THE PROBLEM WITH THE HUMAN RIGHTS ACT 1998: SECTION 2(1)

By

SAMANTHA CHAN

A Thesis Submitted in Conformity with the Requirements for the Degree of Master of Laws
Graduate Department of Law, in the University of Toronto

© Copyright by SAMANTHA CHAN (2012)
Abstract:
The Human Rights Act 1998 incorporated the European Convention on Human Rights. With incorporation, Parliament and the government of the United Kingdom believed that human rights would reflect British values, there would increase support for human rights and a human rights culture would develop. However, the goals of incorporation did not occur. One reason for the failure of the Human Rights Act 1998 is the UK courts interpretation of section 2(1). Courts in the United Kingdom have been unwilling to provide more extensive and less extensive protection of rights than Strasbourg. The effect of the court’s interpretation has been public, political and media backlash. Consequently, to resolve this problem, there must be a reinterpretation of section 2(1).
# Table of Contents

1. **Introduction** ................................................................. 1
   1.1 What is the Human Rights Act 1998 and Why Has it Failed? 1
   1.2 Why Have a Domestic Human Rights Act? 2

2. **The Purpose of Section 2(1)** ....................................... 7
   2.1 Parliament’s Intent .................................................. 7

3. **The UK Courts** ............................................................ 9
   3.1 The UK Courts Interpretation of Section 2(1) ..................... 9

4. **Effect on Cases** .......................................................... 12
   4.1 Who Benefits from the UK Courts Approach ...................... 12

5. **Politicians and Solicitors Reaction** .............................. 17
   5.1 The Role of 9/11 .................................................... 17
   5.2 Fear of Europe and Lack of Education to the UK Public ....... 18

6. **Relationship between Strasbourg and the UK Courts** ......... 21
   6.1 Providing More and Less Protection of Rights ................. 21

7. **Why Deference to Strasbourg is Important to the UK Courts** 25
   7.1 UK Courts Reasoning is Flawed .................................. 25

8. **Strasbourg and other Jurisdictions** ............................... 29
   8.1 Strasbourg and France ............................................ 29
   8.2 Strasbourg and Germany ........................................... 31

9. **How to Change the Relationship** .................................. 33
   9.1 Factors that the UK Judiciary Must Take into Account .......... 33

10. **Dialogue, UK and Strasbourg** .................................... 40
    10.1 How Dialogue Can Help .......................................... 40
    10.2 Dialogue and the Public ......................................... 43

11. **Constraints on the UK Courts** .................................... 46
    11.1 Preventing Human Rights from Going too Far ................. 46

12. **How to Fix the Human Rights Act 1998** ......................... 48
    12.1 Final Thoughts ................................................... 48
Chapter 1
The Purpose of the Human Rights Act

1 Introduction

1.1 What is the Human Rights Act 1998 and Why Has it Failed?

The United Kingdom’s Human Rights Act 1998 (HRA), which incorporated the European Convention on Human Rights into domestic law sought to improve human rights protection for British citizens at home. Prior to the enactment of the HRA 1998, UK citizens sought human rights protection from the European Court of Human Rights (ECtHR). The process of appealing to the ECtHR was both time consuming and expensive.\(^1\) Protection of human rights seemed only possible for wealthy individuals or corporations. Moreover, incorporation was sought since it would allow British judges to influence the direction of human rights in Strasbourg. As stated in the 1997 White Paper, “Rights Brought Home: The Human Rights Bill, “there was a need for a human rights legislation since it would allow for British judges to make a British contribution to the development of human rights.”\(^2\) Finally, incorporation was sought since the government wanted to develop a human rights culture.\(^3\) Thus, the purpose of the HRA was multi-fold.

Despite the goals set out in the White Paper, the HRA has not fulfilled its promise of developing a human rights culture in the UK or allowing UK judges to influence the direction of human rights internationally. Instead, there has been a strong public

\(^1\) House of Lords Debate no 563 (1 May 1995) cc 1271 at 1280.
\(^3\) Ibid.
backlash against the HRA 1998. One reason for the backlash is the interpretation of s. 2(1) of the HRA 1998. This paper argues that s. 2(1) of the HRA 1998 must be reinterpreted to ensure human rights represents British values, has public support and will lead to the development of a human rights culture in the UK.

The first half of this paper provides a background to the purpose of the HRA 1998. Additionally, this section will focus on Parliament’s intention when it drafted s. 2(1) of the HRA. It will be demonstrated that deference to the European Court of Human Rights is unnecessary. Lastly, this section will examine how the courts have interpreted s. 2(1) of the HRA 1998. It is argued that the UK courts have been unwilling to go beyond Strasbourg jurisprudence.

The final half of this paper considers how courts should reinterpret s. 2(1) of the HRA 1998. It is argued that providing less extensive or more extensive protection of rights than guaranteed by Strasbourg does not undermine the purposes of the HRA 1998. Moreover, emulating or drawing inspiration from Strasbourg’s relationship with France or Germany will not help. France and Germany are fundamentally different from the UK. Consequently, UK courts should give weight to the ECtHR, but allow for deviation.

1.2 Why Have a Domestic Human Rights Act?

In 1997, the Labour Government sought to develop a domestic human rights legislation that incorporated the European Convention on Human Rights (ECHR). A domestic human rights legislation was important for several reasons. First, human rights did not represent British values. As stated in the White Paper, “the rights, originally developed
with major help from the United Kingdom Government, are no longer actually seen as British rights.”

Incorporation was sought since human rights should represent British values and beliefs. Human rights should be more accessible.

Second, incorporation was advocated since it would force Parliament to take human rights concerns seriously. The HRA 1998 would force Parliament to, “reflect carefully, in considering proposed legislation, on difficult questions of where the balance lies between the individual’s rights and the needs of the wider community.”

Incorporation meant that Parliament could not ignore human rights concerns.

Third, incorporation was advocated since it would be less costly and time consuming than appealing a case to Strasbourg. During a House of Lords debate, Lord Holme of Cheltenham stated that, “the problem is that the court is in Strasbourg and it takes hundreds of thousands of pounds and many years for British subjects to have their rights redressed.”

Thus, a domestic human rights bill would ensure greater access to justice. Protection of human rights would not be available to only wealthy individuals or corporations. Money and time would be a diminished factor.

Fourth, incorporation was advocated since British courts could contribute to the development of human rights in Strasbourg. As stated by the Lord Chancellor in a House of Lords debate, “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 Union. I agree with the noble and learned Lord Browne-Wilkinson, that it is

---

4 Secretary of State for the Home Department, supra note 2 at para 1.14.
6 House of Lords Debate, No 540 (19 November 1992) cc 714 at 715 (Lord Holme of Cheltenham).
important that our courts have the scope to apply that discretion so as to aid in the
development of human rights law.”

Incorporation of the ECtHR into domestic law would provide judges with a greater voice and legitimacy when stating their opinion about the development of human rights. The opinion of UK judges could not be ignored since the Conventions applied directly to the UK.

Fifth, the Labour Government wanted to incorporate the European Conventions into domestic law since it would lead to a human rights culture in the UK. A human rights culture would make public bodies more conscious of their responsibilities to UK citizens. As stated by Lieve Gies, “spreading a culture of human rights through society, human rights infringements could be prevented.” Making public authorities more aware of the role of human rights would ensure greater protection for individual citizens.

Additionally, a culture of human rights would improve democracy. Accordingly, a, “shared understanding of what is fundamentally right and wrong will lead to people having more confidence in key state bodies and that this will encourage more openness and participation in our democracy.”

Incorporation would facilitate better dialogue between individuals and the state. Incorporation would also prevent Parliament from ignoring or violating human rights. Citizens, being more aware, would be a check on Parliament, holding it to account.

---

7 House of Lords Debate No. 584 (19 January 1998) cc1257 at 1271 (Lord Chancellor).
8 Secretary of State for the Home Department, supra notes 2, para 1.18.
10 Department of Constitutional Affairs, supra notes 5, para 1.13.
Sixthly, incorporation of the Human Rights Act 1998 was desirable because human rights were not a priority in the UK. According to David Feldman, since the UK was only bound by international human rights legislations, judges have, “given little weight to human rights.”¹¹ UK courts did not consider human rights a priority since the Conventions did not have direct effect in the UK. Incorporation would improve protection of human rights by requiring public authorities to advance, “legal accountability for violations of some fundamental freedoms and human rights.”¹² Incorporation would ensure greater protection on human rights since public authorities had to explain their actions. The Conventions would have direct force in the UK.

The desire to ensure greater protection of human rights by national courts was also stated by the Lord Chancellor, as a reason for incorporation. During a House of Lords debate, the Lord Chancellor argued that the, “design of the bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament.”¹³ The HRA 1998 was designed to help enforce human rights and ensure that it could not be easily violated. MP Mike O’Brien also reinforced this belief during a debate in the House of Commons. Mr. Mike O’Brien stated that the Human Rights Act would, “significantly enhance the protection of human rights in this country.”¹⁴ The Human Rights Act 1998 would enhance protection since citizens and public authorities would be more accountable to the courts.

¹² Ibid.
¹³ House of Lords Debate No 582 (3 November 1997) cc1228 at 1228.
¹⁴ House of Commons Debate, No 309 (30 March 1998) cc 895 at 895 (Mike O’Brien).
Finally, incorporation was considered necessary due to the UK’s human right’s record.

According to the Lord Chancellor, “our legal system has been unable to protect people in the 50 cases in which the European Court has found a violation of the Convention by the United Kingdom. That is more than any other country except Italy.”\(^\text{15}\) The UK needed the Human Rights Act 1998 because the number of human rights violations was exceptionally high.

\(^{15}\) House of Lords Debate, No 582, *supra notes 13*, at 1228.
Chapter 2

Parliament and Section 2(1) of the Human Rights Act 1998

2 The Purpose of Section 2(1)

2.1 Parliament’s Intent

Due to the Labour government’s desire to incorporate the European Conventions into domestic law, there had to be a mechanism in place to govern the relationship between the UK courts and Strasbourg. This point was made clear in the Equality and Human Rights Commission. The Commission stated that, “whatever domestic legislation is used to incorporate the Convention rights, there will need to be a supporting machinery for regulating the relationship between the Executive, Parliament and the courts, particularly in matters of public policy, and between the UK courts and the European Court of Human Rights. Ultimately, the machinery needs to maintain the sovereignty of parliament.”16

Thus, the UK wanted to prevent Strasbourg from dictating and undermining the UK courts.

Fear that the UK would be dictated and forced to follow Strasbourg was stated by Lord McCluskey. Lord McCluskey argued that the, “certain aim of British judges will be to interpret the conventions in the way that they think that Strasbourg Court will.

Otherwise, they will be overturned by Strasbourg.”

Thus, incorporation of the Conventions into the HRA 1998 could force the UK judiciary to follow Strasbourg.

The mechanism designed to ensure the independence of the UK judiciary was section 2(1) of the HRA 1998. Section 2(1) of the HRA 1998 asserted that a UK court or tribunal must take into account, “any relevant judgment, decision declaration or advisory opinion of the European Court of Human Rights as well as relevant opinions or decisions of the European Commission of Human Rights and the Committee of Ministers.”

Section 2(1) HRA 1998 does not require UK courts to follow Strasbourg’s decision. UK courts must acknowledge and respect Strasbourg jurisprudence.

Flexibility was another reason the UK decided to implement s. 2(1) of the HRA 1998. The UK did not want to be bound by Strasbourg since, “circumstances may therefore arise in which a judgment given by the European Court of Human Rights decades ago contains pronouncements which it would not be appropriate to apply to the letter in the circumstances of the day.”

UK courts must be able to respond to human rights cases in a manner that takes into account British values, customs and beliefs. Accordingly, s. 2(1) HRA 1998, complies with the goals set out in the White Paper of allowing British values to be incorporated into human rights.

---

17 House of Lords Debate, No 582, supra notes 13, at 1267 (Lord McCluskey).
18 Human Rights Act 1998, c. 42, s. 2(1).
19 House of Lords Debate, supra notes 7, at 1271 (Lord Chancellor).
Chapter 3

The UK Judiciary and Section 2(1)

3 The UK Courts

3.1 The UK Courts Interpretation of Section 2(1)

Parliamentary intention when creating s. 2(1) of the Human Rights Act 1998 was to force UK courts to consider Strasbourg jurisprudence when dealing with human rights. However, UK courts interpretation of s. 2(1) of the HRA has lead to a different relationship with Strasbourg. UK courts have been unwilling to lead in the development of human rights jurisprudence.

The first indication that UK courts were unwilling to go beyond Strasbourg occurred in *Regina (Alconbury Developments Ltd and others v Secretary of State for the Environment, Transport*). In *Alconbury*, Lord Slynn stated in the, “in the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights.”\(^{20}\) Lord Slynn made it clear that UK courts should be reluctant to depart from Strasbourg jurisprudence. Consequently, a different conclusion than Strasbourg should occur rarely. The statement by Lord Slynn does not expressly violate s. 2(1) of the HRA. However, Lord Slynn narrowed the scope for when the UK courts should depart from Strasbourg.

Moreover, Lord Slynn reaffirmed this approach in *R (on the application of Amin) v. Secretary of State for the Home Department*. In the judgment, Lord Slynn stated, “where the court has laid down principles and, as here, 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.”\(^\text{21}\) Courts have been unwilling to go beyond Strasbourg since its decision would likely be reversed if the litigant sought an appeal at the ECtHR. For consistency and to limit costs, UK courts decided to follow Strasbourg. As stated by Elizabeth Wicks the effect of Lord Slynn’s comment comes, “extremely close to abdicating judicial responsibility to Strasbourg.”\(^\text{22}\)

The comments stated that the UK courts should follow Strasbourg.

The decision in *Alcobury* and *Amin* were followed by the House of Lords decision *Regina (Ullah) v Special Adjudicator Do v Immigration Appeal Tribunal*. In *Ullah*, Lord Bingham addressed the relationship between Strasbourg and the UK courts. Lord Bingham stated that, “the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”\(^\text{23}\) Lord Bingham emphasized the need to abide by and respect the standard set by Strasbourg.

The decision in *Ullah* was only obiter. However, the case and Lord Bingham’s remarks set an important precedent about how to interpret s. 2(1) of the HRA. For instance, in *N v Secretary of State for the Home Department*, Lord Hope stated, “enlargement of its scope

\(^{21}\) *R (on the application of Amin) v. Secretary of State for the Home Department*, 2003 UKHL 51 at para 44.


\(^{23}\) *Regina (Ullah) v Special Adjudicator*, 2004 UKHL 24 at para 20.
in its application to one contracting state is an enlargement for them all."

Lord Hope emphasized that consensus and consistency, when interpreting conventions, is vital. UK courts should follow Strasbourg jurisprudence otherwise other member states may have to adopt a principle, which it considers inappropriate. As well, in R (on the application of Begum) v Denbigh High School, the majority refused to expand the definition of Article 9 of the Convention. Relying on Strasbourg, Lord Bingham stated, “even if it be accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints of interference, there remains a coherent and remarkably consistent body of authority.”

Consequently, Denbigh illustrated the unwillingness to question Strasbourg jurisprudence. The impact of Ullah was significant. Ullah helped to define the court’s relationship to Strasbourg.

The statements in cases demonstrate that UK courts are not simply taking into account Strasbourg jurisprudence. UK courts appear to be treating Strasbourg jurisprudence as binding precedence. UK courts seem only willing to go beyond Strasbourg in extreme cases.

The approach adopted by the UK courts does not fulfill the goals stated in the White Paper: Rights Brought Home. By deferring to Strasbourg, UK courts are not ensuring that human rights represent British values. Additionally, UK courts are not ensuring a British contribution to human rights in Europe. Without meeting the goals set out in the White Paper, the purpose of the HRA 1998 has been undermined.

---

24 N (FC) v Secretary of State for the Home Department, 2005 UKHL 31 at para 2.1
25 R (on the application of Begum) v Denbigh High School, 2006 UKHL 15 at para 23.
Chapter 4

The Impact of the UK Courts Approach

4  Effect on Cases

4.1  Who Benefits from the UK Courts Approach

Based on the statements made in Ullah, UK courts could be forced to make decisions it
believes should not be followed. This concern was raised in Secretary of State for the
Home Department v AF. In AF, Lord Hoffman stated that:

“I think that the decision of the ECtHR was wrong and that it may well destroy the system of
control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think
that your Lordships have no choice but to submit. It is true that section 2(1)(a) of the Human Rights Act
1998 requires us only to “take into account” decisions of the ECtHR. As a matter of our domestic law, we
could take the decision in A v United Kingdom into account but nevertheless prefer our own view. But the
United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the
ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of
the international obligation which it accepted when it acceded to the Convention. I can see no advantage in
your Lordships doing so.” 26

Lord Hoffman illustrated the problem with the standard set in Ullah. Courts often follow
Strasbourg, even when it feels that it is inappropriate. Lord Hoffman followed
Strasbourg, even though he feared it could negatively affect UK’s national security.

The principle set out in Ullah has also caused the UK public to believe that human rights

26 Secretary of State for the Home Department v AF, 2009 UKHL 28 at para 70.
do not protect nationals. Ullah created a public perception problem. This is demonstrated by contrasting two cases. In Regina (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and others intervening), a claim was made by the relatives of 6 Iraqi’s who were killed in southern Iraq between August 4 – 10, by British forces after major combat had ended.\(^{27}\) The House of Lords stated that only the sixth claimant, Mr. Mousa, could bring a claim because he was under the jurisdiction of the UK. As stated by Lord Carswell, “Mr. Baha Mousa died as a result of appalling maltreatment in a prison occupied and run by British military personnel.”\(^{28}\) The sixth claimant was protected by the HRA 1998 since the British military had effective control over the prison.\(^{29}\) The other claimants did not die in a British prison. The British military did not have effective control.\(^{30}\) The idea of effective control precluded the other claimants from being protected by the HRA 1998.

However, the European Court of Human Rights heard an appeal. In Al-Skeini \textit{v} United Kingdom, the ECtHR came to a different conclusion about extraterritoriality. Firstly, the ECtHR argued that the UK military did have effective control over southern Iraq. The court stated that, “the civilian administration of those territories was under the control of the occupying state, and it deployed sufficient troops to ensure that its control of the area was effective.”\(^{31}\) The ECtHR argued that the UK had misunderstood the principle of effective control. Secondly, the ECtHR believed that it would be wrong if the UK did not have jurisdiction. The ECtHR stated that an, “occupying state should in principle be held

\(^{27}\) Regina (Al-Skeini and others) \textit{v} Secretary of State for Defence (The Redress Trust and others intervening), 2007 UKHL 26 at para 34.
\(^{28}\) Regina (Al-Skeini and others), supra notes 27, at para 93.
\(^{29}\) Regina (Al-Skeini and others), supra notes 27, at para 31.
\(^{30}\) Regina (Al-Skeini and others), supra notes 27, at para 30.
\(^{31}\) Al-Skeini \textit{v} United Kingdom, 2011 3 E.H.R.R. 18 at para 120.
accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a ‘vacuum’ of protection within the Convention’s, ‘legal space.’” If the Convention did not apply, it would be unfair to the local population. The ECtHR argued that human rights should be extended to people who are not parties to the international agreement.

The situation in *Al-Skeini v United Kingdom* can be compared to *Regina (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission Intervening)*. *Smith* was about a UK soldier who died of hyperthermia while carrying out his duties off base. The majority in the House of Lords argued that HRA did not apply. There were several reasons for this decision. Firstly, Lord Craig stated that, “there are no policy grounds for extending the scope of the Convention to members of the armed forces serving abroad.” Secondly, it may not be possible to acquire, “evidence concerning the situation beyond the frontiers of member states.” The House of Lords asserted that there would be practical problems if the HRA extended to military soldiers abroad, where the UK did not have effective control. The House of Lords believed that a fair process might not be possible. Finally, the House of Lords argued, “extending the scope of the Convention abroad would ultimately involve the courts in issues relating to the conduct of armed hostilities which are essentially non-justiciable.” The UK courts would not extend jurisdiction to armed forces abroad, in areas that it did not have effective control,

---

32 *Al-Skeini v United Kingdom*, supra notes 31, at para 142.
33 *Regina (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission Intervening)*, 2010 UKSC at para 1.
34 *Regina (Smith) v Oxfordshire*, supra notes 33, at para 91
35 Ibid.
36 *Regina (Smith) v Oxfordshire*, supra notes 33, at para 308
since courts would be involved in analyzing political and military decisions. The UK courts believed that it is their duty to focus solely on legal issues. UK courts would not violate the principle of separation of powers.

The two cases illustrate a public perception problem involving human rights in the UK. The decision by the ECtHR protected foreign nationals, holding the UK accountable. However, such human rights protection was denied to Smith, who was a UK national. The two cases fuel the public’s belief that human rights protect foreigners and not UK citizens. This viewpoint has been supported by a survey, which stated that 80% of people believed, “some people take unfair advantage of human rights in Britain.” The public believes that the deserving members of UK society have been disadvantaged by the HRA 1998.

The two cases fuel the belief that the HRA will not protect UK interests. The Rights for Real project confirmed this assumption. Rights for Real asserted that the public believed that it was not worth taking the steps required to ensure human rights protection since, “events and the system will conspire to prevent them securing the result they want.” There is a lack of public trust in the HRA. In fact, Lieve Gies argues that the public believes that, “human rights better protect and help those that are undeserving. The wrong type of people benefit from the HRA.

Moreover, Francesca Klung verified this sentiment. Klung states that tabloids in the UK have, “effectively created a subtitle to the Act in the public’s mind which reads: human

37 Lieve Gies, supra notes 9, at 410.
39 Lieve Giles, supra notes 9, at 410.
rights for FTPs: foreigners, terrorists, and pedophiles – law abiding citizens need not apply.”

Thus, the Daily Mail, published an article in 2011 about Roger Gleaves who was a pedophile. Roger Gleaves was seeking $2600 in damages for, “slopping out,” which he believed was a violation of Article 3 and 8 of the Human Rights Act 1998. The Daily Mail implied, through this article, that prisoners are taking advantage of the HRA 1998. While the Daily Mail is a tabloid newspaper, its views affect and influence the UK population. The Daily Mail has a circulation number of 1.9 million. This number is greater than circulation figures for The Times, Financial Times, The Guardian or The Independent. Campaigns by the press will affect public perception since newspapers and the media are the public’s source of information. As stated by Lieve Gies, “the press is still regarded, not the least by political elites, as a key player in the formation of public opinion.” Without press support for the HRA, the public is unlikely to read anything but negative stories and opinions about human rights.

40 Francesca Klug, “A bill of rights: do we need one or do we already have one?” (2007) Public Law 701 at 714.
43 Ibid.
Chapter 5
The Public and Ullah

5 Politicians and Solicitors Reaction

5.1 The Role of 9/11

The media is only one reason the public dislikes the HRA. Statements by the UK government, Parliament and solicitors are another reason the public has turned against the HRA 1998. For instance, after September 11, 2001, the UK government became involved in the war on terror. The focus of the UK government changed. The HRA was seen as an impediment to national security. Former Prime Minister, Tony Blair and former Home Secretary, David Blunket were displeased with the court’s refusal to deport foreign suspects when there was a real risk of torture if they returned to their home country.\(^{45}\) The Prime Minister blamed Article 3 of the HRA and stated, “should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights.\(^{46}\) The statement demonstrates a lack of trust in the HRA. Politicians have supported public fears and prejudices that Strasbourg hurts national interests and the HRA protects the undeserving.

Solicitors have also been critical, increasing public dislike for the HRA 1998. For instance, Ian Macdonald QC resigned as Special Advocate of the Special Immigration

\(^{45}\) Francesca Klug, supra notes 40, at 714.
\(^{46}\) Prime Minister Tony Blair, Press conference, August 2005.
Appeals Commission since he believed that the HRA 1998 was an, “odious blot on our legal landscape and criticized it for victimizing Muslims.” MacDonald believes that Muslims were taking advantage of the HRA 1998. MacDonald was responsible for, “hearing secret appeals brought by terrorism suspects against their indefinite detention under the Anti-terrorism, Crime and Security Act 2001.” MacDonald believes that the HRA is treating Muslims as victims, helping and supporting them at the expense of national security. This resignation fuels the public’s belief that terrorists are better protected in the UK than nationals.

5.2 Fear of Europe and Lack of Education to the UK Public

Fear of Europe also explains the negative perception of the HRA. The Joint Committee on Human Rights states that the public believes that the, “rights contained in the European Convention on Human Rights are a foreign import, foisted on our legal system from without, and even that the HRA is a product of the European Union.” The public believes that there is an Europeanization of Britain. The HRA has undermined British identity. Support for this viewpoint has come from current Prime Minister David Cameron. David Cameron has argued for the repeal of the HRA and the creation of a British Bill of Rights. Cameron has stated that a Bill of Rights would, “encourage the ECtHR to back off and interfere less with British parliamentary sovereignty.”

Cameron’s argument focuses on the loss of British independence and the fear that British

48 Ibid.
49 Equality and Human Rights Commission, supra notes 38, at 180
50 Francesca Klug, supra notes 40, at 716
values are being overlooked. As stated by Cameron, a British bill of rights would, “define the core values which give us our identity as a free nation.” The public, supported by the Prime Minister, views the HRA poorly since they believe Europe is dictating terms to Britain.

The lack of understanding about the purpose and the goals of the HRA also explains the negative public perception of the HRA. Francesca Klug argues that, “very little ground work was done to prepare for the introduction of the HRA beyond the publication of Bringing Rights Home.” The public does not understand how the HRA benefits their interests. The public does not understand that the HRA was designed to facilitate more knowledge to citizens so that it would be easier for them to, “assert their rights in daily life, preventing (inadvertent) rights abuses.” The HRA was supposed to deter human rights abuses.

Due to the failures of the HRA 1998, it is arguable that there is no human rights culture in the UK. Baroness Prashar has affirmed this assessment during a House of Lords Debate. Baroness Prashar has stated that a human rights culture does not exist due to a, “lack of awareness, lack of leadership and lack of help.” Thus, a human rights culture has not developed because there is no one willing to support the HRA 1998. Additionally, a human rights culture has not developed since, “human rights are looked upon as something from which the state needs to defend itself, rather than to promote.”

52 Francesca Klug, supra notes 40, at 713
53 Lieve Gies, supra notes 9, at 408.
54 House of Lords Debate No 657(16 January 2004) cc741 at 743
55 Ibid.
human rights culture has not developed since the UK is not stating the benefits of the HRA Act 1998. Consequently, media and tabloid outlets that dislike the HRA 1998 are influencing the public.
Chapter 6
Reinterpreting Section 2(1)

6 Relationship between Strasbourg and the UK Courts

6.1 Providing More and Less Protection of Rights

Due to the negative public perception of the Human Rights Act 1998 and how courts have interpreted section 2(1), a human rights culture has not developed, judges have not made a British contribution to European human rights, human rights domestically do not represent British values or beliefs and the public has not supported the HRA 1998. To solve this problem, judges must redefine the relationship between Strasbourg and the UK. Judges must re-interpret s. 2(1).

UK judges should not simply follow Strasbourg jurisprudence. Consequently, UK courts should be able to guarantee less or more protection of rights than Strasbourg. Going below or above the standard set by Strasbourg would not mean UK courts are undermining the desire to ensure a British contribution to human rights. In fact, disagreeing, questioning and adding to the debate about a particular human right will ensure a British contribution.

Going below the standards set by Strasbourg is not a new concept. Going below the standards is allowed and recognized by Strasbourg through the concept of margin of appreciation. A margin of appreciation means, “by reason of their direct and continuous
contact with the vital forces of their countries, the national authorities (including national courts) are in principle better placed than an international court to evaluate local needs and conditions.”

Thus, the margin of appreciation allows for justified infringements of rights. For instance in *Sahin v Turkey*, the ECtHR stated that a prohibition on the wearing of headscarf’s in higher education institutions was an infringement of Article 9, however it was justified. The infringement of Article 9 was justified due to Turkey’s history of secularism, its belief in pluralism and the need for equality between men and women. Thus, in the international arena, going below Strasbourg jurisprudence can mean providing a justified explanation for the interference with a Convention right. This approach does ensure that human rights represent British interests and values.

However, the margin of appreciation is insufficient. The ECtHR only gives nations a, “wide margin of appreciation in relation to contentious social issues issue on which there is no European consensus.” The UK cannot ensure that British identity, culture and history is reflected in all principles of the ECtHR or that British heritage will play a significant role in all appeals to Strasbourg.

UK courts should also be able to go below Strasbourg since more rights is not always better. As stated by Mark Tushnet, “the problem of conflicting rights shows that maximal achievement does not require a single-minded focus on any individual constitutional provision. Getting ‘more’ freedom of expression might mean getting less

---

57 *Sahin v Turkey*, 2005 ECHR 819 at para 122.
58 *Sahin v Turkey*, supra notes 57, at para 116.
informational privacy.” Mark Tushet asserted that ensuring maximum rights is impossible. Rights must be balanced against each other.

Consequently, when UK courts hear a human rights case in relation to the HRA, it must be able to go below or above the standards set out by Strasbourg. UK courts must have the ability to state that Strasbourg provides too much or too little protection and that this is contrary to British identity, culture and history. UK courts are treating Strasbourg decisions as non-binding. The decisions of Strasbourg provide useful information that can help UK courts define the issues and shape their arguments. However, Strasbourg will not be able to force UK to subscribe to a certain principle about human rights.

Allowing UK courts to go below or above the standards set by Strasbourg would help with public perception. The public would believe that UK courts are independent and responsive. The public would believe that Europe is not dictating to the UK about human rights. This is vital since the public does believe that human rights are important.

However, the concern has been the approach human rights have taken in the UK. In Human Rights Insight Project, 84% of the general public believed that there must be laws dealing with human rights in the UK. Going below or above the standards in Strasbourg will give human rights legitimacy in the UK, allowing the public to become more receptive to human rights and thus allowing a human rights culture to develop.

Despite the positives associated with allowing UK courts to go below or above the standard of Strasbourg, there are concerns that must be overcome. The White Paper

---

stated that one of the purposes of creating the HRA was to allow UK courts to give victims the, “same remedies without the delay and expense of resort to Strasbourg.” If courts do not follow Strasbourg then victims may have to go the ECtHR for remedies. This could be costly and time consuming. Yet, the increased costs and time required for victims seeking a remedy in Strasbourg does not outweigh the benefits of ensuring a UK contribution to the development of human rights in Europe, allowing human rights to represent British values, developing a human rights culture and improving the public perception of the HRA 1998.

Another obstacle that must be overcome is the reputation of the UK in relation to human rights, which may be affected if the UK decides to give less rights than Strasbourg. Jane Wright stated that the UK parliament believed as human rights developed throughout society, “our ‘standing [would] rise internationally.’” The implication being as more human rights were acknowledged and protected, the greater UK’s reputation would be internationally. Consequently, there is a fear that giving less rights than Strasbourg could diminish UK’s standing internationally. Yet, so long as the UK’s justification for going below Strasbourg jurisprudence is legitimate and done to ensure the protection of UK citizens than its reputation should remain intact. By going below Strasbourg, the UK courts are simply acknowledging that there is a difference of opinion about the scope of human rights and how human rights should be balanced.

62 Jonathan Lewis, supra notes 56, at 722.
63 House of Lords Debate no 563, supra notes 1, at 1280.
Chapter 7

Why the Ullah Principle Should Not Be Followed

7 Why Deference to Strasbourg is Important to the UK Courts

7.1 UK Courts Reasoning is Flawed

The UK courts have sought to justify its approach towards s. 2(1) of the HRA 1998. UK courts argue that the European Convention on Human Rights is, “an international instrument and it would be unhelpful for each country to develop its own wildly divergent approach.”\(^\text{65}\) UK courts believe that Strasbourg jurisprudence would be undermined if each country made their own rules about the scope and principles of the Conventions. Consistency has been emphasized.

However, this reasoning is inadequate. Elizabeth Wicks has stated, “the HRA provides the opportunity for a domestic law of human rights and this is an invaluable commodity.”\(^\text{66}\) Developing a British human rights jurisprudence should not be sacrificed because of international law. Lord Hoffman also supports this viewpoint. In \textit{McKerr}, Lord Hoffman believed that obligations stated by Strasbourg and the HRA are different because each, “belong to different legal systems; they have different sources, are owed by

---


\(^{66}\) Elizabeth Wicks, \textit{supra notes} 22, at 414
different parties, have different contents and different mechanisms for enforcement.”

The UK should not simply follow the ECtHR because the scope and purpose are different. Incorporation of Conventions does not make the ECtHR binding on domestic courts. This was made clear in by Lord Hoffman. Lord Hoffman argued that, “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.”

Thus, Strasbourg does not have direct effect in the UK.

The desire to uphold the UK’s international obligations is one factor forcing the domestic courts to follow Strasbourg jurisprudence. Another factor is the desire for the UK to be an example for other member states in the ECHR. The UK does not want to, “create a bad example for other less enlightened CoE member states, whom the UK would wish to abide faithfully by all of the ECHR judgments, without exception or qualification.”

The UK believes how it behaves internationally will impact other member states. UK domestic courts believes that if it does not follow Strasbourg then other members states will not follow. This could lead to human rights abuses by less “enlightened” member states.

Yet, this concern by UK domestic courts is misguided. The UK courts are focusing on the wrong issues. The UK courts are, “straying into questions of foreign relations and statecraft.” The UK courts should only focus on the legal issue. Political concerns are not the courts mandate. Thus, by focusing on political issues, the UK judiciary is

67 *Re McKerr (AP) (Respondent) (Northern Ireland), 2004 UKHL 12 at para 64*

68 *Re McKerr, supra notes 67, at para 66*

69 Lord Irvine, *A British Interpretation of Convention Rights, (Paper) delivered at the Bingham Centre for Rule of Law, 14 December 2011 (unpublished)*

70 Ibid.
blurring separation of powers.

Another reason why the UK courts feel bound by Strasbourg is judicial culture. The UK judiciary believes in the importance of binding precedent. For example, the Court of Appeal follows the judgments of the House of Lords and the High court follows the judgments of the Court of Appeal, the effect is a, “powerful, unstated, influence over” UK courts approach to s. 2(1).\textsuperscript{71} The domestic courts in the UK view Strasbourg as having greater authority than the House of Lords. The domestic courts believe that Strasbourg can set binding precedents that must be followed.

The problem of judicial culture can be overcome. The domestic courts in the UK must recognize that Strasbourg does not have more authority than the House of Lords. This can be accomplished by acknowledging that, “under the dualist constitution of the UK, international and domestic law are entirely separate fields. Both are supreme within their own field because they are the only legal system operating there.”\textsuperscript{72} The European Court is supreme when dealing with ECHR cases. The House of Lords is supreme when dealing with the HRA.

Moreover, UK’s decision to employ the Ullah principle is based on a misunderstanding of the nature of Strasbourg. Accordingly, UK courts have misunderstood the purpose of Strasbourg. Roger Masterson stated that “judgments of the European Court of Human Rights are essentially declaratory in nature stating whether a given decision, action or omission of the national authorities in question is either compatible with, or in breach of,

\textsuperscript{71} Ibid.
\textsuperscript{72} Elizabeth Wicks, supra notes 22, at 426.
the Convention standards.”

Thus, when the UK courts are applying the HRA 1998, it is not bound by the decisions of the ECtHR. The declaratory nature of Strasbourg means, “a certain amount of adaptation may be necessary to give effect to their decisions.”

There is room to adapt the declaration to UK’s legal system. This means that UK does not have to give full effect to Strasbourg’s decision. It can give a less or more generous interpretation of Convention rights.

Continuity is another reason UK courts believe in the Ullah principle. Consequently, the “very purpose of the HRA is to enable Convention rights to be applied in British courts; that objective would be defeated if the UK courts were to rule in a manner that they knew would inevitably be reversed by the Strasbourg courts.” UK courts believe the most important purpose of the HRA is to ensure that British citizens will receive the same protection in Strasbourg and in the UK. Symmetry is crucial. The UK courts believe that it would be a waste of time to make a decision that would be reversed by Strasbourg.

Lastly, the Ullah approach should not be adopted since it ignores the idea that the Convention responds to changes. Conventions must be, “interpreted in the light of modern day conditions.” Ullah’s approach is too restrictive. It would be too slow to react to changes in social values or morals. The judiciary’s approach places the UK in a straightjacket.

---

74 Roger Masterson, supra notes 73, at 916.
75 Equality and Human Rights Commission, supra notes 16, at 36.
76 Elizabeth Wicks, supra notes 22, at 407.
Chapter 8
France and Germany

8 Strasbourg and other Jurisdictions

8.1 Strasbourg and France

Due to the problematic relationship between Strasbourg and UK courts, a new theory of how the two jurisdictions should interact must be considered. One way would be to examine the role of Strasbourg in other jurisdictions. This chapter will examine Strasbourg’s relationship with France and Germany. These two countries were chosen because of their position in Europe. Both France and Germany are key actors, trying to solve the debt crisis. France and Germany have significant influence in Europe.

France’s relationship with Strasbourg is different compared to the UK. In France, Article 55 of the French Constitution states that, “treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.” Consequently, the ECHR is not simply an international agreement that can be ignored if necessary. Article 55 states the obligations under the ECHR are compulsory under French law. As stated by Luc Heuschling the, “ECHR is superior to any statue adopted by the French Parliament and the courts are empowered to enforce this pre-eminence.” However, France does not have to follow Strasbourg jurisprudence. National laws can be passed that will allow France to

77 Constitutional of October 4, 1958 (France) 1958, Article 55
go beyond Strasbourg. The French system allows the national legislature to have the final word.

The French model does have the advantage of clearly stating that Strasbourg jurisprudence is binding. Yet, there are problems with France’s approach. First, France does not allow its courts to go below the standards set by the ECtHR. This paper argues that UK courts must be able to go both below and beyond the standards set by Strasbourg. This allows the UK courts to determine how competing interests and human rights should be resolved. Allowing UK courts to go below and above the standards set by Strasbourg ensures that UK culture, values and beliefs are considered. Second, the UK Parliament is unlikely to give international treaties precedence over domestic law since it would fundamentally alter public law. For instance, if the ECHR has precedence over domestic legislation, it would force other international treaties to have precedence. This would alter the laws in the UK significantly. It would be complex and a time-consuming transition. Third, allowing international treaties to have precedence undermines national sovereignty. There would be too much interference from outside influences. This system simply reinforces the problem in the UK currently. The UK is seen as deferring too greatly to Strasbourg. Finally, the problem with the French model is that it gives the ECHR supremacy over national laws. Yet, in the UK, parliamentary supremacy would prohibit this from occurring. Parliamentary supremacy means,

---

80 Constitutional of October 4, supra notes 77, Article 55
“legislation enacted by one Parliament is not immune from amendment or repeal by legislation enacted by a later Parliament.”

Entrenchment is not part of the legal or parliamentary system in the UK. Thus, if the French model is adopted, then parliamentary supremacy will be more limited. The UK model of checks and balances will be altered. As a result, it is unlikely that the UK would choose such as extreme measure to improve the relationship between Strasbourg and the UK.

8.2 Strasbourg and Germany

The French model is unsuitable for the UK. Another model that should be examined is the German model. In Germany, the ECHR has a less, “significant role” compared to the UK or France since the, “German Basic Law provides substantive guarantees which are not only wider in scope and application but also more effectively monitored than those laid down by the ECHR.” German Basic Law deals with many of the same issues as the ECtHR. The decisions of the ECtHR are seen as an, “interpretative aid for the determination of the content and scope of the fundamental rights and rule of law guarantees of the Basic Law.” The ECHR guides Germany’s human rights policy. The ECtHR does not dictate human rights to Germany.

The German model ensures that Germany determines the scope of human rights in its country. Germany is less deferential to the decisions of Strasbourg. However, the German model would not work in the UK. First, the UK does not have a legislation that

---

81 Neil Parpworth, Constitutional & Administrative Law, 5th ed (United Kingdom: Oxford University Press, 2008) at 83
82 Eirik Bjorge, supra notes 79, at 26
83 Esin Orucu, eds., supra notes 78, at 52.
84 Eirik Bjorge, supra notes 79, at 29
is similar to the German Basic Law. The HRA 1998 simply incorporated the ECHR into domestic law. The HRA is not more extensive than the ECHR. Thus, for the German model to work, the UK will have to create a new human rights legislation. The human rights legislation must be more detailed than the ECHR. This would then subordinate the ECHR. Additionally, the culture of German courts is to view the ECHR as subordinate. Yet, the UK views the ECHR and the ECtHR differently. The UK believes that it is important to have continuity between Strasbourg and the UK. What needs to be addressed is UK judges’ attitude towards Strasbourg. It is about forcing judges to better balance the need to respect Strasbourg with the need to ensure that human rights represents British values, interests and culture.
Chapter 9

A New Approach

9 How to Change the Relationship

9.1 Factors that the UK Judiciary Must Take into Account

The approach taken by France and Germany is not appropriate for the UK. Thus, to prevent UK courts being too deferential to Strasbourg, the judiciary should be forced to take certain factors into account when making a decision on human rights. The judiciary should take into account UK culture. The judiciary must ask itself what are the distinctive cultural values of the UK. This provides a legitimate reason for the UK judiciary not to follow Strasbourg. The argument will be that UK values are distinct from the rest of Europe. The UK courts will be able to assert that applying Strasbourg jurisprudence would be unacceptable. Furthermore, this approach will meet the public’s concern that human rights are foreign and human rights do not relate to them.

Moreover, less hostility towards human rights by the public will be beneficial. Less hostility would mean that the public would be more open to understanding the purpose, the responsibilities and the role of human rights in the UK. A culture of human rights will develop. It is important to note that this is not about margin of appreciation.

According to Lord Hope, “the doctrine of the ‘margin of appreciation’ is a familiar part

\[86\] Lieve Giles, supra notes 9, at 410.
of the jurisprudence of the European Court of Human Rights."\(^{87}\) The margin of appreciation applies only in relation to appeals to the ECtHR

Second, UK courts must have the right of rebuttal. Lady Justice Arden explained the right of rebuttal. The right of rebuttal means that the UK judiciary must, “be able to say to the Strasbourg court that it has not made the principle clear, or that it has not applied the principle consistently, or that it has misunderstood national law or the impact of its decision on the United Kingdom’s legal system.\(^ {88}\) While this approach would be vital in undermining the *Ullah* principle, it has been used sparingly.

However, the right of rebuttal was used in *R (Animal Defenders) v Secretary of State for Culture, Media and Sport*, where the UK refused to follow Strasbourg since it believed that political advertising by political parties during election would be damaging for democracy.\(^ {89}\) As stated by Lord Bingham, “the fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false.”\(^ {90}\) Without political advertising, the public will be able to make their own conclusions. The judiciary believes that if political advertising is allowed, “elections become little more than an auction.”\(^ {91}\) If political advertising were allowed elections would be unfair. The democratic process would be undermined since the rich have an advantage over less wealthy political parties. The rich would be able to advertise more,

---

\(^{87}\) *Regina v Director of Public Prosecutions*, [2000] 2 A.C. 326  
\(^{89}\) *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, 2008 UKHL 15 at para 17  
\(^{90}\) *Regina (Animal Defenders International)*, supra notes 89, at para 28  
\(^{91}\) Ibid.
influencing public opinion. The judiciary refused to follow the ECtHR since it misunderstood the impact its decision would have on democracy in the UK.

The case of Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport demonstrated that in rare cases the House of Lords is willing to go against the rulings of Strasbourg. It appears that UK courts are only willing to go beyond Strasbourg when a fundamental feature of UK culture or society would be harmed. Yet, this is insufficient. This is still too deferential to Strasbourg. Consequently, UK courts must continually question, debate and decide to take a different approach from Strasbourg regardless of the substance of the case. It should not matter if a case is dealing with a fundamental human right. This would undermine the Ullah principle. The relationship between Strasbourg and the UK would change.

Additionally, if the UK judiciary is willing to speak and write about why the decision of Strasbourg is wrong or should not be followed this will impact future decisions of Strasbourg. When making decisions in the future, Strasbourg will take into account British opinion and beliefs. Strasbourg would take into account British opinion since it wants to remain relevant. Strasbourg wants its decisions followed and valued.

Another aspect of the right to rebuttal is when Strasbourg misunderstands UK national law. This idea has been supported by Lord Philips in Regina v Horncastle, who argued that, “there will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates

______________

92 Ibid.
particular aspects of our domestic process.”\textsuperscript{93} Thus, UK judges should be critical when reading and following Strasbourg decisions. The UK judiciary must ensure that Strasbourg understands UK national law. If UK applies Strasbourg decisions that misinterpret national law, it weakens the legal system in the UK. There may be a lack of clarity in the meaning of national law. Lack of clarity in the law is problematic. Lack of clarity challenges the belief that the law is open, accessible and predictable.

The right to rebuttal would redefine the relationship between Strasbourg and the UK. However, the right of rebuttal has been criticized. Lord Irvine argued against the right to rebuttal since, “this approach proceeds on the incorrect basis that s. 2 directs the domestic courts to follow Strasbourg, absent some exceptional circumstance.”\textsuperscript{94} Lord Irvine is concerned that this approach acknowledges that Strasbourg should be followed in most cases. This approach does not solve the underlining problem of UK courts being too deferential to Strasbourg. This approach does not ensure that parliament’s intent, when it drafted s. 2(1) of the HRA 1998, is upheld.

Lord Irvine has raised a concern about the right of rebuttal. Nevertheless, the criticisms can be overcome. The right of rebuttal forces UK courts to analyze the judgments of Strasbourg carefully. There is less opportunity for the UK judiciary to simply follow Strasbourg. The right of rebuttal gives the UK courts a stronger voice in determining human rights. Finally, the right of rebuttal prevents the public from believing that the HRA is European.\textsuperscript{95} The right of rebuttal may increase support for the HRA 1998. The

\textsuperscript{93} Regina v Horncastle,2009 EWCA Crim 964 at para 11
\textsuperscript{94} Lord Irvine, supra notes 69
\textsuperscript{95} Equality and Human Rights Commission, supra notes 38, at 180.
public may believe that the HRA 1998 is more flexible and can represent their interests. Therefore, this will have a positive impact on the HRA 1998. It creates a more positive environment for people to learn about human rights. It creates an environment for a human rights culture to develop.

Third, decisions of Strasbourg should be seen as a guide. Strasbourg rules and principles should be an aid to the UK. This relationship should be similar to how Canada treats unimplemented international treaties. According to Jutta Brunne and Stephen J Troope, Canadian courts treat unimplemented treaties, “merely as relevant and persuasive sources that can help inform statutory interpretation.”

Canadian courts treat unimplemented treaties as non-binding. In the UK, courts should treat the European Convention as persuasive. Treating the ECHR as binding only in the international area has also found support from Elizabeth Wicks. Wicks argued that the UK is a dualist country where national and international laws are distinct. Thus, the ECHR does not have direct effect in the UK.

Fourth, to ensure that UK courts do not simply follow Strasbourg, the judiciary should not view Convention terms, principles and rules as static. As stated in Procurator Fiscal v Brown (Scotland), “as an important constitutional instrument the Convention is to be seen as a "living tree capable of growth and expansion within its natural limits." The UK judiciary should not follow Strasbourg if the rulings do not represent modern UK attitudes. This ensures that human rights represent British interests.

---

97 Elizabeth Wicks, supra notes 22.
98 Procurator Fiscal v Brown (Scotland), 2000 UKPC D3 at para 74.
While this approach ensures adaptability and gives the UK a greater role in determining the scope of Conventions in the HRA 1998, there are problems with this approach. This evolutionary approach could cause too much instability. The UK judiciary may constantly change the scope of a Convention based on public opinion or current trends. Yet, this concern is overstated. The UK judiciary still has a duty under s. 2(1) of the HRA to ensure that Strasbourg jurisprudence is taken into account. Strasbourg will act as a check to prevent the UK courts from causing too much unpredictability and volatility in the law. Strasbourg will help UK courts ensure certainty in the law.

Another concern with the evolutionary approach relates to the proper role of the court. It has been argued that the evolutionary approach, “promotes the imposition of value-laden judgments by judges and that it must remain for the legislature and the ballot-box to recognize and protect these emerging social values.”99 It is argued that the evolutionary approach allows judges to focus on issues other than the law. The UK courts would be acting beyond their role. Nonetheless, this criticism can be overcome. The law must change to meet new values. This ensures that laws continue to be relevant and will be supported and obeyed by the population. Out-of-date laws lack legitimacy. The court can include and incorporate modern social values as long as the fundamental features of the Act of Parliament are observed and followed.100 An example of this approach would be Ghaidan v Godin-Mendoza. In Ghaidan, the court used s. 3(1) of the HRA 1998 to enlarge the meaning of “spouse” to include the survivor of a same-sex relationship.101 Lord Millet made clear that courts can, “read in and read down; it can supply missing

99 Tom Rainsbury, supra notes 83, at 42
100 Ghaidan v Godin-Mendoza, 2004 UKHL 30 at para 67
101 Ghaidan v Godin-Mendoza, supra notes 100, at para 18
words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point.” Courts can up-date and change aspects of the law as long as the fundamental characteristics of the scheme remain.

The powers given to the UK court under s. 3(1) of the HRA 1998 to read in or read down legislation has been criticized. According to Kent Roach, the court’s abilities under s. 3(1) hurts democratic dialogue. According to Roach democratic dialogue occurs when there is communication between the legislature and the court. Communication will occur since the legislature will be not inclined to, “stand up for the rights of the truly unpopular such as those accused of crime, suspected terrorists, and prisoners,” and as a result, the court must assess, “whether a limit on a right is demonstrably justified and proportionate.” Thus, the interaction between the two branches of government ensures compromise and accountability. Democratic dialogue is undermined since reading in or reading-down allows, “the court to fix the legislation without legislative reconsideration and deliberation.” S. 3(1) of the HRA does not promote democratic dialogue since the judiciary can make a decision without consulting Parliament. Consultation prior to a court’s decision would be beneficial since the court would be able to understand what Parliament intended. Understanding the will of Parliament could allow the court to make a decision that is carefully reasoned, taking into account multiple considerations.

---

102 Ghaidan, supra notes 100, at para 67
104 Ibid.
Chapter 10

The Role of Dialogue

10 Dialogue, UK and Strasbourg

10.1 How Dialogue Can Help

So far this essay has described substantive measures that can be taken to redefine the relationship between Strasbourg and the UK judiciary. However, to redefine the relationship courts must also engage in dialogue. The UK and Strasbourg lack dialogue. UK courts are not asking tough questions when applying Strasbourg jurisprudence. For instance, Lord Rogers stated that, “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.” Engaging in dialogue is important since it ensures that Strasbourg jurisprudence takes into account British values, culture and beliefs. Engaging in dialogue ensures that human rights represents British identity. Dialogue ensures that the goal of making a contribution to European human rights is met.

Moreover, the lack of dialogue affects the balance of power between Strasbourg and the UK judiciary. As stated by Lord Irvine, “if Strasbourg always proceeds secure in the knowledge that our Judges will inevitably ‘roll over,’ we should not be at all surprised if we find ourselves being ‘rolled over’ with increasing regularity.” The lack of dialogue means that UK opinions will not be taken seriously. UK courts will not be respected by

---

106 Secretary of State for the Home, supra notes 2, at para 98.
107 Lord Irvine, supra notes 69
Strasbourg. Consequently, dialogue ensures that courts are not simply following Strasbourg. Dialogue can affect the mindset of judges. It will force UK judges to be less deferential to Strasbourg.

Dialogue is vital. Dialogue makes certain that the appropriate balance between rights has been struck. Lady Justice Arden has supported this approach. Lady Justice Arden stated that, “any supranational court needs to be subject to checks and balances. In the case of the European supranational courts, dialogue with the national courts is an important means of providing such checks and balances.”\(^{108}\) To change the relationship from one of deference to Strasbourg to a more equal relationship, UK courts must be actively engaged in talking and reading decisions of Strasbourg. Dialogue prevents the belief that Europe should dictate human rights.

Dialogue should be promoted since it will make UK courts less deferential to Strasbourg. Lady Justice Arden stated several ways to ensure that UK courts were not overly deferential. Firstly, Lady Justice Arden believed that developing personal contacts would, “head off steps which might prove ill-advised.”\(^{109}\) Developing personal contacts with the judiciary at Strasbourg could allow UK judges to make comments that impact decisions. This could be valuable and ensure that rights do not have a negative impact on the UK and that human rights represents British beliefs. It ensures a British contribution to human rights in Europe. As well, Strasbourg’s judiciary would listen to the UK courts since developing personal contacts can create trust between members. Second, there should be meetings between the UK judiciary and Strasbourg. Meetings will help

\(^{108}\) Rt Hon Lady Justice Arden DBE, supra notes 88, at 13

\(^{109}\) Ibid.
develop a common approach to human rights. Meetings will create an environment where different opinions can be asserted. Meetings will force the UK courts to question and challenge Strasbourg. UK courts will learn to be less deferential. Eventually, meetings will create compromise and ensure British interests are considered. Finally, dialogue can be achieved through judgments, which would allow the UK to influence the, “direction of the jurisprudence in the Strasbourg court.” UK courts should not be afraid to make judgments that stray from established Strasbourg jurisprudence. By dialoguing through judgments, UK courts are signaling to Strasbourg that it will no longer simply follow.

There are two drawbacks to Lady Justice Arden’s approach. Lady Justice Arden assumes that UK judges will have the time or desire to build personal contacts in Strasbourg. However, it may be difficult to develop professional relationships given the geographical distance between the UK and Strasbourg. There are practical difficulties. This approach also assumes that Strasbourg will be receptive to a different type of relationship with the UK. Strasbourg judges may not be interested in holding meetings. Strasbourg judges may view the meetings as an attempt to undermine its power and influence.

Nevertheless, this drawback can be overcome. Meetings can take place online or over the phone through conference calls. Judges must use new media and technology to resolve obstacles related to time and place. As well, it is unlikely that Strasbourg would be uncomfortable with a more assertive UK. Strasbourg’s relationship with Germany is also based on compromise.

110 Rt Hon Lady Justice Arden DBE, supra notes 88, at 1
111 Rt Hon Lady Justice Arden DBE, supra notes 88, at 13
10.2 Dialogue and the Public

To encourage dialogue, there must also be a voice given to the public. There must be dialogue between the UK judiciary and the UK public. The public can force the UK judiciary to take a different approach to Strasbourg. Consequently, the UK needs to ensure that the public is engaged and informed about human rights, the HRA 1998 and the role of the ECtHR. By having an informed public, it can demand that the UK judiciary better protect its interests. This will ensure that s. 2(1) does not mean deference to Strasbourg or UK’s unequivocal support for Strasbourg. UK can debate, question and refuse to follow Strasbourg.

The idea of engaging the public has been supported by Mark Tushnet. Tushnet stated that a mobilized public could force judges to view rights differently. A mobilized public will force judges to incorporate new social values into the law. According to Tushet, judges recognize that a, "mobilized public – in their terms, a social movement – is offering a new constitutional interpretation, and that the judges take the very existence of the mobilization as a reason for accepting the proffered interpretation."\(^{112}\) Courts are open and can be accommodating. Courts are interacting and engaging with the public.

The one drawback when dialoguing with the public is public pressure. Courts may simply be “intimidated into yielding, seemingly out of fear that failure to do so would directly produce permanent damage to the courts, and thus would indirectly produce damage to them as judges for as long as they continue to serve.”\(^{113}\) Courts are afraid of

\(^{112}\) Mark Tushnet, “Dialogic Judicial Review,” 61 Ark Law Review 205 at 211
\(^{113}\) Ibid.
the negative consequences if reinterpretation of human rights does not live up to the public’s expectation. However, this concern can be overcome because there must be a legal basis for the courts decision.

Dialogue with the public could take the form of a body tasked with explaining and educating the public about human rights and the HRA 1998. Baroness Prashar has supported this idea. Baroness Prashar has stated there should be a commission whose role is to, “promote an understanding and awareness of human rights, including not only convention rights but also rights embodied in international human rights instruments that bind the UK.”114 Thus, dialogue with the public could create a culture of human rights. Education will teach the public their rights, responsibilities and how the HRA 1998 and the ECtHR can advocate their interests. A more informed public can also challenge the UK courts. The public can present more structured and informed statements questioning the courts decision to follow Strasbourg. The public is a check on the UK courts. It prevents the UK courts from being complacent and simply following Strasbourg.

There is one drawback to having a commission promote human rights. The public maybe unwilling to listen. As a result, the commission must find a way to engage the public. Education should be interactive. It will prevent the public from believing that the commission is lecturing them.

Another strategy to promote a culture of human rights through dialogue would be to have a press officer for the HRA. As stated by Lieve Gies, this strategy was used successfully in the criminal justice system where the press officer illustrated to the public that, “the

114 House of Lords Debate, No 657, supra notes 54, at 743
negative views they hold,” are not based in reality.\textsuperscript{115} In relation to the HRA 1998, the press officer could illustrate how the public’s belief that human rights are foreign and protects the wrong people is not based on reality.

There is one drawback to the press officer strategy. As stated by Gies, the press officer model downplays the, “extent to which their success depends on the active and contingent choices which individuals make.”\textsuperscript{116} The press officer may not be successful if the public is unwilling to pay attention. Thus, the press officer must find away to grab the public’s attention and make human rights and the HRA 1998 interesting.

\textsuperscript{115} Lieve Gies, \textit{supra} notes 9, at 415.
\textsuperscript{116} Ibid.
Chapter 11
Are There Limits to the New Approach?

11 Constraints on the UK Courts

11.1 Preventing Human Rights from Going too Far

Having a theoretical and practical basis for allowing the UK judiciary to disregard Strasbourg is vital. However, there must be restraints placed on the UK judiciary. Restraints are necessary to prevent the UK judiciary from extending human rights too far or disregarding Strasbourg completely. One restraint is s. 2(1) of the HRA 1998. This requires UK courts to take into account Strasbourg jurisprudence. The UK court must explain why it is not following Strasbourg. This will make the UK judiciary accountable for its decisions. Section 2(1) of the HRA 1998 is a check on the power of the UK judiciary. To restrain the UK judiciary, the court should also keep in mind separation of powers. Lord Bingham argued that the judiciary is, “not a legislative body. Nor is it entitled or fitted to act as a moral or ethical arbiter.”117 The judiciary cannot create new categories of human rights. The judiciary’s role is to interpret the law. As stated by Lord Bingham, “the task of the committee in this appeal is not to weigh or evaluate or reflect those beliefs and views or give effect to its own but to ascertain and apply the law of the land as it is now understood to be.”118 The UK judiciary cannot interpret the law according to personal views. The judiciary must be impartial and fair. Another

117 Regina (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2001] UKHL 61 at para 2
118 Ibid.
constraint on the judiciary is Parliament. Lord Hope stated that, “in some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body”. 119 There are some human rights issues that require Parliament to become involved because it is not only legally important but involves moral and ethical questions. Parliament should decide certain issues because it represents the public and its interests.

119 Regina v Director of Public Prosecutions, supra notes 87, at 380
12 How to Fix the Human Rights Act 1998

12.1 Final Thoughts

The Human Rights Act 1998 is a disappointment. Politicians, the public and the media dislike the HRA 1998. Politicians have argued that the HRA 1998 has impeded national security. Politicians believe that an incorrect balance has been struck between national security and individual rights. Additionally, politicians do not respect the HRA 1998. Prime Minister David Cameron has called for the repeal of the HRA 1998 and the creation of a Bill of Rights. The public also does not support the HRA 1998. The public believes the HRA protects immigrants, foreigners and unworthy individuals. The HRA 1998 does not protect the right people.

One of the main reasons for the dislike of the HRA 1998 has been the court’s interpretation of s. 2(1). Based on *Ullah*, UK courts are unwilling to go further or to lead in the development of human rights jurisprudence.

While mirroring Strasbourg ensures consistency in human rights jurisprudence this is not a sufficient reason for the UK courts approach. In fact, by following Strasbourg, UK

---

120 Francesca Klug, *supra* notes 40, at 714.
121 David Cameron, *supra* notes 51
122 Francesca Klug, *supra* notes 40, at 714.
123 *Regina (Ullah) v Special Adjudicator*, *supra* notes 23, at para 20
courts may be forced to make decisions that it does not fully support, as expressed in Secretary of State for the Home Department v AF.\(^{124}\) Additionally, the desire to follow Strasbourg was considered necessary because the UK courts wanted to be an example for other member states.\(^{125}\) Yet, UK courts must prioritize the needs of the British public before considering the wider implications to member states.

To stop UK courts from following Strasbourg, several principles should be followed. UK courts should not follow Strasbourg when cultural values and interests have not been fully considered or taken into account.\(^{126}\) This ensures that British values are incorporated into human rights and guarantees that UK judges are contributing to the development of human rights. Also, UK courts must have the right of rebuttal. A right of rebuttal means that UK courts should not follow Strasbourg when a principle is unclear, has been applied inconsistently, where Strasbourg has misunderstood national law and when Strasbourg has not fully understood the impact of its decision on the UK legal system.\(^{127}\) The right of rebuttal provides the UK court with the ability to disregard Strasbourg.

Lastly, to undermine deference to Strasbourg, dialogue between the ECtHR and the UK judiciary must exist. Dialogue is a check on Strasbourg.\(^{128}\) Dialogue will allow UK courts to debate, consider and modify Strasbourg jurisprudence. Dialogue also allows Strasbourg to consider British interests.

---

\(^{124}\) Secretary of State for the Home Department v AF, supra notes 26, at para 70

\(^{125}\) Lord Irvine, supra notes 69

\(^{126}\) Tom Rainsbury, supra notes 83, at 40

\(^{127}\) Rt Hon Lady Justice Arden DBE, supra notes 88, at 15

\(^{128}\) Rt Hon Lady Justice Arden DBE, supra notes 88, at 13
In conclusion, section 2(1) of the HRA 1998 is problematic. It has caused political, public and media backlash. Therefore, s. 2(1) of the HRA 1998 must be reinterpreted by the UK courts to ensure that human rights represents British values, has public support and will lead to the development of a human rights culture in the UK.
References or Bibliography

Legislation

Constitutional of October 4, 1958 (France) 1958

*Human Rights Act 1998*

Jurisprudence

*Al-Skeini v United Kingdom*, 2011 3 E.H.R.R. 18

*Ghaidan v Godin-Mendoza*, 2004 UKHL 30

*N (FC) v Secretary of State for the Home Department*, 2005 UKHL 31

*Procurator Fiscal v Brown (Scotland)*, 2000 UKPC D3 at

*Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, 2008 UKHL 15


*Regina (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and others intervening)*, 2007 UKHL 26

*R (on the application of Begum) v Denbigh High School*, 2006 UKHL 15

*Regina v Director of Public Prosecutions*, [2000] 2 A.C. 326

*Regina v Horncastle, 2009 EWCA Crim 964*

*Regina (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)*[2001] UKHL 61

*Regina (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)*, 2011 A.C. 1

*Regina (Ullah) v Special Adjudicator*, 2004 UKHL 24
Re McKerr (AP) (Respondent) (Northern Ireland), 2004 UKHL 12

Sahin v Turkey, 2005 ECHR 819

Secretary of State for the Home Department v AF, 2009 UKHL 28

Secondary Material


House of Commons Debate, No 309 (30 March 1998) cc 895-6 (Mike O’Brien).

House of Lords Debate, No 540 (19 November 1992) cc1 655-7 (Lord Holme of Cheltenham).

House of Lords Debate No 563 (1 May 1995) cc 1271-85.

House of Lords Debate No 582 (3 November 1997) cc 1227-32.

House of Lords Debate No 582 (3 November 1997) cc1228-32.

House of Lords Debate, No 583 (3 March 1997) cc 1227-32.


Klug, Francesca. “A bill of rights: do we need one or do we already have one?” (2007) Public Law 701


