

Human Rights Law Centre

Sir Nicholas Bratza

Dialogue or deference? The relationship between the UK and Strasbourg courts

On 7th March 2015, Sir Nicholas Bratza, former President of the European Court of Human Rights (ECtHR) and Honorary Professor at the School of Law at the University of Nottingham, delivered a seminar entitled, *Dialogue or Deference? The relationship between the UK and Strasbourg courts*.

Sir Nicholas began by noting that the anticipated Consultation Paper on the Bill of Rights has been delayed and that as a result, we do not know precise terms of the proposed Bill. Section 2 of the Human Rights Act 1998 (HRA) and the requirement that UK courts must 'take into account' relevant jurisprudence from the ECtHR was questioned in the Grayling Report on the proposed Bill however. The report also suggested that UK judges have been making political decisions and prioritising rights over responsibilities and in doing so, have been striking an inappropriate balance.

It was submitted by Sir Nicholas that even if s2 of the HRA is repealed, it is unrealistic to believe that the courts would simply disregard 15 years of jurisprudence on the HRA. Sir Nicholas went on to outline the questions that he would address in the seminar, including if the UK courts had been unduly influenced by Strasbourg jurisprudence, if they have engaged in dialogue or deference and if there has been a change in relationship between the two set of courts.

Sir Nicholas highlighted that it was never envisaged that Strasbourg case law would be determinative in UK courts and that there is some irony in the fact that in the House of Lords debates on the Human Rights Bill (that would eventually become the HRA), it was the Conservatives who moved that domestic courts would be bound by Strasbourg case law. As stated above, s2 of the HRA now states that the UK courts must 'take into account' the relevant Strasbourg jurisprudence, and the meaning of this section was fully examined in *R (Alconbury)* in 2003, where it was found that the courts 'should follow clear and constant jurisprudence [from Strasbourg]'

In *R (on the application of Ullah)*, Lord Bingham articulated what has subsequently been termed the 'mirror principle'. Lord Bingham relied on the fact that the European Convention on Human Rights (ECHR) was an international instrument and decided that a national court subject to the duty in s2 HRA should not dilute or question Strasbourg case law, but should not go above it: 'no more, but certainly no less' (at [20]). Sir Nicholas questioned if perhaps this represented a wrong turn however.

Indeed, Lord Brown in *Al-Skeini* questioned Lord Bingham's judgment and Lady Hale has observed extra-judicially that the reasoning behind the mirror principle is questionable, noting that forging ahead here in the UK in human rights judgments is unlikely to have an effect on other member states party to the ECHR and stating that there is nothing in s2 that prevents courts from going above Strasbourg jurisprudence. Alternatively, in *Ambrose v Harris*, Lord Hope suggested that the UK courts should wait until Strasbourg has spoken on an issue.

Sir Nicholas stated that the UK courts have not always been unwilling to go beyond Strasbourg however and that the mirror principle has not always been applied, even in *Ullah* itself. Numerous cases illustrate this point, including *EM (Lebanon)* and also *Limbuela* (an asylum seeker case), where the House of Lords arguably went further than Strasbourg, and Lady Hale commented that the

decision looked like creating a species of socio-economic right not in Strasbourg case law. In *Re G*, a case regarding adoption, Lord Hoffman felt that it was irrelevant that Strasbourg not ruled on the issue, and in *Rabone*, Lord Brown felt it was absurd to have to wait for an authoritative Strasbourg decision before the House of Lords could pass judgment.

According to Sir Nicholas, it is unlikely now that the Supreme Court would be deterred from ruling in situations not covered by Strasbourg jurisprudence. Although it has been suggested that the *Ullah* principle is too deferential to Strasbourg jurisprudence, Sir Nicholas did not believe this was the case.

In the *A and Others* case on control orders in relation to the Belmarsh cases, it was held that there was no rigid principle that a hearing would be unfair if it was a closed hearing and the fairness of the hearing would depend on all circumstances of the case. The ECtHR in *A and Others v UK* found that the closed hearings did not comply with Article 5(4) ECHR. In the House of Lords, Lord Scott thought that the common law would lead to same conclusion but Lord Hoffman disagreed with the ECtHR's decision, although he nevertheless felt compelled to follow Strasbourg's case law. Lord Rodger decided that Strasbourg had spoken and therefore the case was closed.

Sir Nicholas noted that the language in these judgments seems to show an irritation on part of the judges in the House of Lords but probably does not illustrate an excessive deference to Strasbourg however. It was also acknowledged that the Grand Chamber had been unanimous in its decision and had dealt with the same aspects as the UK case.

In *Chester*, one of the prisoner voting cases, Lord Mance gave the leading judgment and stated that for the Supreme Court to decline to follow Strasbourg jurisprudence at the Grand Chamber level, 'it would have to involve some truly fundamental principle of [UK] law or some most egregious oversight or misunderstanding' (at [25]). Laws LJ has suggested that there has been some slippage from Lord Bingham's mirror principle, but *Ullah* has still not been overturned. In this regard, Sir Nicholas submitted that the term 'slippage' probably does not do justice to what has occurred in the case law and that seems to have been conscious moving away from *Ullah*.

Sir Nicholas then elaborated upon the concept of dialogue between the UK and Strasbourg courts and referred to various cases to illustrate this dialogue. For example, in *Pinnock*, Lord Neuberger stated that national courts may be expected to follow Strasbourg jurisprudence where there is a 'clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of [UK] law' as long as the 'reasoning does not appear to overlook or misunderstand some argument or point of principle' (at [48]). It was submitted by Sir Nicholas that it would be not only be impractical but sometimes inappropriate to follow every decision of the ECtHR and to do so would undermine the dialogue idea. Indeed, Sir Nicholas highlighted that in *Al-Khawaja* and *Horncastle*, it was thought that the ECtHR had not struck the right balance between individual rights and the interests of society and when the cases reached the Grand Chamber the judges took account of the decision of the UK court and reversed the Chamber's decision.

Dialogue between the UK and Strasbourg courts can also be seen in *Pinnock*, where the national courts had some disagreement with the Strasbourg court. This led to a lot of debate in relation to social housing and the Supreme Court accepted a procedural entitlement to determination in a court of proportionality in relation to evictions.

In *Vinter* (a case relating to whole life sentences) a Chamber at Strasbourg held there had been a violation of Article 3, but in *McLoughlin*, the Court of Appeal rejected this approach. Ultimately, in *Hutchinson*, the ECtHR accepted the UK courts' position in relation to whole-life sentencing. Whether this line of cases represents true dialogue between the UK courts and Strasbourg was questioned by Professor Rice-Dickson, who noted that Strasbourg won on the first two occasions, and the UK courts won on the last one. Lord Kerr has expressed the opinion that dialogue is relatively rare but as a matter of principle, international and national courts could not engage in much of a dialogue because according to him, they were having different conversations.

Sir Nicholas stated that he does not agree with this position but noted that there remains a more general concern that national courts are unduly deferential to Strasbourg and in doing so, have failed to develop the common law. This is because the UK courts have arguably relied on the HRA and ECHR too much and thus have not used the common law to achieve the same goals. Lord Reid has echoed this view and noted that there is a striking contrast between the approaches in France and Germany and the approach of courts in this country. Judges here have not used the common law often to protect human rights. Nevertheless, Sir Nicholas submitted that there have been examples of this however. For example, in *Roberts v Parole Board* the common law was relied on by two dissenting law lords and in the Belmarsh case, judges found a common law rule on admission of evidence. Moreover, in *Purdy*, the House of Lords found that the right to private life was engaged and built upon this by requiring a common law remedy in relation to the guidelines on the DPP's decision to prosecute individuals in assisted suicide cases. In *Oswald v Parole Board*, Lord Reid suggested that the values of the ECHR should not be ignored in the common law and Lord Mance has also said that UK courts should start with domestic law in human rights cases.

Some have questioned if the common law would provide adequate protection of human rights in the UK if the HRA were to be repealed, but Sir Nicholas stated that he believed it would quite probably not do so, but submitted that mutual enrichment between the Convention and the common law can lead to greater protection of human rights in the UK.

In relation to the Strasbourg court, Sir Nicholas noted that in less than 2% of cases regarding applications against the UK, the court found a violation and that on the whole, the ECtHR has been respectful of the decisions of UK courts. Strasbourg has also been respectful of the UK courts in relation to misunderstandings of UK law and the judgments of the UK courts have either formed the basis of the ECtHR's judgment or at least aided in its decision in a number of cases, such as in *Pretty* for example.

Sir Nicholas questioned whether the tables have now turned however and as arguably illustrated by *Animal Defenders*, if there was an increased respect for and more deference to national authorities, as well as a respect for the principle of subsidiarity on the part of the ECtHR. Some have also suggested that the ECtHR has recently demonstrated a deference to the UK courts' reasoning, but Sir Nicholas stated that he does not necessarily share this view and he instead believes that the ECtHR has not accorded an enhanced role to UK courts because of political pressure and there has not been a change in the approach of the ECtHR. Sir Nicholas also highlighted that it has been suggested that Strasbourg may be more willing to apply the margin of appreciation in cases where the Convention has already been diligently applied by the UK courts.

Sir Nicholas concluded that a strengthening of the dialogue between the UK courts and Strasbourg will continue to strengthen human rights protection in the UK. It would appear however, that the ECtHR seems to have been more clear and explicit in stating where it is drawing the line of the margin of appreciation and deference to considerations by the UK courts. It was also acknowledged that extra-judicial dialogue between the two sets of courts has been useful and can be very valuable to the promotion of dialogue and indeed, this has happened in Germany too.

Strasbourg is sometimes faced with decisions that will have a serious impact on a particular country, such as in *Al-Skeini* and Sir Nicholas submitted that judges need to have the consequences and impact of the judgment in the back of their minds when making decisions.

Finally, it was noted in discussions that the Grayling Paper seems to not acknowledge the importance of the Court of Justice of the European Union (CJEU) and the European Union (EU) in relation to human rights in the UK. It was also acknowledged that ownership of rights appears to be an important theme in the Grayling Paper although interestingly, the Convention rights are referred to in proposals relating to a *British* Bill of Rights. In terms of ownership of rights, UK courts have also been ruling on the HRA for the last 15-16 years and as discussed above, the UK courts have not always agreed with the ECtHR.

Report by Dominic Bent, LLB