Interpretation of Convention rights: Human Rights Act 1998 s2

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The drafting of the Human Rights Act 1998 ("HRA 1998") has been commended rightly for its aesthetic simplicity. This includes s.2 (interpretation of convention rights) (quoting in part):

> (1) 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 … 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.

The important statutory provisions are, first, "take into account", and, secondarily, "in the opinion of the court or tribunal". The hierarchy of legal materials in paras (a) to (d) of s.2(1) (not quoted fully above), is surely a parliamentary pointer to significant domestic judicial discretion about international law. Strangely, it took some time for domestic courts to properly construe s.2 of the HRA 1998, but practice appears now to have settled down.

The law as stated in this article is accurate for England and Wales, Scotland and Northern Ireland.

Overview of Topic

1. From late 2000, English courts tended to follow Strasbourg jurisprudence as if it was simply a superior court in human rights law. There were judicial mutterings about Strasbourg principles being difficult to understand, but nothing more. Then, for a variety of reasons (mentioned below), there was a quiet judicial *émeute* in 2009. A number of Supreme Court cases - examined in this article - presaged a proper statutory construction of s.2. But, at root, there remains, for judges and practitioners, the constitutional problem of legal dualism, as long as the HRA 1998 continues to be the statutory means to international human rights protection in the three jurisdictions of the United Kingdom.

2. This article:
   - begins with a consideration of the Strasbourg system;
   - looks at the intention behind s.2(1) of the HRA 1998;
   - pauses to delineate the wider constitutional context;

- moves to a discussion of three Supreme Court cases (covering the three jurisdictions of the United Kingdom): *R. v Horncastle (Michael Christopher) [2009] UKSC 14; [2010] 2 A.C. 373* (the criminal cross-examination case: art.6(3)(d)); *Reilly's Application for Judicial Review, Re [2013] UKSC 61; [2013] 3 W.L.R. 1020* (the oral hearing case: art.5.4); and *R. (on the application of Chester) v Secretary of State for Justice [2013] UKSC 63; [2013] 3 W.L.R. 1076* (a prisoners' votes case: art.3/protocol 1); and

- concludes by pointing to the authority which allows United Kingdom UK judges to diverge from their colleagues in Strasbourg certainly on questions of criminal law: *R. (on the application of Hallam) v Secretary of State for Justice [2019] UKSC 2; [2019] 2 W.L.R. 440*.

The Strasbourg system

3. One begins with the Council of Europe ("COE"), established in 1949 (by the treaty of London) - as a region in the new, post-war international order. The COE was to comprise: a committee of ministers; a consultative (later parliamentary) assembly; and a secretariat based in Strasbourg.

4. We are on the plane of international law, governing relations between states … with the United Kingdom (UK) being a dualist state, where parliament - in the case of international agreements - has to transform such laws into domestic legal rules before they take effect. This does not apply to customary international law, where most of the rules are found, which is incorporated into domestic law automatically, as it were - though these rules have to be recognised by domestic courts: *R. v Keyn (Ferdinand) (The Franconia) (1876) 2 Ex. D. 63*; *Trendtex Trading Corp v Central Bank of Nigeria [1977] Q.B. 529*; *Parlement Belge, The (1879) 4 P.D. 129*.

5. The Member States of the COE went on to agree the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") in 1950, and this European instrument entered into force - as between Member States - on 23 September 1953. The human rights were specified in (now) arts 1 to 18 and a number of later protocols. The ECHR provided uniquely then for a European court of human rights ("ECtHR"), which was to open - in Strasbourg - in 1959. Member States then had to opt in, giving their residents the right to apply to the ECtHR (it was also a little-used inter-state court), which the UK did - by executive act - in 1966. The jurisprudence of the ECtHR, which developed from the 1970s, embodied the doctrine of subsidiarity from an early stage: Strasbourg existed to promote human rights in each Member State, not to be an international court managing, as it would turn out, 47 - mainly civil - justice systems in Europe. Protocol No. 15 (inspired largely by the UK) - which entered into force on 1 August 2021 - makes clear, through the preamble to the ECHR, how the principles of "subsidiary" and "margin of appreciation" apply to Strasbourg jurisprudence. Meanwhile, the ECtHR continues to aim for consistency in its case law. This is subject to the doctrine of a "living instrument". Consistency is certainly across Member States (even given the doctrine of margin of appreciation). But there have never been rules of precedent in international human rights law, unlike in the UK's domestic law.

The Human Rights Act 1998

6. This received Royal Assent on 19 November 1998. It is customary, even among judges, to refer to the incorporation of the ECHR into domestic law. Strictly, the ECHR remains in international law, as do the convention rights (designated in s.1 of the statute). The convention rights are not rules of English (and Welsh), Scottish or Northern Ireland law. And this has implications for Strasbourg case law.

7. The long title of the statute refers to giving "further effect" in the UK to the ECHR. This is correct, because the ECHR had a limited effect pre-2 October 2000, when the HRA 1998 entered into force. But it is a case of international law having further effect domestically, because Parliament permits it. Arguably, international human rights have no direct effect through the common law because Parliament has enacted the HRA 1998 to do the job.

8. The original architects of the HRA 1998, among the Parliamentary opposition, in the early 1990s, had envisaged two stages for human rights law: first the incorporation (as it was dubbed) of the Strasbourg convention; followed by a full domestic bill of rights in the UK. In 1999, Robert Blackburn, a legal academic in London, published a book: "Towards

a Constitutional Bill of Rights for the United Kingdom". The introduction deals with: '"The Human Rights Act: The first step towards a constitutional Bill of Rights for the UK".

9. But what of the Bill which went through parliament in 1997-98? On 18 November 1997, Lord Kingsland QC, the shadow Lord Chancellor, had proposed unsuccessfully, that "must take into account", in the original clause 2(1), should be replaced by "shall be bound by" (House of Lords, Hansard, vol. 583, cols 511-516. See also, 19 January 1998).

10. He was trying to stop cases going on to Strasbourg subsequently, though opponents accused him of being "more European than the Europeans". Lord Lester of Herne Hill QC made the point that, under art.46(1), the UK - in international law - was bound only by decisions adverse to the UK. In the Commons, on 3 June 1998, James Clappison MP proposed, again unsuccessfully - and going in the opposite direction - that UK judges "may take into account any" judgments, etc. (House of Commons, Hansard, vol. 313, cols 388-413).

11. The concern was now the possibility of UK human rights law, which was more than the law prescribed by Strasbourg: "We want our approach to be within the general framework of the jurisprudence of the European Court, but not to be too tightly bound by it".

12. The Lord Chancellor in 2003 was Lord Irvine of Lairg. He was largely responsible for the HRA 1998, as a minister, while serving also as speaker of the House of Lords, and (triply) as head of the English judiciary.

13. Yet, it was not until 14 December 2011, and in a lecture at a London university, that Lord Irvine expounded the intentions behind s.2 in "A British Interpretation of Convention Rights":

> This Lecture invites[s] our Supreme Court to re-assess all its previous statements about the stance it should adopt in relation to the jurisprudence of the EC[t]HR. My objectives are: (a) to ensure that the Supreme Court develops the jurisdiction under the HRA that Parliament intended; (b) that, in so doing, it should have considered and respectful regard for decisions of the EC[t]HR, but neither be bound nor hamstrung by that case-law in determining Convention rights domestically; that, ultimately, it should decide the cases before it for itself; (d) that if, in so doing, it departs from a decision or body of jurisprudence of the EC[t]HR it should do so on the basis that the resolution of the resultant conflict must take effect at State, not judicial, level; and (e) by so proceeding, enhance public respect for our British HRA and the development and protection of human rights by our own Courts in Britain [sic].

14. This was not even extra-judicial, eight years after Lord Irvine's resignation, but it articulated clearly - without much fanfare - what senior judges had been thinking, and beginning to say, more recently, extra-judicially and even judicially. The key to the Lord Irvine view is: there would, of necessity, be differences, and even conflicts, involving UK and Strasbourg judges; but the resolution of the resultant conflict, was to be through the committee of ministers of the COE. Lord Irvine, maybe because of his three roles, grasped well the two levels of domestic and international law, and their inter-relationship.

15. The Irvine lecture was published subsequently: A British interpretation of Convention rights P.L. 2012, Apr, 237-252. It produced a flurry of, mainly academic, responses. The most interesting was from Sir Philip Sales (now a Justice of the Supreme Court): Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine P.L. 2012, Apr, 253-267.

Constitutional context

16. Four points need to be appreciated parenthetically before we consider the Supreme Court cases below.

17. First, the idea of a dualist, as opposed to monist, state. Dualism is a rule of the common law. It perceives international law as out there, because that is the law of states, or nations as it used to be called. I have already indicated the distinction

between the incorporation of customary international law (through recognition), and the transformation of bilateral, and multilateral, agreements into domestic rules of law by Parliament.

18. Second, Strasbourg operates on the plane of international law. This is true of, by analogy, its executive, legislative and judicial branches. But the COE is a particular type of international institution:

> The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

(Statute of the Council of Europe, art.1(a)).

19. Third, domestic law is everything within the UK, even if it is compounded by the existence of English (and Welsh) law, Scots law and Northern Ireland law, with a mismatch between devolution and jurisdiction (the problem of Wales), and more recently articulated UK law, upheld ultimately by the Supreme Court, a 21st-century UK institution.

20. And fourth, the Strasbourg system, though it operates in international law, bears no comparison with the European Union ("EU"). With 27 of the COE's 47 Member States, the EU sounds simply more organised:

> By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION … on which Member States confer competences to attain objectives they have in common (TEU, article 1).

The significant difference, however, lies in the jurisprudence of the court of justice of the EU, at Luxembourg; from the early 1960s, it developed the idea of a new European legal order; the European Communities Act 1972 preserved parliamentary sovereignty in the UK, but EU law, pace Lord Denning, remained an incoming tide flowing into the estuaries and up the rivers of England (sic) (*HP Bulmer Ltd v J Bollinger SA (No.2) [1974] Ch. 401* para.418). This was the position, until the UK left the EU finally on 31 December 2020.

21. Why did domestic law, which included lawyers who understood Strasbourg consistency (and inconsistency!), get itself into the rut of national and international precedent, with (if one starts in the county court) Strasbourg being possibly a fourth level of appeal?

22. The answer involves a dynamic combination of the following factors:

- one, the role of counsel in citing Strasbourg "authorities" - for and against - in court (on which there was an early judicial warning: *Williams v Cowell (t/a The Stables) (No.1) [2000] 1 W.L.R. 187* (Mummery L.J. [Nourse L.J. agreeing]);
- two, the human rights community, in the form of statutory quangos, non-governmental organisations and human rights professors - a pretending fourth branch of government;
- three, busy judges, using Strasbourg "authorities" inappropriately to justify interlocutory or final decisions;
- four, the considerable authority of Lord Bingham, as senior law lord (2000-08), when he put forward the doctrine of "no more, but certainly no less" as regards national courts keeping pace with Strasbourg: *R. (on the application of Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 A.C. 323*, para.20; and
- five, a formidable array of extra-judicial utterances after Lord Bingham (and going the other way), by the most senior judges, often in keynote lectures, where the tendency was to query Strasbourg, to a greater or lesser extent; in date order, I refer to: Lord Hoffman, judicial studies board annual lecture (19 March 2009); Lord Judge CJ, judicial studies board annual lecture (17 March 2010); Lord Kerr, Clifford Chance lecture (25 January 2012); Lord Sumption, Kuala Lumpur (20 November 2013); Laws L.J., Hamlyn trust lecture (27 November 2013); and - reversing the counter-tendency - Baroness Hale, Warwick University (28 November 2013); Lord Neuberger (resuming the counter-tendency), Cambridge Freshfields annual law lecture (12 February 2014); Lord Neuberger, Supreme Court of Victoria, Australia (8 August 2014).

Case one

23. *R. v Horncastle (Michael Christopher) [2009] UKSC 14; [2010] 2 A.C. 373*: if the prosecution relies solely or decisively upon the evidence of a witness, who is absent or dead (that is upon these forms of hearsay evidence), may a criminal defendant trump this with the right to cross-examine, guaranteed by art.6(3)(d), leading to acquittal?

24. On 20 January 2009, Strasbourg said yes in two UK cases - *Al-Khawaja v United Kingdom (26766/05) (2009) 49 E.H.R.R. 1* and *Tahery*. It was against hearsay evidence, if it solely or decisively led to conviction. Subsequently, the UK requested the referral of these two cases to the grand chamber.

25. Meanwhile, on 24 March 2009, a special five-judge Court of Appeal heard the three cases of Horncastle and others (one of whom was to succeed): *R. v Horncastle (Michael Christopher) [2009] UKSC 14; [2010] 2 A.C. 373*. Counsel argued that Strasbourg had to be followed. The Court of Appeal did not agree, on 22 May 2009, Thomas L.J. giving the sole judgment. But - stressing the new statutory code on admissibility, in the Criminal Justice Act 2003 - it certified points of law of public importance, including whether a conviction based upon such hearsay evidence was necessarily unsafe.

26. A special seven-judge appellate committee of the House of Lords heard the appeals on 7 and 8 July 2009, though it would be the new Supreme Court which decided the case on 9 December 2009: *R. v Horncastle (Michael Christopher) [2009] UKSC 14; [2010] 2 A.C. 373*. Lord Phillips gave the sole judgment. The Supreme Court upheld the Court of Appeal, declining to follow *Al-Khawaja* and *Tahery* (and, perhaps more significantly, *Secretary of State for the Home Department v F [2009] UKHL 28; [2010] 2 A.C. 269*, decided on 10 June 2009 by the House of Lords, which, at Strasbourg, had turned on another sole and decisive evidential rule, regarding closed material in civil proceedings).

27. Lord Phillips strongly criticised Strasbourg jurisprudence on fair criminal procedure and held that the common law (in England and Wales) was superior, courts being able to consider hearsay evidence and, indeed, convict upon it solely or decisively:

> The regime enacted by Parliament contains safeguards that render the sole or decisive rule unnecessary … The continental procedure had not addressed that aspect of a fair trial that article 6(3)(d) was designed to ensure … The sole or decisive rule has been introduced into Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions.

(para.14)

28. *Al-Kawaja* and *Tahery* was referred to the grand chamber, on 19 May 2010, partly as a result of *Horncastle*. The grand chamber considered the case, on 9 November 2011. The judgment published the following month showed heavy reliance upon *Horncastle*. The ECtHR reversed its position on *Al-Khawaja* (where the sexual complainant had committed suicide), but upheld the earlier decision on *Tahery* (where the witness of a stabbing claimed to be in fear). Sir Nicholas Bratza, the UK judge, and the incoming president of the ECtHR, concurring (and changing his mind), discussed Lord Phillips's judgment, accepting that Strasbourg had applied its "sole or decisive test" inflexibly. He conceded that this was a good example of "judicial dialogue", between national judges and the ECtHR. This relationship had not been envisaged in the ECHR.

29. Lord Phillips revealingly commented on the Supreme Court's circumventing of the Bingham dictum in *Ullah* after he retired:

> … as usual, there has been a tendency to treat the word of Lord Bingham as the last word on the topic. However, in a case called *Horncastle*, we declined to follow a decision of the Strasbourg court …, explaining courteously why we were doing so, and inviting Strasbourg to think again … Nicholas Bratza … commended our approach as representing a valuable dialogue between the Supreme Court and the Strasbourg Court.

(10th Slynn Foundation lecture, Clifford Chance, 12 November 2012).

Case two

30. *Reilly's Application for Judicial Review, Re [2013] UKSC 61; [2013] 3 W.L.R. 1020*: Three separate criminal appeals were consolidated, including one from Northern Ireland ("NI"). They concerned the parole board of England and Wales. In the third appeal, James Reilly, a transferred prisoner in NI, who had been refused an oral hearing before the parole board, appealed successfully to Treacy J. (who was reversed in the Court of Appeal in Belfast), relying upon inter alia art.5.4.

31. The Supreme Court allowed all three prisoner appeals, relying upon the common law and effectively relegating the ECHR and Strasbourg jurisprudence.

32. The WLR headnote reads (citing paras 2 and 54 to 63):

> that the protection of human rights was not a discrete area of the law, based on the jurisprudence of the [ECtHR], but permeated the domestic legal system; that compliance with article 5.4 had, in the first place, to be compliance with the relevant substantive and procedural rules of domestic law; that in order to comply with common law standards of procedural fairness, the board was required to hold an oral hearing before determining an application for release, or transfer to open conditions, whenever fairness to the prisoner required it in the light of the facts of the case and the importance of the issues at stake; that by so doing the board would also fulfil its duty under section 6 of the Human Rights Act 1998 to act compatibly with article 5.4 and that, accordingly, the claimants' approach in focusing on the case law of the European court was erroneous.

33. The Supreme Court effectively came out against Strasbourg micro-managing of the UK's justice systems (there being three). Lord Reed JSC, with whom the other four justices agreed, surveyed, for the first time, in paras 54 to 63, the relationships between domestic and international law: "The Convention taken by itself is too inspecific [sic] to provide the guidance which is necessary in a state governed by the rule of law" (paras 55-56).

34. In a pithy phrase, Lord Reed referred to the ECHR: "The Convention cannot … be treated as if it were Moses and the prophets" (para.56). This dictum deserves wider legal proclamation.

Case three

35. *R. (on the application of Chester) v Secretary of State for Justice [2013] UKSC 63; [2013] 3 W.L.R. 1076*: The background to this case was set in Strasbourg by: *Hirst v United Kingdom (74025/01) (2006) 42 E.H.R.R. 41* (plus: *Greens v United Kingdom (60041/08) (2011) 53 E.H.R.R. 21*; and *Scoppola v Italy (126/05) [2013] 1 Costs L.O. 62*) (a lifetime ban on voting if sentenced to five years or more, lawful)) - the original prisoners' votes case, where Strasbourg had held that the UK's blanket ban on all those sentenced was a violation of protocol 1/art.3 ("free elections at reasonable intervals"); and a free vote of the House of Commons - not Parliament - , on 11 February 2011, when MPs, from the government and opposition, by 234 to 22, had supported a motion stating that "legislative decisions of this nature should be a matter for democratically elected lawmakers".

36. Peter Chester was serving a life sentence for murder. So too was George McGeoch, a second, Scottish, appellant. If there had not been a blanket ban, Parliament would have, almost certainly, not extended the right to vote to them.

37. The seven-judge Supreme Court, actively innovative, held here that it had to follow Strasbourg on the blanket ban. (*Horncastle* was cited, but not *Reilly's Application* - decided the week before). This meant *Hirst* in 2005, and *Scoppola* in 2012. There was no prospect of further meaningful dialogue, said Lord Mance (giving the lead judgment), not between UK and Strasbourg judges, but simply the UK (at executive level) and the Strasbourg court. According to the headnote, "prisoner voting did not involve some fundamental aspect of domestic law such as would justify the Supreme Court refusing to apply those decisions of the European Court". But prisoner voting was the ground on which a major tussle was being enacted! Lord Mance was arguably wrong.

38. The Supreme Court, exercising its discretion, declined to make a declaration of incompatibility, for the following headnoted reasons:

> ... in circumstances where a declaration of incompatibility had already been made in other domestic proceedings, the matter was under active consideration by Parliament and the European court would without doubt uphold a ban depriving murderers serving sentences of life imprisonment of the right to vote, it would not be appropriate for the court to exercise its discretion to grant a declaration of incompatibility.

39. Messrs Chester and McGeoch came away with little. Lord Sumption was scathing:

> The protection of minorities is a necessary concern of any democratic constitution … Prisoners belong to a minority only in the banal and legally irrelevant sense that most people do not do the things which warrant imprisonment by due process of law (para.112).

Baroness Hale took a gender point: Peter Chester had murdered his niece (George McGeoch's victim being presumably male): she thought that their human rights were not even engaged (both appellants being outside *Scoppola*).

40. The Attorney-General, Dominic Grieve QC, failed to persuade the Supreme Court not to follow Strasbourg. It appears that the UK's failed intervention in *Scoppola*, and the "no further meaningful dialogue" argument, led to this conclusion. But Lord Mance was surely on weaker ground, when he held: "while the diversity of approach in this area within Europe derives from different traditions and social attitudes, it makes it difficult to see prisoner disenfranchisement as fundamental to a stable democracy and legal system such as the United Kingdom enjoys" (para.35). But, again, minor issues can become decisive.

41. George McGeoch also took an EU law point, relying upon the charter of fundamental rights, but Lord Mance held there was no right to vote equivalent to that in the ECHR.

42. The tussle between the UK and Strasbourg was finally resolved on 7 December 2017, when the then justice secretary, David Lidington, agreed to a tiny breach in the no votes for prisoners position: those on temporary release and at home under curfew would be permitted to vote (if they wanted to). The principle was big, according to UK politicians; but the number of prisoners actually deprived of a vote had been small. Strasbourg accepted this fig- leaf concession

Recent domestic cases

43. The effects of the Supreme Court's initiative, between 2009 and 2013, became visible further down the judicial hierarchy. Two cases from early 2014 suggested that the Court of Appeal was now treating Strasbourg as less authoritative.

44. In *R. (on the application of Hicks) v Commissioner of Police of the Metropolis [2014] EWCA Civ 3; [2014] 1 W.L.R. 2152*, a case concerning the preventative detention of some anti-royalist protestors, the Court of Appeal, while applying two well-known Strasbourg cases, decided not to follow a more recent, and factually similar, third case from Germany. The court also used domestic law to construe the provisions of art.5(1)(c) (lawful arrest or detention).

45. Perhaps more significantly, in *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2014] EWCA Civ 312; [2014] 3 W.L.R. 948*, another division of the Court of Appeal, again with Maurice Kay L.J. in the chair, helped push back Strasbourg. Here, the applicants from Malaysia, wanted a statutory inquiry into the deaths of relatives in 1948 at the hands of British soldiers. The court of appeal, applying the art.2 procedural right, accepted that the appellants would probably succeed in Strasbourg. It, however, applied the HRA 1998, and domestic case law about art.2 procedural being available from only 2 October 2000. The court went even further: any duty to investigate, arising within customary international law (and therefore the common law), was trumped by domestic statute law.

46. The Court of Appeal decision must now be read with the Supreme Court's judgment of 25 November 2015: *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] A.C.*

1355. The appellants failed again, but the Supreme Court, treating art.2 procedural as applicable, relied upon 1948 being simply too long ago.

47. One first instance decision, of Kerr J. in the Administrative Court, deserves noting: *R (on the application of Minto Morrill Solicitors) v Lord Chancellor [2017] EWHC 612 (Admin)*. The facts related to solicitors preparing Strasbourg applications and seeking legal aid under different statutes. Construing statutory provisions, Kerr J. had cause to criticise judicial references to incorporation of human rights as incorrect: the convention rights were not part of the law of England and Wales. In passing, he stated: "The domestic courts are not bound by decisions of the ECtHR, though they must take them into account". (para.24) One wonders why it took so long!

48. This view was echoed in the dicta of Singh L.J., in *Secretary of State for the Home Department v Onuorah [2017] EWCA Civ 1757*, paras. 37; "In my view, the legal position has now been authoritatively settled by this Court. Although this Court has an obligation under section 2(1) of the HRA to take into account any relevant decision of the European Court of Human Rights or the former European Commission for Human Rights, we are normally bound by former decisions of this Court, in accordance with the domestic law principle of precedent" (see also paras 56-60).

49. See also Lord Carnwarth in *Poshteh v Kensington & Chelsea [2017] UKSC 36*, para. 36; "Our duty under the Human Rights Act 1998 section 2 is to "take account of" the decision of the court. There appears to be no relevant Grand Chamber decision on the issue, but we would normally follow a "clear and constant line" of chamber decisions (see *Manchester City Council v Pinnock [2010] UKSC 45; [2011] 2 A.C. 104*, para 48). This might perhaps be said of some of the previous decisions referred to in the judgment, including most recently *Tsfayo v United Kingdom (2006)* in which the application of article 6 was conceded by the government. However, it is apparent from the Chamber's reasoning....that it was consciously going beyond the scope of previous cases. In answer to Lord Hope's concern that there was "no clearly defined stopping point" to the process of expansion, its answer seems to have been that none was needed. That is a possible view, but one which should not readily be adopted without full consideration of its practical implications for the working of the domestic regime."

Divergence?

50. Perhaps the leading case on s.2 will become: *R. (on the application of Hallam) v Secretary of State for Justice [2019] UKSC 2; [2019] 2 W.L.R. 440*. This was heard by seven Supreme Court justices in May 2018. There were seven separate judgments on 30 January 2019, with five against the appellants and two (Lords Reed and Kerr) dissenting. It involves criminal law, where the UK has diverged from civil law member states of the COE.

51. According to art.6(2) of the ECHR there is a presumption of innocence. One is innocent up until conviction by a criminal court, and, if that conviction is set aside (for whatever reason), the state of innocence returns. However, s.133 of the Criminal Justice Act 1988 (as amended by s.175 of the Anti-social Behaviour, Crime and Policing Act 2014), states: "(1) … when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation…". The secretary of state submitted - because of the statutory definition of "miscarriage of justice" in s.133(1ZA) - that the applicant for compensation had to prove that he was innocent of the crime of which he had been convicted (and not simply that the conviction was unsafe).

52. The Supreme Court, by a majority, deferred to parliament and the wording of the statute, finding fault with Strasbourg's presumption of innocence.

53. Lord Wilson (speaking for himself) put it dramatically: "My view is that the present appeals place the court in a deeply uncomfortable position. We afford profound respect to the decisions of the ECtHR and recognise its unparalleled achievements in raising the standards according to which member states of the Council of Europe, undoubtedly including the UK, must treat their people. I am, however, persuaded that, in its rulings upon the extent of the operation of art.6(2) of the Convention, the ECtHR has, step by step, allowed its analysis to be swept into hopeless and probably

irretrievable confusion. An analogy is to a boat which, once severed from its moorings, floats out to sea and is tossed helplessly this way and that." (paras.83-85). Tossed helplessly this way and that is another dictum worth proclaiming.

54. Hallam's case was cited in: *R v Abdurahman (Ismail) [2019] EWCA Crim 2239 [2020] 4 WLR 6*, an unsuccessful second criminal appeal against conviction with judgment on 17 December 2019. The appellant had failed to have excluded an early witness statement he had made. Strasbourg found in favour of Mr Abdurahman, and the Criminal Cases Review Commission referred the case back to the Court of Appeal. The appellant relied on this violation of art.6 found by the ECtHR grand chamber, and claimed he did not fall into either of the two exceptions preventing the quashing of a conviction: Strasbourg misapprehension about domestic law; and overwhelming evidence. The Court of Appeal - despite this - dismissed the second appeal. On the facts, the police had properly restricted his access to lawyers, because they were pursuing a terrorist bomber. On the law: 'The degree of constraint the Strasbourg jurisprudence imposes is context-specific. Even where the Grand Chamber had endorsed a line of authority, it is not necessary for the domestic court to conclude that it involved an "egregious" oversight or misunderstanding before declining to follow it' (para 110).

The other side of Lord Bingham's dictum

55. Reference was made above to Lord Bingham's dictum of 2004: "no more, but certainly no less". The cases discussed here have been concerned with the "certainly no less". But there has been one Supreme Court case which addresses the "no more" aspect: *R (on the Application of AB) v Secretary of State for Justice [2021] UKSC 28 [2021] 3 WLR 494*.

56. AB had served 55 days of a 12-month detention in a young offender institution in solitary confinement. He alleged a violation of art.3. He failed in the High Court, in the Court of Appeal and again in the Supreme Court. There was no Strasbourg authority exactly in point. His counsel argued in the alternative: one, solitary confinement of a person under 18 years was a violation; two, there was a defence of exceptional circumstances where such treatment was strictly necessary.

57. 57. The Supreme Court discussed the Bingham dictum, and later judicial iterations of the relationship between domestic law and Strasbourg, when considering the case law on art.3 (paras 54-60): "If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European Court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European court will go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected." (para 57) The Supreme Court did, however, permit - despite the impracticality - a domestic court anticipating a Strasbourg development, using that court's existing case law.

58. This case is cited in: *R (on the application of Elan-Cane) v Secretary of State for the Home Department [2021] UKSC 56*

Conclusion

59. Judges have got the message that they do not have to follow Strasbourg, even if it is not clear when it would be safe to not follow the ECtHR. Lord Neuberger's dictum on following Strasbourg cases remains the starting point, for the moment:

> Where … there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this [Supreme] court not to follow that line. (*Manchester City Council v Pinnock [2011] UKSC 6; [2011] 2 W.L.R. 220*, para.4).

60. However, *Hallam's* case, followed in *Abdurahman*, shows that, at least as regards criminal law, domestic courts feel increasingly confidence about disregarding Strasbourg jurisprudence.

Legislation

Key Acts
Human Rights Act 1998

Key Subordinate Legislation
None.

Key Quasi-Legislation
None.

Key European Union Legislation
European Convention on Human Rights

Key Cases

R. v Horncastle (Michael Christopher) [2009] UKSC 14; [2010] 2 A.C. 373

Reilly's Application for Judicial Review, Re [2013] UKSC 61; [2013] 3 W.L.R. 1020

R. (on the application of Chester) v Secretary of State for Justice [2013] UKSC 63; [2013] 3 W.L.R. 1076

R (on the application of Minto Morrill Solicitors) v Lord Chancellor [2017] EWHC 612 (Admin)

R. (on the application of Hallam) v Secretary of State for Justice [2019] UKSC 2; [2019] 2 W.L.R. 440

R v Abdurahman (Ismail) [2019] EWCA Crim 2239; [2020] 4 WLR 6

R (on the application of Elan-Cane) v Secretary of State for the Home Department [2021] UKSC 56

Reading

Key Texts
None.

Further Reading
None.