

## NOTTINGHAM HUMAN RIGHTS LECTURE 2011

### ARGENTORATUM LOCUTUM: IS THE SUPREME COURT SUPREME?

#### Lady Hale, Justice of the Supreme Court of the United Kingdom

My title comes, as many of you will know but some of you may not, from the short opinion of the late lamented Lord Rodger of Earlsferry in *Secretary of State for the Home Department v AF (No 3)*.<sup>1</sup> This was all about the minimum requirements for a fair hearing in control order cases where the Secretary of State declined to allow some of the material upon which the order was based to be disclosed to the controlled person. In the earlier case of *Secretary of State for the Home Department v MB*,<sup>2</sup> the House of Lords had performed heroic feats of interpretation under section 3 of the Human Rights Act and read the Prevention of Terrorism Act to mean precisely the opposite of what Parliament had intended: thus if the Secretary of State was unwilling to make the disclosure necessary to enable the controlled person to have a fair hearing, the court was unable to confirm the order. But the majority of us thought that disclosure of the closed material to a special advocate would in many, perhaps most, cases enable the controlled person to have a fair hearing.

When *MB* was decided it was not entirely clear what test the Strasbourg court would apply to the extent of disclosure required for a hearing to be fair. They had recognised that considerations of national security might justify some modification to what would otherwise be required for a fair trial, provided that ‘any difficulties caused to the defence by a limitation on its rights [were] sufficiently counterbalanced by the procedures followed by the judicial authorities’. There was a distinct hint that special

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<sup>1</sup> [2009] UKHL 28.

<sup>2</sup> [2007] UKHL 46, [2008] 1AC 440.

advocates might be enough. But by the time that *AF (No 3)* reached us, the Grand Chamber had decided the case of *A v United Kingdom*.<sup>3</sup>

This case was brought by 11 of the suspected foreign terrorists who had been detained under the Anti-terrorism, Crime and Security Act 2001. The Grand Chamber agreed with the House of Lords<sup>4</sup> that the United Kingdom's attempt to derogate from article 5 of the Convention was ineffective, and found (in all but two cases) that their detention had been in breach of article 5(1). But the Grand Chamber went on to discuss whether there had been breaches of the procedural guarantees in article 5(4), which requires a proper judicial determination of the lawfulness of the detention. They held that the necessary secrecy had to be 'counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him' (para 218). The special advocate could not perform his function of testing the evidence and putting forward arguments on behalf of the detainee properly 'unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate' (para 220). Where 'the open material consisted purely of general assertions and [the decision] was based solely or to a decisive degree on closed material the procedural requirements of article 5(4) would not be satisfied' (para 220).

Although *A v United Kingdom* was concerned with detention, and the control order cases were not, the House of Lords in *AF (No 3)* considered it inevitable that Strasbourg would take the same view of the procedural requirements for confirming control orders. Strangely enough, and despite some provocation from the Bench, the

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<sup>3</sup> (2009) 26 BHRC 1.

<sup>4</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

government did not challenge our bold interpretation of the legislation and invite us to make a declaration of incompatibility instead. So we adopted the Strasbourg view. As Lord Rodger put it, ‘Even though we are dealing with rights under a United Kingdom statute, in reality we have no choice. *Argentoratum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed’ (para 98). I do not think that he wholly approved of that conclusion.

But was he right? Does Strasbourg have the last word? The Lord Chief Justice and the President of the Supreme Court have recently expressed slightly different views on this issue.<sup>5</sup> One thought that it did not, at least in the courts of this country, and the other thought that it did, in the end at least. And should we mind if it does?

These are hot topics at the moment. Strasbourg-bashing has become very popular. In his Kingsland Memorial Lecture on Wednesday 23 November, Michael Howard, the former leader of the Conservative party, attacked the Strasbourg court for descending into the minutiae of the Convention rights and denying member states their proper margin of appreciation to interpret and apply the Convention in the light of local conditions. But he also attacked the United Kingdom courts for going beyond the Strasbourg case law in extending the interpretation of the Convention. In his FA Mann lecture on Tuesday 8 November, Jonathan Sumption QC, soon to be a Justice of the Supreme Court of the United Kingdom, also attacked the Strasbourg court for its detailed development of the general principles in the Convention, for deciding not only whether the member states had proper institutional safeguards for those rights but also whether it agreed with the findings of those institutions, and for attempting to

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<sup>5</sup> Evidence to the House of Lords and House of Commons Joint Committee on Human Rights, 15 November 2011.

apply the rights in a uniform manner throughout the 47 member states, despite the fact that ‘the consensus necessary to support it at this level of detail does not exist’. It is one thing to have common European values but another thing to have the same laws on such contentious issues as, for example, abortion. Given that this is such a hot political topic at the moment, it is perhaps odd that a lecture preaching that judges should stay out of political questions should have entered so publicly into the political arena. For what the United Kingdom as a Member State should choose to do about what the politicians see as the over-activism of the Strasbourg court is a completely different question from what the judges in this country should do with the jurisprudence of the Strasbourg court.

I want to talk about the questions of law for the courts. First, what should the approach of the United Kingdom courts, and particularly our highest court, be to the Strasbourg case law? And secondly, what should be the approach of the Strasbourg court towards us, the decisions of the highest courts in the member states?

### *Our approach to Strasbourg*

If you come and listen to a human rights case being argued in the Supreme Court, you will be struck by the amount of time counsel spend referring to and discussing the Strasbourg case law. They treat it as if it were the case law of our domestic courts. This is odd, because the Strasbourg case law is not like ours. It is not binding upon anyone, even upon them. They have no concepts of *ratio decidendi* and *stare decisis*. Their decisions are at best an indication of the broad approach which Strasbourg will take to a particular problem. Over the years they have built up a considerable body of *doctrine*, but it is developing all the time. They are always saying things like ‘in

principle’ or ‘as a rule’ which is not the sort of thing which we often say. The courts in some other European countries, we are told, do not study their decisions in the detail which we do. They have written constitutions with their own charters of fundamental rights and they get on with interpreting and applying those.

The reason, I suppose, why counsel spend so much time with the Strasbourg case law is the so-called ‘mirror principle’, enunciated by Lord Bingham in the famous case of *Ullah*.<sup>6</sup>

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

With this are usually coupled the words of Lord Brown in *Al Skeini*,<sup>7</sup> ‘no less but certainly no more’. And that was undoubtedly the approach of our Deputy President in *Ambrose v Harris*,<sup>8</sup> a recent devolution reference from Scotland. Sir Stephen Sedley has commented that ‘the logic of this is entirely intelligible; it avoids judicial legislation and prevents member states from getting out of step with one another’.

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<sup>6</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20.

<sup>7</sup> *R (on the application of Al-Skeini) v Ministry of Defence* [2007] UKHL 26, [2008] 1 AC 153, para 106.

<sup>8</sup> *Ambrose v Harris (Procurator Fiscal, Oban) (Scotland)* [2011] UKSC 43, para 20: ‘It is not for this court to expand the scope of the Convention rights further than the jurisprudence of the Strasbourg court justifies’.

Although he also points out that ‘it carries the risk that, in trying to stay level, we shall fall behind’.<sup>9</sup>

There are a number of well known objections to the ‘mirror principle’, most of them voiced by people who take the opposite view from Mr Howard and want the UK to develop its own home grown human rights jurisprudence.<sup>10</sup> First, although the Human Rights Act defines the Convention rights in the language used by the Convention, it is clear that it has created new rights in United Kingdom law, and not simply given the people within the jurisdiction of the United Kingdom the rights which Strasbourg would give them. This much is clear from the case of *Re McKerr*,<sup>11</sup> even if the actual result of that case has now been modified in the light of developments in Strasbourg.<sup>12</sup>

Secondly, the Human Rights Act does not require us to *follow* the Strasbourg jurisprudence, but it does require us to ‘take it into account’ (section 2(1)). The courts have given this a purposive interpretation. As the purpose of the Human Rights Act was avowedly to ‘bring rights home’ and avoid the need for people to take their cases to Strasbourg, we should take into account their jurisprudence with a view to finding out whether or not the claimant would win in Strasbourg. If it is clear that she would do so, then we should find her a remedy. Hence the view that if there is a ‘clear and constant’ line of Strasbourg jurisprudence indicating that the claimant should win,

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<sup>9</sup> ‘Bringing rights home: time to start a family?’ (2008) 28(3) Legal Studies 327, 332.

<sup>10</sup> Eg Jonathan Lewis, ‘The European ceiling on human rights’ [2007] Public Law 720 – 747; I have also found T Rainsbury, ‘Their Lordships’ Timorous Souls’ [2009] UCL Human Rights Review, very illuminating.

<sup>11</sup> [2004] UKHL 12, [2004] 1 WLR 807.

<sup>12</sup> *McCaughey’s Application for Judicial Review* [2011] UKSC 20, [2011] 2 WLR 1279.

then we should follow it.<sup>13</sup> But this does not apply to stray chamber decisions, particularly if we find them hard to understand or difficult to reconcile with others.

And of course this does not necessarily mean the reverse. There is nothing in the Act, or in its purposes, to say that we should deliberately go no further than Strasbourg has gone, or that we should refrain from devising what we think is the right result in a case where Strasbourg has not yet spoken. There is nothing in the Act to support the reluctance shown in *Sheldrake v DPP*<sup>14</sup> to seek such guidance as we can from the jurisprudence of foreign courts with comparable human rights instruments (Canada is the best example), especially on subjects where we do not know what Strasbourg would say. Thus Lord Kerr, dissenting in *Ambrose v Harris*,<sup>15</sup> thought it our duty to work out the answer to a new question on first principles, albeit derived from the Strasbourg jurisprudence.

A third objection to the mirror principle is that there are plenty of indications in the Parliamentary history that another of the objects of the Human Right Act was to enable us to develop our own distinctive United Kingdom approach to the Convention rights. The White Paper, *Rights brought home: the Human Rights Bill*, explained:<sup>16</sup>

‘The Convention is often described as a “living instrument” because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the

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<sup>13</sup> *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 23 (Lord Slynn of Hadley).

<sup>14</sup> [2004] UKHL 43, [2005] 1 AC 264, para 33.

<sup>15</sup> [2011] UKSC 43, paras 128 – 129.

<sup>16</sup> *Rights brought home: the Human Rights Bill*, 1997, Cm 3782, para 2.5.

circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.’

There were also clear statements by the Home Secretary in the House of Commons<sup>17</sup> and the Lord Chancellor in the House of Lords<sup>18</sup> that the courts must be free to develop human rights jurisprudence and move out in new directions. The Home Secretary also said this about the margin of appreciation:<sup>19</sup>

‘Through incorporation we are giving a profound margin of appreciation to British courts to interpret the Convention in accordance with British jurisprudence as well as European jurisprudence. One of the frustrations of non-incorporation has been that our own judges . . . have not been able to bring their intellectual skills and our great tradition of common law to bear in the development of European Convention jurisprudence.’

Lord Bingham himself, then the Lord Chief Justice, told the House that ‘British judges have a significant contribution to make in the development of the law of human rights. It is a contribution which so far we have not been permitted to make.’<sup>20</sup> He even went so far as to quote Milton’s *Areopagitica*: ‘Let not England forget her precedence of teaching nations how to live’. This is quite hard to square with his later reticence in the *Ullah* case.

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<sup>17</sup> *Hansard (HC Debates)*, 16 February 1998, vol 306, col 768.

<sup>18</sup> *Hansard (HL Debates)*, 18 November 1997, vol 583, cols 514-515.

<sup>19</sup> *Hansard (HC Debates)*, 3 June 1998, col 424.

<sup>20</sup> *Hansard (HL Debates)*, 3 November 1997, col 1245.

A fourth reason to doubt the mirror principle is that the reason given for it, in *Ullah* and elsewhere, does not make much sense. The thinking goes back to *Brown v Stott*,<sup>21</sup> Lord Bingham had counselled against implying new rights into the Convention:

‘... 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.’

But that consideration is not one for the national courts to bother about. It may or may not be desirable that the interpretation of the ECHR should be uniform throughout the member states. But anything we decide here is not likely to have any effect in other member states. They probably pay about as much attention to how we interpret the Convention rights as we pay to how they do, which is hardly any attention at all. There is no reason why either Strasbourg or the other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law. Indeed, there is good reason to think that they do not.<sup>22</sup>

Lastly, I have heard it argued that our considerable respect for the Strasbourg jurisprudence is getting in the way of our regarding the Convention as a properly British Bill of Rights, of taking its guarantees as a starting point and working out the proper balance between the competing interests for ourselves.<sup>23</sup> It might even be suggested that if we had paid less attention to the Strasbourg jurisprudence, we would

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<sup>21</sup> [2003] 1 AC 681.

<sup>22</sup> See Nicolas Bratza, ‘The relationship between the UK courts and Strasbourg’ [2011] EHRLR 505, at p 512.

<sup>23</sup> Eg Francesca Klug and Helen Wildbore, ‘Follow or lead? The Human Rights Act and the European Court of Human Rights’ [2010] EHRLR 621.

not have given human rights such a bad name in certain quarters, because we could be seen to be having regard to British values, British mores, and British legal principles.

So we are damned in some quarters whatever we do, whether we follow Strasbourg or whether we do not. But I think we can find several examples of our trying to follow our own rather than a pan-European line.

First, there are those cases where we have definitely gone further than Strasbourg had gone at the time and probably further than Strasbourg would still go. Despite what some politicians have been saying, I would not myself put most of our article 8 cases concerning migrants and their private and family lives into this category, although how they are then applied to particular cases in the first instance tribunals may be another matter. But the exception is *EM (Lebanon)*.<sup>24</sup> This was a case where mother and son risked a flagrant breach of their article 8 rights in the Lebanon: Strasbourg had only so far found a violation on account of the risk of breaches of article 3 in the foreign country and not on account of any of the qualified rights.

Another example is *Limbuela*,<sup>25</sup> where the House of Lords held that it was inhuman and degrading treatment deliberately to reduce certain categories of asylum seeker to utter destitution by denying them both the right to earn their own living and the right to any assistance from the state. Although the dividing line between positive and negative obligations is not clear cut, this did look like creating a species of socio-economic right which, by and large, the Convention does not do.

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<sup>24</sup> *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198.

<sup>25</sup> *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

A third example is the adoption case of *Re G* which I shall come back to for another reason.

Then there are those cases where there may have been an interference with a qualified Convention right, but it is the result of recent legislation, when Parliament was well aware of the arguments, so we have taken a British line. The most obvious example is the *Countryside Alliance* case.<sup>26</sup> During the last administration, more Parliamentary time was spent on the proposals to ban hunting with dogs than on anything else. The resulting legislation was the subject of no less than three distinct challenges in the House of Lords. The first argued that it was not a valid Act of Parliament at all, as it had been passed under the procedure in the Parliament Act 1911 as amended by the Parliament Act 1949, and it was not competent to use the 1911 Act procedure to amend that Act.<sup>27</sup> Once we had decided that against them, the opponents of the Act argued that it was contrary to articles 8, 11, 14 and 1 of the First Protocol. And as a last desperate throw they argued that it was contrary to two of the fundamental rights of EEC law, free movement of goods and free supply of services between member states of the Union. Mostly, we held that the ban did not interfere with these rights at all. But if it did, it was justified. And this was for very British reasons. As Lord Bingham explained, ‘the familiar suggestion that the British mind more about their animals than their children does not lack a certain foundation of fact.’ (para 37). For the supporters of the ban, ‘it was felt to be morally offensive to inflict suffering on foxes (and hares and mink) for sport’ (para 40). He went on,

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<sup>26</sup> *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719.

<sup>27</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

‘ . . . the present case seems to me pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.’

This reasoning convinced Strasbourg that the judgment was within our margin of appreciation.<sup>28</sup> One can imagine that in other European countries, an interference with the time-hallowed right to hunt over other people’s land or shoot tiny song birds for sport would not have been justified.

The test for justification for any interference with the EU rights on grounds of public policy is even stricter. Lord Bingham relied on the well-known *Omega* case from Germany.<sup>29</sup> This was about the laser gun games. The German police had banned the use of laser guns against human targets. This was found justified in Germany (though we do not find it offensive here) because the simulated killing of human beings for fun infringed the fundamental value of human dignity enshrined in the German constitution. Here, Parliament had concluded that the prevention of cruelty to animals in the pursuit of sport was a fundamental British value.

In similar vein was our controversial decision in the *Animal Defenders International* case,<sup>30</sup> which was about our very comprehensive ban on any kind of political advertising. The appellants wanted to show an advertisement on TV showing a child

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<sup>28</sup> *Friend v United Kingdom; Countryside Alliance v United Kingdom* (2010) 50 EHHR SE6.

<sup>29</sup> *Omega Spielhallen-und Automtenaufstellungs-GmbH v Oberburgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

<sup>30</sup> *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312.

chained and caged in the way that chimpanzees and other primates may be chained and caged. Their object was to campaign for a change in the law, which is caught by section 321(3)(b) of the Communications Act 2003. This was clearly an interference with freedom of speech, indeed freedom of political speech, which is the most important of the kinds of speech protected by article 10. It would certainly not be tolerated in the United States of America. But, as I pointed out (para 48),

‘In the United Kingdom, and elsewhere in Europe, we do not want our government or its policies to be decided by the highest spenders. . . . We have to accept that some people have greater resources than others with which to put their views across. But we want to avoid the grosser distortions which unrestricted access to the broadcast media will bring.’

A fair balance had to be struck between freedom of speech and the protection of our democracy based upon the equal value of everyone, rich and poor. Parliament had struck that balance recently and its view should be respected (notwithstanding a chamber decision which pointed the other way).

You can see these cases as examples of our bowing – or surrendering – to the recent judgment of Parliament as to how the balance between the competing private rights and public interest should be struck. But I would also see them as striking the balance in a very British way. Another example of striking the balance in a very British way, this time despite the reluctance of the national Parliament to do so, is the Northern Ireland case of *Re G*.<sup>31</sup> The claimants were an unmarried opposite sex couple who

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<sup>31</sup> *G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173.

wished jointly to adopt the woman's 10 year old daughter. English law and Scottish law have both now permitted joint adoptions by unmarried couples, whether of the same or opposite sexes.<sup>32</sup> But Northern Ireland retained the old law,<sup>33</sup> which restricts joint adoptions to married couples (and even failed to include civil partners when the Civil Partnership Act 2004 was passed). Single people, whether or not they are in a stable opposite or same sex relationship, can adopt alone but the child will not become their partner's child or a member of their partner's family. While Northern Ireland was still under direct rule from London, civil servants produced an impressive review which concluded that the law should be brought into line with the rest of the UK. Consultation had produced some strong opposition, mainly from the Protestant churches, and particularly to adoption by same sex couples. But the review found good reasons to reject all of their arguments. Then devolution happened and the relevant Minister in the Northern Ireland government had not yet made a decision about what to do. It does not take much imagination to realise how difficult it must be for any elected politician in Northern Ireland to take such a step.

We decided, not without some hesitation on my part, that the ban was contrary to article 14 of the ECHR, which prohibits unjustified discrimination in the enjoyment of the Convention rights, in this case the right to respect for the family life which the child, her mother and her step-father enjoyed together. While there may often be good reasons not to allow an unmarried couple to adopt, it is difficult to find good reasons for a blanket ban. It is, as Lord Hoffmann put it, to turn a reasonable generalisation into an irrebuttable presumption.<sup>34</sup> Bright line rules may be appropriate in some cases, but not where the object is to promote the welfare of children. There could well be

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<sup>32</sup> Adoption and Children Act 2002; Adoption and Children (Scotland) Act 2007.

<sup>33</sup> Article 14 of the Adoption (Northern Ireland) Order 1987.

<sup>34</sup> [2008] UKHL 38, [2009] 1 AC 173, para 20.

cases, especially where the child was already living with the couple and had no contact at all with the other half of her birth family, where adoption by them both would be better for the child than the status quo.

This was a case on which Strasbourg had not yet spoken. The court had recently held, in a change of mind, that refusing to allow adoption by gay and lesbian people was incompatible with article 14.<sup>35</sup> But here the issue was whether a ban on joint adoptions by unmarried couples, whether of the same or opposite sexes, was incompatible. Two of us were by no means sure that Strasbourg would find that it was: the European Convention on Adoption was still restricted to married couples and in the Republic of Ireland, the married family was protected by the Constitution. It seemed unlikely to me that Strasbourg would oblige the Irish to allow unmarried couples to adopt. But we were in the United Kingdom. Our paramount principle is the welfare of the child. The blanket ban could not be reconciled with that principle. So we declared it unlawful for the courts in Northern Ireland to refuse to accept an adoption application on the sole ground that the applicants were not married to one another. We could do that, rather than making a declaration of incompatibility, because the law was contained in delegated legislation.

That case led me to change my own position a little on our relationship with the legislature. In *DS v HM Advocate*<sup>36</sup> I had suggested that ‘the legislature can get ahead of Strasbourg if it wishes and so can the courts in developing the common law. But it is not for us to challenge the legislature unless satisfied that the Convention rights, as

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<sup>35</sup> *Fretté v France* (2002) 13 BHRC 187, it was held by a narrow majority that refusing to allow a single gay man to adopt on his own was justified. But in *EB v France* (2002) 38 EHRR 438 it was held that refusing to allow a single lesbian woman to adopt was not.

<sup>36</sup> [2007] UKPC 36, [2007] HRLR 28, para 92.

internationally agreed and interpreted in Strasbourg, require us to do so.’ Also in *Animal Defenders International*,<sup>37</sup> I declared that ‘I do not believe that, when Parliament gave us these novel and important powers . . . it was giving us the power to leap ahead of Strasbourg in our interpretation of the convention rights.’ It is tempting to draw a distinction between leaping ahead of Strasbourg when developing the common law<sup>38</sup> and leaping ahead of Strasbourg in telling Parliament that it has got things wrong. It is in the latter context that most of the strongly *Ullah* type statements have been made. Yet the concept of the ‘Convention rights’, upon which all our powers and duties under the Human Rights Act depend, cannot mean different things depending upon whether we are developing the common law, controlling the executive, or assessing the legislation. I now think that it is more a question of respect for the balances recently struck by the legislature than a question of the extent of our powers. One reason for this is that an aggrieved complainant can always go to Strasbourg if she disagrees with our assessment, but the United Kingdom cannot.

But all these cases were about the justifications for interferences with qualified rights, on questions which Strasbourg might very well hold to be within our margin of appreciation – indeed, where arguably they should do so even if they sometimes might not. We cannot then decline to decide the case on the basis that Strasbourg has not yet spoken. We have to make the best judgment we can about the balance between the competing interests. It does seem, from the materials quoted earlier, that Parliament intended us to do our best to interpret the Convention rights in accordance with British conditions and British values. That was certainly the view I took in *Re G*.

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<sup>37</sup> Para 53.

<sup>38</sup> Lewis’ argument was concerned with developing the common law, not with finding legislation incompatible.

But what about the reverse situation, where we think that Strasbourg has gone too far, and failed to take proper account of our legal traditions here? Jury trial does not sit comfortably with all the requirements of article 6. But neither does the continental inquisitorial practice, in which the defendant may not get an opportunity to challenge everything which is in the dossier compiled against him. The Criminal Justice Act 2003 provides for the admissibility of hearsay evidence in certain circumstances, including when the person making a witness statement has since died. In *Al-Khawaja*,<sup>39</sup> a Chamber of the Strasbourg court held that it was a breach of article 6 where this was the sole and decisive evidence against the defendant – even though there was ample corroboration for what the deceased victim had said. So when the same problem came up before the Supreme Court in *Horncastle*,<sup>40</sup> the Court went to a great deal of trouble to explain to Strasbourg why we thought they were wrong, and that a fair trial could still be had in those circumstances. The object was to persuade the Grand Chamber to hear the *Al-Khawaja* case, and to reach a different conclusion. Well, they have heard the case, but we do not yet know what their conclusion will be.

If they maintain their stance, what will we do when the question next comes before us? We have not so far, at least to my knowledge, ever disagreed with – or failed to apply – a decision of the Grand Chamber which is directly in point or even a ‘clear and constant’ line of chamber decisions. (That is why, in the end, we had to give in and hold that tenants of social housing with no right to remain there in domestic law had nevertheless to have the opportunity of persuading a court that it would be disproportionate to evict them.<sup>41</sup>) So there would be three choices. First, we could meekly go along with it and engage in some heroic interpretation of the 2003 Act to

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<sup>39</sup> *Al-Khawaja v United Kingdom* (2009) 40 EHRR 1.

<sup>40</sup> *R v Horncastle* [2009] UKHL 14, [2010] 2 AC 373.

<sup>41</sup> *Manchester City Council v Pinnock* [2011] UKSC 6, [2011] 2 AC 104.

make it compatible with the Convention rights. How far section 3(1) of the Human Rights Act allows us to go in that direction is a large topic for another day. But I sense some reluctance among my colleagues to go as far as the boldest cases, including *MB*, have gone in the past. So I think that we would not do that. Second, we could meekly go along with it and make a declaration of incompatibility under section 4. Third, however, we could politely decline to make a declaration of incompatibility on the ground that we do not agree with the Strasbourg decision. *Argentoratum locutum: iudicium non finitum*.

#### *Strasbourg's approach to us*

But what of the Strasbourg court itself? The newly elected President, Sir Nicolas Bratza, has mounted a serious defence of the relationship between us.<sup>42</sup> He points out that last year there were around 1,200 applications to Strasbourg from the UK, the great majority of which were declared inadmissible or struck out. Only 23 resulted in a judgment of the Court and in several of these there was no violation found. He argues that they have shown themselves receptive to arguments that they have misunderstood national law or given insufficient weight to national traditions or practices; they do pay close regard to the particular requirements of the society in question; even if they find a violation, they tend to leave it to the national authorities to decide how to put it right – the most obvious example being the prisoners' voting case.<sup>43</sup> Nevertheless, he believed that there were things they could do to ensure greater harmony between national courts and Strasbourg.

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<sup>42</sup> 'The relationship between the UK courts and Strasbourg' [2011] EHRLR 505..

<sup>43</sup> *Hirst v United Kingdom* (2006) 42 EHRR 41.

The Court might perhaps show greater awareness of the consequences of its judgments for the law and practice in *other* member states than the one against which the complaint has been made. But the other member states could help by intervening more often to point these out. Second, where it was necessary to strike a balance between competing Convention rights, they should be particularly cautious about interfering with the way in which the national courts have struck the balance when they have been applying the Convention principles and have reached a decision which is ‘on its face reasonable and not arbitrary’. Third, while the case law should evolve to deal with new factual and legal situations, ‘it is equally important that the Court should show respect for precedent and recognise the vital need for consistency’. After all, that is what it expects of national legal systems, so it should show the same respect for legal certainty itself.

Last, in his view, there is room for increased dialogue between the courts, both informally and in our judgments. The mirror principle in *Ullah* and *Al-Skeini* can suggest a position of deference from which it is difficult to have an effective dialogue. It is right for national courts consciously to leap ahead of Strasbourg – and he cited the three examples I gave earlier. Equally it is right and healthy for national courts to feel free to criticise Strasbourg where their judgments have applied principles which are unclear or inconsistent or where they have misunderstood national law or practices. ‘But I also believe that it is important that the superior national courts should, as Lord Phillips put it in the *Horncastle* judgment, on the rare occasions where they have concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of the domestic process, “decline to follow the Strasbourg decision, giving reasons for adopting this course”.’

Currently under discussion between the politicians, of course, is whether the treaty should be amended so as to allow the Member States some way out when there is a serious disagreement between their national Parliament and the Strasbourg court, as currently there is here about prisoners' voting rights. That is a matter for the politicians and certainly not my concern as a judge. But as a judge I am intrigued and encouraged indeed to know that *Argentoratum locutum, iudicium finitum* is not in fact how the President and his fellow judges view the respective roles of our two courts. I think that there is room for us to develop a distinctively British human rights jurisprudence without overstepping the boundaries which Parliament has set for us. It is just as likely to lead to our respecting the recent judgments of Parliament as it is to our declaring them incompatible. We may look forward to an even more lively dialogue with Strasbourg in future.