is under a duty only to 'take into account' relevant Strasbourg jurisprudence and not to apply it, there is no 'departure' in the precedential sense.

<sup>94</sup> *Hansard* HL vol 584 col 1269 (19 January 1998) (Lord Lester of Herne Hill).

<sup>95</sup> Ibid.

<sup>96</sup> *Rights Brought Home* (n 3) [1.13].

<sup>97</sup> Eg Laws LJ in Cambridge Centre for Public Law, *The Human Rights Act and the Criminal Justice and Regulatory Process*, (Hart Publishing, Oxford 1999) (Overview) xiii.

Pursuant to such an aim it would naturally be ‘insufficient simply to identify a previous decision of the ECtHR on the matter in issue and to follow it’.<sup>98</sup> Accordingly, while the drift of judicial reasoning under s.2 has seemingly favoured a ‘mirror’ approach to the Strasbourg case law it is clear that the guidance given by the House of Lords (as well as the discretion in the provision itself) allows departure from that jurisprudence. As Nico Kirsch has written, the vague formula to ‘take into account’ Strasbourg jurisprudence ‘deliberately creates opportunities for divergence’.<sup>99</sup> Further, ‘[f]ormulae such as ‘special circumstances’ or ‘without strong reason’ still leave the courts significant flexibility and have led to ‘creative dialogues’ with the ECtHR as well as open departures from its interpretations’.<sup>100</sup>

It is possible to see that domestic courts have been ready to interpret the guidance in this manner. The judgment of the House of Lords *Williamson*<sup>101</sup> is a good example: the case concerned the appeal of parents and teachers of children at an independent Christian school where discipline was enforced by mild corporal punishment. According to their religious beliefs the claimants asserted that the teachers had the right to administer such treatment and claimed that s.548 Education Act 1996 (prohibiting corporal punishment) interfered with their rights under Article 9 ECHR. Taking into account these decisions, Lord Nicholls openly departed from the decision of the Strasbourg Court in *Campbell and Cosans*<sup>102</sup> (also concerning the scope of Article 9 and corporal punishment) in order to find that the manifestation of the beliefs of the parents and teachers fell within Article 9. His Lordship gave as reasons for the departure the fact that ‘[u]nlike Mrs Campbell and Mrs Cosans, the claimants in the present proceedings do not *object* to the use of corporal punishment. Quite the contrary: they *support* [it] and object to the statutory ban’.<sup>103</sup> Accordingly, *Campbell and Cosans* ‘[could not] be regarded as comparable to [the present case]’.<sup>104</sup>

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<sup>98</sup> N. Sheldon, ‘The Effect of the Human Rights Act on Domestic Precedent’ [2001] JR 208, 210.

<sup>99</sup> N. Kirsch, ‘The Open Architecture of European Human Rights Law’ (n 67) 203; I. Leigh, R. Masterman, *Making Rights Real* (n 2) 64.

<sup>100</sup> *Ibid* 202-3.

<sup>101</sup> *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

<sup>102</sup> (1982) 4 EHRR 293.

<sup>103</sup> *Williamson* (n 95) [5] (original emphasis).

<sup>104</sup> *Ibid* [52].



Other reasons for departing from a Strasbourg decision were given by Lord Hoffman in *Alconbury*, feeling that if Strasbourg jurisprudence ‘compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, [he] would have considerable doubt as to whether [it] should be followed’.<sup>105</sup> Similarly, Lord Bingham added in *Kay*<sup>106</sup> that

... a domestic court may challenge the application by the Strasbourg court of the principles it has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of national authorities. The 1998 Act gives it scope to do so.<sup>107</sup>

It is also clear that age may feed reasons for departure: some courts have plainly taken the view that more recent Strasbourg case law will be more relevant and thus more persuasive than older decisions. This was clearly a consideration in *Re F (Care: Termination of Contract)*.<sup>108</sup> Considering the compatibility of the Children’s Act 1989 with Article 9 of the Convention, Mr Justice Wall said he would be ‘disappointed if ... there were in every case to be extensive citation of authorities from the European Court of Human Rights, particularly where reliance was placed on cases pre-dating the 1989 Act’.<sup>109</sup> However, while the approach resembles the European Court of Human Rights’ own view of Convention case law (on the grounds that it is the Convention is a ‘living instrument’) and Parliament arguably intended it to give domestic courts space to disregard outdated judgments,<sup>110</sup> it is difficult to see that restricting reference to Strasbourg judgments given after any given date (for instance to post-1989 cases as in *Re F*) would not run directly counter to the obligation in s.2 HRA; as Leigh and Masterman have written, an attempt such as this ‘[flies] in the face of the duty to take account of [Strasbourg] jurisprudence ‘*whenever made or given*’’.<sup>111</sup>

A more compelling reason for departure from Strasbourg jurisprudence has been given on the grounds that the jurisprudence is affected by a margin of appreciation. Since the margin of appreciation ‘constitutes a recognition by Strasbourg court ... that is not best placed to decide the particular means by which the Convention’s Articles ought to be

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<sup>105</sup> *Alconbury* (n 54) [76].

<sup>106</sup> *Kay* (n 60).

<sup>107</sup> *Ibid* [28].

<sup>108</sup> [2000] 2 FCR 481; *The Times*, 22 June 2000 (emphasis added).

<sup>109</sup> *Ibid*.

<sup>110</sup> N. Kirsch ‘The Open Architecture of European Human Rights Law’ (n 67), 202-3.

<sup>111</sup> I. Leigh, R. Masterman, *Making Rights Real* (n 2) 57.

fulfilled in an individual signatory state'<sup>112</sup> it is arguable that a court faced with jurisprudence affected by a margin of appreciation may properly divorce it from its reasoning. Lord Hoffmann took this approach in *A and others v Secretary of State for the Home Department*:<sup>113</sup> confronted with Strasbourg authority shaped by the margin of appreciation, his Lordship said 'we, as a United Kingdom court, have to decide the matter for ourselves'.<sup>114</sup>

Open willingness to depart from a seemingly relevant decision of the Strasbourg Court has also been reasoned on the basis that the decision suffered from unclear reasoning. In *R v Lyons* for instance, Lord Hoffmann felt that there was 'room for dialogue' where an English court 'considers that the ECtHR has misunderstood or been misinformed about some aspect of English law',<sup>115</sup> and in *R v Spear*<sup>116</sup> the House of Lords were willing to depart from Strasbourg jurisprudence<sup>117</sup> on the basis that the Strasbourg Court had not 'receive[d] all the help ... needed to form a conclusion'.<sup>118</sup> In a similar vein is the reluctance to follow Strasbourg jurisprudence driven by a lack of confidence in Strasbourg reasoning itself: speaking during the Parliamentary debates, Lord Browne-Wilkinson felt it dangerous to 'tie' domestic courts to Strasbourg jurisprudence on the basis that '[w]e are now seeing a wider range of judges adjudicating such matters, a number of them drawn from jurisdictions 10 years ago not famous for their observance of human rights'.<sup>119</sup> Interestingly, the French judiciary has similarly evidenced a certain distrust of the Strasbourg Court: 'its composition with foreign judges coming from very different legal cultures and traditions, is the object of doubts and sarcasm'.<sup>120</sup>

In spite of this evidence that domestic courts are willing to depart from Strasbourg jurisprudence in certain circumstances, the approach is generally not distinct from the preference *prima facie* to follow the Strasbourg line. In fact, departure has often been

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<sup>112</sup> Laws LJ, 'The limitations of Human Rights' [1998] PL 254, 258.

<sup>113</sup> [2004] UKHL 56.

<sup>114</sup> Ibid [92]; *Re P* (n 33).

<sup>115</sup> *R v Lyons (No 3)* [2003] 1 AC 976 [46].

<sup>116</sup> *R v Spear and Others* [2003] 1 AC 734.

<sup>117</sup> *Morris v United Kingdom* (2002) 34 EHRR 52.

<sup>118</sup> *Spear* (n 110) [12] (Lord Bingham).

<sup>119</sup> Hansard HL vol 583 col 513 (18 November 1997).

<sup>120</sup> L. Heuschling, 'Comparative Law in French Human Rights Cases' in E. Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (n 66) 36.

reasoned in accordance with that approach. In *Alconbury* for instance, Lord Hoffman did not disagree with the view put forward by Lord Slynn that domestic courts should only depart from ‘clear and constant’ Strasbourg jurisprudence ‘in special circumstances’ and evidently felt that construction to be compatible with his view that departure may be appropriate where Strasbourg decisions ‘compelled a conclusion fundamentally at odds with the distribution of powers under the British Constitution’.<sup>121</sup>

One exception to this tendency has been given by Laws LJ who has firmly maintained that while the Act operates to modernise the law, ‘common lawyers must administer it, according to their ancient methods’.<sup>122</sup> Before the coming into force of the HRA, His Lordship had emphasised the foundational role of the common law in *ex parte B*:<sup>123</sup> certain rights (broadly speaking those occupying a central place in the Convention and obviously including the right to life) were not to be perceived merely as enjoying a legal status internationally, but were to be vindicated, as forming part of the substance of the English common law.<sup>124</sup> As such, in his Lordship’s view, the HRA did not implement a new system of rights adjudication reliant on Strasbourg; rather, it provided these domestic common law rights with a ‘democratic underpinning’.<sup>125</sup> Laws LJ has thus been reluctant to follow the ‘mirror’ approach set out by the House of Lords, suggesting instead that ‘the duty of domestic courts is ‘to develop, by the common law’s incremental method, a coherent and principled domestic law of human rights ... [t]reating the Convention text as a template for our own laws runs the risk of an over-rigid approach’;<sup>126</sup> ‘[t]he English Court is not a Strasbourg surrogate’<sup>127</sup> and ‘the task of domestic courts was ‘not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights...’.<sup>128</sup>

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<sup>121</sup> *Alconbury* (n 54) [76].

<sup>122</sup> Laws LJ Overview (n 91).

<sup>123</sup> *R v Cambridge District Health Authority ex parte B* [1995] 1 FLR 1055.

<sup>124</sup> *Ibid*; P. Kearns, ‘United Kingdom Judges in Human Rights Cases’, in E. Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (n 66) 69.

<sup>125</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, [71].

<sup>126</sup> *R (on the application of Prolife Alliance) v BBC* [2002] 2 All ER 756, 771-772.

<sup>127</sup> *Ibid* [33]-[44].

<sup>128</sup> *Runa Begum v Tower Hamlets London Borough Council* [2002] 2 All ER 668 [17].

There are some examples of domestic courts sympathising with this, and departing from Strasbourg jurisprudence with the effect of enhancing the scope of Convention rights beyond that given by the Strasbourg Court may often draw from such an approach. While uncommon, departures with that result have been made: in *Ghaidan v Mendoza*<sup>129</sup> for instance, Buxton LJ consciously and explicitly departed from the Strasbourg decision in *S v United Kingdom*<sup>130</sup> in order to grant protection for homosexual partnerships under the Housing Act 1967, and one of the reasons given for the ‘limited assistance’ of the European jurisprudence in *AG’s Ref 2 of 2001*<sup>131</sup> was that ‘it is open to member states to provide better protection than the Convention requires’.<sup>132</sup> Examples of this approach in the jurisprudence of English courts are, however, relatively rare and it is unlikely that ‘going’ further will of itself feed reasons for departure. Nico Krisch is sympathetic: the development of a municipal law of human rights ‘might have appeared as too openly ‘creative’, as a legislative rather than judicial function’ and the tendency to closely rely on or follow Strasbourg jurisprudence ‘may have helped to maintain a more clearly judicial role, one of ‘applying’ the law...’.<sup>133</sup> As another commentator has explained:

The English courts have not so far laid any particular emphasis on the importance of interpreting the Act generously. In fact, there is an obvious tension between the courts giving effect to the HRA as a constitutional instrument and avoiding the charge of excessive judicial activism.<sup>134</sup>

On the whole domestic courts have been unreceptive to an interpretation of s.2 HRA which appears to be too openly creative or allows the development of human rights jurisprudence beyond the Strasbourg position. As Lord Hope said in *N*:

It is not for [domestic courts] to search for a solution to [the appellant’s] problem which is not to be found in the Strasbourg case law ... [or] to determine what extensions, if any, are needed to the rights guaranteed by the Convention.<sup>135</sup>

It is clear that the prevalent trend in judicial reasoning under s.2 HRA leans more towards caution than creativity.

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<sup>129</sup> *Ghaidan v Mendoza* [2004] UKHL 30. See also *R (LS and Marper) v Chief Constable of South Yorkshire Police*, [2002] EWCA Civ 1275 [34].

<sup>130</sup> (1986) 47 D&R 247.

<sup>131</sup> *AG’s Reference (No 2 of 2001)* (n 82).

<sup>132</sup> *Ibid* 79.

<sup>133</sup> N. Krisch, ‘The Open Architecture of European Human Rights Law’ (n 67) 203; R. Masterman, ‘Aspiration or foundation?’ (n 2) 57, 78, 85.

<sup>134</sup> R. Clayton, ‘Judicial Deference and ‘Democratic Dialogue’: the legitimacy of judicial intervention under the Human Rights Act 998’ [2004] PL 33, 34.

<sup>135</sup> *N* (n 65) [25] (emphasis added).

### III. 'DEPARTING' FROM STRASBOURG WITHOUT CLEAR REASONS

On a straightforward reading of s.2 it is entirely plausible that a court need not give reasons for departing from relevant Strasbourg jurisprudence at all (the HRA enjoins domestic courts only to take it 'into account'). Commentators tend to encourage domestic courts to depart from the 'mirror approach' first laid down in *Alconbury*,<sup>136</sup> however, departures made without reasons have been received with scepticism.

The Court of Appeal decision in *Begum* for instance has been heavily criticised by commentators on s.2 HRA as a result of Laws LJ's short regard of the (relevant) Strasbourg jurisprudence. His Lordship resisted any express reliance on Strasbourg case law on the basis that the case concerned 'a matter of our domestic law of human rights'.<sup>137</sup> Perceived as overtly elevating the role of the judiciary in the development of human rights jurisprudence under the HRA, Laws LJ's approach has been described by one commentator as 'judicial creativity at its height'.<sup>138</sup> According to Paul Kearns 'the tenor of Laws LJ's dicta leaves us in no doubt that he [was] trying to carve a new way forward in UK human rights law based on an independent human rights regime only once derived from Strasbourg but no longer reliant on it'.<sup>139</sup> The sparse analysis given by Laws LJ to the relevant Strasbourg case law was condemned by Wicks as 'superficial' and 'not within the spirit of s.2(1)',<sup>140</sup> while Loveland suggested that '...the court has in effect turned a Nelsonian blind eye to the relevant European Court of Human Rights jurisprudence' on the basis that 'that authority [did] not support the conclusion which the court may have wished to reach'.<sup>141</sup>

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<sup>136</sup> R. Masterman, 'Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?' (n 34); E. Wicks, 'Taking Account of Strasbourg?' (n 10); J. Lewis, 'The European Ceiling on Human Rights' (n 35).

<sup>137</sup> *Begum* (n 122) [25].

<sup>138</sup> P. Kearns, 'United Kingdom Judges in Human Rights Cases', in Esin Öricü (ed), *Judicial Comparativism in Human Rights Cases* (n 66) 82.

<sup>139</sup> *Ibid.*

<sup>140</sup> E. Wicks, 'Taking Account of Strasbourg?' (n 10) 417.

<sup>141</sup> I. Loveland, 'Does Homelessness Decision-making Engage Article 6(1) of the European Convention on Human Rights?' [2003] EHRLR 177, 192.

The development of breach of confidence into a privacy remedy is another example: in a line of cases<sup>142</sup> leading up to *Campbell v MGN*<sup>143</sup> the Court of Appeal had incorporated a test from a decision of the Australian High Court<sup>144</sup> while simultaneously ignoring Strasbourg jurisprudence on the matter.<sup>145</sup> Moreover, even though the House of Lords did turn to the Strasbourg position in *Campbell* and anticipate the development made by the Strasbourg Court in *Von-Hannover*, judicial reasoning in privacy cases following that decision appeared to ascribe very little influence to *Von-Hannover*, preferring instead to rely on the domestic reasoning in *Campbell*.<sup>146</sup> This particular predilection has recently been re-addressed by the House of Lords<sup>147</sup> but the remarkable reluctance to ignore *Von Hannover* in a number of decisions evidences a worrying lack of rigour in judicial reasoning under s.2. Similarly, the House of Lords in *Limbuella*<sup>148</sup> held s.55 of the Nationality, Immigration and Asylum Act 2002 to contravene Article 3 ECHR and, in doing so, appeared to expand the scope of Article 3 beyond the Strasbourg jurisprudence without any express discussion on the duty under s.2 HRA.<sup>149</sup>

Most interesting is the recent decision in *Animal Defenders International*<sup>150</sup> (*ADI*) where the House of Lords did not attempt to justify departure from what was arguably the most relevant Strasbourg decision, *Verein gegen Tierfabriken v Switzerland*<sup>151</sup> (*VgT*). *ADI* concerned the compatibility of the absolute prohibition on paid political advertising in the Communications Act 2003 with Article 10 of the Convention, and the facts of *VgT* were almost identical. In that case, the Strasbourg Court found a violation

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<sup>142</sup> See: *A v B plc* [2002] EWCA Civ 337; [2003] QB 195; *Campbell v MGN* [2002] EWCA Civ 1373; [2003] QB 633.

<sup>143</sup> *Campbell v MGN* [2004] UKHL 22.

<sup>144</sup> *Australian Broadcasting Association v Lenah Game Meats* (2001) 208 CLR 199 [42].

<sup>145</sup> See e.g: *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Z v Finland* (1998) 25 EHRR 371; *Tammer v Estonia* (2003) 37 EHRR 43.

<sup>146</sup> G. Phillipson, 'The Common Law, Privacy and the Convention' in H. Fenwick, R. Masterman, G. Phillipson, *Judicial Reasoning Under the UK Human Rights Act* (n 2) 219.

<sup>147</sup> Eg *Regina v G (Secretary of State for the Home Department intervening)* [2008] UKHL 37.

<sup>148</sup> *R v Secretary of State for the Home Department, ex parte Limbuella* [2005] UKHL 66; [2006] 1 AC 396.

<sup>149</sup> As Leigh and Masterman have pointed out, '[h]ad the 'no less/no more' doctrine been applied rigorously, then presumably the threshold at which Article 3 would be engaged should have been the same as – not broader than – that recognised by Strasbourg' *Making Rights Real* (n 2) 79-80.

<sup>150</sup> *Animal Defenders International* (n 60).

<sup>151</sup> (2002) 34 EHRR 4.

of Article 10 of the Convention on the basis that the absolute ban was not proportionate to the legitimate aim pursued (protecting the rights of others) and therefore not necessary in a democratic society. In doing so the Court emphasised that, as a result of the value ascribed to political speech, the Swiss authorities enjoyed only a narrow margin of appreciation.

Despite the clear similarities in the decisions, the House of Lords favoured the reasoning of another Strasbourg decision in which the Court had found no violation of Article 10: *Murphy v Ireland*.<sup>152</sup> Yet, in contrast to *ADI* and *VgT* (both concerned with *political* advertising), the applicant in *Murphy* was prevented from broadcasting a *religious* advertisement by Irish legislation prohibiting advertisements ‘directed towards any *religious* or political end...’.<sup>153</sup> In that case the Strasbourg Court agreed that the prohibition satisfied the Article 10(2) qualifications but, importantly, did so on the grounds that the Court would accord a wider margin of appreciation in matters of religion: a clear contrast to *VgT*.<sup>154</sup>

Interestingly, the House of Lords seemed to discount *VgT* from their reasoning while continuing to speak in terms of following the Strasbourg jurisprudence. Baroness Hale clearly confirmed the task of domestic courts to be ‘to keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less’<sup>155</sup> while Lord Bingham was careful to repeat that ‘in the absence of special circumstances our courts should follow any clear and constant jurisprudence of the Strasbourg court’.<sup>156</sup> Yet it is unclear what the ‘special circumstances’ feeding departure from *VgT* might have been or what the ‘strong reasons’ were for diluting the effect of it. It might in theory have been suggested that - since the *VgT* judgment was given before *Murphy* and indeed the 2003 Act - the House could find the reasoning in *Murphy* more relevant given time concerns to the instant case but the point was not given any mention in the House of Lords, and as Lord

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<sup>152</sup> (2003) 38 EHRR 212.

<sup>153</sup> Section 10(3) Radio and Television Act 1988 (emphasis added).

<sup>154</sup> The view of the Strasbourg Court was that ‘... there is little scope ... for restrictions on political speech or on debate of questions of public interest ... However, a wider margin of appreciation is generally available ... when regulating freedom of expression in relation to matters ... within the sphere of morals or, especially, religion ... it is this margin of appreciation which distinguishes [*Murphy*] from [*VgT*]’ (n 146) [67].

<sup>155</sup> *R (On the Application of Al-Skeini and others) v Secretary of State for Defence* [2008] 1 AC 153 [106]

<sup>156</sup> *Alconbury* (n 54).

Scott recognised, the *VgT* case was in fact considered again more recently in Strasbourg.<sup>157</sup> Secondly, the Court in *VgT* emphatically provided that there would be a narrow - rather than wide - margin of appreciation and by virtue of religious sensitivities *Murphy* in fact commanded a wider margin of appreciation than *VgT*. Lastly, while the Administrative Court found the *VgT* decision to be ‘aberrant’<sup>158</sup> and ‘one of those ECtHR decisions which suffers from unclear or unsound reasoning’<sup>159</sup> no mention was made of the idea in the House of Lords.

Since the House of Lords confirmed the approach of *prima facie* following relevant Strasbourg jurisprudence and gave no substantive reasoning as to why a departure from *VgT* was appropriate, it may be that the House of Lords considered *Murphy* to be of the most relevance and therefore did not consider that it was ‘departing’ from Strasbourg at all. However, it is arguable that *VgT* was at least *as* relevant and since it is extremely difficult to at least see how *Murphy* was *more* relevant, that conclusion feels like a superficial result. Lord Neuberger recently hinted his agreement: ‘as the recent decision of this House in *Animal Defenders* ... shows, decisions of the ECtHR are not always followed as literally as some might expect’.<sup>160</sup> The reasoning in *ADI* might have been more convincing if the House of Lords had followed its own guidance, recognised the proper relevancy of *VgT* and outlined the ‘special circumstances’ or given the ‘good reason’ for diluting the effect of that case. Instead, domestic courts seemed to explicitly rule out the *VgT* decision as a persuasive factor altogether.<sup>161</sup> the opinion of Ouseley J in the Administrative Court was that the decision in *VgT* offered ‘no useful guidance’<sup>162</sup>

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<sup>157</sup> As a result of the continued Swiss prohibition on broadcasting the television commercial in question following the original application the Strasbourg Court found a new and continuing violation of Article 10: *Verein Gegen Tierfabriken Schweiz (VGT) v Switzerland* (no. 32772/02) Chamber judgment of 4 October 2007; On 19 December 2007 the Swiss Government requested that the case be referred to the Grand Chamber. That request was accepted on 31 March 2008 and the decision was confirmed on 8 July 2008.

<sup>158</sup> *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2006] EWHC 3069 (Admin) [30] (Auld LJ).

<sup>159</sup> *Ibid* [121] (Ousley J).

<sup>160</sup> *Regina (on the application of RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] 3 WLR 1023 [64].

<sup>161</sup> Of course this is *prima facie* justified within the normal meaning of s.2: since the obligation of domestic courts is expressly only to ‘take into account’ Strasbourg jurisprudence, once they have done so courts may legitimately choose to disregard it.

<sup>162</sup> *Animal Defenders International* (n 60) [121].



while, in the House of Lords, Lord Scott found it impossible to ‘assume from the *VgT* case that the European Court would disagree with your Lordships' conclusion that the statutory ban on the broadcasting of ADI's ‘political’ advertisement does not infringe ADI's Article 10 rights’.<sup>163</sup>

It is tempting to suggest that the House of Lords emphasised instead an arguably less relevant decision (*Murphy*) because it better supported the conclusion which the court wished to reach.<sup>164</sup> In her study Elizabeth Wicks identified this kind of approach as:

describ[ing] judges who assess the relevance of Strasbourg case law by reference to their own perception of the case law's value and integrity. In other words, some judges will primarily take into account those judgments which support their own pre-determined opinions.<sup>165</sup>

Other commentators have had similar reactions to such reasoning. Luc Heuschling's hypothesis was that ‘comparative law assumes mainly a legitimisation function’<sup>166</sup> while McCrudden noted that:

There are concerns increasingly voiced by academic commentators such as that substantial ‘cherry picking’ of which jurisdiction to cite occurs, and that those jurisdictions chosen will be those which are likely to support the conclusion sought, leading to arbitrary decision-making, not legitimate judging.<sup>167</sup>

A possible explanation for the altogether perplexing reasoning in *ADI* may be linked to the evident desire among domestic courts to avoid charges of judicial activism. It is plausible that the senior judiciary, mindful of negative public perceptions of the HRA - coupled with the inclination to avoid allegations of unwarranted activism - may operate a restrained approach to human rights adjudication under the Act in cases concerning less serious breaches of the Convention (reserving stricter scrutiny for more serious

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<sup>163</sup> *VgT* (n 145) [43].

<sup>164</sup> I. Loveland, ‘Does Homelessness Decision-making Engage Article 6(1) of the European Convention on Human Rights?’ (n 135) 192.

<sup>165</sup> E. Wicks, ‘Taking Account of Strasbourg?’ (n 10) 410 other commentators have contributed similarly on this point, eg Justice Antonin Scalia, ‘The Bill of Rights: Confirmation of Extent Freedoms or Invitation to Judicial Creation?’ in G. Huscroft and P. Rishworth, eds, *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford 2002); J. Allan, ‘A Defence of the Status Quo’ in T. Campbell, J. Goldsworthy and A. Stone, eds, *Protecting Human Rights: Instruments and Institutions* (OUP, Oxford, 2003).

<sup>166</sup> L. Heuschling ‘Comparative Law and the European Convention on Human Rights Cases’ (n 114) 47.

<sup>167</sup> C. McCrudden, ‘A Common Law of Human Rights? Trans-national Judicial Conversations on Constitutional Rights’ [2000] OJLS 449, 507.

‘battles’). It may be possible to explain *ADI* in this way: the possible breach of rights in that case is plainly not as serious as, for instance, that in *A and Others*<sup>168</sup> (concerning personal liberty) where the House of Lords *was* prepared to take a more activist stance on human rights adjudication.<sup>169</sup> Secondly, since the Communications Act 2003 sought to protect the level playing field of political expression, the finding that the 2003 was not incompatible with Article 10 of the Convention arguably did not undermine Article 10 but gave effect to it through other means.

Whatever the explanation, if domestic courts can reconstruct the guidance - that domestic courts should normally follow the ‘clear and constant’ Strasbourg jurisprudence departing only in ‘special circumstances’ - to suit the desired outcome, or ‘cherry pick’ the cases to which it will be applied, the weight of that guidance seems somewhat superficial.<sup>170</sup> While s.2 allows domestic courts the flexibility and discretion to depart from Strasbourg jurisprudence, an approach which has this effect without giving clear reasons for doing not only flies in the face of the House of Lords’ own guidance on the provision, but makes it difficult to support the constitutional legitimacy of these decisions. The lack of clear reasons for any conclusion tends towards a dangerous abdication of the judicial role altogether.

## CONCLUSIONS

Despite perceivable Parliamentary intentions that s.2 was designed to give domestic courts ‘flexibility and discretion,’ the tenets that domestic courts must ‘follow clear and constant Strasbourg jurisprudence’ in the absence of ‘special circumstances’ or that they ought not to ‘dilute’ such case law without ‘good reasons’ have been consistently upheld during the first decade of judicial reasoning under the HRA. The ‘good reasons’

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<sup>168</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

<sup>169</sup> Finding that where Convention rights were in issue, national courts were required to afford them effective protection by adopting an intensive review of compatibility with the Convention and that the courts were not precluded by any doctrine of deference from examining the proportionality of a measure taken to restrict such a right.

<sup>170</sup> This possibility has been of considerable controversy in the US Supreme Court, eg Justice Scalia’s well known dissent in *Lawrence v Texas* (2003) 539 U.S. 558.

justifying departure from relevant Strasbourg jurisprudence broadly remain where the decision is ‘old’, where a wide margin of appreciation was ascribed or where the decision was unclear or had misunderstood some aspect of domestic law. As Masterman has written, however, ‘in practice, [the] grounds on which departure from Strasbourg might be justified have been both narrowly drawn and infrequently used’,<sup>171</sup> and the direction to ‘follow clear and constant Strasbourg jurisprudence’ would appear to rule out departures outside these ‘good reasons’ altogether.

As a result of such narrowly drawn guidance departures without justification or clear reasons from Strasbourg jurisprudence not falling within the guided exceptions are not surprising. In the end, the emphasis on ‘following’ Strasbourg jurisprudence (however clear and constant) may itself have resulted in a restrictive reading of the otherwise flexibly worded duty to ‘take it into account’. Perhaps a better construction would impose a duty on domestic courts to take relevant Convention jurisprudence *as a starting point*, considering that case in the specific circumstances of its adjudication.<sup>172</sup> In many cases, this will require domestic courts to decide matters for themselves.

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<sup>171</sup> I. Leigh, R. Masterman, *Making Rights Real* (n 2) 65.

<sup>172</sup> R. Clayton, H. Tomlinson, *The Law of Human Rights* (OUP, Oxford 2000) 134.

## CHAPTER II

### ‘ESCAPING’ STRASBOURG

The guidance given by the House of Lords to ‘follow’ the ‘clear and constant’ jurisprudence of the Strasbourg Court appears *prima facie* to preclude departure from Strasbourg jurisprudence. As it was suggested in chapter I, however, in many cases this guidance overstates the obligation under s.2 and results in a more restrictive reading of the otherwise flexibly worded duty to ‘take it into account’. Ultimately the words ‘take into account’ were specifically designed not to oblige courts to ‘follow’ Strasbourg jurisprudence in the manner of precedent: Strasbourg decisions are ‘a source of jurisprudence indeed, but not binding precedents which we necessarily should follow *or even necessarily desire to follow*’.<sup>1</sup> On this basis blindly following ‘clear and constant’ Strasbourg jurisprudence may give rise to an overly deferential attitude towards the Strasbourg Court.<sup>2</sup>

More significantly, following Strasbourg jurisprudence in this way may have a detrimental effect on the development of domestic human rights law. For example, following ‘old’ jurisprudence may simply transplant an outdated interpretation of Convention rights. Similarly, domestic courts following jurisprudence affected by a margin of appreciation may copy a margin into domestic law which would not necessarily be given to the UK by the Strasbourg Court in a similar case. For more obvious reasons following decisions of the Strasbourg court which are unclear, or based on a misunderstanding of domestic law would also be undesirable. The Lord Chancellor explained that s.2 furnished domestic courts with the ‘flexibility and discretion ... so as to aid the development of human rights law’<sup>3</sup> and domestic courts have shown some willingness to ‘depart’ from Strasbourg jurisprudence affected by these factors. Arguably, however, s.2 may not only allow domestic courts to ‘depart’ from decisions of this type but also go further than them. This chapter therefore seeks to explore the

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<sup>1</sup> Hansard HL vol 583 col 515 (18 November 1997) (emphasis added).

<sup>2</sup> E. Wicks, ‘Taking Account of Strasbourg? The British Judiciary’s Approach to Interpreting Convention Rights’ [2005] *European Public Law* 405, 410.

<sup>3</sup> Hansard HL vol 584 cols 1270-1271 (19 January 1998).

circumstances in which domestic courts may be encouraged not only to ‘depart’ from but also to ‘escape’ Strasbourg jurisprudence.

### ‘A LIVING INSTRUMENT’

Implicit in the construction of the European Convention on Human Rights as a ‘living instrument’<sup>4</sup> is the presumption that domestic courts may properly conclude that ECHR jurisprudence has lost its relevance per s.2 because of ‘old age’. As one commentator has pointed out, this is virtually a mirror image of the classical common law approach: instead of a doctrine of precedent, the Strasbourg Court has operated a doctrine of evolutionary law in which the most recent case law is usually the most persuasive.<sup>5</sup> The Convention itself does not require reliance on its own jurisprudence; for ‘old’ decisions to be ‘carved in stone’<sup>6</sup> is plainly undesirable and *a fortiori* incompatible with the construction of the Convention as a ‘living instrument’.<sup>7</sup> Accordingly, the ECtHR can and does overrule its own decisions on the basis of its ‘living instrument’ principle.

In *Cossey v United Kingdom* the European Court explained that it may depart from an earlier decision ‘if it was persuaded that there were cogent reasons for doing so’<sup>8</sup> and one such ‘cogent reason’ seems to arise where the Court considers there to have been developments in the broad consensus among the member states.<sup>9</sup> From that view it is probably true that UK courts should consider whether, notwithstanding any societal changes, a Strasbourg Court would reach the same conclusion as in a previous decision. According to Feldman, ‘should there be reason to believe that the European Court would not follow one of its own previous decisions, *that* would be a good reason for

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<sup>4</sup> *Tyrer v United Kingdom* (1978) 2 EHRR 1 [31].

<sup>5</sup> F. Klug, ‘The Human Rights Act – A ‘Third Way’ or ‘Third Wave’ Bill of Rights’ [2001] EHRLR 361, 366.

<sup>6</sup> Hansard HL vol 583 col 513 (18 November 18, 1997) (Lord Browne Wilkinson).

<sup>7</sup> *Tyrer* (n 4).

<sup>8</sup> *Cossey v United Kingdom* (1991) 13 EHRR 622 [35]. The court also referred to the case of *Inze v Austria* (1987) 10 EHRR 394; The ‘cogent reasons’ test was also used in *Wynne v United Kingdom* (1995) 19 EHRR 333, 347.

<sup>9</sup> Eg *Goodwin v United Kingdom* (2002) 35 EHRR 447; *I v United Kingdom* (2003) 40 EHRR 967.

domestic courts and tribunals to interpret a provision differently'.<sup>10</sup> Other commentators have similarly noted the need to keep 'constantly up to date':<sup>11</sup>

... [I]t would appear to be insufficient simply to identify a previous decision of the ECtHR on the matter in issue and to follow it; some consideration would also be required, if that decision were not a recent one, of whether it held good in the face of changes in society that had occurred in the meantime.<sup>12</sup>

The possibility that the HRA and the Convention might have this effect has been ill received by the judiciary. In *Anderson*, for example, Simon Brown LJ (as he then was) opined that 'it would seem somewhat presumptuous for us, in effect, to pre-empt [the] decision [of the Strasbourg Court]'<sup>13</sup> and in *N* Lord Hope explained that 'It is for the Strasbourg Court, *not for us*, to decide whether its case law is out of touch with modern conditions'.<sup>14</sup> However, it is clear that the abdication of this exercise is unlikely to guarantee Convention compatibility. It is also clear that the Strasbourg Court will not look sympathetically upon domestic courts for failing to consider developing conditions and consequently falling short of Convention standards.

The duty of a domestic court to keep track of the development in Convention jurisprudence is most clearly exemplified by a series of judgments on the rights of transsexuals: in the earlier cases, the Court held that the refusal of the United Kingdom Government to alter the register of births or to issue birth certificates concerning the recorded gender of the individual could not be considered as an interference with the rights under Article 8, instead affording the UK a wide margin of appreciation.<sup>15</sup> However, the Court stressed the importance of keeping appropriate legal measures in this area under review.

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<sup>10</sup> D. Feldman, 'The Human Rights Act 1998 and constitutional principles' [1999] 19(2) LS 165, 192 (emphasis added).

<sup>11</sup> M. Amos, *Human Rights Law* (Hart Publishing, Oxford 2006) 18.

<sup>12</sup> N. Sheldon, 'The Effect of the Human Rights Act on Domestic Precedent' [2001] JR 208, 210.

<sup>13</sup> *R. (On the Application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 [66].

<sup>14</sup> *N v Secretary of State for the Home Department* [2005] 2 WLR 1124 [25] (emphasis added).

<sup>15</sup> *Rees v United Kingdom* (1987) 9 EHRR 56; *Cossey v United Kingdom* (1991) 13 EHRR 622; *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163.

The opportunity arose for the UK to review this area of the law in *Bellinger v Bellinger*<sup>16</sup> which concerned a transsexual woman who wished to be recognised as married to a man under section 11(c) of the Matrimonial Causes Act 1973 which did not recognise gender change. In the Court of Appeal, while Thorpe LJ (dissenting) did seem to have ‘taken account’ of social and medical developments since the case previously relied on had been decided,<sup>17</sup> the majority seemed content to leave open the possibility that Strasbourg might decide things differently and ultimately came to the familiar conclusion that a change in the law should be effected by Parliament.<sup>18</sup> Before the matter came to appeal, the ECtHR handed down the judgment in *Goodwin v United Kingdom*.<sup>19</sup> It was there satisfied that European (and international) consensus had progressed so that the ‘fair balance’ now tilted in favour of the applicants and the position in the UK has now breached the applicant’s rights under Article 8 right. Accordingly when *Bellinger* came before the House of Lords,<sup>20</sup> their Lordships considered UK law to be in breach of Article 8. Considering it unsuitable to use s.3 HRA to interpret the offending provision compatibly, the House of Lords issued a declaration of incompatibility.

Crucially, the case exemplifies that where ECHR jurisprudence is affected by age it may be necessary for domestic courts to take into account any developments that may influence a future Strasbourg decision. As Warbrick has written: ‘...to collaborate fully with the Court, national tribunals have to keep on top of the developments in the Court’s practice, and even anticipate how it might resolve an issue’.<sup>21</sup> Further, Warbrick thought this eventuality to be ‘necessarily the case when the Strasbourg Court has not dealt with a point’.<sup>22</sup> The House of Lords recently made it clear that it interprets the obligation

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<sup>16</sup> [2001] EWCA Civ 1140; (2001) *The Times*, 15 August.

<sup>17</sup> *Ibid* (the previous authority was *Corbett v Corbett* [1971] P 83).

<sup>18</sup> Eg P. Greatorex, ‘The Human Rights Act: s.2(1): Duty to Take into Account Strasbourg Jurisprudence’ [2001] JR 220, 223.

<sup>19</sup> *Goodwin v United Kingdom* (2002) 35 EHRR 447 confirmed more recently in *Grant v United Kingdom* Application no. 32570/03 (Judgment of 23 May 2006).

<sup>20</sup> *Bellinger v Bellinger* [2003] 2 WLR 1174.

<sup>21</sup> C. Warbrick, ‘The View from the Outside’, in H. Fenwick, R. Masterman and G. Phillipson (eds.) *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge 2007) 37.

<sup>22</sup> Warbrick also notes Lord Bingham’s ‘no more ... no less’ passage in *Ullah* and considers that ‘[c]ases like [*Ullah*] must be distinguished from ones where the ECtHR has considered an issue and left it to the national legal systems to decide’, *Ibid*.

similarly: the recent decision of the House of Lords in *Re P and Others*<sup>23</sup> concerned an unmarried couple who wished to apply jointly to adopt a child in order for the man, who was not the child's biological father, to be formally recognised as the father, while maintaining the woman's status as the legal mother. The couple were prevented from doing so by Article 14 of the Adoption (Northern Ireland) Order 1987 which provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple.

As per Warbrick's opinion of cases which may require courts to anticipate Strasbourg, no case had been before the Strasbourg Court on the issue of discrimination raised here. Thus the House of Lords took into account other relevant decisions of the Strasbourg Court. One of these was *Fretté v France*,<sup>24</sup> in which the applicant was a French homosexual who wished to be considered as an adoptive parent. French law allows adoption by individuals but the applicant was rejected at the first stage on the ground that he was a homosexual. The Court decided by a majority of four to three that it was within the margin of appreciation allowed to member states of the Council of Europe to discriminate against homosexuals as applicants to be adoptive parents. The majority in *Fretté* suggested that in areas involving 'delicate issues' of sexual relationships, in which public opinion in many member states showed strong and vocal prejudices and passions, the European Court would treat such decisions, however irrational, as falling within the national margin of appreciation.

However, concerned to anticipate any possible developments, Lord Hoffman noted that in *EB v France*<sup>25</sup> the Court appeared to be changing its course.<sup>26</sup> Similarly to *Fretté*, *EB* concerned an adoption application by a homosexual (this time a woman). Her application was rejected by the French Administrative Court on grounds which the European Court treated as having been based substantially upon her sexual orientation and which constituted discrimination contrary to article 14. Although the majority in *EB* did not expressly say that the decision overruled *Fretté*, Lord Hoffman here considered that this was the effect of it and that the margin of appreciation has been narrowed.

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<sup>23</sup> [2008] 3 WLR 76.

<sup>24</sup> (2002) 38 EHRR 438.

<sup>25</sup> (Application No 43546/02) (unreported) 22 January 2008.

<sup>26</sup> *Re P* (n 23) [25].



Accordingly, his Lordship felt it ‘not at all unlikely’<sup>27</sup> that, if the issue in this case were to go to Strasbourg, the Court would hold that the discrimination against a couple who wish to adopt a child on the ground that they are not married would violate article 14. Lords Hope and Mance also agreed that the *developing* Strasbourg jurisprudence indicated that the Court would find a violation of article 14 in this case.<sup>28</sup>

However, the obligation to anticipate a Strasbourg decision in this way raises one concern: by requiring domestic courts to take stock of any evolving consensus where the relevant Strasbourg case is not conclusive - e.g. by virtue of age or there being no Strasbourg case on the issue (as in *Re P*) - the HRA may enjoin courts to look beyond that jurisprudence. Since a consensus is, by definition, an opinion or position reached by a group as a whole, it is logical to suggest that discovering an ‘evolving consensus’ would necessitate some inquiry into the constituent parts of that group. In other words, an evolving consensus within the Convention states (which, by reason of its evolution, will not yet have been outlined by the Strasbourg Court) may logically only be discovered by surveying the approach in individual member states; the exercise may require domestic courts to consider the *domestic* jurisprudence of the other member states.

The requirement that domestic courts undertake such an exercise cannot have been intentional, and to date English courts have not attempted it. Even if this exercise did materialise before domestic courts there would be a number of problems. Aside from *inter alia* the foreseeable accessibility and linguistic difficulties,<sup>29</sup> the result is probably incompatible with the feeling that comparative study should ‘inform the journey towards a national system which meets our distinctive needs’,<sup>30</sup> rather than ‘lead to the attempted mimicry of others’.<sup>31</sup> Moreover it is simply not the task of domestic courts to

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<sup>27</sup> Ibid [27].

<sup>28</sup> Ibid [53] (Lord Hope); [143] (Lord Mance). Conversely, Lord Walker was not persuaded and reasoned that the matter fell into a category of issues upon which a European consensus had not yet emerged, [83]. Baroness Hale was also ‘unsure’ that Strasbourg jurisprudence suggested a finding of incompatibility.

<sup>29</sup> As to linguistic difficulty see e.g. N. Weiss, ‘The Impact of the European Convention on Human Rights on German Jurisprudence’, in E. Öricü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, Birmingham 2003) 60-61.

<sup>30</sup> D. Feldman, ‘The Human Rights Act 1998 and constitutional principles’ (n 10) 205.

<sup>31</sup> Ibid.

identify a consensus, and doing so would arguably overstep the position of the Strasbourg Court. Instead domestic courts might be better placed to clarify their understanding of Convention rights insofar as they apply to the UK. This would make more of a constructive contribution to human rights jurisprudence in Strasbourg, either by (indirectly) establishing evidence of a consensus, or alternatively by establishing reasons why the state ought to be given a margin of appreciation on the matter.

### **THE MARGIN OF APPRECIATION AND THE DISCRETIONARY AREA OF JUDGEMENT**

A major difficulty with the application of ECtHR decisions in the domestic context arises where these are affected by a margin of appreciation. The judges of the Strasbourg Court are ‘acutely conscious that on several key issues, the European-wide consensus which generally provides the mainspring of their decision-making does not exist ... precisely because of the prevalence of divergent moral standards and religious traditions in the affiliated states’.<sup>32</sup> The approach of the European Court has therefore been that the lesser the consensus among Contracting States,<sup>33</sup> the better placed national authorities are to decide on the matter and the more deferential the European Court has to be in its review.<sup>34</sup> It is also clear that, despite heavy criticism,<sup>35</sup> the doctrine remains an important and pervasive element of Strasbourg jurisprudence. Yet the idea that national authorities are ‘better placed’ to decide on questions of morals because there is no uniform European conception creates problems for a court seeking to ‘take into account’ Strasbourg decisions for the purposes of domestic adjudication. In the end, the doctrine signifies that there are many issues on which there is no persuasive or relevant Strasbourg authority at all.<sup>36</sup>

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<sup>32</sup> I. Leigh, L. Lustgarten ‘Making Rights Real: The Courts Remedies, and the Human Rights Act’ (1999) 58 CLJ 509, 544.

<sup>33</sup> *Frette v France* (2004) 38 EHRR 438, [41]: Where the law ‘appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State’.

<sup>34</sup> G. Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 OJLS 705, 722.

<sup>35</sup> Eg Judge Macdonald ‘The Margin of Appreciation’ in Macdonald, Matscher, and Pretzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993).

<sup>36</sup> Eg F. Klug ‘A Bill of Rights: Do we need one or do we already have one?’ [2007] PL 701, 708.

## I. APPLYING THE STRASBOURG MARGIN

It is well known that the margin of appreciation ‘is not available to national courts when they are considering Convention issues arising within their own countries’.<sup>37</sup> Fenwick has added that ‘[S]ince the doctrine has probably been the key dilutant of Convention standards, it is essential that UK judges and other public authorities should reject it as a relevant factor in their own decision-making under the Convention’.<sup>38</sup> If judges simply apply Strasbourg decisions affected by a margin of appreciation directly, the doctrine will be ‘smuggled into a situation for which it was never intended’<sup>39</sup> and the pursuit of a ‘domestic law of human rights’ will quickly vanish into the ether of European principles. Hunt, Singh and Demetriou predicted that ‘[i]mportation into the domestic sphere of the supranational concept of the margin of appreciation will ... seriously hinder the effective incorporation of the ECHR’<sup>40</sup> and that ‘[r]eference to the phrase ‘margin of appreciation’ is likely to confuse the picture and give shelter to those who would prefer to think that the ECHR requires no more than domestic law already provides...’.<sup>41</sup>

This danger has manifested itself to some extent by virtue of the ‘margin of discretion’ which some judges have evolved from the margin of appreciation, entailing a UK court’s deferring to the judgment of Parliament or a public authority.<sup>42</sup> In *Mahmood*<sup>43</sup> Laws J opined: ‘[W]hen the court is ... applying the Convention as municipal law we shall no doubt develop a jurisprudence in which a margin of discretion ... is allowed to the statutory decision maker’.<sup>44</sup> The existence of a ‘discretionary area of judgment’ has since been confirmed in numerous decisions under the Human Rights Act<sup>45</sup> and has

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<sup>37</sup> *R v Director of Public Prosecutions, ex parte Kebeline* [2000] 2 AC 326, 380-381 (Lord Hope); D. Feldman, ‘The Human Rights Act 1998 and constitutional principles’ (n 10) 192.

<sup>38</sup> H. Fenwick, *Civil Rights: New Labour and the Human Rights Act* (Pearson Education, Harlow 2000).

<sup>39</sup> H. Fenwick, G Phillipson, *Media Freedom Under the Human Rights Act* (OUP, Oxford 2006) 146.

<sup>40</sup> M. Hunt, R. Singh, M. Demetriou, ‘Current Topic: Is There a Role for the ‘Margin of Appreciation’ after the Human Rights Act?’ [1999] 1 EHRLR 15, 22.

<sup>41</sup> *Ibid* 16.

<sup>42</sup> *Eg R v DPP ex parte Kebeline* [1999] 3 WLR 972; Paul Kearns, ‘United Kingdom Judges and Human Rights Cases’ in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (n 29) 71.

<sup>43</sup> *R v SSHD ex parte Mahmood* [2000] All ER 2191.

<sup>44</sup> *Ibid*; See further Lord Steyn, ‘Deference: a tangled story’ [2005] PL 346 .

<sup>45</sup> *Eg R v Director of Public Prosecutions, ex parte Kebeline* [2000] 2 AC 326, 381; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344 [376]-[378]; *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] AC 185 [136].

prompted a vast array of academic literature.<sup>46</sup> The extent of the debate falls outside the scope of this study, for now it is sufficient simply to point out that the doctrine represents the disinclination and difficulty for domestic courts to divorce the margin of appreciation from the decision it is taking into account. Some commentators have even thought it ‘typical of judicial reasoning under the HRA’<sup>47</sup> that no effort is made to disregard any afforded margin from the Strasbourg jurisprudence. In fact, in some cases it is clear that domestic courts have sought to emphasise the existence of a margin of appreciation in order to justify their conclusions.

The recent House of Lords judgment in *Animal Defenders International*<sup>48</sup> (*ADI*) is particularly illustrative of this approach: As it will be recalled from the discussion in chapter I, the case concerned the compatibility of the absolute prohibition on paid political advertising in the Communications Act 2003 with Article 10 of the Convention.<sup>49</sup> One decision of the Strasbourg Court in which a breach of Article 10 was found, *Verein gegen Tierfabriken v Switzerland*<sup>50</sup> (*VgT*), was very similar on the facts to *ADI* since it dealt with a similar ban on political advertising. However, the House of Lords in *ADI* unanimously concluded that the decision in *VgT* did not lead to a finding of incompatibility concerning the UK ban and preferred the reasoning of another Strasbourg decision in *Murphy v Ireland*.<sup>51</sup>

In contrast to *VgT* the applicant in *Murphy* was prevented from broadcasting a *religious* advertisement by Irish legislation prohibiting advertisements ‘directed towards any religious or political end...’.<sup>52</sup> Nevertheless, Lord Bingham relied in part on the Strasbourg Court’s observations in that case that ‘there appeared to be no clear

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<sup>46</sup> Eg R Clayton ‘Judicial Deference and “Democratic Dialogue”: the legitimacy of judicial intervention under the Human Rights Act 1998’ [2004] PL 33; F. Klug, ‘Judicial deference under the Human Rights Act 1998’, [2003] EHRLR 125; Lord Steyn, ‘Deference: a tangled story’ (n 44); Sir David Keene, ‘Principles of deference under the Human Rights Act’ in H. Fenwick, R. Masterman and G. Phillipson (eds.) *Judicial Reasoning under the UK Human Rights Act* (n 21).

<sup>47</sup> D. Bonner, H. Fenwick, and S. Harris-Short, ‘Judicial Approaches to the Human Rights Act’ (2003) 52 ICLQ 549.

<sup>48</sup> *R (On the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport (Respondent)* [2008] UKHL 15.

<sup>49</sup> The facts were described in Chapter I from n 144.

<sup>50</sup> (2002) 34 EHRR 4.

<sup>51</sup> *Murphy v Ireland* (2003) 38 EHRR 212.

<sup>52</sup> Section 10(3) Radio and Television Act 1988.

consensus between member states...'<sup>53</sup> and suggested that 'the same may be said of political advertising'.<sup>54</sup> Further, his Lordship reasoned that '[t]he European Court has regarded such a lack of consensus as tending to widen the margin of appreciation enjoyed by member states'.<sup>55</sup> However, the Strasbourg Court in *Murphy* in fact confirmed that the Court would accord a narrower margin of appreciation to advertisements of a political nature than in matters of religion, making it difficult to see how Lord Bingham felt able to find a wide margin on the matter in *ADI*.<sup>56</sup> Since the advertisement in *ADI* involved political and not religious speech it is submitted that the House ought to have assumed, as a starting point, that any margin accorded to the UK in this context would be narrow, in line with the judgment in *VgT*.<sup>57</sup> Nevertheless, on the basis that such a margin would be given, the House of Lords seemed to think it appropriate to defer to Parliament on the compatibility of the legislation concerned.<sup>58</sup> In Lord Bingham's opinion, 'the judgment of Parliament ... should ... be given great weight'.<sup>59</sup>

Yet, a finding of compatibility of these grounds is, as Fenwick and Phillipson have pointed out, 'a paradoxical result since Parliament considered that [the blanket ban] was probably incompatible';<sup>60</sup> the Communications Act 2003 was the only piece of legislation to have been passed without a declaration of compatibility under s.19. Considering *VgT*, the Government during the passage of the Bill felt unable to certify that the legislation was Convention compatible and made a statement under s.19(1)(b)

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<sup>53</sup> *Animal Defenders International* (n 48) [35].

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> It is worth re-capping from chapter I that the view of the Strasbourg Court in *Murphy* was that '... there is little scope ... for restrictions on political speech or on debate of questions of public interest ... However, a wider margin of appreciation is generally available ... when regulating freedom of expression in relation to matters ... within the sphere of morals or, especially, religion ... it is this margin of appreciation which distinguishes [*Murphy*] from [*VgT*]' (n 51) [67].

<sup>57</sup> Eg Fenwick & Phillipson who, in the context the 2003 Act have suggested that 'since the ban concerns political, not religious or commercial speech, an intense focus should be brought to bear on the issues', H. Fenwick, G Phillipson, *Media Freedom Under the Human Rights Act* (n 39) 1026.

<sup>58</sup> *Animal Defenders International* (n 48) [33].

<sup>59</sup> *Ibid.*; Lending support, Baroness Hale noted that 'the [ban] has all-party support. Parliamentarians of all political persuasions take the view that the ban is necessary in this democratic society. Any court would be slow indeed to take a different view on a question such as this' [52].

<sup>60</sup> H. Fenwick, G Phillipson, *Media Freedom Under the Human Rights Act* (n 39) 1027.

HRA to the effect that the Government wished Parliament to pass the Bill despite being unable to make a statement of compatibility under s.19(1)(a). The House of Lords in *ADI* seem to have been acutely aware of this uncertainty in the passage of the Bill; indeed Lord Bingham gave a detailed account of it.<sup>61</sup> Nevertheless, Lord Bingham felt able to support the compatibility of the Bill on the grounds that Parliament had proceeded with the Bill under s.19(b) HRA ‘while properly recognising the interpretative supremacy of the European Court’.<sup>62</sup> As such, he was of the opinion that ‘the judgment of Parliament on such an issue should not be lightly overridden’.<sup>63</sup>

Of course, the fact that Parliament felt unable to make a statement of compatibility under s.19 may mean one of two things: 1) that Parliament considered Strasbourg to be mistaken in their analysis of *VgT* and that there was in fact no incompatibility with the Convention; 2) that Parliament intended to enact the Communications Act 2003 notwithstanding the finding of incompatibility of the Strasbourg Court in *VgT*. If the House of Lords had taken the view that the first of these possibilities was correct, the hesitation to declare an incompatibility may be better understood. However, none of their Lordships in *ADI* evidenced a view that this was the case. Remarkably, Lord Bingham in fact emphasised the second of these scenarios and, by curious logic, his Lordship seemed to consider that Parliament’s adoption of the blanket ban notwithstanding possible incompatibly *itself* justified the generous deference.<sup>64</sup> Following *ADI* it is clear that where a ‘clear and constant’ Strasbourg decision is in conflict with the perceived will of Parliament, Strasbourg will not be ‘a priori always ‘right’’.<sup>65</sup>

Even more perplexing is that this reasoning comes as a marked contrast to the analysis in *R (Countrywide Alliance) v Attorney General*<sup>66</sup> which preceded *ADI* by just one year. In that case, Lady Hale was very clear to explain that she did not ... think that it is open

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<sup>61</sup> *Animal Defenders International* (n 48) [13]-[21].

<sup>62</sup> *Ibid* [33].

<sup>63</sup> *Ibid*.

<sup>64</sup> See also the opinion of Ouseley J in the Administrative Court: ‘The experience, expertise and judgment of Parliament expressed in the legislation can demonstrate the necessary justification’, *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2006] EWHC 3069 (Admin) [85].

<sup>65</sup> J. Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720, 727.

<sup>66</sup> [2007] UKHL 52.

to [courts] to wash [their] hands of such difficult issues on the ground that this is a matter for Parliament'.<sup>67</sup>

... Parliament has entrusted us with the task of deciding whether its legislation is compatible with the Convention rights. If it is not, it is our duty to say so. The fact that the issue raises moral questions on which views may legitimately differ does not let us off the hook ... *When we can make a good prediction of how Strasbourg would decide the matter, we cannot avoid doing so on the basis that it is a matter for Parliament. Strasbourg will be largely indifferent to which branch of government was responsible for the state of the domestic law.*<sup>68</sup>

In the end a domestic court that concludes on the compatibility question by taking into account a margin of appreciation risks that the possibility that the margin will be narrower than anticipated. Moreover, since the Strasbourg Court usually neglects to differentiate the grounds upon which a margin of appreciation is ascribed, the possibility that a domestic court applying such a case will fall below the Strasbourg standard is a real one. For these reasons domestic judges should be careful to avoid transplanting a margin of appreciation into the corpus of domestic human rights law. Along these lines, Fenwick and Phillipson have suggested that the 'sparse and tokenistic' reasoning in much of the case law may in some cases mean that 'stripping away' the effects of the doctrine might simply involve 'treating certain judgments as non-determinative of the points raised at the domestic level'.<sup>69</sup> Baroness Hale appeared to take a similar approach in *Countryside Alliance*<sup>70</sup> where she was careful to explain that *even* if the Strasbourg Court were not to grant a margin of appreciation to the UK her conclusion would be the same:

... I believe that the ban would fall within the margin of appreciation [the Strasbourg Court] would allow to the United Kingdom on a matter such as this. *Even if I were eventually to be proved wrong* ... I would not think that the 1998 Act now required us to declare the Hunting Act 2004 incompatible.<sup>71</sup>

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<sup>67</sup> *R(Countryside Alliance) v Attorney General* [2007] UKHL 52 [125].

<sup>68</sup> *Ibid* (emphasis added).

<sup>69</sup> H. Fenwick, G Phillipson, *Media Freedom Under the Human Rights Act* (n 39) 146.

<sup>70</sup> [2007] UKHL 52.

<sup>71</sup> *Countryside Alliance* (n 67) [127].

## II. ANTICIPATING THE STRASBOURG APPROACH

Fenwick and Phillipson have suggested that domestic courts may deal with a Strasbourg case affected by a margin of appreciation ‘by having regard to the possible alternative outcome of the jurisprudence in question had the margin not been so applied’.<sup>72</sup> However, this relies 1) on the judgments themselves being clear enough so that a domestic court may dissect them in this manner and 2) that such an exercise is even a desirable one. The transplantation of the doctrine into domestic law is plainly undesirable, but to assume of the judiciary an ability to evaluate the extent of the margin afforded, how far it would apply in the domestic context of the UK as well as what a Strasbourg Court might have concluded had there been no margin available, seems optimistic. Most commentators complain about the lack of a uniform or coherent application of the margin of appreciation doctrine in the case law of the European Court of Human Rights,<sup>73</sup> making it difficult to see how a domestic court may be able to conclude differently. Additionally, the margin of appreciation is little more than a ‘conclusory label which only serves to obscure the true basis on which a reviewing court decides whether or not intervention in a particular case is justifiable’.<sup>74</sup> As Hunt, Singh and Demetriou have pointed out:

When a court ... [gives] as its ‘reason’ that the matter is within the authority’s margin of appreciation, it may be saying one of two things. First, it may be saying that it is not appropriate for the court to substitute its judgment on a particular matter for the judgment of the challenged authority. Or, secondly, it may be saying that it has reviewed the decision and finds there to be, no unjustifiable breach. The margin of appreciation obscures this important distinction ...<sup>75</sup>

A safer approach might be to consider the margin afforded in the relevant case and assign that as the ‘ceiling’ for the restriction on the right in hand. Fittingly, the principle occasion when a departure from relevant Strasbourg jurisprudence is encouraged (by commentators on s.2 HRA at least) is where it pursues a progressive view of the

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<sup>72</sup> H. Fenwick, G Phillipson: *Media Freedom Under the Human Rights Act*, (n 39) 146.

<sup>73</sup> R, Macdonald, ‘The Margin of Appreciation’ (n 35) 85, quoted in George Letsas, ‘Two Concepts of the Margin of Appreciation’ (n 34) 705.

<sup>74</sup> M. Hunt, R. Singh, M. Demetriou, ‘Is there a role for the ‘Margin of Appreciation’ in national law after the Human Rights Act?’ (n 40); See also H Fenwick and G Phillipson ‘Public protest, the HRA and judicial responses to political expression’ [2000] PL 627, 630; B. Dickson, ‘The Common Law and the European Convention’ in Dickson (ed.), *Human Rights and the European Convention* (LAG, London 1997) 216-217.

<sup>75</sup> Ibid 21; George Letsas, ‘Two Concepts of the Margin of Appreciation’ (n 34) 705.



Convention and its case law. Ian Leigh thought it ‘implicit that in any given case UK judges might adopt a more rigorous approach than Strasbourg and declare legislation incompatible that the Strasbourg Court would find to be within the margin of appreciation’.<sup>76</sup> This point has also been recognised by Masterman who suggests that ‘UK laws which have been upheld or would be upheld at Strasbourg because of the margin should be open to be given a more rights-friendly reading at the domestic level’.<sup>77</sup>

Clearly a restrictive reading of Convention rights based on Strasbourg jurisprudence which is furnished with a wide margin of appreciation is no guarantee of compatibility with the Convention in the first place. This is an especially large concern where the doctrine forms part of the reasoning in a domestic court; since the margin of appreciation may disguise reasons for the compatibility in Strasbourg case law, applying the outcome of such decisions in a similar domestic case would be to import factors which may not apply to the UK. Indirectly applying these factors in this way may then lead to a more restrictive interpretation of Convention rights than would otherwise be appropriate in the UK.<sup>78</sup> Domestic courts may avoid this danger by simply divorcing the outcome of Strasbourg jurisprudence burdened with a wide margin of appreciation from their reasoning and attempting instead to decide the matter for themselves.

The view is given support by the decision of the House of Lords in *Re P*<sup>79</sup> discussed earlier above. It will be recalled that the case concerned an unmarried couple who wished to apply jointly to adopt a child but were prevented from doing so by article 14 of the Adoption (Northern Ireland) Order 1987 (which provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple.) Notwithstanding the fact that a case of the kind had not yet been before the Strasbourg Court and the fact that the Court had previously granted a margin of appreciation on matters of social policy such as this, Lord Hoffman, Lord Hope and

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<sup>76</sup> I. Leigh, L. Lustgarten ‘Making Rights Real’ (n 32) 517.

<sup>77</sup> I. Leigh, R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, Oxford 2008) 55.

<sup>78</sup> A. Mowbray, ‘No Violations but Interesting: A Study of the Strasbourg Court’s Jurisprudence in Cases where no Breach of the Convention has been Found’ [2008] 14 *European Public Law* 237.

<sup>79</sup> *Re P* (n 23).

Lord Mance felt it appropriate to anticipate a development in the Strasbourg Court and find an incompatibility with the Convention.<sup>80</sup> In Lord Hoffman's view, it would make 'no difference' if the Strasbourg Court were to revert to its earlier position and say that these are delicate questions which should therefore be left to the national margin of appreciation. Accordingly, his Lordship did not feel that the House should be inhibited from declaring the 1987 Order incompatible 'by the thought that [they] might be going further than the Strasbourg Court'.<sup>81</sup>

Repeating the tenets delivered by Lord Bingham in *Ullah* (that the duty of domestic courts is to 'keep pace' with Strasbourg jurisprudence 'no more, no less') Lord Hoffman emphasised that '[t]hese remarks were not ... made in the context of a case in which the Strasbourg Court has declared a question to be within the national margin of appreciation'<sup>82</sup> and explained that 'none of these considerations can apply in a case in which Strasbourg has deliberately declined to lay down an interpretation for all member states, as it does when it says that the question is within the margin of appreciation'.<sup>83</sup> For that reason, his Lordship concluded that 'the question is one for the national authorities to decide for themselves and it follows that different member states may well give different answers'<sup>84</sup> and 'it is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament *in the way which appears appropriate for the United Kingdom*'.<sup>85</sup> Lord Mance evidently agreed, adding that

It would be contrary to the Strasbourg court's purpose, and circular, if national authorities were to take the view that they should not consider any question other than whether a particular solution was within the United Kingdom's margin of appreciation. Under the 1998 Act, United Kingdom authorities (legislators and courts) have domestically to address the impact of the domestically enacted Convention rights in the particular context of the United Kingdom.<sup>86</sup>

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<sup>80</sup> Baroness Hale also found the bar on unmarried adoption in article 14 of the Adoption (Northern Ireland) Order 1987 to be incompatible with the Convention but did not base this finding in any anticipation of developing Strasbourg jurisprudence.

<sup>81</sup> *Re P* (n 23) [37].

<sup>82</sup> *Ibid* [31].

<sup>83</sup> *Ibid* [36].

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid* [37] (emphasis added).

<sup>86</sup> *Ibid* [129].

The approach in *Re P* represents a more realistic approach to Strasbourg jurisprudence burdened by a margin of appreciation. Rather than seeking to undertake the wholly unrealistic guesswork about the reasons behind a margin of appreciation, this decision serves as an encouraging indication that domestic courts are not only *able* to interpret the matter for themselves but are also increasingly *willing* to do so.

## UNCLEAR AND ERRONEOUS JURISPRUDENCE

It seems clear that s. 2 HRA for the most part imposes an obligation of referral first to relevant decisions of the Strasbourg Court. But must a court follow this approach, even where Strasbourg decisions are ultimately not that useful? Gearty has made neat analysis of the situation, concluding that ‘British judges have the double challenge of retaining analytical coherence while at the same time seeking both to *understand* the Strasbourg case law and to *apply* it within the jurisdiction’.<sup>87</sup> For Gearty, s.2 HRA was the saving grace: ‘[f]ortunately [it] gives them some freedom of manoeuvre in that ... it does not require such decisions to be followed, merely taken into account’.<sup>88</sup> In line with these conclusions judicial reasoning has pointed to some exceptions to the generally loyal approach where relevant Strasbourg jurisprudence is unclear or where the Court has misunderstood some aspect of domestic law.

### I. UNCLEAR REASONING

As was mentioned in chapter I, Loveland considers that ECHR decisions are so important as to be considered as authority even in instances in which they did not ‘argue the point through in a coherent and thorough manner’.<sup>89</sup> That position invites criticism: the extent to which Convention jurisprudence is afforded authority was surely not envisaged to embrace unclear decision making.

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<sup>87</sup> C. Gearty, ‘Tort Law and the Human Rights Act’ in Tom Campbell, K.D Ewing, and Adam Tomkins (eds) ‘Sceptical Essays on Human Rights’ (OUP, Oxford 2001) 258 (emphasis added).

<sup>88</sup> *Ibid.*

<sup>89</sup> I. Loveland ‘Making it up as they go along? The Court of Appeal on same sex spouses and succession rights to tenancies’. [2003] PL 222, 233.

At the heart of the problem is the view that the House of Lords has taken concerning the importance to be attached to the Strasbourg jurisprudence. As it will be recalled from Chapter I, Lord Hope expressed the view in *N*<sup>90</sup> that '[i]t is not for [domestic course] to search for a solution to [the appellant's] problem which is not to be found in the Strasbourg case law ... [courts] must take its case law as [they] find it, not as [they] would like it to be'.<sup>91</sup> Yet in that case Lord Nicholls described the Strasbourg authorities as 'in a not altogether satisfactory state'<sup>92</sup> and that the available decisions 'lacked [the ECHR's] customary clarity'.<sup>93</sup> Lords Hope and Brown also thoroughly analysed the ECtHR's case law but had trouble identifying any clear principles. It must be open to a domestic court in such cases to conclude against the helpfulness of that Strasbourg jurisprudence in order to 'escape' the unclear reasoning. As the Lord Chancellor pointed out during the Parliamentary debates, '... [Strasbourg decisions] are a source of jurisprudence indeed, but not binding precedents which we necessarily should follow *or even necessarily desire to follow*'.<sup>94</sup>

## II. MISUNDERSTANDINGS ABOUT DOMESTIC LAW

A connected and perhaps more serious quandary arises where relevant Strasbourg jurisprudence is based on a misunderstanding of domestic law. Lord Hoffman offered guidance on the possibility in *R v. Lyons*: his Lordship felt that there was 'room for dialogue' where an English court 'considers that the ECtHR has misunderstood or been misinformed about some aspect of English law' and 'it may wish to give a judgment which invites the ECtHR to reconsider the question'.<sup>95</sup> Warbrick recently agreed: 'There is ... space for national courts to reconsider Strasbourg cases which appear 'wrong', either because they are founded on a misunderstanding of national law or because they are poorly reasoned'.<sup>96</sup>

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<sup>90</sup> *N* (n 14) [25].

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* [11].

<sup>93</sup> *Ibid* [14].

<sup>94</sup> Hansard HL vol 583 col 515 (18 November 1997).

<sup>95</sup> *R v. Lyons (No 3)* [2003] 1 AC 976 [46].

<sup>96</sup> Although Warbrick was also careful to suggest that 'a strong case would need to be made that this were the case', C. Warbrick, 'The View from the Outside' (n 21).

That domestic courts follow or apply decisions of the Strasbourg Court based upon misunderstandings would clearly be inappropriate. Rather, domestic courts ought to – legitimately – be able consciously to depart from Strasbourg while firmly offering an opinion about the mistake. Lord Bingham recently confirmed as much in *Kay*<sup>97</sup> where he explained that ‘there are occasions ... when a domestic court may challenge the application by the Strasbourg Court of the principles it has expounded to the detailed facts of a particular class of case, peculiar within the knowledge of national authorities’.<sup>98</sup>

A well known example of such a situation is found in *Osman v United Kingdom*<sup>99</sup> where the European Court found that the blanket immunity granted to the police (over liability for possible negligence) in the English law to be a violation of Article 6 of the Convention because the action against the police had not been allowed to proceed to trial. The matter was the cause of some controversy amongst the English judiciary, who considered that the European Court had been mistaken in its understanding of domestic law, and in *Z and others v United Kingdom*<sup>100</sup> the European Court in fact did admit that the judgment in *Osman* was based on ‘an understanding of the law of negligence ... which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably the House of Lords’.<sup>101</sup> The incident provoked widespread concern about the position of European judgments in domestic law. For example, Lord Hoffman set out his opinion of the affair extra judicially:

We have had a very recent example of a decision of the Strasbourg court giving an interpretation to the Convention which, I venture to suggest, it is inconceivable that any domestic court in this country would have adopted ... the case serves to reinforce the doubts I have had for a long time about the suitability, at least for this country, of having questions of human rights determined by an international tribunal made up of judges from many countries.<sup>102</sup>

In the end this line of cases clearly illustrates at least one situation in which domestic courts are willing to find reasons for departure and assert a domestic interpretation of

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<sup>97</sup> *Kay and others v London Borough of Lambeth* [2006] UKHL 10 [28].

<sup>98</sup> *Ibid.*

<sup>99</sup> (2000) 29 EHRR 245; On the *Osman* judgment, see Lord Steyn, ‘2000–2005: Laying the Foundations of Human Rights Law in the United Kingdom’ 2005 EHRLR 349, 361.

<sup>100</sup> [2002] 34 EHHR 3.

<sup>101</sup> *Ibid* [100].

<sup>102</sup> Lord Hoffmann, ‘Human Rights and the House of Lords’ (1999) 62 MLR 159, 162-164.

human rights. Moreover, the *Osman* saga shows that the Strasbourg Court may even be persuaded to revise its own jurisprudence and is probably the clearest example of the ‘dialogue’ between domestic courts and Strasbourg envisaged in the enactment of the HRA and by commentators since.

### III. PURPOSELY FINDING FAULT WITH STRASBOURG JURISPRUDENCE

Some commentators have suggested that departing from Strasbourg jurisprudence on these grounds usually pursues a desire to avoid conflicting Strasbourg jurisprudence *per se*.<sup>103</sup> For instance Merris Amos has concluded that ‘the means by which conflicting Strasbourg jurisprudence is usually avoided is by a finding that the reasoning of the Court (or Commission) was inadequate’ while Elizabeth Wicks identified one of the prevalent judicial approaches under s.2 to be ‘assessing relevance by reference to own perception of merits’.<sup>104</sup> In other words, ‘the Strasbourg jurisprudence is being used merely to substantiate domestic reasoning: it is not taken into account as a factor in reaching the decision; merely as a factor in justifying the decision’.<sup>105</sup>

In *R v Spear*,<sup>106</sup> it was clear that their Lordships did not wish to follow the conclusion of the European Court in *Morris v United Kingdom*<sup>107</sup> (where the same issue had arisen) that trial by court-martial necessarily involves a violation of rights protected by Article 6 ECHR. Lord Bingham accepted that ‘any judgment of the European Court commands great respect, and section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account, as it routinely does’ but thought there to be ‘a large number of points in issue in [*Morris*]’, and that ‘the European Court did not receive all the help [on the particular aspect disputed in *Spear*] which was needed to form a conclusion’.<sup>108</sup>

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<sup>103</sup> M. Amos, *Human Rights Law* (n 11) 19.

<sup>104</sup> E. Wicks, ‘Taking Account of Strasbourg?’ (n 2) 419.

<sup>105</sup> *Ibid* 423.

<sup>106</sup> *R v Spear and Others* [2003] 1 AC 734.

<sup>107</sup> (2002) 34 EHRR 1253.

<sup>108</sup> *Spear* (n 106) [12]; see also the judgment of lord Rodger, particularly [92].

Similarly, the Privy Council in *Brown v Stott*<sup>109</sup> felt able to conclude that the use of evidence gathered under s.172(2)(a) of the Road Traffic Act 1988 did not interfere with rights under Article 6 of the Convention, despite there being a Strasbourg judgment (*Saunders v United Kingdom*<sup>110</sup>) pointing to the contrary conclusion.<sup>111</sup> Lord Steyn described the reasoning of the Court in this case as ‘unsatisfactory and less than clear’<sup>112</sup> while Lord Hope found it ‘unconvincing’<sup>113</sup> and described ‘the main weakness in the reasoning of the Court in *Saunders* [as the] ... failure to examine the issue’.<sup>114</sup>

It was also tempting to draw similar conclusions when considering the reasoning in *ADI*<sup>115</sup> above. The judgment of the European Court in *VgT*<sup>116</sup> was very similar to the case in *ADI* and the Court in that case had found a breach of Article 10 of the Convention. However, despite evidence that Parliament had itself been uncertain as to the compatibility of the legislation in question, it became clear that the courts considering *ADI* were unwilling to apply *VgT* and reach the same conclusion. When the case came before the Administrative Court it found the *VgT* decision to be ‘aberrant’<sup>117</sup> and ‘one of those ECtHR decisions which suffers from unclear or unsound reasoning’<sup>118</sup> but no mention was made of the idea in the House of Lords. The House of Lords instead found alternative reasons to follow another decision of the Strasbourg Court and ultimately find no incompatibility with the Convention.

The argument is given particular weight by evidence from *Anderson*<sup>119</sup> that domestic courts do not always feel departure to be necessary, despite considering Strasbourg jurisprudence to be unsatisfactory. That case concerned the question of whether the Home Secretary’s power to determine the minimum period of a mandatory life sentences was incompatible with the principle of the separation of powers as expressed

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<sup>109</sup> *Brown v Stott* [2003] 1 AC 681.

<sup>110</sup> *Saunders v United Kingdom* (1997) 2 BHRC 358.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Brown v Stott* (n 109) 711.

<sup>113</sup> *Ibid* 721.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Animal Defenders International* (n 48).

<sup>116</sup> (2002) 34 EHRR 4.

<sup>117</sup> *Animal Defenders International* (n 64) [30] (Auld LJ).

<sup>118</sup> *Ibid* [121] (Ousley J).

<sup>119</sup> *Anderson* (n 13).

in Article 6 ECHR. The Court of Appeal showed an obvious reluctance to depart from the Strasbourg jurisprudence even though it considered that the domestic legislation may fall foul of compatibility with Article 6 if Strasbourg were to re-examine the issue. Indeed, Simon Brown LJ felt that it would be ‘presumptuous’ to ‘pre-empt’ such a decision.<sup>120</sup>

While it is clear that domestic courts have been willing to depart from Strasbourg jurisprudence on the basis that the reasoning of the Strasbourg Court has been unclear or based on a misunderstanding of domestic law, it is also clear that this willingness is more obvious where the departure results in a more restrictive view of the Convention than given in that jurisprudence. Conversely, departures on this basis resulting in a more generous interpretation of Convention rights are unusual. With this in mind it is tempting to agree that departing from Strasbourg jurisprudence on these grounds usually pursues a desire to avoid Strasbourg jurisprudence *per se*. The problem arguably remains a product of guidance to ‘follow’ the ‘clear and constant’ Strasbourg jurisprudence. Rather than seeking to categorise Strasbourg jurisprudence into the strictly circumscribed circumstances feeding departure, it would be surely be better if domestic courts were guided to decide matters for themselves and, in this way, be forced to give more transparent reasons for departure.

## CONCLUSIONS

Several factors may encourage domestic courts to decide matters independently of Strasbourg: doctrinal tools developed by the Court, such as the margin of appreciation, represent a teleological approach to its own adjudication which makes it difficult for domestic courts to ‘keep pace’ simply by following the jurisprudence of that Court. The status of the European Convention of Human Rights as a ‘living instrument to be interpreted in light of present-day conditions’<sup>121</sup> similarly carries the danger that following Strasbourg jurisprudence domestically, without anticipating its development or being prepared to expand upon it, may cause domestic human rights law to fall

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<sup>120</sup> Ibid [66].

<sup>121</sup> *Tyner* (n 4) [31].



behind it. Similarly, it is clearly undesirable that domestic courts apply Strasbourg jurisprudence which is itself unclear or based on a misunderstanding of domestic law. It is also clear that domestic courts simply cannot follow Strasbourg where no relevant jurisprudence exists. Remembering that in *none* of these situations is a domestic court discharged from its duty as a public authority under s.6 HRA to act compatibly with Convention rights, it is suggested in *all* of these situations s.2 HRA allows room for manoeuvre.<sup>122</sup> At the very least it must allow domestic courts to ‘escape’ Strasbourg and decide the matter for themselves.

But how far can domestic courts go? It is suggested that domestic courts may not only be encouraged to ‘escape’ Strasbourg jurisprudence, but also to expand upon it. This may be of special relevance where the matter before the domestic court is subject to a national margin of appreciation, or where there is no steer from Strasbourg at all.<sup>123</sup> Encouragingly, while some judges clearly have reservations about expanding the scope of Convention rights even in this context,<sup>124</sup> others have shown an increased willingness to interpret s.2 so as to allow such a result. The majority of the House of Lords appeared to construct the problem similarly in *Re P*,<sup>125</sup> and Baroness Hale (discussing *Re P*) has since hinted that it may be better to make ‘a small but significant advance upon the Strasbourg jurisprudence’<sup>126</sup> rather than to ‘[defer] to the wisdom of the crowd – even when convinced of its stupidity’.<sup>127</sup> In the end while English courts may have a tendency to follow decisions of the European Court of Human Rights, it is crucial that they do so as a matter of choice, not obligation.<sup>128</sup>

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<sup>122</sup>As Lord Slynn emphasised in *Alconbury*, ‘the Human Rights Act 1998 does not provide that a national court is bound by [Strasbourg] decisions’, ‘it is obliged to take account of them so far as they are relevant’ (n 69) [26] (emphasis added).

<sup>123</sup> See also R. Masterman, ‘The Status of Strasbourg Jurisprudence in Domestic Law’ in H. Fenwick, R. Masterman, G. Phillipson (eds), *Judicial Reasoning Under the UK Human Rights Act* (n 21) 81; H. Fenwick and G. Phillipson, ‘Direct Action, Convention Values and the Human Rights Act’ (2001) 21 LS 535, 564.

<sup>124</sup> Eg in *Re P* (n 23).

<sup>125</sup> *Ibid.*

<sup>126</sup> Baroness Hale, ‘Who Defines Convention Rights?’ (JUSTICE Tom Sargant Memorial Annual Lecture, 15 October 2008) <<http://www.justice.org.uk/trainingevents/annuallecture/index.html>> accessed 7 November 2008.

<sup>127</sup> *Ibid.*

<sup>128</sup> D. Feldman (ed) *English Public Law* (OUP, Oxford 2004) 390.

## CHAPTER III

### MOVING BEYOND STRASBOURG?

It was suggested in chapter I that Parliamentary debates during the drafting of the Human Rights Act supported a flexible approach to Strasbourg jurisprudence. It was proposed that, on the basis of these identifiable intentions, domestic courts are not obliged to follow the decisions of the Strasbourg Court and that judges are probably free to develop human rights jurisprudence under the Convention in keeping with domestic traditions. To that end, the instances in which domestic courts may be encouraged to depart from (or ‘escape’) the Strasbourg jurisprudence (either on the basis of age, a margin of appreciation or unclear reasoning) were outlined in Chapter II. In this chapter, the possibility that domestic courts are, or should consider themselves, able to depart from Strasbourg in order to apply a more generous interpretation of Convention rights will be considered.

It has been repeatedly stressed that the Strasbourg institutions insist only upon a minimum threshold:<sup>1</sup> during the Parliamentary debates it was said that the HRA established ‘a “floor”, not a “ceiling”, for human rights’<sup>2</sup> and that domestic courts ‘must be free to try to give a lead to Europe as well as to be led’.<sup>3</sup> In the early years of the HRA, Grosz, Beatson and Duffy took this approach to s.2, writing:

It is ... open to national courts to develop a domestic jurisprudence under the Convention which may be more generous to applicants than that dispensed in Strasbourg, while remaining broadly consistent with it.<sup>4</sup>

However, domestic courts have largely resisted an interpretation of the HRA that gives rise to a progressive approach to human rights. The source of this reluctance is usually found in a specific construction of the HRA as a statute designed to ensure the compatibility of domestic law with the Convention (and little more) but it will be

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<sup>1</sup> *Eg R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653 [44]-[45].

<sup>2</sup> Hansard, HL vol 583 col 510 (18 November 1997).

<sup>3</sup> *Ibid.*

<sup>4</sup> S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet and Maxwell, London 2000) 20.

suggested that the HRA, as a statute designed to ‘bring rights home’, gives domestic courts considerably more scope for manoeuvre.

## THE ARGUMENT FROM PURPOSE

In large part, the debate around the possibility of domestic courts applying a more expansive interpretation of Convention rights turns on the effect the HRA 1998 is perceived to have on these rights. As Baroness Hale has recently asked, ‘[a]re the ‘Convention rights’ for the purpose of section 1(1) of the 1998 Act, the rights as defined by Strasbourg but given effect in UK law, or are they the rights defined by United Kingdom law within the parameters defined by Strasbourg?’<sup>5</sup>

Proponents of the progressive view often argue that the HRA was enacted with the intention of developing a domestic or ‘municipal’ law of human rights<sup>6</sup> or that it is nature of rights arising under the HRA - as distinct from rights arising under the Convention - that could ‘indicate that a more generous interpretation [than that provided by the Strasbourg court] is possible’.<sup>7</sup> For instance, Professor Wintermute has suggested that ‘if a country voluntarily incorporates the exact wording of the Convention into its national law, the Convention ceases to be a European text and becomes a *national* text, to which national courts are free to give a more generous interpretation’.<sup>8</sup> Similarly, Jonathan Lewis pointed out that ‘the Convention has not been moved but copied’.<sup>9</sup>

Some support for this construction of rights under the HRA is to be found in judicial reasoning. Laws LJ in *Begum* felt the task of domestic courts under the HRA was ‘not

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<sup>5</sup> *Re P and Others* [2008] 3 WLR 76 [84].

<sup>6</sup> Laws LJ, ‘The limitations of Human Rights’ [1998] PL 254; R. Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a ‘municipal law of human rights’ under the Human Rights Act’ [2005] 54 ICLQ 907; S. Grosz, J. Beatson and P. Duffy, *Human Rights* (n 4) 20; J. Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720.

<sup>7</sup> M. Amos, *Human Rights Law*, (Hart Publishing, Oxford 2006) 22.

<sup>8</sup> R. Wintermute, ‘The Human Rights Act’s First Five Years: too strong, too weak or just right?’ (2006) 17 Kings College Law Journal 209.

<sup>9</sup> *Ibid* 724.

simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights...'.<sup>10</sup> In *Re McKerr* Lord Nicholls said that 'rights, arising under the Convention, [were] to be contrasted with rights created by the 1998 Act' and considered there to be 'significant differences' between the two.<sup>11</sup> In the same case Lord Hoffman held that the Act had

...create[d] domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.<sup>12</sup>

This passage from *Re McKerr* has been given specific endorsement by the House of Lords in *Re P*<sup>13</sup> where Lord Hoffman explained that 'Convention rights' within the meaning of the 1998 Act were domestic rights, not international rights and that the duty of UK courts was to give effect to them according to what they considered to be their proper meaning as they would any other statutory rights: 'As this House affirmed in *In re McKerr* ... "Convention rights" within the meaning of the 1998 Act are domestic and not international rights'.<sup>14</sup> Accordingly, Lord Hoffman explained that it was '[i]n the interpretation of *these domestic rights* [that] the courts must "take into account" the decisions of the Strasbourg court'.<sup>15</sup> Lord Mance was also clear on the point:

The Act creates as "part of this country's law" rights in the same terms as the Convention rights, and the interpretation and impact of those new domestic rights depends upon the 1998 Act ... the meaning of the new domestic rights scheduled to the 1998 Act is a matter of domestic law ... [and] [u]nder the 1998 Act, United Kingdom authorities (legislators and courts) have domestically to address the impact of the domestically enacted Convention rights *in the particular context of the United Kingdom*.<sup>16</sup>

The decision in *Re P* is arguably the clearest example of a willingness to differentiate between rights arising under the ECHR and rights arising under the HRA. As Jonathan

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<sup>10</sup> *Runa Begum v Tower Hamlets London Borough Council* [2002] 2 All ER 668 [17].

<sup>11</sup> *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807 [25].

<sup>12</sup> *Ibid* [65].

<sup>13</sup> *Re P* (n 5).

<sup>14</sup> *Ibid* [33].

<sup>15</sup> *Ibid* (emphasis added).

<sup>16</sup> *Ibid* [128]-[129] (emphasis added).

Herring has pointed out '[t]his means that there are rights under the ECHR that English applicants may be able to claim against their government, but that an applicant in another country might not. So the HRA does not *just* give citizens rights that are established in the ECHR by the ECtHR. It also enables the English courts to generate rights found to exist in the ECHR that would not be found by the ECtHR'.<sup>17</sup> Indeed, in *Re P*, this construction of Convention rights under the HRA 1998 lent support to a 'a small but significant advance upon the Strasbourg jurisprudence'<sup>18</sup> but it should not be assumed that a domestic view of human rights is either synonymous with or always supports a progressive view of Convention rights under the HRA. While the two tend to be associated, a construction that champions the separation of rights arising domestically under the HRA from those arising under the Convention could equally lend weight to an approach that restricts the scope of Convention rights to the Strasbourg standard.

A good example of this possibility is given by two Court of Appeal judgments in which Laws LJ - a strong proponent of the domestic view of human rights - seemed to restrict rights under the Convention in this manner: the first of these decisions came in *A and Others v Secretary of State for the Home Department*.<sup>19</sup> The facts of the case are well known, but, briefly, the appellants were ten foreign nationals (all Arab Muslims and suspected of links to Al Qaeda or Osama bin Laden) who had been detained under sections 21 and 23 of the Anti-terrorism, Crime and Security Act 2001. The Court of Appeal unanimously dismissed their appeals, but was split 2:1 on the important issue of the admissibility of evidence obtained by torturing third parties abroad, which was argued to have breached the appellants' right to a fair trial contained in Article 6(1) of the Convention. In the course of his reasoning, Laws LJ thought it 'obvious' that 'neither the Strasbourg court nor (since the coming into force of the 1998 Act) our courts can abdicate their duty to safeguard the Convention rights,'<sup>20</sup> and 'elementary' that 'there is a strong presumption that our law, judge-made or statutory, should be interpreted so as not to place the United Kingdom in breach of an international

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<sup>17</sup> J. Herring, 'Who decides on human rights?' [2009] LQR 1, 4.

<sup>18</sup> Baroness Hale, 'Who Defines Convention Rights?' (JUSTICE Tom Sargant Memorial Annual Lecture, 15 October 2008) <<http://www.justice.org.uk/trainingevents/annuallecture/index.html>> accessed 7 November 2008.

<sup>19</sup> [2004] EWCA Civ 1123.

<sup>20</sup> *Ibid* [258].

obligation'.<sup>21</sup> Nevertheless, guided by the view that 'the right's application, and its scope in practice, is highly dependent upon the practical context in which it is asserted'<sup>22</sup> and that 'under section 2 of the 1998 Act our duty is no more nor less than to 'take into account' the Strasbourg jurisprudence'<sup>23</sup> his Lordship found reason to depart from the Strasbourg jurisprudence where breaches of Article 6 had been found<sup>24</sup> in order to conclude that the admissibility of evidence obtained by torture would not be incompatible with the Convention where the UK had not 'procured' or 'connived in' that torture and where it had no control over those responsible for it.<sup>25</sup>

Laws LJ again disappointed human rights activists in the Court of Appeal judgment in *Limbuella*<sup>26</sup> which concerned provisions of the Nationality, Immigration and Asylum Act 2002. Section 55(1) of that Act provided that the Secretary of State might not provide support under the Immigration and Asylum Act 1999 to a person who claims asylum where he is not satisfied that the claim was made as soon as reasonably practicable after that person's arrival in the UK. In other words, asylum seekers who did not meet the time requirements would fall outside the protection granted by the 1999 Act. The majority in the Court of Appeal held that destitution resulting from denying the assistance provided by that Act could amount to inhuman or degrading treatment under Article 3 of the Convention. Laws LJ, however, dissented from the majority view. His Lordship evidently felt that '... a person is not degraded in that particular, telling sense, if his misfortune is no more - and of course, no less - than to be exposed to suffering (not violence) by the application of legitimate government policy'.<sup>27</sup> The danger of the 'municipal' or domestic approach to human rights adjudication is

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<sup>21</sup> Ibid [266].

<sup>22</sup> Ibid [260].

<sup>23</sup> Ibid.

<sup>24</sup> Eg *Saunders v United Kingdom* (1996) 23 EHRR 313, where the ECtHR held that the applicant's conviction for offences related to illegal share dealing breached the Article 6(1) right to freedom from self-incrimination because of the use at his trial of statements obtained from him under statutory powers of compulsion. Laws LJ did not consider the case to be 'of any assistance at all' on the grounds that it was a case about self-incrimination in the context of company law legislation' [264].

<sup>25</sup> Ibid [252]; The decision was overturned by the House of Lords: [2004] UKHL 56.

<sup>26</sup> *Secretary of State for the Home Department v Limbuella* [2004] EWCA Civ 540.

<sup>27</sup> Ibid [71].

therefore plainly that the view may result in the restriction of those rights.<sup>28</sup> The danger is made clearer still by the decision of the House of Lords in *Limbuela*<sup>29</sup> that s.55 of the Nationality, Immigration and Asylum Act 2002 *did* contravene Article 3, upholding the majority decision of the Court of Appeal.

Despite these dangers, it is clear that courts have been concerned to apply at least the minimum standard of rights set out by the Strasbourg Court on the basis that '[t]o do otherwise would defeat one of the purposes of the HRA 1998'.<sup>30</sup> In *Amin* Lord Slynn confirmed that:<sup>31</sup>

... where the [Strasbourg] court has laid down principles and ... a minimum threshold requirement ... United Kingdom courts should follow what the Strasbourg court has said. If they do not do so without good reason the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed.<sup>32</sup>

However, while it is clear that courts are concerned to follow at least the minimum threshold, it is also clear that they are generally unwilling to go any further. Instead, it is becoming clearer that this kind of dicta is better classified as part of a cautious approach often evidenced by the judiciary.<sup>33</sup>

Several explanations may be advanced for this caution. First, it is usually argued by courts administering it that the language of the HRA emphasises compatibility as the

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<sup>28</sup> Laws LJ's inquiry in *Limbuela* has been criticised for being concerned 'not so much to seek assistance from the Strasbourg case law but to leave his own mark on the understanding of the Convention right under Article 3' C. Warbrick, 'The View from the Outside' in H. Fenwick, G. Phillipson, R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge 2007) 48.

<sup>29</sup> *R v Secretary of State for the Home Department, ex parte Limbuela* [2005] UKHL 66; [2006] 1 AC 396.

<sup>30</sup> D. Feldman (ed) 'English Public Law' (OUP, Oxford 2004) 390; D. Feldman, 'The Human Rights Act 1998 and constitutional principles' (1999) 19 LS 165, 193; This approach was predicted by Fenwick and Phillipson in a publication around the time that the HRA came into force: 'it would seem safe to predict that domestic courts will wish to provide at least as high a protection for the Convention rights as has Strasbourg, since to do otherwise, 'would defeat one of the main purposes of the 1998 Act and lead to a flood of applications to Strasbourg'. H Fenwick and G Phillipson 'Public protest, the HRA and judicial responses to political expression' [2000] PL 627-50, 640 quoting E. Barendt, 'Freedom of Assembly' in Beatson and Cripps (eds), *Freedom of Expression and Freedom of Information* (2000) 168.

<sup>31</sup> *Amin* (n 1).

<sup>32</sup> *Ibid* [44].

<sup>33</sup> Recall eg *R (On The Application of Animal Defenders International) V Secretary of State For Culture, Media and Sport (Respondent)* [2008] UKHL 15.

primary aim, or that ‘Bringing Rights Home’ through the HRA simply means ‘improving UK co-operation with the ECHR system by providing a better means for resolving disputes about the meaning and application of the ECHR in the UK legal system’.<sup>34</sup> For instance, in *Quark*<sup>35</sup> Lord Nicholls described the purpose of the Act to be to ‘provide a means whereby persons whose rights under the Convention were infringed by the United Kingdom could, in future, have an appropriate remedy available to them in the courts of this country’<sup>36</sup> while Lord Bingham explained that ‘a party unable to mount a successful claim in Strasbourg can never mount a successful claim under [the HRA]’<sup>37</sup> and (in another case) that the purpose of the HRA ‘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’.<sup>38</sup>

Moreover, the Court of Appeal in *Al-Jedda*<sup>39</sup> sought to rely on this ‘purpose’ of the HRA in order to resist granting effect to Convention rights beyond the standard of the European Court. Mr Al-Jedda submitted that the detention of a person by British authorities in Iraq was in violation of his Convention rights under Article 5. In the course of his judgment, Brooke LJ considered the outcome of *Al Skeini*<sup>40</sup> (in the same court) where it was conceded that one of six claimants had rights upon which he could rely in a complaint against the UK in Strasbourg. Relying in part on the purpose of the HRA as given in *Quark*, the court held that since the claimant would have a case in Strasbourg the HRA enabled him to bring his claim in UK courts. Brooke LJ felt his conclusion to be a ‘natural complement’ to the conclusion in *Quark* and *Al Skeini*, considering that, ‘[b]y parity of reasoning,’<sup>41</sup> because Mr Al-Jedda would have failed in asserting his claim before the Strasbourg Court, ‘it would contradict the purpose of the 1998 Act ... if he could get a better remedy at home than he could achieve in

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<sup>34</sup> C. Warbrick, ‘The view from the outside’ (n 28) 25.

<sup>35</sup> *R v Secretary of State for Foreign and Commonwealth affairs, ex parte Quark Fishing Limited* [2005] UKHL 57.

<sup>36</sup> *Ibid* [33].

<sup>37</sup> *Ibid* [25]; [88] (Lord Hope).

<sup>38</sup> *R. (on the application of SB) v Denbigh High School* [2007] 1 AC 100 [29].

<sup>39</sup> *R (on the application of Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327; The case was confirmed on appeal to the House of Lords: [2008] 1 AC 332.

<sup>40</sup> *R (On the Application of Al-Skeini and others) v Secretary of State for Defence* [2008] 1 AC 153.

<sup>41</sup> *Ibid* [98].



Strasbourg’.<sup>42</sup> However, while the reasoning in *Al-Skeini* (that a claimant able to rely upon rights in Strasbourg must also be able to rely upon them domestically) is a logical application of the purpose of the HRA as explained in *Quark* (to do otherwise would fail to follow at least the minimum standard as given by the Strasbourg Court and run counter to the scheme of the Act by failing to ‘bring rights home’), it is not at all clear that it should apply in reverse. Although Brooke LJ felt able to apply the reasoning in *Al-Skeini* in this way to conclude that, because Mr Al-Jedda would not have succeeded in Strasbourg he could not be granted a remedy domestically, this *only* follows if it is accepted that domestic courts are prohibited from giving further effect to Convention rights than the Strasbourg Court. It has already been argued that the language of s.2 does not itself prohibit this and judicial guidance that domestic courts must ‘keep pace with the Strasbourg jurisprudence ... no more and no less’ is directed *only* to avoid falling below a minimum standard. The reasoning in *Al Jedda* is a good example of courts not simply following the minimum Strasbourg standard, but in fact restricting themselves to it.

### THE ARGUMENT FROM CONSISTENCY

An increasingly common argument for judicial restraint in the development of domestic rights jurisprudence is that the Convention must be understood and applied uniformly amongst all member states. In *Ullah*<sup>43</sup> Lord Bingham stressed that while 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*’.<sup>44</sup> Accordingly his Lordship felt that the task of domestic courts was ‘no more, [and] no less’ than keeping pace with Strasbourg. As discussed in chapter I, this restrained approach has been adopted in a line of cases since *Ullah*. In *R (Clift)*<sup>45</sup> Lord Hope added that ‘[a] measure

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<sup>42</sup> Ibid.

<sup>43</sup> *Regina (Ullah) v. Special Adjudicator; Do v. Immigration Appeal Tribunal* [2004] UKHL 26.

<sup>44</sup> Ibid [20] (emphasis added); *Kay and others v London Borough of Lambeth* [2006] UKHL 10.

<sup>45</sup> *R (on the application of Clift) (FC) (Appellant) v. Secretary of State for the Home Department (Respondents)* [2006] UKHL 54.

of self-restraint is needed, lest we stretch our own jurisprudence beyond that which is shared by all the States Parties to the Convention'<sup>46</sup> and Lord Brown gave recent endorsement to this cautious approach in *Al-Skeini*,<sup>47</sup> further suggesting that 'no more, but certainly no less' could be read as 'no less, but certainly no more'.<sup>48</sup>

A major justification for this type of 'uniform' approach among the Convention states is the preservation of legal certainty 'through a coordinated and harmonized approach designed to avoid confusion and relativism'.<sup>49</sup> But arguments with this basis are palatable only when the 'uniform' approach represents a minimum protection of the Strasbourg standard. Where the approach results in a better protection of Convention rights than might otherwise have been given by a domestic court unconcerned with such judicial coordination there is little cause for criticism. However, where a domestic court is minded to develop domestic jurisprudence beyond the current Strasbourg standard, the argument that domestic courts should 'coordinate' reasoning with the Strasbourg line will serve only to stifle that development. Given the very deliberate formulation of the 'flexibility and discretion' in s.2,<sup>50</sup> it is difficult to see that a limitation of this kind would not run counter to the scheme of the provision. As one commentator has recently asked, 'why should the United Kingdom's human rights protection be reduced to Europe's lowest common denominator?'<sup>51</sup> Furthermore, the 'uniformity' goal may itself be unrealistic given the structural features of the Convention which allow for diverse application of the Convention (for instance, the margin of appreciation and the qualifications in Articles 8-11 which almost guarantee some variation in the protection afforded to Convention rights). Accordingly, 'uniformity' amongst Convention states can arguably only be desirable in terms of the meaning of the Convention itself, or the

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<sup>46</sup> Ibid 49 (Lord Hope of Craighead).

<sup>47</sup> *Al-Skeini* (n 40).

<sup>48</sup> Ibid [106]; cf *Re P* (n 5) [50] (Lord Hope).

<sup>49</sup> Council of Europe, Conference on the Position of Constitutional Courts Following Integration into the European Union', addressed by Luzius Wildhaber, 30 September 2004, 4  
<[http://www.echr.coe.int/NR/rdonlyres/5D1C0CCF-B026-4E68-AC9E-AB0A2CDB66E6/0/2004\\_Bled\\_\\_Slov%C3%A9nie\\_\\_Const\\_Court.pdf](http://www.echr.coe.int/NR/rdonlyres/5D1C0CCF-B026-4E68-AC9E-AB0A2CDB66E6/0/2004_Bled__Slov%C3%A9nie__Const_Court.pdf)> accessed 01/02/2007.

<sup>50</sup> Eg The Lord Chancellor, Lord Irvine, firmly upheld that domestic judges required 'flexibility and discretion' in developing human rights law' Hansard HL vol 584 col 1270 (19 January 1998).

<sup>51</sup> J. Lewis, 'In *Re P* and others: an exception to the "no more, certainly no less" rule' [2009] PL 43.

scope of the primary right in question and therefore can only really be considered in the fairly abstract sense of a minimum level of protection.<sup>52</sup>

Early in the academic debates on s.2, Masterman argued that the loyalty domestic courts were showing to the Strasbourg line would have the result of binding domestic courts to Strasbourg.<sup>53</sup> The practice of striving for consistency or uniformity with the Strasbourg Court, neither falling below the minimum nor developing rights more generously, understandably gives this impression. In similar terms, Jonathan Lewis described the approach as ‘the mirror principle’ and felt the result to be that domestic human rights law would affect be ‘nothing more than Strasbourg's shadow’.<sup>54</sup> Accordingly, Lewis has argued that the effect of Lord Bingham’s dictum in *Ullah* (that ‘...provid[ing] for rights more generous than those guaranteed by the Convention ... should not be the product of interpretation of the Convention by national courts: the Convention must bear the same meaning for all states party to it’)<sup>55</sup> ‘wrongly conflates rights under the European Convention on Human Rights (ECHR) with rights under the Human Rights Act 1998’.<sup>56</sup> Moreover, the ‘consistency’ approach also carries a significant risk that domestic jurisprudence under the HRA will result in a more restrictive reading of Convention rights than the one given by the European Court. Sedley LJ recognised the risk that ‘in trying to stay level, we shall fall behind’.<sup>57</sup>

The argument from consistency also assumes that by giving higher protection to Convention rights domestically, there would be some onerous effect on the meaning of

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<sup>52</sup> If the guidance as to consistency with the Convention is to be understood in this way, the decisions in *Campbell* and *Limbuella* (discussed in chapter I) are all the more surprising since in both cases the House of Lords appeared to openly expand the scope of the primary right in point. In *Campbell*, the House of Lords pre-empted the expansion of privacy under Article 8 to cover relations between private parties (in advance of the decision in *Von-Hannover*) while in *Limbuella* it is arguable that the House of Lords - finding a violation of Article 3 - expanded the scope of ‘inhuman and degrading treatment’ beyond that previously recognised by the European Court (See further J. Lewis ‘The European Ceiling on Human Rights’ (n 6) 736).

<sup>53</sup> R. Masterman, ‘Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?’ [2004] PL 725.

<sup>54</sup> J. Lewis, ‘The European Ceiling on Human Rights’ (n 6) 730.

<sup>55</sup> *Ullah* (n 43) [20].

<sup>56</sup> J. Lewis, ‘The European Ceiling on Human Rights’ (n 6).

<sup>57</sup> *Ibid.*

the Convention for other member states. Lord Bingham appeared to rely on this possibility in *Brown v Stott* when he counselled against expanding the scope of Convention rights domestically: ‘...the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept’.<sup>58</sup> Yet it is difficult to imagine how an English decision granting a greater protection of rights in English law could upset the uniformity at Strasbourg. Neither the European Court of Human Rights nor the Convention itself would require other member states to follow that standard, nor indeed would it be required to keep its own case law in line with it. Baroness Hale recently agreed:

Lord Bingham can only have meant one of two things. That Strasbourg will be cautious in its interpretations for fear of committing member states, which are bound by its decisions, to obligations which they did not want. Or that UK courts should be cautious for fear of committing the UK to obligations which it did not want ... But there is no particular reason why either Strasbourg or other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law.<sup>59</sup>

Indeed, if an English case of the kind were ever brought before the Strasbourg Court by the appellants in a case against another member state, the Court would be more likely to allow a margin of appreciation to the contracting state than to hold it to the standards upheld by the English decision.<sup>60</sup>

Equally, while many commentators propose that a ‘dialogue’ may evolve between domestic courts and Strasbourg<sup>61</sup> and that the Strasbourg Court *is* influenced by

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<sup>58</sup> *Brown v Stott (Procurator Fiscal, Dunfermline) and another* [2003] 1 AC 681, 703.

<sup>59</sup> Baroness Hale, ‘Who Defines Convention Rights?’ (n 18).

<sup>60</sup> The point has also recently been recognised by R. Singh, ‘Interpreting Bills of Rights’ [2008] Stat LR 82; also, J. Lewis ‘The European Ceiling on Human Rights (n 6) 737: ‘realistically it is unthinkable that Strasbourg would reprimand a state for its generous rights protection. It would no doubt revert to the ‘margin of appreciation’ doctrine’; C. Warbrick, ‘The View From the Outside’ (n 28) 31: It should be remembered that this reasoning is of course subject to the situation whereby the higher standard is recognised enough member states so as to provide a European consensus on the issue. An example of this kind of development concerning the rights of transsexuals was discussed in chapter II (from n 14) and is arguably an example of the ‘dialogue’ that domestic courts may have with Strasbourg.

<sup>61</sup> Eg R. Clayton, ‘Judicial Deference and ‘Democratic Dialogue’: the legitimacy of judicial intervention under the Human Rights Act 1998’ [2004] PL 33.

domestic decisions<sup>62</sup> this result is almost exclusively restricted to instances where the Court is considering cases to which the UK is a party.<sup>63</sup> Further, as Baroness Hale has recently pointed out, in practice ‘the main contribution [domestic] judgments make in Strasbourg is to explain why [domestic courts] have *not* found a violation of the Convention in a particular case’.<sup>64</sup> Recall for example *Z v United Kingdom*<sup>65</sup> where the ECtHR departed from its decision in *Osman v United Kingdom*<sup>66</sup> after considering the discussion given to that case by the House of Lords in *Barrett v London Borough of Enfield*<sup>67</sup> in order to find the UK position not to be incompatible with the Convention. Similarly, in *Evans v United Kingdom*<sup>68</sup> the ECtHR made express reference to the discussion of proportionality in the UK Court of Appeal, upholding the view of the English courts that the Human Fertilisation and Embryology Act 1990 was compatible with Article 8 of the Convention. Furthermore, Strasbourg judgments concerning other member states do not appear to give any weight to UK domestic adjudication. A clear example of this is the decision of the House of Lords in *Campbell v MGN*<sup>69</sup> which seemingly pre-empted the Strasbourg decision in *Von Hannover v Germany*<sup>70</sup> on the scope of privacy in Article 8 (discussed further below); the Strasbourg Court was not influenced by *Campbell* in that case, in fact, *Campbell* was not even considered.

The argument for uniform application also overlooks Strasbourg’s own view of the Convention system. Colin Warbrick has explained that ‘[i]t was not the object of the Convention to establish a uniform set of human rights for all the party states, still less an optimum standard’.<sup>71</sup> Grotz, Beatson and Duffy noted that ‘there is no imperative that parties to the Convention should adopt a uniform approach, only that they should not fall below an irreducible minimum, which will be monitored by the Strasbourg

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<sup>62</sup> Eg Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) 1; I. Leigh, R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, Oxford 2008) 294.

<sup>63</sup> Eg *Evans v United Kingdom* (2006) 43 EHRR 21; *Dickson v United Kingdom* (2007) 44 EHRR 21.

<sup>64</sup> Baroness Hale, ‘Who Defines Convention Rights?’ (n 18).

<sup>65</sup> (2001) 34 EHRR 97.

<sup>66</sup> (1998) 29 EHRR 245.

<sup>67</sup> [2001] 2 AC 550.

<sup>68</sup> *Evans* (n 63).

<sup>69</sup> [2004] UKHL 22.

<sup>70</sup> (2005) 40 EHRR 1.

<sup>71</sup> C. Warbrick, ‘The View From the Outside’ (n 28) 29.

institutions’<sup>72</sup> while Masterman also thought it ‘clear that the Strasbourg institutions do not anticipate the Convention standards be uniformly applied as between all contracting states’.<sup>73</sup> Further, Masterman has reasoned that the Convention *itself* ‘assumes that the domestic courts will *also* take a progressive approach’ to rights and should be ‘free to develop an enhanced protection within their national legal system’.<sup>74</sup> As one former European Court judge has written, ‘the ECHR’s injunction to further realise human rights and fundamental freedoms contained in the preamble is also addressed to domestic courts’.<sup>75</sup> Accordingly, Judge Sibrand Karel Martens considered that the role of domestic courts ‘goes further than seeing to it that the minimum standards in the ECHR are maintained’.<sup>76</sup> Quoting Judge Martens, Singh recently concurred: ‘[t]here is therefore no bar to individual states adopting more generous interpretations of Convention rights’.<sup>77</sup>

Even more persuasively, the principle that English courts must apply the Convention strictly in line with Strasbourg case law is not the approach used in other Council of Europe countries like France or Germany.<sup>78</sup> While the French political and judicial systems ‘have grown increasingly open’ and ‘the constitutionally mandated superiority of the ECHR over domestic legislation is now widely accepted’,<sup>79</sup> Luc Heuschling has noted that ‘French judges ... are very attached to the preservation of their own authority and legitimacy’.<sup>80</sup> Nico Krisch has similarly observed that ‘French scholars and judges prefer to see the relationship between the legal orders as one of coordination and that of French and European judges as a “dialogue” ... [and] they often regard the authority of

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<sup>72</sup> S. Grosz, J. Beatson and P. Duffy, *Human Rights* (n 4) 20; *Amin* (n 1).

<sup>73</sup> R. Masterman, ‘Section 2(1) of the Human Rights Act’ (n 53), 732.

<sup>74</sup> R. Masterman, ‘Taking the Strasbourg jurisprudence into account’ (n 6).

<sup>75</sup> Judge Sibrand Karel Martens, ‘Incorporating the European Convention: the role of the judiciary’ [1998] EHRLR 5, 14.

<sup>76</sup> *Ibid.*

<sup>77</sup> R. Singh, ‘Interpreting Bills of Rights’ (n 60).

<sup>78</sup> Eg E. Öricü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, Birmingham 2003).

<sup>79</sup> N. Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) MLR 71 (2) , 183–216, 191. See also E. Steiner, ‘France’ in C. Gearty (ed), *European Civil Liberties and the European Convention on Human Rights* (Kluwer Law International, The Hague 1997); L. Heuschling, ‘Comparative Law and the European Convention on Human Rights in French Human Rights Cases’ in E. Öricü (ed), *Judicial Comparativism in Human Rights Cases* (*ibid.*).

<sup>80</sup> L. Heuschling ‘Comparative Law and the European Convention on Human Rights Cases’ (*Ibid.*) 33.

ECtHR judgments as limited, especially in cases France has not been a party to'.<sup>81</sup> Indeed, Kirsch discovered that not only do the French courts readily disagree with Strasbourg on the interpretation of the Convention, but they also 'set autonomous limits and protect a constitutional core from European interference';<sup>82</sup> 'French practice ... ultimately reflect a "oui, mais ..." vis-à-vis Strasbourg'.<sup>83</sup>

The margin of appreciation doctrine discussed earlier in chapter II itself lends support to the possibility of interpreting Convention rights more expansively than Strasbourg. Since the margin of appreciation does not operate domestically, and it is undesirable to transpose the doctrine into domestic law adjudication, it may even be desirable for a domestic court to grant more generous protection to Convention rights than is set out by the Strasbourg Court.<sup>84</sup> The European Court has made it clear that where little or no consensus exists on a particular matter, national authorities are better placed to adjudicate on the matter by reason of their being in 'direct and continuous contact with the vital forces of their countries'.<sup>85</sup> Yet, as Rabinder Singh has also noted, the rationale 'sits uneasily' with the reasoning of the senior judiciary that the European Court, not only better understands the 'ambit and reach'<sup>86</sup> of Convention rights, but also brings to its adjudication 'a range of knowledge and principle *that a national court cannot aspire to*'.<sup>87</sup> Masterman has elaborated that '[t]his rigid interpretation of s.2(1) ... arguably undermines the role of national authorities as the primary mechanism for securing the protections afforded by the Convention'.<sup>88</sup>

Interestingly, the initial reluctance of the senior judiciary to 'go further' than the Strasbourg Court in such cases appears to be under revision. The House of Lords arguably broadened the scope of Article 3 beyond the Strasbourg interpretation in

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<sup>81</sup> N. Kirsch, 'The Open Architecture of European Human Rights Law' (n 79) 192.

<sup>82</sup> Ibid 193.

<sup>83</sup> Ibid 196.

<sup>84</sup> Eg S. Grosz, J. Beatson and P. Duffy, *Human Rights* (n 4) 22.

<sup>85</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737.

<sup>86</sup> *R (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 [65].

<sup>87</sup> Ibid [91].

<sup>88</sup> I. Leigh, R. Masterman, *Making Rights Real* (n 62) 63-64.

*Limbuela*<sup>89</sup> and, as is well known, the House of Lords in *Campbell*<sup>90</sup> found a violation of Article 8 following the publication of photographs of Naomi Campbell (a celebrity) taken in a public place before such a finding by the Strasbourg Court and pre-empting the later decision in *Von Hannover*<sup>91</sup> (where the publication of photographs taken of Princess Caroline in a public place were also found in breach of Article 8). In *EM (Lebanon) v Secretary of State for Home Department*<sup>92</sup> the House of Lords found that returning the appellant to Lebanon where she would almost certainly be separated from her child amounted to an infringement of Article 8, despite there being no Strasbourg jurisprudence to indicate a violation. As discussed earlier, the House of Lords also made a ‘a small but significant advance upon the Strasbourg jurisprudence’<sup>93</sup> in *Re P*<sup>94</sup> finding that Article 14 of the Adoption (Northern Ireland) Order 1987 was incompatible with Articles 8 and 14 of the Convention.

However, despite these few exceptions and promising dicta in early cases under the HRA, it is clear that the judiciary have shown little enthusiasm for the proposition that the HRA was enacted with a progressive view of human rights development generally. As the few cases discussed above show, it is easier to count the examples in which the courts *have* arguably furthered the Strasbourg interpretation of a Convention than cases in which they have not. Even if the proper construction of the legislative intentions is that Parliament positively gave domestic courts the opportunity and discretion to develop domestic human rights jurisprudence beyond the interpretations of the Strasbourg organs, it is less than clear that English courts themselves have understood – or been willing to construct - s.2 in this way. Instead, judicial reasoning has focused on developing jurisprudence consistently with Strasbourg, leading to a ‘restrained’ and ‘cautious’ approach.

In fact, it is particularly clear that domestic courts will only ‘go further’ when there is a very clear reason to do so. For example, in *Re P* Lord Hoffman justified the departure from Strasbourg jurisprudence on the basis that ‘none of [the reasons usually given for

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<sup>89</sup> *Limbuela* (n 29).

<sup>90</sup> *Campbell* (n 69).

<sup>91</sup> *Von Hannover* (n 70).

<sup>92</sup> [2008] UKHL 64

<sup>93</sup> Baroness Hale, ‘Who Defines Convention Rights?’ (n 18).

<sup>94</sup> *Re P* (n 5).



following the Strasbourg decisions] can apply in a case in which Strasbourg has deliberately declined to lay down an interpretation for all member states, as it does when it says that the question is within the margin of appreciation'.<sup>95</sup> Lord Mance agreed<sup>96</sup> and it was in reliance on this margin that Lord Hope was concerned to emphasise that '[Lord Bingham in *Ullah*] said that the duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: "no more, but certainly no less". *Not, it should be noted, "certainly no more"*<sup>97</sup> ... [t]he Strasbourg jurisprudence is not to be treated as a straitjacket from which there is no escape'.<sup>98</sup>

Further, domestic courts are especially willing to make an 'advance' upon Strasbourg where the development can be constructed in such a way as to suggest the court is not 'going further' at all: of the majority in *Re P*, Lord Hoffmann, Lord Hope and Lord Mance all reasoned that it was actually the jurisprudence of the ECtHR which indicated that discrimination on (non)marital grounds was incompatible with the Convention. It was only Baroness Hale that felt the 'advance' on Strasbourg to be justified *per se* (in fact, she could not agree that the Strasbourg Court would hold the discrimination in this case to be incompatible)<sup>99</sup> and, on this basis, only Baroness Hale outwardly concluded that, for the purposes of the Convention rights *as given effect in the UK by the HRA*, the Order was unjustifiably discriminatory. Both Lord Hope and Lord Mance agreed with Lord Hoffman that the incompatibility was derived from the developing Strasbourg jurisprudence and, consequently, that the 'dilemma' as to whether a domestic court might further the Strasbourg position was 'less acute' than Baroness Hale had suggested.<sup>100</sup> This is compounded by his Lordship's emphasis in *Re P* that there are usually 'good reasons ... [to] follow the interpretation adopted in Strasbourg'.<sup>101</sup> The best of these reasons was 'the old rule of construction that when legislation is based upon an international treaty, the courts will try to construe the legislation in a way

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<sup>95</sup> Ibid [36].

<sup>96</sup> Ibid [129].

<sup>97</sup> Cf. *Al-Skeini* (n 40) [106] (Lord Brown).

<sup>98</sup> *Re P* (n 5) [50], Lord Hope refers to the guidance of the Lord Chancellor in the House of Lords debates on the Act: 'putting the courts in some kind of straitjacket where flexibility is what is required' Hansard HL, vol 583 col 515 (18 November 1997) (Lord Irvine of Lairg).

<sup>99</sup> Ibid [115].

<sup>100</sup> Ibid [50], [122].

<sup>101</sup> Ibid [35].

which does not put the United Kingdom in breach of its international obligations’<sup>102</sup> but his lordship also confirmed that other reasons are ‘ordinary respect for the decision of a foreign court on the same point’ as well as ‘the general desirability of a uniform interpretation of the Convention in all member states’.<sup>103</sup>

## CONCLUSIONS

A short while ago, Bonner, Fenwick and Harris-Short suggested that ‘the ability to depart from the ECHR jurisprudence ... enable[s] a court to build extra protection above [the Strasbourg] “floor”’.<sup>104</sup> The language of s.2 certainly leaves it open to the judiciary to build upon the Strasbourg interpretation of Convention rights and on this basis, it is possible that domestic courts *can* go further than the Convention requires, either by adopting a minimum standard, constructing the approach as the development of a domestic law of human rights, or when considering relevant jurisprudence in an area given a wide margin of appreciation. Crucially however, that the courts may ‘go further’ is not because the HRA (or the Convention) *requires* it of them, rather, it is because the HRA 1998 *allows* it to them. As one commentator has written, the introduction of the HRA ‘gave UK courts the opportunity - rather than a mandate - to make a greater contribution to international human rights jurisprudence’<sup>105</sup> and at least this much was confirmed by the House of Lords in *Re P*.

Yet – as *Re P* also shows - there is a clear reluctance on the part of domestic courts to *openly* ‘go further’ than the Strasbourg Court and give a more generous interpretation to Convention rights at the domestic level. The continued eagerness to maintain consistency with the reasoning of the European Court and the central importance of Lord Bingham’s guidance in *Ullah* to ‘keep pace’ with Strasbourg jurisprudence ‘no more, no less’ has in this way placed obvious limits on judicial reasoning under s.2.

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid [36].

<sup>104</sup> D. Bonner, H. Fenwick, and S. Harris-Short, ‘Judicial Approaches to the Human Rights Act’ (2003) 52 ICLQ 549, 553

<sup>105</sup> J. Lewis, ‘The European Ceiling on Human Rights’ (n 6) 725.

Unfortunately, as Leigh and Masterman recently concluded, ‘so long as the “no less/no more” doctrine continues to hold sway there will continue to be doubts over the ability of our judges to constructively ‘contribute to [the] dynamic and evolving interpretation of the Convention’ at the Strasbourg level’.<sup>106</sup>

The resultant desire for consistency is also enlarged by another fear: as Hunt has explained, ‘pre-HRA positivistic legal approach allowed judges to avoid the charge of making value choices that might undermine their legitimacy. ... Such judges were far from eager to explicitly develop the common law lest they be accused of illegitimate judicial law-making’.<sup>107</sup> Post HRA, the mood is similar and it is not difficult to sympathise with the reasoning behind this caution: by interpreting the Convention more generously than Parliament may have anticipated the danger is that it may effectively tie the UK to obligations which Parliament did not contract into and may not have been willing to accept.<sup>108</sup> As one commentator put it, there is ‘no opportunity for the Government to “appeal” to Strasbourg’<sup>109</sup> and ‘[t]here is no provision in the ECHR enabling a Convention state to bring a claim against one of its citizens (as a means to challenge a domestic court's interpretation of a particular right)’.<sup>110</sup> Nor is there any mechanism similar to the procedure for a reference to the European Court of Justice in Luxembourg.<sup>111</sup> Writing extra judicially, Sedley LJ has given an account of judicial reasoning which suitably sums up such a view:

Our courts have set their face against any interpretation of the Convention that carries individual rights further than Strasbourg has carried them. The logic of this is intelligible: it avoids judicial legislation and prevents member states from getting out of step with one another.<sup>112</sup>

Section 2 HRA offers no normative guidance, the ambit of the duty to ‘take into account’ Strasbourg jurisprudence and, predictably, ‘[i]t all depends on the juridical

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<sup>106</sup> I. Leigh, R. Masterman, *Making Rights Real* (n 62) 294; *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997) [2.5].

<sup>107</sup> M Hunt, ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’, in L Clements and J Young (eds), *Human Rights: Changing the Culture* (Blackwell, Oxford 1999) 93.

<sup>108</sup> *Eg Brown v Stott* (n 58) 703 (Lord Bingham).

<sup>109</sup> R. Singh, ‘Interpreting Bills of Rights’ (n 60).

<sup>110</sup> J. Lewis, ‘The European Ceiling on Human Rights’ (n 6) 737.

<sup>111</sup> R. Singh, ‘Interpreting Bills of Rights’ (n 60).

<sup>112</sup> Sedley LJ, ‘Bringing Rights Home: Time to Start a Family?’ (2008) 28 LS 327.

political complexion and energy of the current judiciary'.<sup>113</sup> At a time when Law Lords are themselves identifying and publicising critical reasons for growing judicial activism<sup>114</sup> the likelihood of any willingness to judicially expand the scope of Convention rights or move beyond Strasbourg jurisprudence under the HRA seems slim. Judicial awareness of cynical public perceptions may alone render these conclusions moot. As Sedley LJ has put it (extra-judicially), '[a]ll of this makes it a pity that, instead of setting out in a reasonably sanguine and collaborative mood to see how we can build on the Human Rights Act, we are starting from a low and defensive base'.<sup>115</sup> Perhaps however, *Re P* at least represents a step in the right direction: the acknowledgement that domestic courts ought to decide cases *in the domestic context* will at least allow a development beyond the Strasbourg position in certain circumstances. However, the possibility for domestic judges to legitimately adopt an expansive reading of Convention rights outside such (circumscribed) circumstances remains doubtful.

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<sup>113</sup> P. Kearns, 'United Kingdom Judges in Human Rights Cases', in E. Örtücü (ed), *Judicial Comparativism in Human Rights Cases* (n 78) 66.

<sup>114</sup> Speaking recently to the Bar Conference Lord Neuberger identified several factors that are pushing UK judges into being more activist and concluded that 'increased judicial activism means increased media and political scrutiny of the more senior judges — at appointment and thereafter'. F. Gibb, 'Should MPs interview new Supreme Court Judges?' *The Times*, (London 04 November 2008) <<http://business.timesonline.co.uk/tol/business/law/article5080873.ece?openComment=true>> accessed 8 November 2008.

<sup>115</sup> Sedley LJ, 'Bringing Rights Home: Time to Start a Family?' (n 112).

## CHAPTER IV

### COMPARATIVISM UNDER THE HUMAN RIGHTS ACT

If any of the situations giving rise to a ‘departure’ or ‘escape’ from Strasbourg jurisprudence (as set out in chapters I and II) arise in a domestic case, it has so far been argued that domestic courts should be ready to decide the matter for themselves. However, this exercise may not always be workable and where domestic law does not present a solution, it may be possible - or even preferable - that the domestic court look outside the Convention for comparative assistance. Yet, an important quandary is raised by a specific duty in section 2 to take into account *Strasbourg* jurisprudence.

Historically, English judges have looked to a wealth of jurisprudence in the course of domestic adjudication,<sup>1</sup> typically taking the form of decisions emanating from other Commonwealth systems (similarly rooted in the common law) and the language of the Act *prima facie* retains that possibility. As chapter I sought to clarify, the rejection of the amendment to replace the words ‘must take into account’ with ‘shall be bound by’ positively confirmed the intention that section 2 was designed to give Strasbourg jurisprudence the effect of strictly *persuasive* authority in UK law<sup>2</sup> which is essentially the same status traditionally afforded to authority from other jurisdictions. Indeed, it is the subsidiary nature of the Convention system that provides for doctrinal tools such as the margin of appreciation and provisions for derogation, and it must be for the same reasons that the traditional regard to other (common law) jurisdictions - classically rationalised by a basic ‘like for like’ breed of reasoning - is an approach that Section 2 nowhere prohibits.<sup>3</sup> As Fenwick has written, ‘... it was always clear that the courts could also consider jurisprudence from other jurisdictions’.<sup>4</sup>

Yet while the Act does not strictly *prohibit* reference outside the Convention jurisdiction, neither does it necessarily *encourage* such an approach. Even more

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<sup>1</sup> Eg M. Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, Oxford 1998).

<sup>2</sup> R. Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a ‘municipal law of human rights’ under the Human Rights Act’ [2005] ICLQ 54.

<sup>3</sup> F. Klug, ‘The Human Rights Act 1998, *Pepper v Hart* and All That’ [1999] PL 246.

<sup>4</sup> H. Fenwick, *Civil Liberties and Human Rights* (Cavendish, London 2007) 192.

significant, is the possibility that section 2 operates to positively *discourage* such recourse, advocating instead a closer harmonisation of the common law with European human rights standards. Since ‘legal cultures are neither homogeneous nor unchanging’,<sup>5</sup> what might have been ‘relevant’ before the HRA may not be so now. It is also possible that some jurisdictions may be (or may become) more appropriate for comparison than others.

Some enquiry into the human rights principles sought to be protected by HRA is necessary at this juncture. Christopher McCrudden has made some useful analysis of this point and loosely identifies three possibilities.<sup>6</sup> Firstly the Act may intentionally recognise *universal* principles of human rights. If so, domestic reliance on *any* human rights jurisdiction whatsoever may be acceptable. Secondly is the possibility that it is a tradition of *domestic* rights (so to speak), or at least rights not altogether transposed from ‘foreign’ legal systems that is to be promoted. If this is the case, then the application of standards borrowed from the familiar common law systems may be more appropriate. Lastly, if the Act were to incorporate wholly *European* principles of human rights, one might assume that courts applying section 2 would rightly favour European jurisprudence ahead of any other.

## UNIVERSAL PRINCIPLES, UNIVERSAL JURISPRUDENCE

The possibility that courts may legitimately refer to any jurisdiction whatsoever in the course of domestic adjudication is given by virtue of s.11(a) HRA, which seems at least to confirm that the principles protected by the HRA are not *exclusively* European. According to that provision, reliance on a Convention right ‘does not restrict any other right or freedom conferred on [the applicant] by or under any law having effect in any part of the United Kingdom’.<sup>7</sup> The preamble to the ECHR also clearly states that the Convention aims at ‘securing the universal and effective recognition and observance’ of

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<sup>5</sup> J. Bell, ‘Mechanisms for Cross Fertilisation of Administrative Law in Europe’ in J Beatson & T Tridimas, *New Directions for European Public Law* (Hart Publishing, Oxford 1998) 156.

<sup>6</sup> C. McCrudden, ‘A Common Law of Human Rights? Trans-national Judicial Conversations on Constitutional Rights’ [2000] OJLS 449, 503.

<sup>7</sup> Section 11(a) HRA 1998.

certain rights declared by the Universal Declaration of Human Rights'.<sup>8</sup> In fact the common membership of most Convention signatories to other international human rights instruments such as the Universal Declaration of Human Rights (UDHR) and, more recently, the International Covenant on Civil and Political Rights (ICCPR), has probably had the effect of influencing Convention jurisprudence, albeit indirectly. As one commentator has written, 'The Convention protects certain universal human rights, not some *sui generis*, internationally agreed upon rights'<sup>9</sup> and in *Re P* (in support of his dissent) Lord Walker was careful to note that 'in principle the content of human rights should (almost by definition) be the same world-wide'.<sup>10</sup>

If universal principles of human rights influenced the drafting of the European Convention, and the HRA gives effect to that Convention, it follows that the HRA must also be giving effect to those universal principles, albeit indirectly. If this 'equation' works, it must be legitimate for a domestic court adjudicating potentially universal human rights matters to do the same by reference to the jurisprudence under any of the treaties the UK is signatory to (e.g. International Covenant on Civil and Political Rights, Universal Declaration of Human Rights). Feldman has suggested that 'such instruments are used by the Court in Strasbourg as an aid to interpreting rights under the ECHR, and can be used by our courts and tribunals for the same purpose'.<sup>11</sup> Rabinder Singh has added that '[h]uman rights lend themselves to this approach, given that they are frequently cast *in universalist terms*, and very often in a form similar to corresponding provisions in other jurisdictions'.<sup>12</sup>

Some decisions of the senior judiciary have shown the willingness to use comparative sources in this way: for example, in *A and Others*<sup>13</sup> Lord Bingham made considerable reference not only to the Convention and its jurisprudence, but to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, Resolutions of the Security Council of the United Nations as well as the General Commission for Human Rights, Resolutions of the Parliamentary Assembly of the

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<sup>8</sup> G. Letsas, 'The Two Concepts of the Margin of Appreciation' (2006) 26(4) OJLS 705, 707.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Re P and Others* [2008] 3 WLR 76 [80].

<sup>11</sup> D. Feldman (ed) *English Public Law* (OUP, Oxford 2004) 395-396.

<sup>12</sup> R. Singh, 'Interpreting Bills of Rights' [2008] Stat LR 82 (emphasis added).

<sup>13</sup> *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

Council of Europe.<sup>14</sup> In *Jones*,<sup>15</sup> while Lord Phillips focused on the approach of the Strasbourg Court,<sup>16</sup> Lord Mance drew heavily from a wide range of international instruments as well as United States jurisprudence.<sup>17</sup>

The approach is not mirrored by other Convention states, where, generally speaking, a broad comparative method is not popular. For example, legal writers are unanimous in saying that in comparison to the United Kingdom, comparative law has played only a minor role in French courts.<sup>18</sup> French judges appear to have recourse almost exclusively to western, and more specifically to European legal sources. Examples of liberal democracies with a different cultural background are either ignored or rejected.<sup>19</sup> In fact, where courts do take account of broader – universal – jurisprudence, the practice is more often a symbolic, rather than a substantive, contribution to judicial reasoning. For instance, in a decision of the Administrative Court of Appeal of Paris, the *commissaire du gouvernement*, Mirielle Heers, was obliged to take notice of comparative law after heavy reliance on it by the applicants, but essentially concluded that different philosophical influences and cultural traditions rendered reliance on those standards inappropriate.<sup>20</sup>

A similar result is detectable in Germany, although there the hesitant attitude towards judgments of foreign or international courts has been put down to the differences in the working orders of those jurisdictions. Being dominated by written law and no case law, the German legal order is simply unfamiliar with applying precedents.<sup>21</sup> Equally, the relative lack of comparative study in German courts may be explained by the lack of adequate translation. (English is not ordinarily a working language for German judges

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<sup>14</sup> Eg *Ibid* [58]-[63].

<sup>15</sup> *Jones v Ministry of the Interior* [2004] EWCA Civ 1394, [2005] QB 699.

<sup>16</sup> *Ibid* [132]-[134].

<sup>17</sup> *Ibid* [61]-[68].

<sup>18</sup> L. Heuschling 'Comparative Law and the European Convention on Human Rights Cases' in E. Örüci (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, Birmingham 2003) 38

<sup>19</sup> *Ibid* 47.

<sup>20</sup> Administrative Court of Appeal of Paris, 9 June 1998, *Mme Donyoh and Mme Senanayake*, concl M Heers, *RFDA*, 1998, 1231 et seq.

<sup>21</sup> N. Weiss, 'The Impact of the European Convention on Human Rights on German Jurisprudence', in E. Örüci (ed), *Judicial Comparativism in Human Rights Cases* (n 18) 61.



or lawyers).<sup>22</sup> Of course, the opposite could be said of the UK: the British judiciary are very familiar with the precedent based comparative method and since almost all cases are translated into English, UK domestic courts do not suffer the linguistic barriers in the terms which confront the German courts. This feeds a compelling argument as to why the rejection of broader comparative study should not be applicable in the British context and that domestic courts should not be limited to the boundaries of European jurisprudence in that way. At least, if there are to be limits, they must be imposed for different reasons.

Perhaps a compelling reason arises from the principle that those legal institutions which are compared must, in fact, be fit for comparison. Whether true or not, there is a perception that different ideological positions on human rights are taken by different jurisdictions and, if that is true, comparative standards drawn from a particular jurisdiction's approach to human rights may be regarded, therefore, as a sign of a particular orientation towards human rights generally.<sup>23</sup> The treatment of comparative authority by the South African Constitutional Court is of particular interest in this respect since the Constitution expressly declares that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum *may* consider *foreign law*'<sup>24</sup> but that it '*must* consider international law'.<sup>25</sup> The Court has explained that '[c]omparative research is generally valuable, and is all the more so when dealing with problems new to our jurisprudence but well developed in *mature constitutional democracies*'.<sup>26</sup>

It is hardly surprising that, as McCrudden has highlighted, 'it is [in the main] the judiciaries of liberal democratic regimes that cite each other'.<sup>27</sup> 'The citation of, for example, Chinese cases by the House of Lords, does not seem likely...'<sup>28</sup> and the HRA can probably be assumed not to alter that principle. While the rights protected under the

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<sup>22</sup> Ibid 60-61.

<sup>23</sup> See C. McCrudden, 'A Common Law of Human Rights?' (n 6) 501; R. Clayton, 'Judicial Deference and 'Democratic Dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] PL 33, 47; L. McDonald, 'New Directions in the Australian Bill of Rights Debate' [2004] PL 22.

<sup>24</sup> Constitution of the Republic of South Africa 1996 s.39(1)(c) (emphasis added).

<sup>25</sup> Ibid s.39(1)(b) (emphasis added).

<sup>26</sup> *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (emphasis added); R. Singh, 'Interpreting Bills of Rights' (n 12).

<sup>27</sup> C.r McCrudden, 'A Common Law of Human Rights?' (n 6) 517.

<sup>28</sup> Ibid 517-518.

Convention may in essence be read as ‘universal’, this does not necessarily mean that there are universal *interpretations* of such rights. Different constitutional structures, institutional arrangements and socio-political traditions make it unlikely that rights will be identically interpreted, in different countries. As George Letsas has explained:

[T]here is no reason to assume in advance that national constitutional courts, regional supranational courts and global human rights committees should reach the same result in interpreting specific rights. The decisions of these different bodies are primarily propositions of the law of the respective instrument, not accounts of the *concept* of a particular human right.<sup>29</sup>

Comparative jurisprudence, of any kind, should therefore be applied with caution. Equally, the scope of jurisdictions left open for the judiciary to consider will sensibly maintain some boundaries although perhaps not so narrowly defined as to preclude recourse outside the Convention remit altogether.

#### **DOMESTIC PRINCIPLES, COMMONWEALTH JURISPRUDENCE**

The White Paper explained the choice not to entrench human rights legislation on the grounds that such an arrangement ‘could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament’.<sup>30</sup> The idea that the HRA was framed with the intention of developing a domestic or ‘municipal’ law of human rights has also been widely discussed in commentary on the Act<sup>31</sup> and is in keeping with the idea that the Act was supposed to generate ‘evolutionary rather than revolutionary change’.<sup>32</sup> Indeed, writing the foreword to a publication by S. Grosz, J. Beatson and P Duffy, Stephen Sedley considered that it was the HRA’s status *as a domestic statute* that ‘opens the door to a wealth of jurisprudence and experience from other Commonwealth, common law and

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<sup>29</sup> G. Letsas, ‘The Two Concepts of the Margin of Appreciation’ (n 8) 709.

<sup>30</sup> *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997) [2.16].

<sup>31</sup> Eg R. Masterman, ‘Taking the Strasbourg jurisprudence into account’ (n 2); S. Grosz, J. Beatson and P Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet and Maxwell, London 2000); J. Laws, ‘The Limitations of Human Rights’ [1998] PL 254; J. Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720.

<sup>32</sup> D. Feldman, ‘The Human Rights Act 1998 and constitutional principles’ (1999) 19(2) LS 165.

European jurisdictions, as well as from the Strasbourg Court itself, in its interpretation and application'.<sup>33</sup> He continued:

It is through this rich prism that the Convention, in its turn will be read and applied in our courts: not as a monochrome exercise in textual interpretation and the application of received authority, but as a kaleidoscopic pattern combining the symmetry of law with the variety of experience. *We may not simply reach down answers from the Strasbourg shelf: in every case the question will remain what is the impact of the Convention on our law and our public administration.*<sup>34</sup>

Similarly, Laws LJ has consistently maintained that while the Act operates to modernise the law, 'common lawyers must administer it, according to their ancient methods'.<sup>35</sup> He continued, '... The judges will not stick out their necks on poles of individual predilections, nor feel reluctantly driven to apply a foreign law. It is not 'foreign'; it is no more nor less than a revitalising of the common law'.<sup>36</sup> 'We must develop the common law and rules of statutory interpretation conformably with the Convention; but it is part of a *continuum* with everything that has gone before. It is not an alien add-on'.<sup>37</sup>

If s.2 was designed to allow domestic courts the scope to enfold the Strasbourg jurisprudence 'within the traditions of the British state'<sup>38</sup> (as has been argued in previous chapters) it would be wholly appropriate for the judiciary to incorporate the Convention in line with domestic habits. Thus while reliance on any jurisdiction whatsoever may be inappropriate, having recourse to jurisdictions sharing some commonality with the UK may not be. The HRA is not inimitable. More and more countries with legal systems rooted in the common law have adopted Bills of Rights. It is said that the Labour Party was strongly influenced by the Canadian position when it decided to campaign for human rights legislation.<sup>39</sup> Like the Canadian Charter, the UK

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<sup>33</sup> S. Sedley in S. Grosz, J. Beatson and P Duffy, *Human Rights: The 1998 Act and the European Convention* (n 31) foreword vii (emphasis added).

<sup>34</sup> *Ibid.*

<sup>35</sup> Laws LJ in Cambridge Centre for Public Law, *The Human Rights Act and the Criminal Justice and Regulatory Process*, (Hart Publishing, Oxford 1999) (Overview).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> J. Laws, 'The Limitations of Human Rights' (n 31) (emphasis added).

<sup>39</sup> Eg Lord Irvine, 'The legal system and law reform under Labour' in D. Bean (ed), '*Law Reform for All*' (Blackstone, London 1996) referred to in R. Clayton, 'Judicial Deference and 'Democratic Dialogue'' (n 23) 45.

HRA contains, *inter alia*, provisions for derogation from Convention rights<sup>40</sup> and has been drafted to prevent the courts having the final word in human rights adjudication.<sup>41</sup> Accordingly, reference to cases decided under the Canadian Charter may, in some cases, be quite appropriate for the domestic context of the UK. Similarly, Feldman has suggested that the decisions of the Supreme Court of India under that country's 1947 Constitution, those of the Court of Appeal of New Zealand on the New Zealand Bill of Rights Act 1990, and those of the South African Constitutional Court on the rights under South Africa's 1993 and 1996 African Constitutions, may all contain 'useful insights'.<sup>42</sup> Lester and Clapinska have gone so far as to surmise that '[t]he developing principles contained in the constitutional case law of courts in other common law countries...are likely to be at least *as persuasive* as the Strasbourg case law'.<sup>43</sup> Starmer has even considered these sources to be 'invaluable' in assisting the interpretation of Convention rights.<sup>44</sup> Comparison with jurisprudence under Bills of rights that are of recent origin and share strong similarity with the HRA are likely to be especially relevant in this respect. The Canadian and New Zealand jurisprudence would fall into this category, as would the HRA of the Australia Capital Territory which was passed in March 2004 and the 'Charter of Rights and Responsibilities' introduced in Victoria (both modelled on the British HRA).<sup>45</sup>

In line with these conclusions, a willingness to continue referral to jurisdictions outside the Convention has been shown by some of the early decisions made under the HRA.<sup>46</sup> In *Montgomery and Coulter*<sup>47</sup> Lord Hope's judgment contains, in addition to references to numerous Strasbourg decisions, an impressive citation of New Zealand, Canadian,

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<sup>40</sup> Section 16 HRA 1998.

<sup>41</sup> R. Clayton, 'Judicial Deference and 'Democratic Dialogue'' (n 23) 45.

<sup>42</sup> D. Feldman (ed) *English Public Law* (n 11) 397

<sup>43</sup> A Lester and L Clapinska 'Human Rights and the British Constitution' in J Jowell and D Oliver (eds) *The Changing Constitution* (5<sup>th</sup> edn OUP, Oxford 2004) 83.

<sup>44</sup> K. Starmer, 'European Human Rights Law - The Human Rights Act 1998 and the European Convention on Human Rights' (LAG, London 1999) 27.

<sup>45</sup> F Klug 'A Bill of Rights: Do we need one or do we already have one?' (2007) PL 701.

<sup>46</sup> R. Masterman, 'Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?' [2004] PL 725.

<sup>47</sup> *Montgomery and Coulter v HM Advocate* 2001 SLT 37.

Australian and Irish case law.<sup>48</sup> Similarly, in *Lambert* Lord Steyn referred to judgments of the Canadian Supreme Court and South African Constitutional Court<sup>49</sup> while In *R v A (No 2)*<sup>50</sup> Lord Hope analysed rape shield provisions in the United States, Australia, Canada, and Scotland. In *A and Others*<sup>51</sup> considerable reference was made to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, Resolutions of the Security Council of the United Nations as well as the General Commission for Human Rights, Resolutions of the Parliamentary Assembly of the Council of Europe.

The Privy Council in *Brown v Stott*<sup>52</sup> also continued to refer to jurisdictions outside the Strasbourg remit and in doing so seemingly opted *not* to follow developing Strasbourg jurisprudence as to the *absolute nature* of the privilege against self-incrimination in Article 6.<sup>53</sup> The case concerned whether evidence led by prosecution obtained under s. 172(2)(a) of the Road Traffic Act 1988 violated the freedom from self-incrimination as protected by Article 6 of the Convention. The Strasbourg Court has held in *Saunders v United Kingdom*<sup>54</sup> that the use of statements obtained from him by DTI inspectors under statutory powers of compulsion at trial breached the Article 6 right but Lord Steyn, Lord Hope and the Rt Hon Ian Kirkwood found the reasoning of the Court in that case to be ‘unsatisfactory’, ‘unconvincing’ and a ‘more absolute standard than the other jurisprudence of the court indicates’.<sup>55</sup> In truth the Privy Council appeared to circumvent the European jurisprudence in order to avoid a finding of incompatibility. While Lord Steyn took the view that the observations in *Saunders* ‘were never intended to apply to a case such as the present’<sup>56</sup> Lord Bingham clearly felt that ‘all who own or drive motor cars know that by doing so they subject themselves to a regulatory regime

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<sup>48</sup> A. O’Neill QC, ‘Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council’ [2001] MLR 603, 610.

<sup>49</sup> *R v Lambert* [2002] 2 AC 545 [34]-[35], [40].

<sup>50</sup> [2002] 1 AC 45.

<sup>51</sup> *A and Others* (n 13).

<sup>52</sup> *Brown v Stott (Procurator Fiscal, Dunfermline) and another* [2003] 1 AC 681.

<sup>53</sup> see eg *Funke v France* (1993) 16 EHRR 297; *Saunders v United Kingdom* (1997) 23 EHRR 313; A. O’Neill QC, ‘Judicial Politics and the Judicial Committee’ (n 48) 610.

<sup>54</sup> (1996) 23 EHRR 313

<sup>55</sup> *Brown v Stott* (n 52) 733.

<sup>56</sup> *Ibid* 712.

which does not apply to members of the public who do neither<sup>57</sup> and made reference to the Canadian Charter of Rights and Freedoms, the New Zealand Bill of Rights Act 1990, the Constitution of South Africa, the Constitution of the United States, the Indian Constitution, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights before concluding that the right not to self-incriminate oneself was an ‘implied right’ (on the basis that such a right was contained in many of those international instruments) but not an ‘absolute’ right as suggested in *Saunders*.<sup>58</sup>

The reasoning in *Brown* and the reliance on ‘foreign’ jurisprudence instead of the Strasbourg decision in *Saunders* makes it difficult not to agree with Luc Heuschling’s ‘intuitive hypothesis’ that ‘comparative law assumes mainly a legitimisation function’.<sup>59</sup> The asymmetry in the use of comparative case law in some domestic decisions also does little to rebut the suggestion: for instance Lord Walker found a judgment of the Constitutional Court of South Africa ‘very helpful’ when giving judgment in *Williamson* and borrowed heavily from Sachs J’s reasoning in that decision<sup>60</sup> in order to conclude that the ban on corporal punishment did not violate Article 9 of the Convention while Lord Nicholls distinguished the decision of the Strasbourg Court in *Campbell and Cosans*<sup>61</sup> in order to reach the same conclusion.

In a multitude of cases, however, the use of comparative jurisprudence outside the European Convention has aided the development of domestic human rights in areas where relevant Strasbourg decisions are unhelpful or non-existent. For instance, the development of the common law breach of confidence action so as to protect the Article 8 privacy right owes much to a decision of the Australian High Court in *Australian Broadcasting Corporation v Lenah Game Meats*.<sup>62</sup> Most recently Lord Hoffmann drew

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<sup>57</sup> Ibid 705.

<sup>58</sup> Ibid 703-704.

<sup>59</sup> L. Heuschling, ‘Comparative Law in French Human Rights Cases’ (n 18) 47.

<sup>60</sup> *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 WLR 590 [67].

<sup>61</sup> (1982) 4 EHRR 293.

<sup>62</sup> [2001] H.C.A. 63; R. Masterman, ‘Section 2(1) of the Human Rights Act’ (n 46) 726; G. Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act’ (2003) 65 MLR 726, 731; By contrast, the House of Lords in *Campbell v MGN* [2004] UKHL 22 appeared to consider the jurisprudence of the Australian High Court less influential to the development of the Breach of Confidence action than in previous decisions but nevertheless continued to develop the law in this direction.

comparison with a decision of the South African Constitutional Court in *Du Toit and Vos v Minister for Welfare and Population Development* (concerning adoption by a same-sex couple) in order to fill gaps in the Strasbourg jurisprudence on unmarried adoptions in *Re P*.<sup>63</sup> Baroness Hale has recently added that ‘... there is nothing in the Act ... to support the reluctance shown in *Sheldrake v DPP* to seek such guidance as we can from the jurisprudence of foreign courts with comparable human rights instruments ... especially on subjects where Strasbourg has not recently spoken’.<sup>64</sup> Thus, it seems clear that in cases where there is ‘little or no steer from the Strasbourg organs’<sup>65</sup> the use of comparative jurisprudence beyond Strasbourg appears to remain important to the development of domestic human rights. Moreover, the burgeoning volume of UK HRA case law is likely to have an impact on those common-law jurisdictions that historically placed great emphasis on English case law such as Hong Kong<sup>66</sup> and Canada,<sup>67</sup> so that the jurisprudence of those legal systems may develop in accordance with Convention principles by default so that it may even become incrementally more suitable to have recourse to those jurisdictions in domestic reasoning under the HRA.

## EUROPEAN PRINCIPLES, EUROPEAN JURISPRUDENCE

It is crucial at this juncture to recall the rationale for the reliance on Commonwealth authority in the first place: common heritage, cultural traditions and legal orders. Although there is hesitation to divorce domestic principles from the familiarity of the common-law, reliance on that species of jurisprudence may not fit as easily if the UK has developed away from that common ground.

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<sup>63</sup> *Re P* (n 10) [17].

<sup>64</sup> Baroness Hale, ‘Who Defines Convention Rights?’ (JUSTICE Tom Sargant Memorial Annual Lecture , 15 October 2008) <<http://www.justice.org.uk/trainingevents/annuallecture/index.html>> accessed 7 November 2008 (emphasis added).

<sup>65</sup> F. Klug, ‘The Human Rights Act 1998, *Pepper v Hart* and All That’ (n 3) 251.

<sup>66</sup> A. Byrnes, ‘Jumpstarting the Hong Kong Bill of Rights in its Second Decade? The Relevance of International and Comparative Jurisprudence’ (2002) <<http://hdl.handle.net/1885/41125>> 17 accessed 29 January 2007.

<sup>67</sup> B. McLachlin, ‘Bills of Rights in Common Law Countries’ [2002] ICQL 97.

That the United Kingdom has moved steadily towards convergence with the rest of Europe is hardly contentious. A construction of domestic traditions as entirely divorced from those of our European neighbours can now probably be dismissed as no longer applicable. Indeed, the UK was among the first members of the Council of Europe to ratify the Convention, and it is usually assumed that English lawyers made a substantial contribution to the drafting of the document. Rather ironically a major factor said to be involved in the reluctance of the French judges to rely on Strasbourg decisions is their national pride in front of a new instrument, which is supposed to be dominated by English legal conceptions.<sup>68</sup> More significantly, and as Masterman suggested, cases from jurisdictions outside the Convention borders are ‘unlikely to point to the direction in which the common law should be developed to ensure compatibility with the Convention rights’.<sup>69</sup> Furthermore, the Convention and its jurisprudence are built into the structure of the HRA<sup>70</sup> and therefore expressly tie domestic rights to those existing in the European Convention on Human Rights (in contrast to the Canadian, Victorian and New Zealand experiences which do not draw from another treaty). The upshot of this reality may be that reliance on Strasbourg jurisprudence ought to be treated as preference.

The senior judiciary seem to agree: In *Ullah*<sup>71</sup> Lord Bingham considered that national courts should ‘keep pace with the Strasbourg jurisprudence ... as it evolves’ and again expressed reservations about the value of examining Commonwealth case law in HRA cases in *Sheldrake*, saying that even though the Lords had on a number of occasions ‘gained valuable insights from the reasoning of Commonwealth judges’ the UK ‘must [now] take its lead from Strasbourg’.<sup>72</sup> In *Gillan*<sup>73</sup> Lord Bingham thought it was ‘perilous ... to seek to transpose the outcome of Canadian cases’<sup>74</sup> by reason of their being ‘decided under a significantly different legislative regime,’<sup>75</sup> while in *Marper*

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<sup>68</sup> J-F Burgelin and A Lalardrie, ‘L’application de la Convention par le juge judiciaire français’, *Mélanges Pettiti* (Bruxelles: Bruylant, 1998) 160 referred to in Luc Heuschling ‘Comparative Law and the European Convention on Human Rights Cases’ (n 18) 36.

<sup>69</sup> R. Masterman, ‘Taking the Strasbourg jurisprudence into account’ (n 2) 923.

<sup>70</sup> Schedule 1 HRA 1998.

<sup>71</sup> *Regina (Ullah) v. Special Adjudicator; Do v. Immigration Appeal Tribunal* [2004] UKHL 26 [20].

<sup>72</sup> *Sheldrake v DPP* [2004] 3 WLR 876 [33].

<sup>73</sup> *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307.

<sup>74</sup> *Ibid* [23].

<sup>75</sup> *Ibid*.



Lord Steyn rejected the idea that domestic traditions bear any relevance to the scope of Convention rights at all.<sup>76</sup> The court in *British American Tobacco*<sup>77</sup> recognised that ‘it is instructive ... to see how another respected jurisdiction has dealt with a related but confined problem’ but also considered that comparison (with the jurisprudence of the US First Amendment) should be undertaken with care:

...the balance between State legislation and federal legislation in the United States is a subject of renowned complexity. Decisions on such matters can have limited effect on our consideration of the balance to be struck in considering a restriction of a limited Convention rights and the measure of a discretion to be afforded to Parliament and ministers under our own rather different constitutional system.<sup>78</sup>

Accordingly, Strasbourg jurisprudence has been preferred. The House of Lords made reference to German constitutional law in *Aston Cantlow*,<sup>79</sup> and in *Pretty*<sup>80</sup> Lord Bingham referred to section 7 of the Canadian Charter of Rights and Freedoms and associated judgments, but noted that the judgments were directed to a provision with no close analogy in the ECHR.<sup>81</sup> It is clear that - for the majority of cases - domestic courts show a tendency to confine themselves to considering jurisprudence which the European Court of Human Rights would itself have been likely to consider if it were dealing with the case. As Aidan O’Neill wrote in the first years of HRA: ‘[i]n the early days of wrestling with human rights arguments there will clearly be a temptation for practitioners and the courts to elevate *dicta* of the European Court of Human Rights into binding pronouncements on the law...’<sup>82</sup>

Yet such an approach would not be consistent with the Government’s stated intention of producing a ‘creative dialogue’ between the judges in the United Kingdom and the European Court of Human Rights and may perhaps be criticised as overly deferential to

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<sup>76</sup> *R (Marper) v Chief Constable of Yorkshire* [2004] 1 WLR 2196 [27].

<sup>77</sup> *R (on the application of British American Tobacco UK Ltd) v The Secretary of State for Health* [2004] EWHC (Admin) 2493s.

<sup>78</sup> *Ibid* [36].

<sup>79</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546

<sup>80</sup> *R (on the application of Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2001] 3 WLR 1598.

<sup>81</sup> *Ibid* [23].

<sup>82</sup> A. O’Neill QC, ‘Judicial Politics and the Judicial Committee’ (n 48) 612.

that court.<sup>83</sup> It is appropriate to recommend caution about a Strasbourg loyalty which ignores alternative comparison altogether. If s.2 does inspire focus on cases and decisions of the Strasbourg institutions, it should be recalled that it only requires domestic courts to do so insofar as they are 'relevant'. For instance, where a relevant decision of the Strasbourg court is, say, thirty years old, more recent Commonwealth case law may provide a more contemporary take on how a certain right had been balanced against the public interest. Equally, it is not to be automatically assumed that the jurisprudence of other member states can be treated as quintessentially 'European' in character for the purpose of discovering any changing 'consensus' as discussed in chapter II. For example, it has been said that German constitutional law has more resemblance to American constitutional law than to French constitutional law. Similarly, French law's Roman origins, strongly conceptual and deductive style of legal reasoning with distinctive legal concepts, make it different from the English common law despite the common liberal political ideology.<sup>84</sup> In reality, local conditions produce difficulties 'which are often subtle and require ... sophisticated analytical tools' to separate them from their 'culturally-determined realities'.<sup>85</sup>

Institutions of government are also very divergent. For example, forms of local government, structures of ministries and the organisation of the civil service are quite different between France, Italy, Sweden and the United Kingdom.<sup>86</sup> Further, many European countries have a monist (rather than dualist) construction of the relationship between municipal and international law which can significantly affect the way in which they give effect to human rights.<sup>87</sup> In fact, Legrand has made much of the idea that differences in *mentalité* are actually an obstacle to genuine Europeanisation.<sup>88</sup>

This is in addition to the fact that different Convention states have different attitudes to the position of the ECHR in the first place. For example, while the Spanish

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<sup>83</sup> Ibid.

<sup>84</sup> J. Bell, 'Mechanisms for Cross Fertilisation of Administrative Law in Europe' (n 5) 154.

<sup>85</sup> Nicholas HD Foster, 'The Journal of Comparative Law: A New Comparative Resource' <<http://www.wildy.co.uk/jcl/pdfs/foster.pdf>> accessed 01 February 2007.

<sup>86</sup> J. Bell, 'Mechanisms for Cross Fertilisation of Administrative Law in Europe' (n 5) 167.

<sup>87</sup> D. Feldman (ed) *English Public Law* (n 11) 397, also Judge Sibrand Karel Martens, 'Incorporating the European Convention: the role of the judiciary' [1998] EHRLR 5, 14.

<sup>88</sup> P. Legrand, 'European Legal Systems and not Converging' (1996) 45 ICLQ 52.

Constitutional Court is one of the most active in the reception of Strasbourg jurisprudence this may be attributable to ECHR ranking above ordinary legislation in Spain (in contrast to the UK position).<sup>89</sup> In France too, the constitution grants the Convention a rank above statutes.<sup>90</sup> Conversely, one commentator has observed that ‘the decisions of the European Court of Human Rights appear ... to lose their importance when compared with the case law on the German constitution’ since ‘it is often thought that human rights are sufficiently protected by the German constitution’.<sup>91</sup> Consequently, judgements of the ECtHR have to be ‘taken into account’ by German courts but may have to be ‘integrated’ or ‘adapted to fit into the domestic legal system’. Moreover, if they run counter to legislative intention, or are ‘contrary to German constitutional provisions,’ such judgements must be fully disregarded.<sup>92</sup> Seeking to rely on such jurisprudence may therefore present some problems; a more workable solution for courts dealing with Strasbourg jurisprudence has been suggested by Feldman:

If the focus of attention in human rights jurisprudence moves to Europe, there will be a need to investigate the human rights traditions and constitutional arrangements in far more depth and breadth than has usually been attempted in the United Kingdom, and to make the findings accessible to English Lawyers... We will have to avoid being blinded by the impressive traditions of our neighbours to the point where we lose sight of the object of the exercise: comparative study should not lead to attempted mimicry of others, but should inform the journey towards a national system *which meets our distinctive needs*.<sup>93</sup>

It is clear that HRA moves domestic law closer to European human rights standards. Section 2 represents this intention simply by *requiring* that relevant Strasbourg jurisprudence be taken account of. But, where there is such relevant Strasbourg jurisprudence, there will be a need to investigate the human rights traditions and constitutional arrangements in far more depth and breadth than has usually been attempted previously in the United Kingdom.

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<sup>89</sup> N. Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) 71 (2) MLR 183, 188.

<sup>90</sup> Ibid 187.

<sup>91</sup> E. Voss, ‘Germany’, in C. Gearty (ed), *European Civil Liberties and the European Convention on Human Rights. A Comparative Study* (M. Nijhoff, Dordrecht 1997) 169; See also N. Weiss, ‘The Impact of the European Convention on Human Rights on German Jurisprudence’ (n 21) 60-61.

<sup>92</sup> N. Krisch, ‘The Open Architecture of European Human Rights Law’ (n 89) 196-7.

<sup>93</sup> D. Feldman, ‘The Human Rights Act 1998 and constitutional principles’ (n 32) 205.

## CONCLUSIONS

Domestic courts have preferred to show loyalty to decisions of the Strasbourg court. Regard to jurisprudence outside the Convention remit has not been outlawed, but it has become less than automatic and the prediction that Francesca Klug made before the Act came into force appears to have become the rule: domestic courts may legitimately turn to comparative jurisprudence where there is 'little or no steer from the Strasbourg organs'.<sup>94</sup> Where there is 'relevant' Convention jurisprudence, a true construction of section 2 HRA appears now to impose a duty on the court to take that jurisprudence *as a starting point*.

The approach unfortunately endangers one of the major justifications for Comparativism in the first place, which is that it can aid not only with applying the under-theorised Strasbourg jurisprudence but also in encouraging the domestic judiciary to adopt a more theorised approach to human rights. As one commentator has hypothesised, 'where the difference between comparative jurisdictions is so great as to render the use of comparative jurisprudence irrelevant, it may nevertheless perform a cognitive function ... the confrontation of both legal systems may force some consideration and better understanding of the nature of domestic law'.<sup>95</sup> If comparison to jurisprudence outside the Convention remit becomes less common, it could significantly hamper the development of the domestic law of human rights.

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<sup>94</sup> F. Klug, 'The Human Rights Act 1998, *Pepper v Hart* and All That' (n 3) 251.

<sup>95</sup> Eg L. Heuschling, 'Comparative Law in French Human Rights Cases' (n 18) 44; see also R. Singh, 'Interpreting Bills of Rights' (n 12): 'courts are increasingly turning to comparative jurisprudence *to better understand* the content of human rights provisions' (emphasis added).

## CHAPTER V

### DOMESTIC ADJUDICATION ON CONVENTION RIGHTS:

#### *The effect of factors external to the Strasbourg jurisprudence*

Previous chapters have sought to clarify the intentions, purposes and possibilities behind section 2 of the Human Rights Act 1998. Notwithstanding the direction that domestic courts *must* ‘take into account’ Strasbourg jurisprudence, it has been argued that in *no* case is it right for domestic courts to follow Strasbourg jurisprudence as a matter of course. Ultimately, circumstances exist to allow – or even require – domestic courts to depart from that Strasbourg jurisprudence. It has also been argued that, in certain situations, domestic courts may not only simply *depart* from but also *expand* upon Strasbourg jurisprudence, and that, in these cases, the discretion in the HRA leaves it open for domestic courts to decide matters for themselves.

Thus far these arguments have drawn impetus from the nature and qualities of the Strasbourg jurisprudence itself. For instance, where the Strasbourg reasoning is unclear or based on a misunderstanding of domestic law it was argued that domestic courts could openly depart from the jurisprudence of that court. Similarly, jurisprudence tainted by age or a wide margin of appreciation feed reasons for departure but also allow scope for a domestic court to expand upon the Strasbourg position.<sup>1</sup> Yet the reality is that the s.2 exercise is affected by a backdrop of concerns external to the jurisprudence itself: the type of right in point (qualified or unqualified rights); the domestic system of precedent; whether a possible incompatibility with the Convention derives from statute or common law; whether Parliament has considered the issue(s) in play and determined upon a particular response (which may be *prima facie* incompatible with the Strasbourg jurisprudence); and the effect of the institutional position of the Strasbourg Court itself. Indeed, the effect of these additional factors may provide a better explanation for otherwise unclear or confusing decisions under s.2 HRA such as *Animal Defenders International* (discussed further below).<sup>2</sup>

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<sup>1</sup> Recent confirmation of this position was given in *Re P and Others* [2008] 3 WLR 76.

<sup>2</sup> *R (On The Application of Animal Defenders International) v Secretary of State For Culture, Media and Sport (Respondent)* [2008] UKHL 15, the House of Lords preferred arguably less relevant jurisprudence

## QUALIFIED AND UNQUALIFIED RIGHTS

As Leigh and Masterman have recently pointed out, ‘...plainly not all rights are alike and the situations in which they might be limited varies enormously’.<sup>3</sup> This being so, it is clear that different types of right are treated differently by the Strasbourg Court.<sup>4</sup> It follows that a domestic court under a duty to ‘take into account’ Strasbourg jurisprudence will similarly be guided by these variations. More significantly, the operation of s.2 itself may vary. Specifically, the possibilities inherent in the discretion under the provision may significantly change, depending on whether a court is concerned to evaluate the compatibility of domestic law with either a qualified or unqualified Convention right.<sup>5</sup>

### I. UNQUALIFIED RIGHTS

Since the Convention does not permit the restriction of unqualified rights, any state interference will render domestic law incompatible with the Convention. Accordingly, domestic adjudication on unqualified Convention rights does not necessitate any balancing exercise but instead encompasses one chief concern: whether a particular claim falls within the ‘scope’<sup>6</sup> of the right in point. For this purpose, the intuitive suggestion is that unqualified rights (by reason of their being ‘absolute’) ought to bear *at least* the same scope domestically as in Strasbourg. By this it is meant that domestic courts taking into account Strasbourg jurisprudence (per s.2) should apply the Strasbourg position as a minimum; domestic courts should find a right to be engaged

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of the Strasbourg Court in order to avoid making a declaration of incompatibility under s.4 HRA 1998. See chapter II from n 48 for facts and analysis of the decision.

<sup>3</sup> I. Leigh, R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, Oxford 2008) 168.

<sup>4</sup> It is the scope for justified interference with qualified rights, whereas unqualified rights are treated as ‘absolute’.

<sup>5</sup> ‘Qualified rights’ refer to those rights (enshrined in Articles 8-11, Protocol 1 Article 1, Protocol 6 Article 2) with which, under certain specified circumstances, interference may be justified. ‘Unqualified rights’ (or ‘absolute rights’) refer to those rights (enshrined in Articles 2-5,7,12,14, Protocol 1 Articles 2 and 3, Protocol 6 Article 1) with which no interference may be justified.

<sup>6</sup> It is whether a particular case falls within the ambit of an unqualified right.

domestically in *at least* every case in which it would be engaged in Strasbourg. Domestic law would be *prima facie* incompatible if the domestic court did not attach this meaning to the duty in s.2.

It may be possible to go further. It would be reasonable to suggest that the interference with unqualified rights ought to attract the strictest scrutiny at the domestic level (by virtue of their being ‘absolute’).<sup>7</sup> Along these lines, Gearty has proposed that

the closest the issues before the court connected with one of the key *underlying principles* of the Convention, then the more likely it is that the judges can be assertive and intrusive in their application of the disputed right to the facts before them... If a decision directly involves the principle of the protection of civil liberties, or an issue of legality, or a clear matter of human dignity, then the more confident can a judge inclined to activism be that he or she is on the right lines.<sup>8</sup>

If Gearty is right, that a judge inclined to activism may be more confident ‘if a decision directly involves the principle of the protection of civil liberties, or an issue of legality, or a clear matter of human dignity’, it may be possible to support a more rigorous approach where that kind of ‘fundamental’ right is in point; since Strasbourg inherently views ‘unqualified’ rights as ‘absolute’, it may be assumed that these represent rights of central importance - or ‘fundamental’ - to the Convention.

In these terms, arguments that domestic courts should ground analysis on the principles which inform the Convention and be ready to interpret Convention rights more generously than the Strasbourg Court (especially where the Strasbourg position is unclear) are persuasive.<sup>9</sup> However, since a court judging a case to fall within the scope of such a right gives the state no opportunity to justify the interference, stretching beyond Strasbourg as to the scope of an unqualified right is almost certain to attract

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<sup>7</sup> This distinction between qualified and unqualified rights carries weight in the context of judicial review, where courts have a tendency to apply more intense scrutiny to cases concerning unqualified rights than to qualified rights cases: I. Leigh, R. Masterman, *Making Rights Real* (n 3) 168-169.

<sup>8</sup> C. Gearty, *Principles of Human Rights Adjudication* (OUP, Oxford 2004) 122; conversely, ‘[w]here none of these principles is directly engaged, then it is likely to be a case that a restrained, or at least, less aggressive, application of the Human Rights Act is called for’.

<sup>9</sup> Eg R. Masterman, ‘Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the ‘Convention Rights’ in Domestic Law’ in H. Fenwick, R. Masterman, G. Phillipson (eds), *Judicial Reasoning Under the UK Human Rights Act* (CUP, Cambridge 2007) 59.

criticism on the grounds that it may result in holding the state to obligations that it did not intend to subscribe and thus risk blurring the boundary between interpretation and legislation.<sup>10</sup> Perhaps for this reason UK domestic courts do not appear willing to place too heavy reliance on Convention principles or the possibility that such reasons could feed a development *beyond* the jurisprudence of the Strasbourg Court where relevant jurisprudence exist.

Yet there remain circumstances in which domestic courts should be willing to decide matters for themselves. For example, while a (narrow) margin of appreciation *may* exist as to the scope of an unqualified right, courts should deal with this in the manner described in chapter II (either divorcing it from domestic reasoning or, where possible, seeking to anticipate how Strasbourg may have decided the matter notwithstanding the existence of the margin). Equally, while it would be inappropriate to paste the Strasbourg approach into domestic law, recognising a discretionary area of judgment may also tend towards abdicating judicial responsibility on this count: since there are no provisions for interference with unqualified rights there is no balance to be struck in these cases. Therefore, the possibility that domestic courts should recognise a discretionary area of judgment on the matter simply does not exist. As Lord Hope pointed out in *KebeLine*

... It will be easier for [the discretionary area of judgment] ... to be recognised where the Convention itself requires a balance to be struck, *much less so where the right is stated in terms which are unqualified*.<sup>11</sup>

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<sup>10</sup> Of course, all the arguments set out in chapters II and III as to the legitimacy of expanding the scope of an Article where a court is concerned to anticipate the development in Strasbourg (eg where there is an evolving European consensus) continue to apply. A court may expand the scope of an unqualified Convention right where it is minded to believe that the Strasbourg Court will develop its own jurisprudence in this direction.

<sup>11</sup> *R v Director of Public Prosecutions, ex parte KebeLine* [2000] 2 AC 326, 381 (emphasis added); Lord Justice Laws agreed in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344, paras 376-8, as did Lord Walker in *R (ProLife Alliance) v British Broadcasting Corporation* [2004] AC 185 [136] (although Lord Walker's approval on this point is strictly *obiter* since the case concerned Article 10, a qualified right).



## II. QUALIFIED RIGHTS

While the concern with unqualified rights is focused upon the scope of the right, qualified rights present two distinct questions for a domestic court using Strasbourg jurisprudence under s.2 HRA. As Lord Mance observed in the recent *Re P* case, there is a distinction between the basic content of the right - which in his view should generally receive a uniform interpretation throughout the member states - and the justifications for interference, where different cultural traditions might be material.<sup>12</sup>

Admittedly a uniform interpretation as to the scope of the basic (or 'primary') right is necessary to maintain at least a minimum standard and avoid falling foul of compatibility with the Convention. For reasons put forward in chapter III, however, it is clear that Lord Mance's distinction should not require domestic courts to give a uniform interpretation to the basic right where doing so would place a bar on otherwise more generous domestic protection; an interpretation of this kind is not prescribed by either the HRA or the Convention itself.<sup>13</sup> Thus Lord Mance's distinction as to the interpretation of the basic content of the right must pertain more specifically to the uniform application of the Strasbourg *minimum*. Furthermore, it is suggested that domestic courts must interpret *only* the minimum scope of the primary right consistently with Strasbourg. As was pointed out in chapter III, the argument from consistency against expanding upon the Strasbourg position holds little weight:<sup>14</sup> since qualified rights inherently allow state interference to some extent (so long as it is necessary and proportionate), it must be preferable from any human rights perspective that the court turns greater scrutiny upon the justifications for the interference rather than on expanding the right in point. To this end an approach which seeks *simply* to follow

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<sup>12</sup> *Re P* (n 1); Lord Mance based this on some observations of Lord Steyn in *R(S) v Chief Constable of South Yorkshire Police* [2004] UKHL 49, [2004] 1 WLR 2196 [27]; see also *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 [130].

<sup>13</sup> See chapter III from n 71.

<sup>14</sup> Neither the European Court of Human Rights nor the Convention itself would require other member states to follow that standard. Moreover, despite the possibility that domestic courts may open up a 'dialogue' with the Strasbourg Court and 'make a distinctively British contribution to the development of the jurisprudence of human rights in Europe' (*Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997) [1.14]) it is clear that the Strasbourg Court is not required to keep its decisions in line with domestic jurisprudence.

Strasbourg jurisprudence as to the scope of the primary right would be unnecessarily timid.

The problem for a domestic court adjudicating on qualified rights is that Strasbourg jurisprudence applies to a question beyond the scope of the primary right. Since qualified rights may be interfered with, decisions of the Strasbourg Court are also relevant to the justification for interferences. For instance, in order to determine whether the breach is ‘necessary in a democratic society’ a domestic court remains enjoined by s.2 HRA to take the Strasbourg position into account. As discussed in chapter II, the jurisprudence (as well as domestic circumstances) in connection with such questions is a shifting one and what can be deemed ‘necessary’ may be subject to development. This reality is cemented further by the margin of appreciation doctrine which usually operates in connection with these justifications and creates a further concern for a court minded to follow Strasbourg jurisprudence rather than develop a domestic application for it. The possibility that qualified rights are particularly likely to be affected by the margin of appreciation doctrine or any evolving consensus makes an even more convincing case for more intense scrutiny of the justifications for any interference with qualified rights and a vigilant approach to the jurisprudence of the Strasbourg organs will be especially pertinent in order to avoid falling behind.

An additional factor is the problem that, inherent in justifications such as ‘protection of morals’ or ‘in the interests of public safety’ is a balancing exercise which ultimately allows a varying level of interferences among the various Convention states. Thus the very existence of ‘qualified rights’ represents a view that the operation of human rights provisions depends on considerations that exist independently of the right itself: whether a Convention right has been breached ultimately turns on how far it may be qualified because of legal or political circumstances.

In this vein the perceived competence of the court may affect the conception of the duty under s.2: whether the qualification falls within the traditional judicial realm of competence (e.g. criminal justice) or whether the matter appears to fall into a more “political” domain (e.g. immigration control or national security) is likely to have an impact on the approach to Strasbourg jurisprudence and consequently the justification analysis. In the context of judicial review, Leigh and Masterman have recently written

that ‘some potential limitations on qualified rights (for example protection of national security) would be treated more generously than others (for example prevention and detection of crime) according to the perceived familiarity or competence of the courts’.<sup>15</sup> That courts alter the standard of review according to this basis is relatively clear. One need only be reminded of the factors set out by Lord Steyn in *Samaroo* to be considered by a court debating whether to defer to a decision maker’s judgment. Roughly speaking these were given as:

whether the right is unqualified or qualified; the extent to which the issue requires consideration of social, economic and political factors; the extent to which the court has a special expertise, for example, in criminal matters; and whether the right has a high degree of constitutional protection such as freedom of expression and access to the courts.<sup>16</sup>

An interference in an area seen as ‘political’ for instance, would therefore feed a judicial tendency to defer to the appropriate body and therefore dilute the level of scrutiny given to the potential violation. This explanation may go some way to explaining the approach of the House of Lords in cases like *ADI* (where it will be recalled that the House was concerned with evaluating whether the absolute prohibition on paid political advertising was ‘necessary in a democratic society’ so as to be compatible with Article 10 of the Convention). It was clear that the House of Lords in that case had considered the matter to be an appropriate one for deference even though there appeared to be clear Strasbourg jurisprudence indicating the incompatibility of the legislation in question with Article 10.

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<sup>15</sup> I. Leigh, R. Masterman, *Making Rights Real* (n 3) 168-169; I. Leigh, ‘The Standard of Judicial Review after the HRA’ in H. Fenwick, R. Masterman, G. Phillipson, *Judicial Reasoning Under the UK Human Rights Act* (n 9) 204.

<sup>16</sup> *R. (on the application of Samaroo) v Secretary of State of the Home Department* [2001] EWCA Civ 1139; R. Clayton, ‘Judicial Deference and ‘Democratic Dialogue’: the legitimacy of judicial intervention under the Human Rights Act 1998’ [2004] PL 33, 35.

## THE DOMESTIC SYSTEM OF PRECEDENT

While it is argued that s.2 leaves it open for domestic courts to follow, depart or (in certain circumstances) expand upon Strasbourg jurisprudence and that courts should fully utilise these possibilities to aid the development of domestic human rights law, it is important to point out that these possibilities are affected by a factor outside these concerns: the domestic system of precedent.

The first problem is that a lower court applying House of Lords guidance to *follow* 'clear and constant' Strasbourg jurisprudence may have to resolve a conflict between binding domestic precedent and a later decision of the Strasbourg Court. The matter raises no problem where the inconsistent domestic decision was given before the enactment of the HRA: where a lower court considers 'clear and constant' Strasbourg jurisprudence to be in conflict with a *pre-HRA* decision of a higher UK court, the HRA may itself be seen as overruling the previous decision through its requirement in section 6 to act compatibly with the Convention. As Sheldon has put it:

... the court is expressly required by the Act to take any relevant Strasbourg jurisprudence into account. There is no such requirement in relation to the decisions of domestic courts prior to incorporation. It would appear, therefore, that where there is a Strasbourg authority on the issue, it should be followed. Where there is a pre-incorporation domestic decision, the court is free to make such use of it as it sees fit.<sup>17</sup>

Butler Sloss P evidently viewed the matter in the same way in *NHS Trust A v M*<sup>18</sup> which concerned the lawfulness of feeding two patients defined to be in a permanent vegetative state: the matter had been resolved by the House of Lords in *Bland*<sup>19</sup> but, 'since the implementation of the European Convention on Human Rights' Butler Sloss P felt 'no longer bound' by that decision.<sup>20</sup>

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<sup>17</sup> N. Sheldon, 'The Effect of the Human Rights Act on Domestic Precedent' [2001] JR 208 [11].

<sup>18</sup> [2001] 2 WLR 942.

<sup>19</sup> [1993] AC 789.

<sup>20</sup> From this example Sheldon concluded that 'even decisions of the House of Lords are no longer binding on inferior courts when there is a human rights issue at stake' (n 17).

The scope for departure from pre-HRA precedent was further addressed by *D v East Berkshire Community NHS Trust*<sup>21</sup> where the Court of Appeal departed from the House of Lords decision in *X (Minors) v Bedfordshire County Council*<sup>22</sup> on the basis that it could not survive the introduction of the HRA. However, while no criticism of the Court of Appeal's approach was expressed when that case reached the House of Lords, Lord Bingham has later been careful to point out that 'there were other considerations which made *X v Bedfordshire* a very exceptional case'.<sup>23</sup> These not only included the fact that the judgment was given prior to the HRA, but also that no reference was made to the European Convention and, 'importantly', that the children whose claim the House had rejected as unarguable succeeded at Strasbourg in establishing a breach of their Convention rights.<sup>24</sup> Lord Bingham concluded that '[o]n these extreme facts' the Court of Appeal was entitled to hold in *D*, that the decision in *X* could not survive the 1998 Act but 'such a course is not permissible *save where the facts are of that extreme character*'.<sup>25</sup>

This is a curious approach. The two 'extreme' facts which Lord Bingham considered to exist in *D* are (1) that the domestic decision made no reference to the European Convention and (2) that the claimants had subsequently succeeded in Strasbourg. The first of these is intelligible: where reference has been made to the Convention there is at least some indication that the superior court considered the conclusion in that case to be compatible with it. Yet this overlooks the fact that, prior to the enactment of the HRA, domestic courts were not *obliged* to act compatibly with the Convention and therefore might have noted Strasbourg jurisprudence indicative of an incompatibility and nevertheless decline to draw Convention compatible conclusions. In many cases courts would simply have lacked the power to remedy an inconsistency: in cases where the alleged incompatibility derives from legislation rather than the common law, this reality would be particularly acute; prior to the HRA domestic courts would simply have

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<sup>21</sup> [2004] QB 558.

<sup>22</sup> [1995] 2 AC 633.

<sup>23</sup> *Kay and others v London Borough of Lambeth* [2006] UKHL 10 [45].

<sup>24</sup> *Z v United Kingdom* (2001) 34 EHRR 97.

<sup>25</sup> *Kay* (n 23) (emphasis added).

lacked the power in these cases to make Convention compatible conclusions such that post-HRA courts are given under sections 3 and 4 of the Act.<sup>26</sup>

Furthermore, the advantages of this requirement exist only where no Strasbourg jurisprudence exists subsequent to the domestic decision in question. If a Strasbourg case decided later indicates the conclusions in the domestic authority to be incompatible with the Convention, it is difficult to see that there would be a difference between a pre-HRA case which had made reference to the Convention and one which had not. All the reasons to avoid assuming the compatibility of pre-HRA domestic precedent with the Convention would continue to apply and would be further compounded by a positive indication of the incompatibility at Strasbourg.<sup>27</sup>

Lord Bingham's second requirement – that the claimants had subsequently succeeded in Strasbourg – is even more curious. Although that result would provide a valuable indication that the domestic decision did not correctly reflect the Convention position, Lord Bingham cannot have intended to make this a prerequisite for departure from such authority. While it is clear that a Strasbourg decision to which the UK is not a party may be less persuasive as an indicator that UK domestic law is incompatible with the Convention (owing, for example, to a margin of appreciation), where the UK is a party the strength of that indication would surely be great in *any* case. The reality is that - for a myriad of reasons (sometimes unrelated to the possible outcome) - not all cases are taken to Strasbourg and specifically requiring that the claimants *in the pre-HRA* domestic case had succeeded in Strasbourg risks relying on a measure for compatibility which simply may not exist. Further, actively ignoring otherwise relevant Strasbourg jurisprudence on this basis would severely dilute the duty of post-HRA courts to take into account Strasbourg jurisprudence 'wherever made or given'.<sup>28</sup>

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<sup>26</sup> Moreover, even *post-HRA* courts have shown some reluctance to robustly engage with compatibility issues where the source of incompatibility is in statute rather than the common law. Recall eg *Animal Defenders International* which may be explained on these grounds. This distinction is given fuller analysis below.

<sup>27</sup> The strength of that indication would clearly be greater where it is given in a case to which the UK is a party. Where pre-HRA domestic precedent is followed by a positive account of its incompatibility with the Convention it must be open for a post-HRA court to depart from it.

<sup>28</sup> Section 2(1) HRA 1998.

Enjoining a post-HRA court to follow pre-HRA authority which is clearly inconsistent with later Strasbourg jurisprudence on the basis that the conflict had not been confirmed by a successful application to the Strasbourg Court surely flies in the face of the HRA as a statute designed to ‘bring rights home’.<sup>29</sup> For these reasons it is suggested that, where there is a clear conflict between pre-HRA domestic authority and later (‘clear and constant’) Strasbourg jurisprudence, the combined duties to ‘take into account’ relevant Strasbourg jurisprudence under s.2 and to act compatibly with the Convention under s.6 almost *require* a fresh analysis in domestic courts.

For a domestic court faced with Strasbourg jurisprudence that is inconsistent with a *post HRA* decision of a superior UK court, the matter is more complicated. It may first be assumed that where the superior court has itself considered the conflicting Strasbourg jurisprudence the domestic doctrine of precedent would require inferior courts to follow the authoritative decision. This much was clarified by Judge LJ in *Bright*.<sup>30</sup>

Without implying any disrespect for the decisions of the European Court ... where such a decision ... has been examined by the House of Lords or Court of Appeal, this [inferior] court is bound by the reasoning of the superior courts in our jurisdiction ... So far as we are concerned ... we have been told how they should be taken into account.<sup>31</sup>

However, if a Strasbourg decision indicating the incompatibility of domestic law as given by a post-HRA decision of a senior court has not yet been considered domestically, the tension is more acute. If after ‘taking into account’ Strasbourg jurisprudence a domestic court feels an earlier decision of a superior court to be incompatible with the Convention, it may be that s.2 and s.6 HRA would feed a departure from that decision notwithstanding the fact that the domestic decision may have been decided after the coming into force of the HRA. As Sheldon has pointed out, it is readily apparent that judgments of this sort would be extremely difficult to make and that such a decision would involve ‘autonomous law-making of a type with which

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<sup>29</sup> *Rights Brought Home* (n 14).

<sup>30</sup> *R (Bright) v Central Criminal Court* [2001] 1 WLR 662.

<sup>31</sup> *Ibid* 682.

our precedent-based legal system has hitherto been unfamiliar<sup>32</sup> which, at a systematic level, imposes obvious costs in terms of legal certainty.<sup>33</sup>

The issue has been the subject of substantial debate, stimulated by a series of domestic cases concerned chiefly with possession proceedings. It is worth setting out the (rather complex) series of events, beginning in 2004 with the House of Lords decision in *Harrow London Borough Council v Qazi*.<sup>34</sup> *Qazi* concerned the making of a possession order in respect of a council house held under a joint tenancy of a husband and wife. The marriage broke down and the joint tenancy came to an end when Mrs Qazi served a notice to quit. Mr Qazi's application for a new tenancy was refused but he nonetheless remained in occupation with his new family, and sought to resist possession proceedings on the ground that they constituted an interference with the right to respect for his home under Article 8 of the Convention. The House of Lords unanimously held that the property continued to be Mr Qazi's home and that Article 8 was engaged<sup>35</sup> but the majority (Lord Hope, Lord Scott and Lord Millett) held that since the local authority had an unqualified right to immediate possession, there was no infringement of Mr Qazi's right to respect for his home under Article 8(1), and therefore no issue arose under Article 8(2) as to justification.<sup>36</sup> In other words, where the landlord is entitled as a matter of domestic law to obtain possession, a possession order would never constitute an interference with the occupier's right to respect for his home (or will always be justified under article 8(2)).<sup>37</sup>

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<sup>32</sup> N. Sheldon, 'The Effect of the Human Rights Act on Domestic Precedent' (n 17) 210.

<sup>33</sup> I. Loveland 'Making it up as they go along? The Court of Appeal on same sex spouses and succession rights to tenancies'. [2003] PL 222.

<sup>34</sup> [2004] 1 AC 983.

<sup>35</sup> *Ibid* [11], [26], [68], [95], [99], [110].

<sup>36</sup> *Ibid* [84] (Lord Hope of Craighead).

<sup>37</sup> It is worth noting that Lord Bingham and Lord Steyn (dissenting) took the view that, where there was a proposed interference with a person's Article 8(1) rights, the question of justification *did* fall to be considered (even though the occasions on which a court would be justified in declining to make a possession order would be 'highly exceptional') *Ibid* [24] – [26].



The second instalment arrived with the European Court of Human Rights' decision in *Connors v United Kingdom*.<sup>38</sup> The facts of *Connors* centred on a Gypsy family who had been living on a local authority owned site for 16 years when the authority served a notice to quit, requiring the family to vacate the plots. No written or detailed reasons were given but the Council continued with possession proceedings and eventually evicted the family. The ECtHR found that the eviction was not accompanied by the requisite procedural safeguards (namely the opportunity to have the proportionality of the measure addressed) and could not be regarded as justified by a 'pressing social need' or proportionate to the legitimate aim being pursued per Article 8(2). The effect of *Connors* is therefore that the right of a landlord to enforce a claim for possession - notwithstanding compliance with domestic law - against an occupier whose right to occupy, does engage Article 8 and requires justification under Article 8(2).

The resulting inconsistency between *Qazi* and *Connors* first became important in two further cases concerning possession proceedings. The appellants in *Kay*<sup>39</sup> and *Price*<sup>40</sup> both sought to resist these proceedings on the basis that they amounted to a violation of their rights under Article 8 of the Convention. The Court of Appeal in *Kay* felt able to distinguish *Connors* on the basis that it was of assistance to UK courts *only* in relation to cases involving Gypsies (which *Kay* was not)<sup>41</sup> but a differently constituted Court of Appeal in *Price* found *Connors* to be 'unquestionably incompatible' with *Qazi* and that *Qazi* could not therefore be assumed to correctly reflect the Convention position.<sup>42</sup> Further, the Court did not consider that the reasoning in *Connors* could be confined to the treatment of Gypsies.<sup>43</sup> The Court of Appeal in both cases felt bound to follow the House of Lords decision in *Qazi* but raised the question as to the extent which, if at all, domestic rules of precedent should be modified to give effect to obligations under the European Convention and the duties imposed on domestic courts by the 1998 Act.<sup>44</sup>

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<sup>38</sup> (2004) 40 EHRR 189.

<sup>39</sup> *Kay v Lambeth London Borough Council* [2005] QB 352.

<sup>40</sup> *Leeds City Council v Price* [2005] 1 WLR 1825.

<sup>41</sup> *Kay* (n 39) [106].

<sup>42</sup> *Price* (n 40) [26].

<sup>43</sup> *Ibid*, [29].

<sup>44</sup> *Ibid*, [5] (Lord Bingham).

A seven strong appellate committee of the House of Lords heard *Kay* and *Price* as conjoined appeals ('*Kay*' herein).<sup>45</sup> Lord Bingham (the rest of the House agreed) took the view that legal certainty was 'best achieved by adhering, *even in the Convention context*, to our rules of precedent':<sup>46</sup>

if [judges] consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way ... they discharge their duty under the 1998 Act.<sup>47</sup>

Yet this solution must only be satisfactory if the 'binding precedent' has properly interpreted the Convention. If, for instance, the superior court had been mistaken in their assessment of the Convention and its case law, Lord Bingham's construction would oblige a lower court to follow the erroneous (and potentially Convention incompatible) reasoning of a more authoritative court. That result would arguably have some resemblance to the early and restrained approach given by Judge LJ in *Bright*<sup>48</sup> which Leigh and Masterman have pointed to as a good example of courts 'treat[ing] the previous pronouncements of UK courts as binding where they had considered Convention case law, even where it was arguable that the earlier courts had misunderstood it'.<sup>49</sup> Judge LJ regarded himself bound by the decisions of English courts on the meaning of the rule against self-incrimination notwithstanding a recent decision of the Strasbourg Court indicating its incompatibility.<sup>50</sup> His lordship said: 'we are not permitted to re-examine decisions of the European Court to ascertain whether the conclusion of the House of Lords or the Court of Appeal may be inconsistent with those decisions'.<sup>51</sup>

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<sup>45</sup> *Kay* (n 23).

<sup>46</sup> *Ibid*, [43].

<sup>47</sup> *Ibid*, this guidance has since been upheld in a plethora of cases under the HRA, see eg in the context of privacy *Murray v Express Newspapers plc and another* [2008] 3 WLR 1360, para 20; *Wood v Commissioner of Police of the Metropolis*, [2008] EWHC 1105 (Admin) [2].

<sup>48</sup> *Bright* (n 30) (forcing journalists to divulge incriminating letters received from a former MI5 officer, was argued to amount to a violation of the right against self-incrimination in Article 6 of the Convention).

<sup>49</sup> I. Leigh, R. Masterman, *Making Rights Real* (n 3) 57.

<sup>50</sup> *Saunders v United Kingdom* (1997) 23 EHRR 313.

<sup>51</sup> *Bright* (n 30) 682.

*Kay* is itself a good example of the danger in this approach: taking *Connors* into account, it was said in the House of lords that there might be a defence to possession proceedings in ‘exceptional’ cases, namely, (1) where the applicant challenged the domestic law as itself being incompatible with Article 8 (as in *Connors*) or (2) where the action of the public authority landlord was challenged on public law grounds. However, the right of a landlord to enforce a claim for possession under domestic law against an occupier whose right to occupy had ended, would, *in most cases*, automatically supply the justification required under Article 8(2). Further, the majority held that the grant of the right to the occupier to raise an issue under Article 8 would have serious consequences for the functioning of the system or for the domestic law. Conversely, the minority (Lord Bingham, Lord Nicholls and Lord Walker) held that a defendant to possession proceedings brought by public authorities should be permitted in principle to raise an Article 8 defence since ‘in the overwhelming majority of cases this will be in no way burdensome [and] [i]n rare and exceptional cases it will not be futile’.<sup>52</sup>

Soon after, however, the European Court handed down the decision in *McCann v United Kingdom*<sup>53</sup> where it concluded that the House of Lords in *Kay* had been mistaken on their interpretation of Convention rights arising under Article 8. The Court expressly rejected the argument that the reasoning in *Connors* should be confined only to cases involving the eviction of Gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case.<sup>54</sup> The applicant claimed that to exclude the possibility of individual circumstances rendering an eviction disproportionate was to deprive the Convention of any effect and the Strasbourg Court appeared to agree. Contrary to the majority in *Kay*, the Court could not accept that the grant of the right to the occupier to raise an issue under Article 8 would have serious consequences for the functioning of the system or for the domestic law. In *McCann* the effect of the domestic system was to dispossess the applicant of his home without any

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<sup>52</sup> *Kay* (n 23) [29].

<sup>53</sup> *McCann v United Kingdom* (2004) 40 EHRR 189.

<sup>54</sup> *Ibid* [50].

possibility of determining the proportionality of the measure;<sup>55</sup> as in *Connors*, the procedural safeguards required for the assessment of the proportionality were not met and there was a violation of Article 8. It appeared therefore that domestic courts paying strict adherence to Lord Bingham's guidance and following *Kay* as to the scope of Article 8 in possession proceedings would be applying Convention incompatible reasoning.

Lord Bingham's solution was that a lower court which considered binding precedent to be inconsistent with Strasbourg authority would discharge their duty under the 1998 Act by the expression of their views and by their giving leave to appeal.<sup>56</sup> Yet although the discretion in s.2 allows such a result (enjoining courts only to 'take into account' jurisprudence) it is difficult to reconcile with s.6 HRA which enjoins *all* courts (as public authorities under s.6(3)(a)) to adjudicate compatibly with Convention rights. The solution is also inconsistent with Lord Bingham's own guidance in *Ullah*: if domestic courts are prevented from following recent decisions of the Strasbourg Court by an earlier domestic decision, regardless of how clear the inconsistency between these may be, it is difficult to see how domestic courts can 'keep pace' with the Strasbourg jurisprudence.<sup>57</sup> Moreover, discharging the s.2 duty by simply giving leave to appeal will compel a case to be appealed through the court system at some cost. At best, the approach is a compromise between safeguarding legal certainty and truly 'bringing rights home' in *all* courts under the HRA.

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<sup>55</sup> The procedural protection against the termination of a secure tenancy were applicable only in circumstances where the landlord was seeking to terminate the tenancy, not where the joint tenancy was brought to an end by a notice to quit.

<sup>56</sup> *Kay* (n 23) [28].

<sup>57</sup> Eg H. Fenwick, *Civil Liberties and Human Rights* (Cavendish, London 2007) 197; Fenwick also proposes that the rule in *Kay* may mean that citizens might have to seek the vindication of their Article 8 rights at Strasbourg in tension with the UK's obligations under Articles 1, 8, and 13 of the Convention. However, it is respectfully suggested that, although the 'leap frog' appeal solution suggested by Lord Bingham in *Kay* would place an undesirable delay on the vindication of Convention rights, the matter would still be dealt with domestically by the House of Lords. Where it applies, the rule in *Kay* postpones any domestic vindication, but it does not force an application to Strasbourg.

Moreover, it is not at all clear that this compromise was itself necessary. The arguments put forward in *Kay* towards a relaxation of the doctrine of precedent also provided several conditions to be satisfied before departure from authoritative domestic decisions would be appropriate. For instance, JUSTICE and LIBERTY (intervening in the case) set out that a lower court is free to follow, and barring some special circumstances *should* follow, the later Strasbourg ruling where four conditions are met: (1) the Strasbourg ruling has been given since the domestic ruling on the point at issue; (2) the Strasbourg ruling has established a clear and authoritative interpretation of Convention rights based (where applicable) on an accurate understanding of United Kingdom law; (3) the Strasbourg ruling is necessarily inconsistent with the earlier domestic judicial decision; (4) and the inconsistent domestic decision was or is not dictated by the terms of primary legislation, so as to fall within section 6(2) of the 1998 Act.<sup>58</sup> Furthermore, both the appellants and the respondents appeared to accept some relaxation of the precedent doctrine, respectively advocating that a domestic court ‘might’ depart from the authoritative domestic decision in the event of a ‘very clear’ inconsistency with a later Strasbourg decision and that a lower court ‘may decline to follow binding domestic authority in the limited circumstances where it decides that the higher courts are bound to resile from that authority in the light of subsequent Strasbourg jurisprudence’.<sup>59</sup> The Secretary of State also favoured a (strictly circumscribed) relaxation of the doctrine of precedent, proposing that a lower court should be entitled to depart from an otherwise binding domestic decision where there is a clearly inconsistent subsequent decision of the Strasbourg Court on the same point, but added that the inconsistency must be clear. A mere tension or possible inconsistency would not entitle a lower court to depart from binding domestic precedent.<sup>60</sup>

As Leigh and Masterman have pointed out, ‘[t]hese carefully measured criteria should have been sufficient to allay the fear of insubordinate and anarchic rulings by lower courts enticed by doubtful arguments about Strasbourg jurisprudence’.<sup>61</sup> Indeed, the would-be effectiveness of these criteria are made clear by a recent decision purporting

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<sup>58</sup> *Kay* (n 23) [41].

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> I. Leigh, R. Masterman, *Making Rights Real* (n 3) 73.

to uphold the rule from *Kay: R (on the application of Purdy) v DPP*.<sup>62</sup> In that case the Divisional Court was unwilling to expand the scope of Article 8 beyond the jurisprudence of the House of Lords in *R (on the application of Pretty) v DPP*<sup>63</sup> so that it would be engaged by assisted suicide, notwithstanding the fact that the Strasbourg Court appeared to move its jurisprudence in this direction in *Pretty v United Kingdom*.<sup>64</sup> The House of Lords had not subsequently departed from its view on the ambit of Article 8<sup>65</sup> and, accordingly, the Divisional Court concluded that Article 8 was not engaged on the facts of the instant case. While departing from the House of Lords' decision in order to *expand* the scope of a right would certainly lean towards an undesirable level of domestic inconsistency and legal uncertainty in the manner avoided by the rule in *Kay*, it might equally be pointed out that the criteria for departure proposed by the interveners in *Kay* would not have been met in this case. Plainly, since it is concerned with more than a possible incompatibility, *expanding* the scope of a Convention right would not follow a 'very clear' inconsistency such that the higher court would be 'bound to resile from that authority in the light of subsequent Strasbourg jurisprudence'. Rather, the *Purdy* case can more appropriately be described as one concerned with '[a] mere tension' or 'possible inconsistency' which would not justify departure.

For many reasons the rule in *Kay* represents an unnecessary restriction of the discretion in s.2 HRA where an inconsistency between domestic and Strasbourg jurisprudence comes before a lower court. A possible solution has been offered by Fenwick who suggests that domestic courts might attempt to 'marginalis[e] the rule from [*Kay*] in any affected areas of law while technically adhering to domestic precedent'.<sup>66</sup> Fenwick proposes that

... where a statute has been interpreted domestically in a superior court in a post-HRA decision in a manner that conflicts with Strasbourg jurisprudence, the court should strive to find an interpretation of the domestic precedent that avoids the conflict, but if this is impossible it should issue a declaration of the incompatibility, leaving Parliament to over-turn the precedent. That

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<sup>62</sup> [2008] EWCA 2565 (Admin).

<sup>63</sup> [2002] 1 AC 800.

<sup>64</sup> [2002] 2 FLR 45.

<sup>65</sup> *R. (on the application of Countryside Alliance) v Attorney General* [2008] 1 AC 719.

<sup>66</sup> H. Fenwick, *Civil Liberties and Human Rights* (n 57) 197.

course would be preferable to minimising the interpretation of the right in order to avoid the conflict.<sup>67</sup>

If Strasbourg always properly understands domestic proceedings and goes on to find an incompatibility with the Convention, Fenwick's suggestion (that the rule from *Kay* may be 'marginalised' to apply the Strasbourg decision) must work. However, as chapter II sought to show, this is not always the case. Where Strasbourg jurisprudence has misunderstood some aspect of domestic law in its finding of incompatibility, it would be less agreeable that a lower court attempt to bypass, say, an otherwise binding House of Lords decision in order to follow the Strasbourg position. The costs imposed on legal certainty if a lower court does so are quite clear, especially where the House of Lords goes on to restate its position and depart from Strasbourg in a later decision.

*Kay* itself is again a good example. As already discussed, the decision of the House of Lords in *Kay* was revisited when *McCann v United Kingdom*<sup>68</sup> came before the Strasbourg Court and the Court in that case concluded that the House of Lords in *Kay* had been mistaken on their interpretation of Article 8 of the Convention. *McCann* was followed by the House of Lords judgement in *Doherty*<sup>69</sup> which directly addressed the Strasbourg conclusion in *McCann*. Mr Doherty and his family had been residents on a Gypsy and caravan site for 17 years when a possession order was issued. The council commenced possession proceedings on the same day that the Strasbourg Court held the eviction in *Connors* to amount to a violation of rights under Article 8 of the Convention and Mr Doherty also claimed that his removal would violate his rights under Article 8 of the Convention. *McCann* was handed down by the European Court before *Doherty* was heard in the House of Lords and might therefore have been expected to feed a departure from the position of the majority in *Kay*. Instead however, dismissing Mr Doherty's appeal, the House of Lords strongly criticised the Strasbourg ruling in *McCann*. Lord Scott considered that the *McCann* decision was based on a 'mistaken understanding'<sup>70</sup> of how possession claims by public bodies were dealt with domestically and that 'the *McCann* judgment discloses a misunderstanding of the

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<sup>67</sup> *Ibid.*

<sup>68</sup> *McCann* (n 53).

<sup>69</sup> *Doherty & Others v Birmingham City Council* [2008] UKHL 57.

<sup>70</sup> *Ibid.*, [82].

various factors that would have been taken into account by the domestic court that dealt with the possession application'.<sup>71</sup> Lord Hope was equally critical, explaining that he wasn't sure the ECtHR had appreciated the 'very real problems' which would be caused by departing from the majority view in *Kay*.<sup>72</sup> Accordingly, the House of Lords rejected the submission that the *McCann* judgment should cause a departure from *Kay* and went on to restate the majority view in that case.

*McCann* was handed down after *Doherty* was considered in the lower courts. If, however, *Doherty* had come before a lower court *after* the decision of the Strasbourg Court in *McCann*, and the court had followed the Strasbourg outcome (marginalising the rule from *Kay* to issue of declaration of incompatibility or reinterpret the legislation), it would not only have decided the matter in conflict with the House of Lords precedent in *Kay*, but the result would be compounded by the fact that the House later restated their position in *Doherty*. The obvious costs of departing from binding precedent are thus much more obvious where the superior court holds its position.<sup>73</sup>

Legitimately 'marginalising' the rule from *Kay* would therefore require at least two considerations: the court must firstly consider that domestic precedent would be affected by the Strasbourg jurisprudence in point and secondly that the Strasbourg Court had not misunderstood domestic law. Where this point is unclear (as in the ongoing possession proceedings saga) and outside these conditions, it appears that (where there exists an inconsistency between domestic and Convention jurisprudence) the

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid, [20].

<sup>73</sup> It is suspected that this particular disparity between the House of Lords will continue to evolve. Indeed, the Strasbourg Court has recently repeated its own guidance from *McCann* in *Cosic v Croatia* (Application no. 28261/06) judgment of 15 January 2009 [22], reiterating that 'the loss of one's home is a most extreme form of interference with [Article 8] ... [a]ny person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined ... notwithstanding that, under domestic law, his or her right of occupation has come to an end'. It remains to be seen how soon the matter will be revisited by the House of Lords. When it does fall for consideration again, it is of course possible that the House of Lords will continue to uphold the view of the majority in *Kay* (n 23). If so, a resolution may have been delayed until the issue is directly addressed by the Strasbourg Court in another case to which the UK is a party.



possibilities inherent in s.2 remain broader in relation to adjudication in the House of Lords and narrow, if not non-existent, in relation to inferior courts.

## THE DIFFERING SITUATIONS OF STATUTE AND THE COMMON LAW

A different view of the scope to interpret Convention rights domestically may arise according to the source of the potential incompatibility. For instance, where a court is concerned to develop the common law in line with the ECHR, providing a higher standard of rights protection than the Strasbourg Court may prompt fewer objections than a development based on an Act of Parliament. Writing extra judicially around the time of the passing of the HRA, Sir John Laws took the view that: ‘... the rigour of the common law presents the best and only opportunity to enfold the Strasbourg jurisprudence ... within the traditions of the British state so that the one will be tranquil with the other, and both enhanced’.<sup>74</sup> Masterman noted early in the academic debates on s.2, ‘[t]hat the HRA might be used as a tool for the development of domestic common law standards is not in doubt’<sup>75</sup> while Fenwick also offered a model that relies on the common law recognising and upholding fundamental human rights.<sup>76</sup> On that basis, an approach which at times takes an activist stance towards human rights would in fact sit harmoniously (rather than conflict) with UK legal tradition. Baroness Hale confirmed in *Animal Defenders International*<sup>77</sup> that there is ‘nothing to stop our Parliament from legislating to protect human rights to a greater extent than the Convention and its jurisprudence currently require ... *nor is there anything to prevent the courts from developing the common law in that direction*’.<sup>78</sup>

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<sup>74</sup> J. Laws, ‘The Limitations of Human Rights’ [1998] PL 254, 265 (emphasis added).

<sup>75</sup> R. Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a ‘municipal law of human rights’ under the Human Rights Act’ [2005] 54 ICLQ 907, 913.

<sup>76</sup> H. Fenwick, *Civil Rights: New Labour and the Human Rights Act* (Pearson, Harlow 2000) 31.

<sup>77</sup> *Animal Defenders International* (n 2).

<sup>78</sup> *Ibid* [50] (emphasis added).

Conversely, it may not be within the power of a domestic court to interpret the scope of a Convention right beyond the standard provided by Strasbourg where the source of the alleged incompatibility is an Act of Parliament. Giving further effect to Convention rights in such cases might readily be viewed as a legislative rather than interpretative role since it would arguably result in binding the legislative bodies to a level of protection which it had not intended to ascribe (and which crucially goes beyond remedying any incompatibility). Lord Bingham spoke in these terms when giving reasons for a cautious approach in *Brown v Stott*:

The language of the Convention is for the most part so general that some implication of terms is necessary ... But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.<sup>79</sup>

Thus, where a court is seeking to expand the scope of a Convention right so as to render legislation incompatible, the issue becomes one of the separation of powers and one which the judiciary are usually loath to engage with.<sup>80</sup>

Perhaps on this basis, Baroness Hale recently emphasised that it was ‘...tempting to draw a distinction between leaping ahead of Strasbourg when developing the common law and leaping ahead of Strasbourg in telling Parliament that it has got things wrong’<sup>81</sup> and pointed out that ‘[i]t is in the latter context that most of the strongly *Ullah* type statements have been made’.<sup>82</sup> Accordingly, considering the compatibility of the Communication Act 2003 in *Animal Defenders International*, Baroness Hale did not believe that ‘when Parliament gave us those novel and important powers [under s.3 and s.4 HRA], it was giving us the power to leap ahead of Strasbourg in our interpretation of

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<sup>79</sup> *Brown v Stott (Procurator Fiscal, Dunfermline) and another* [2003] 1 AC 681, 703; Indeed, of the well known provision in s.3 HRA for domestic courts to interpret legislation compatibly with the Convention ‘so far as is possible to do so’, Lord Chief Justice Lord Woolf considered the ‘most difficult task which courts face’ to be ‘distinguishing between legislation and interpretation’, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 [76].

<sup>80</sup> Indeed, the Human Rights Act 1998 preserves Parliamentary Sovereignty. (E.g. declarations of incompatibility made under s.4 do not affect the continuing validity of an Act of Parliament).

<sup>81</sup> Baroness Hale, ‘Who Defines Convention Rights?’ (JUSTICE Tom Sargent Memorial Annual Lecture, 15 October 2008) <<http://www.justice.org.uk/trainingevents/annuallecture/index.html>> accessed 7 November 2008.

<sup>82</sup> *Ibid.*

the Convention rights'.<sup>83</sup> Her Ladyship repeated that the task of domestic courts is 'to keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less'<sup>84</sup> despite being acutely aware that this 'cautious approach ... has been criticised ... mainly on the ground that 'the Convention is a floor and not a ceiling' ... [representing] the minimum and not the maximum protection that Member States should provide'.<sup>85</sup> In her Ladyship's opinion, the purpose of a declaration of incompatibility is *simply* 'to warn Government and Parliament that ... the United Kingdom is in breach of its international obligations. It is then for them to decide what, if anything, to do about it'.<sup>86</sup>

It is easy to sympathise with this distinction. In their traditional role domestic courts adjudicate but do not create law and any approach which allows courts to extend the ambit of Parliamentary legislation is never likely to be popular. It is not difficult to see how this reality might feed a reluctance to tell Parliament it has 'got it wrong'. Fittingly, domestic courts have taken a restrained approach to declarations of incompatibility under s.4 HRA, treating them as a 'measure of last resort' which has been at least one factor in the scarcity of these declarations.<sup>87</sup> But the rationale behind a restrictive view of declarations of incompatibility under s.4 HRA is not obvious. The orthodox argument based on the enacted provision of the HRA must be this: firstly, a progressive approach to s.4 cannot carry the same charge as would the same approach to s.3: by issuing a declaration of incompatibility under s.4, domestic courts are not effecting any actual change in that legislation or tying Parliament to a protection of rights on a level which it did not intend.<sup>88</sup> Rather, s.10 HRA makes clear that s.4 triggers only a 'fast track' procedure and ultimately that any change to the legislation in question is left to Parliament. In addition, the thus-far attentive Parliamentary response to declarations may itself be revised; differing governments may react to declarations of

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<sup>83</sup> *Animal Defenders International* (n 2) [53].

<sup>84</sup> *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [106].

<sup>85</sup> *Animal Defenders International* (n 2) [53].

<sup>86</sup> *Ibid.*

<sup>87</sup> A Liberty consultation paper outlined this attitude to be a 'key factor' (Liberty's response to the Joint Committee on Human Rights, 'Implementation of Judgments of the European Court of Human Rights and Declarations of Incompatibility' March 2007 <<http://www.liberty-human-rights.org.uk/pdfs/policy07/response-to-jchr-re-implementation.pdf>> accessed 15 September 2008.

<sup>88</sup> Section 4(6) HRA

incompatibility with greater or lesser enthusiasm.<sup>89</sup> Ultimately, the HRA does not enjoin any particular course of action and attaching more than a discretionary meaning to s.4 would be misleading. As Clayton (drawing on comparison with the Canadian system) has reasoned:

... [a] rationale ... can be gleaned from developments concerning the Canadian Charter of Rights and Freedoms (which the HRA strongly resembles) ... structural features [of the Charter] mean that judicial decisions are *not* the final word on human rights, but provide the opportunity for the legislature (and the executive) to respond to court decisions.<sup>90</sup>

Yet, despite the evidence that s.4 creates a compromise between the protection of human rights by domestic courts and the retention of parliamentary supremacy, it may be more realistic to ascribe some legislative influence to the court's role under s.4 than is gleaned from an orthodox reading of the provision.<sup>91</sup> Declarations of incompatibility are themselves rare and it may be that this paucity of declarations under s.4 has directly contributed to the effectiveness of the provision: by reason of their scarcity, declarations of incompatibility may present more pressure for legislative change. This reality is given further confirmation by a recent report of the Joint Committee on Human Rights which pledged to 'be more proactive in relation to declarations of incompatibility, both in terms of *pressing the Government to take action* and, in appropriate cases, recommending what action should be taken'.<sup>92</sup> Lord Irvine also appeared to ascribe a measure of influence to s.4, writing that

Where a declaration of incompatibility is made, in respect of legislation passed since the Act, and which was accompanied by a s.19 statement of compatibility by the minister, the minister must inevitably come under some moral pressure to reconsider the position. After all, the declaration

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<sup>89</sup> S. Foster, *The Judiciary, Civil Liberties and Human Rights* (Edinburgh University Press, Edinburgh 2006) 34.

<sup>90</sup> R. Clayton, 'Judicial Deference and 'Democratic Dialogue: the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] PL 33; For growing literature on dialogue see eg T. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act, 1998' [2005] PL 306; D. Nicol 'Law and Politics After the Human Rights Act' [2006] PL 722; T. Hickman, 'The courts and politics after the Human Rights Act: a comment' [2008] PL 84.

<sup>91</sup> Cf. Liberty's response to the Joint Committee on Human Rights (n 87) para 14: 'section 4 of the HRA empowers a court to make a declaration where it believes a piece of legislation to be incompatible with the HRA. A declaration of incompatibility has no legal effect and does not bind Parliament, contrary to popular belief'.

<sup>92</sup> *Twenty-third Report 2005-06*, HL 239/HC 1575 [61].

will mean that the view he presented to Parliament has been proved wrong in a fully reasoned judgment of a higher court.<sup>93</sup>

Paul Kearns has similarly suggested that ‘Parliaments do not subsequently easily reject a court’s interpretations and it is arguable that in this way, under the HRA, judicial power is not really subject to any overriding domestic pressure and reigns unfettered and supreme’.<sup>94</sup>

Of course, frequent judicial use of s.4 may reduce the impact of declarations of incompatibility in Parliament. On this basis, the logic behind the ‘striking aversion’<sup>95</sup> of the courts to make declarations of incompatibility based on anything more than a minimalist interpretation of the Convention is understandable. Nevertheless, this position cannot explain the approach of the House of Lords in cases such as *Animal Defenders International*. Baroness Hale explained that a court should be reluctant to ‘leap ahead’ of Strasbourg in telling Parliament that it has got things wrong,<sup>96</sup> but consciously avoiding resort to a declaration of incompatibility under s.4 where Strasbourg jurisprudence clearly indicates an incompatibility with legislation (as was arguably the case in *Animal Defenders International*) turns the duty to ‘take into account’ that jurisprudence under s.2 a symbolic rather than a substantive contribution to judicial reasoning.

Encouragingly, since drawing this troublesome distinction between the common law and legislation Baroness Hale has herself conceded that she ‘may have put it too high’. Baroness Hale instead recognised that ‘the concept of the ‘Convention rights’, upon which all our powers and duties under the HRA depend, cannot mean different things depending upon whether we are developing the common law, controlling the executive,

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<sup>93</sup> Lord Irvine of Lairg, *Human Rights, Constitutional Law and the Development of the English Legal System* (Hart Publishing, Oxford 2003) 125-126.

<sup>94</sup> P. Kearns, ‘United Kingdom Judges in Human Rights Cases’ in E. Özücü (ed), *Judicial Comparativism in Human Rights Cases* (n 50) 83; see also T. Campbell, ‘Incorporation through Interpretation’ in T. Campbell, K.D Ewing, and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (OUP, Oxford 2001) 79.

<sup>95</sup> S. Foster, *The Judiciary, Civil Liberties and Human Rights* (n 89) 79.

<sup>96</sup> Baroness Hale, ‘Who Defines Convention Rights?’ (n 81).

or confronting the legislature'.<sup>97</sup> In the end, a restrictive reading of Strasbourg jurisprudence - for whatever reason - carries the significant danger that domestic law will fall below Strasbourg standard and result in incompatibly with the Convention.

## **THE INSTITUTIONAL POSITION OF THE STRASBOURG COURT**

An interesting question is related to the institutional position of the Strasbourg Court. Since it is clear that the Strasbourg jurisprudence does not remain static and that the Strasbourg Court is itself subject to review and reform, it is equally clear that a domestic court seeking to 'take into account' Strasbourg jurisprudence under s.2 HRA will be taking into account jurisprudence affected by these variant factors.

The first important point is the effect of the backlog before the European Court of Human Rights. It is well known that the Strasbourg Court has an ever increasing workload, partly due to the influx of new signatories to the Convention and partly due to a growing culture of human rights awareness resulting in more claims under the Convention.<sup>98</sup> A rise from a handful of cases in 1959 (when individual petition first came before the Court) to an annual average of 791 between 1955 and 1982 marked the start of a clear trend. Greer estimates that numbers rose to 3,000 a year by the mid eighties and by 1998 to over 16,000. Just 3 years later, the 1998 figure had doubled to over 31,000 by 2001 and to 44,000 by 2004.<sup>99</sup> To Greer's figures it may be added that 45,500 applications were lodged in 2005, 51,300 in 2006 and the 2007 Annual Report estimated the total number of new applications lodged as 54,000.<sup>100</sup> The clearest effect of this increase in applications arises out of the limited capacity of the Court to address

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<sup>97</sup> Ibid 9.

<sup>98</sup> The Joint Committee on Human Rights also gave as reasons for the increasing case-load: the entry into force of Protocol 12 (containing the general non-discrimination provision); the ratification of additional protocols by States not currently parties to them; the Court's continuing development of the Convention as a 'living instrument'; and eventually, possibly, the accession of the EU to the Convention system.

<sup>99</sup> S. Greer, *The European Convention on Human Rights – Achievements, problems, and prospects* (CUP, Cambridge 2006).

<sup>100</sup> 'Annual Report 2007 of the European Court of Human Rights, Council of Europe' 133.

them. Accordingly, the number of cases pending before the Court is equally dramatic. From 12,600 applications pending in 1999<sup>101</sup> the number by 2005 was over 81,000,<sup>102</sup> increasing to almost 90,000 in 2006<sup>103</sup> and to over 103,850 by the end of 2007.<sup>104</sup> Incredibly, it is estimated that this number is likely to reach 250,000 by 2010.<sup>105</sup>

This increasing volume of applications to the Strasbourg Court may have several effects on judicial reasoning under the HRA in the UK. Firstly, the possibility that domestic courts may be required to anticipate any change in the Strasbourg jurisprudence in order to avoid a successful challenge before the Strasbourg Court (as discussed in chapter II) may become more pertinent: since a backlog of cases will contribute to the delay in the resolution of those cases, national courts may come under an increasing obligation to take stock of any evolving consensus among the member states to the Convention (since the Strasbourg Court may not itself keep pace with it). This exercise may be especially important if the UK is to successfully avoid challenges before the Strasbourg Court (which is arguably one of the key purposes for which the HRA was enacted). However, as was outlined in chapter II, the problems associated with such an exercise are vast and it is clear that the domestic judiciary have shown little inclination to engage with it.<sup>106</sup>

A more significant impact on judicial reasoning under the HRA stems from the measures which the Convention institutions have formulated to manage the backlog. Protocol No. 11 took the first step towards addressing the increasing case load by the creation of a single full-time Court and abolishing both the European Commission of Human Rights and the quasi-judicial role played by the Committee of Ministers. However, despite effecting significant improvements in the output of the Strasbourg system, the case-load of the Court has continued to rise. Protocol No. 14 was brought in

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<sup>101</sup> European Court of Human Rights, 'Statistics 2004', 9.

<sup>102</sup> Annual Report 2006 of the European Court of Human Rights, Council of Europe' 96.

<sup>103</sup> Ibid.

<sup>104</sup> Annual Report 2007 (n 100) 137.

<sup>105</sup> Lord Woolf, *Review of the Working Methods of the European Court of Human Rights* (Strasbourg: Council of Europe, 2005) 4; S. Greer, *The European Convention on Human Rights* (n 99) 170.

<sup>106</sup> Although a willingness to engage with this type of exercise appears to be emerging. Recall for instance *Re P* (n 1) in which the House of Lords were openly concerned to anticipate a development in the Strasbourg jurisprudence in the context of unmarried adoption.

to institute further reform by improving the efficiency of the Strasbourg Court's operation.<sup>107</sup> Under these reforms, cases that have less probability of succeeding before the Court will be filtered out<sup>108</sup> along with cases that are similar to any previously brought against the same member state.<sup>109</sup>

If (as these reforms suggest) the Strasbourg Court is becoming increasingly tactical about the cases it receives, the threshold for the admissibility of applications will inevitably grow higher. This is especially clear from the hurdle added to the admissibility stage by Protocol No. 14 requiring applicants to have suffered 'significant disadvantage'. The possible implementation of this particular hurdle has raised some concerns: firstly, the Joint Committee on Human rights expressed a worry that the introduction of the new 'significant disadvantage' admissibility requirement would 'amount to a restriction on the right of individual petition and therefore inhibit access to the European Court of Human Rights by individuals in the UK'.<sup>110</sup> Similarly the Committee argued that the effect of the 'significant disadvantage' requirement 'would be to restrict the remedies available to individuals in the UK who wish to complain about arguable violations of their Convention rights, and potentially leave violations of Convention rights unremedied'.<sup>111</sup> That unease was also shared by one third of the Judges on the Court, including the British Judge, Sir Nicolas Bratza and by the Parliamentary Assembly of the Council of Europe.<sup>112</sup>

However the Government responses did not reflect the concern, instead emphasising that the right to individual petition would be likely to 'suffer dramatically' without

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<sup>107</sup> It should be noted that Protocol 14 will enter into force only when *all* parties to the Convention have ratified it. At the time of writing, all but Russia have done so, thus this discussion is - for now - strictly academic.

<sup>108</sup> This addresses the delay caused by the large number of inadmissible applications: for instance, in 2003, 96% of applications considered were declared inadmissible.

<sup>109</sup> The large number of cases concerning repetitive violations after a judgment given in an earlier pilot case (60% of cases in 2003 for instance) are also blamed for the backlog.

<sup>110</sup> Joint Committee on Human Rights, 'Protocol No. 14 to the European Convention on Human Rights' 'First Report for 2004-2005' HL 8, HC 106 [34].

<sup>111</sup> *Ibid.*

<sup>112</sup> Parliamentary Assembly of the Council of Europe, *Opinion No. 251* (2004) (28 April 2004) [11].



Protocol No. 14. In the Government's view, the new criterion 'will not restrict the right of an individual petition' and the introduction of the new requirement was the only way to preserve a practically effective - as opposed to illusory - right of individual petition since the increased work-load of the Strasbourg Court is resulting in a diminution of access to the Court by people in the UK.<sup>113</sup> Yet it is difficult to see that the new admissibility criterion would not have this effect. After all, Protocol No. 14 is designed to tackle the backlog of cases before the Court and would be somewhat self defeating if it did not reduce access to the Court. Indeed, the Council of Europe's Explanatory Report to the Protocol itself concedes that '[t]he new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it'.<sup>114</sup>

Additional to these concerns are two possible effects of the new admissibility hurdle upon domestic adjudication under the HRA in the UK: firstly, the admissibility criterion may *directly* find its way into the government submissions. Government lawyers defending a HRA claim may seek to import the additional hurdle into domestic adjudication in order to argue that the claimant had not suffered a 'significant disadvantage' and thus that there is no violation of the Convention. Of course, it is clear that the admissibility criteria have no place in domestic adjudication and that domestic courts should make short-thrift of arguments of this kind, choosing instead to simply divorce such factors from their analysis.<sup>115</sup>

The second effect concerns an *indirect* consequence of the new admissibility criterion. Protocol no.14 does not elaborate on exactly what is meant by a 'significant disadvantage' but it is possible to speculate that an applicant suffering disadvantage - but not such as to be considered 'significant' - may have succeeded in the Strasbourg Court at a time when the Strasbourg system was under less pressure but that, under these reforms, the same applicant may be excluded at the admissibility stage notwithstanding an albeit less 'significant' violation of the Convention. In other words,

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<sup>113</sup> Letter from Rt Hon Jack Straw MP, Secretary of State for Foreign & Commonwealth Affairs (13 May 2004).

<sup>114</sup> Council of Europe, Explanatory Report to the CETS 194 [79].

<sup>115</sup> Perhaps in the same way as it was suggested domestic courts may divorce a margin of appreciation from their adjudication (chapter II from n 68).

cases falling short of the ‘significant disadvantage’ threshold (but still constituting a Convention violation) may now become hidden within the bulk of admissibility decisions and may not reach the Strasbourg Court. It is important to reiterate that there will continue to be violations of the Convention even where the disadvantage is not ‘significant’. Protocol No. 14 does not seek to raise the threshold of admissibility; the hurdle simply seeks to filter the most serious cases to the full Court. If, however, Convention violations not carrying a ‘significant’ disadvantage are to be excluded from a full hearing in the Strasbourg Court, the effect may be a gradual disappearance of Strasbourg case law dealing with more trivial breaches of the Convention.

As a result, a domestic court adjudicating under the HRA in accordance with the guidance to follow ‘clear and constant’ Strasbourg jurisprudence may find only Strasbourg decisions connected with a significant disadvantage to ‘take into account’.<sup>116</sup> In this way, domestic courts – minded not to ‘leap ahead’ of that jurisprudence but simply to ‘keep pace’ with it – will risk indirectly applying the ‘significant disadvantage’ threshold to Convention violations domestically. In other words, as a result of a diminution in the jurisprudence of less significant Convention breaches, the bar for successful complaints under the HRA may be raised by analogy to the bar for admissible complaints before the Strasbourg Court.

Since this consequence will not result in a rise in the number of violations of the Convention found against the UK,<sup>117</sup> it will not trouble those who view the purpose of the HRA as purely addressing that aim. However, to those who view the HRA as a vehicle for ‘bringing rights home’ and securing the protection of Convention rights domestically rather than relying on the decisions of an international court, the possibility that the bar for human rights protection may be raised in this way will come as a blow. If domestic courts are to avoid raising the bar for claims under the HRA in correlation with the bar in Strasbourg, it is clear that they may have to adopt a more

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<sup>116</sup> While ‘Strasbourg jurisprudence’ for the purposes of s.2 does not exclusively refer to Strasbourg case law, it is widely accepted that domestic courts operate a system of hierarchy in relation to the Strasbourg organs and that decisions of the Court would likely be given more weight.

<sup>117</sup> Cases falling foul of the ‘significant disadvantage’ hurdle will evidently not come before the Strasbourg Court and thus not prompt a ruling that domestic law is incompatible with the Convention.

confident stance to that evidenced by the cautious approach in judicial reasoning to date. Along these lines, the Committee of Ministers declared that the adoption of reform under Protocol No. 14 was to ‘be accompanied by effective national measures by the legislature, the executive and the judiciary to ensure protection of Convention rights at the domestic level’.<sup>118</sup> Domestic judges ought to be more willing to decide the matter for themselves and domestic courts must bear more of the burden.<sup>119</sup>

Arguably, domestic courts ought also to be prepared to go further than the Strasbourg Court has done; the efficacy of the HRA, as well as the Convention system, depends not on judicial caution, but upon ‘the existence of effective *domestic* remedies, with the Strasbourg Court exercising an essentially supervisory international jurisdiction’.<sup>120</sup> As Colin Warbrick has written, ‘[a]ll those who examine the problem [of the Court’s increasing workload] agree that an essential ingredient in any reform is that *the national legal systems must take a greater share of the load*’.<sup>121</sup>

Pursuant to these aims, UK domestic courts may be led to consider and analyse admissibility decisions in much more depth and breadth than is usually attempted. Ultimately, an overly deferential approach to the decisions of the Strasbourg Court is unlikely to benefit the development of domestic human rights law. Indeed, it should be emphasised that s.2 HRA requires domestic courts to take into account Strasbourg *jurisprudence*, not Strasbourg case law. While many views differ as to the purpose of the HRA, it must at least be agreed that the HRA was not enacted to facilitate the

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<sup>118</sup> ‘Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels,’ Declaration of the Committee of Ministers, adopted on 12th May 2004 at its 114th Session; indeed, the HRA has significantly reduced the number of applications lodged against the UK. For instance, in 2000 the number of applications was 1,600, declining to 1,275 in 2004.

<sup>119</sup> See also C. Warbrick, ‘The View from the Outside’, in H. Fenwick, R. Masterman and G. Phillipson (eds.) *Judicial Reasoning under the UK Human Rights Act* (n 9) 31: ‘...the Strasbourg Court simply does not have the capacity (even if it had the expertise) to act as a court of last resort for all European states, taking appeals, as well as review, ‘bailing out the state which wanted to pass on the responsibility for what it could see would be an expensive or unpopular result to the ECtHR’.

<sup>120</sup> A. Lester, ‘The utility of the Human Rights Act: a reply to Keith Ewing’ [2005] PL 249, 256.

<sup>121</sup> C. Warbrick, ‘The View from the Outside’ (n 119) 32. Although it should be noted that Warbrick does not himself support a progressive view of human rights so that domestic courts should interpret rights more generously than the Strasbourg Court.

gradual erosion of civil rights and liberties. Yet this is the danger if the reforms of Protocol No. 14 are implemented and domestic courts do not begin to take a more autonomous view of domestic human rights.

## CONCLUSIONS

While domestic courts have devised certain formulae such as ‘clear and constant’ and ‘no more, no less’ it is apparent that several factors exist which will necessitate differing approaches to the s.2 exercise. A domestic court adjudicating on unqualified rights for instance, should be ready to apply a rigorous analysis to the scope of the right in point, while qualified rights cases will necessitate stricter scrutiny as to the justifications for interference. In the latter case, the justifications for interference themselves present a whole host of problems connected to the earlier discussion in chapter II: a domestic court opting to follow Strasbourg jurisprudence on this point encounters all the difficulties presented by evolving jurisprudence and margins of appreciation.

Inconsistencies between domestic precedent and later Strasbourg jurisprudence also raise interesting issues under s.2. *Kay* makes it clear that a lower court faced with such a predicament should follow the domestic precedent, although this remains an unconvincing compromise between legal certainty and effective rights adjudication under s.2 HRA. Fenwick’s suggestion that courts may be able to legitimately ‘marginalise’ the rule from *Kay* would provide one solution where the court is sure that the relevant Strasbourg jurisprudence is not based on a misunderstanding of UK domestic law. Where this is unclear or part of an ongoing dialogue between the superior court and Strasbourg (as in the ongoing possession proceedings saga) legal certainty would require lower courts to abdicate to the authoritative guidance. In the end, where this issue arises it is clear that the discretion in s.2 is reserved for adjudication in the superior court.

The possibilities in s.2 also appear to differ in connection to the judicial exercise. For instance, the possibility that s.2 might encourage domestic courts to ‘give a lead to

Strasbourg' varies according to whether the potential incompatibility with the Convention arises out of legislation or the common law. Domestic courts are seemingly free to develop human rights jurisprudence beyond the 'ceiling' in the development of the common law but where courts are concerned to evaluate the compatibility of an Act of Parliament with the Convention, the House of Lords in *Animal Defenders International* appears to have positively confirmed that they should stick to the minimum conception of the rights given in Strasbourg. In overly simplistic terms, domestic courts must 'keep pace' with Strasbourg in such cases but apply only the Strasbourg 'floor'. While the position sits harmoniously with the separation of powers doctrine, it is difficult to see it as anything more than a reluctance to engage too readily with legislative provisions. The result also carries the significant danger that a tentative or restrictive reading of Strasbourg jurisprudence – for whatever reason – will cause domestic law to fall below Strasbourg standard and result in incompatibility with the Convention.

The danger carries over when one considers the possible effect of Strasbourg's own reforms. The increasing backlog and implementation of Protocol No. 14 will plainly have the effect of reducing access to the European Court of Human Rights. Since it is clearly undesirable that domestic courts should imitate this result (it would fly in the face of the HRA as a statute that 'only gives and does not take away') it is important that domestic reasoning does not suffer the effect of these external factors when taking into account the Strasbourg jurisprudence under s.2. Rather than supporting a loyal approach to the European Court, the review and reform process feeds a compelling argument that domestic courts should now be increasingly ready to develop a domestic law of human rights which takes guidance from, but is not reliant on, Strasbourg; 'taking into account' Strasbourg jurisprudence requires more than simply 'keeping pace' with Strasbourg or following the 'clear and constant' decisions of that Court.

## FINAL CONCLUSIONS

Differing conceptions about the purpose of the Human Rights Act 1998 have inevitably led to conflicting interpretations of the duty under s.2 of the Act. Those who view the Act as a statute designed to implement remedies for Convention rights in the domestic system invariably have difficulty with a construction of s.2 which allows domestic judicial reasoning to expand upon the scope of Convention rights. Conversely, those who view the Human Rights Act as a statute facilitating the development of domestic rights as well as domestic remedies often stress the importance of developing a domestic human rights law which draws from the Convention and Strasbourg jurisprudence but is not reliant upon it. This thesis has argued that the latter construction is the one closest to the scheme of the Human Rights Act 1998 as it was designed by the Government<sup>1</sup> and enacted by Parliament.<sup>2</sup>

It was plainly intended that domestic courts would be *obliged* to ‘take into account’ Strasbourg jurisprudence and that ignoring such material altogether would not be an option. However, it is also obvious that s.2 was designed to afford ‘flexibility and discretion’ to domestic courts: the HRA does not bind domestic courts to Strasbourg. Instead, in many situations the discretion in s.2 arguably encourages domestic courts to decide matters for themselves.

This is most obvious where following Strasbourg jurisprudence is undesirable or simply impossible. Thus, where Strasbourg jurisprudence is affected by age, following it without anticipating a development may carry the danger of falling behind it. Similarly, following jurisprudence affected by a margin of appreciation may import an overly restrictive reading of the Convention into domestic law. This risk is especially clear where domestic courts apply the reasoning of jurisprudence to which another state is a party: there is simply no way of knowing whether the Strasbourg Court would find the margin in a similar UK case to be wider or narrower. The possibility that it might be narrower (and thus render UK law incompatible with the Convention) means that domestic courts would better discharge their duties under the HRA by focusing on the

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<sup>1</sup> *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997)

<sup>2</sup> Eg Hansard HL vol 584 cols 1270-1271 (19 January 1998) (Lord Irvine of Lairg).

matter as it arises in the specific context of UK domestic law. It is also undesirable that domestic courts apply Strasbourg jurisprudence which is itself unclear or based on a misunderstanding of domestic law. Remembering that in *none* of these situations is a domestic court discharged from its duty as a public authority under s.6 HRA to act compatibly with Convention rights, it is suggested in *all* of these situations s.2 HRA allows domestic courts to decide matters for themselves.

But how far can domestic courts go? In certain circumstances, domestic courts may not only be encouraged to ‘escape’ Strasbourg jurisprudence, but also to expand upon it. The central question in chapter III was thus concerned with whether domestic courts may legitimately ‘move beyond’ or ‘go further’ than the Strasbourg Court in its view of Convention rights. It became clear that courts have been concerned to apply at least the minimum standard of rights set out by the Strasbourg Court (on the basis that ‘[t]o do otherwise would defeat one of the purposes of the HRA 1998’)<sup>3</sup> but the perception that ‘Bringing Rights Home’ through the HRA simply meant introducing no more than domestic remedies for violations of Convention rights has led to a restrained approach to judicial reasoning. This construction of the HRA has in turn fed a tendency to restrict domestic reasoning to the Strasbourg minimum (lest courts be accused of illegitimate law-making or unwarranted activism) despite evidence that the Strasbourg organs insist only on a minimum threshold.<sup>4</sup> Although there is evidence that courts will ‘go further’ than Strasbourg, this may be of relevance only where the matter before the domestic court is subject to a national margin of appreciation, or where there is no steer from Strasbourg at all.<sup>5</sup> The eagerness to maintain consistency with the reasoning of the European Court and the central importance of Lord Bingham’s guidance in *Ullah* to ‘keep pace’ with Strasbourg jurisprudence ‘no more, no less’ place obvious limits on judicial reasoning under s.2. While these concerns are evidently conducive to reducing

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<sup>3</sup> D. Feldman (ed) *English Public Law* (OUP, Oxford 2004) 390; D. Feldman, ‘The Human Rights Act 1998 and constitutional principles’ (1999) 19 L.S. 165 at 193; H Fenwick and G Phillipson ‘Public protest, the HRA and judicial responses to political expression’ [2000] PL 627, 640; E. Barendt, ‘Freedom of Assembly’ in Beatson and Cripps (eds), *Freedom of Expression and Freedom of Information* (2000) 168.

<sup>4</sup> Eg *R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653 [44]-[45].

<sup>5</sup> Eg R. Masterman, ‘The Status of Strasbourg Jurisprudence in Domestic Law’ in H. Fenwick, R. Masterman, G. Phillipson (eds), *Judicial Reasoning Under the UK Human Rights Act* (CUP, Cambridge 2007) 81; H. Fenwick and G. Phillipson, ‘Direct Action, Convention Values and the Human Rights Act’ (2001) 21 LS 535, 564.

successful challenges in Strasbourg, the result is a judicial diffidence not usually associated with a comprehensive system of human rights protection and one that is difficult to reconcile with the 1998 Act as a statute which ‘only gives and does not take away.’<sup>6</sup> Moreover, cautious decisions such as the one given in *Animal Defenders International* represent the consequence that, in striving to do ‘no more’, domestic courts appear - at best - to be abdicating responsibility to Strasbourg. At worst, the result may be the failure to guard against violations of Convention rights domestically and, ultimately, the failure to realise the central purpose for which the Act was enacted: to ‘bring rights home’.

The reluctance shown to seek comparison with the jurisprudence of foreign courts<sup>7</sup> is similarly detrimental to the development of a domestic law of human rights. While it is clear that cases from jurisdictions outside the Convention borders are ‘unlikely to point to the direction in which the common law should be developed to ensure compatibility with the Convention rights’,<sup>8</sup> restricting comparison to Strasbourg does not assist a domestic court faced with under-theorised Strasbourg jurisprudence. Moreover, the approach is probably incompatible with the feeling that ‘comparative study should not lead to attempted mimicry of others, but should inform the journey towards a national system *which meets our distinctive needs*.’<sup>9</sup> The comparative use of jurisprudence from jurisdictions outside Strasbourg may be of immense value, not only in pointing to judicial techniques under instruments similar to the Human Rights Act, but also to approaches which aid the development of domestic law towards Convention

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<sup>6</sup> Hansard HL vol 583 col 510 (18 November 1997) (Lord Irvine).

<sup>7</sup> Eg *Sheldrake v DPP* [2004] 3 WLR 876 [33]; *R(Marper) v Chief Constable of Yorkshire* [2004] 1 WLR 2196; *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307.

<sup>8</sup> R. Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a ‘municipal law of human rights’ under the Human Rights Act’ [2005] 54 ICLQ 907, 923.

<sup>9</sup> D. Feldman, ‘The Human Rights Act 1998’ (n 4) 205; Indeed, it was the fact that s.2 allows the courts to ‘range wider than the ECHR and look at the jurisprudence of other human rights treaties’ led Klug to characterise the Human Rights Act 1998 as ‘effectively a bill of rights or ‘higher law’, F. Klug, ‘The Human Rights Act – A ‘Third Way’ or ‘Third Wave’ Bill of Rights’ [2001] EHRLR 361, 370; F. Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (Penguin, London 2000) 164.



compatibility.<sup>10</sup> Thus chapter IV sought to illustrate that broader use of comparative jurisprudence may provide a useful aid to judicial reasoning which a Strasbourg focused comparative exercise fails to fully utilise.

This is compounded by the reality that the s.2 duty is affected by factors which are external to the Strasbourg jurisprudence itself. For instance, whether a right is ‘qualified’ or ‘unqualified’ will alter the possibilities for a domestic court under s.2. Further, whether the source of the alleged incompatibility is statute or common law, whether Parliament has itself considered the issue(s) in play and the existence of the domestic system of precedent may make it inappropriate to ‘follow’ Strasbourg jurisprudence at all, however ‘clear and constant’. Lastly, the institutional position of the Strasbourg Court and the effect of its own reforms feed a compelling argument that domestic courts should now be increasingly ready to develop a domestic law of human rights which takes guidance from, but is not reliant on, Strasbourg.

An exercise in these terms will require a more autonomous view of rights adjudication than the judiciary have shown willingness to engage with. Doubtless it will also attract criticism on the grounds that it supports judicial creativity rather at the cost of legal certainty. Nevertheless, as the Lord Chancellor explained in the Parliamentary debates on s.2, ‘the courts will often be faced with cases that involve factors perhaps *specific to the United Kingdom* which distinguish them from cases considered by the European Court’<sup>11</sup> and a Procrustean approach to Strasbourg jurisprudence is therefore unlikely to properly give effect to the HRA 1998 as a statute designed to ‘bring rights home.’ In the end, ‘taking into account’ Strasbourg jurisprudence requires more than simply ‘keeping pace’ with Strasbourg or following the ‘clear and constant’ decisions of that Court: domestic courts must instead decide cases in the very specific circumstances that come before them, being advised by Strasbourg jurisprudence but not informed by it.

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<sup>10</sup> Most obviously in the line of cases leading up to *Campbell* in which domestic courts drew from Commonwealth jurisprudence to develop the breach of confidence action into a common law remedy for privacy in line with article 8 of the Convention.

<sup>11</sup> Hansard HL vol 584 cols 1270-1271 (19 January 1998).

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