Maurice Byers Address 2012

By the Right Honourable the Lord Phillips of Worth Matravers KG PC

I have the great honour to be the first lawyer from the United Kingdom who has been invited to give the Maurice Byers lecture. That is perhaps because Sir Maurice was a great constitutional lawyer and we have only recently acquired the vestiges of a written constitution. So far as constitutional principles go, Australia does things in an orderly fashion. Thus it was in 1985 that the federal government announced the formation of the Australian Constitutional Commission and asked Sir Maurice , the obvious candidate, to chair it. He had made his name, as solicitor general and in private practice, as a master, or perhaps it would be more accurate to say the master, of constitutional law and practice.

The United Kingdom had no written constitution of its own, but its parliament was very good at enacting written constitutions for others. Queen Victoria gave the royal assent to your constitution in 1900. In 1986 the Australia Act removed the power of the United Kingdom Parliament to change the Australian constitution. That Act also brought to an end the right of appeal from the Australian courts to the Judicial Committee of the Privy Council.

I do not know whether these important constitutional developments owed anything to the influence of Sir Maurice.

At the time I must confess that I regretted the latter one, for joint expeditions to the Privy Council in company of distinguished and convivial lawyers from this country had been a particularly happy feature of my practice at the English Bar.

If Australian constitutional changes were carefully considered, the same cannot be said for those that included the creation of our Supreme Court. They were announced by the prime minister, Tony Blair, in 2003, unheralded and without consultation. They resulted in my ending my judicial career in a position that I had never anticipated. And they have meant that I found myself in the front line in dealing with the implications of one of our most significant constitutional developments in my lifetime, which was the enactment of the Human Rights Act in 1998. That constitutional change was brought about with due propriety. It had been part of the Labour Party manifesto and was attended by due consultation. But before we get to the Human Rights Act I want to go back in history to the end of the Second World War.

In direct reaction to that war the United Nations Charter was signed on 26 June 1945.

Some three years later, the Universal Declaration of Human Rights, drafted by Eleanor Roosevelt, was adopted by 48 members of the General Assembly. The Universal Declaration was the basis of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the drafting of which the United Kingdom took the lead. The convention was open for signature in 1950 and the United Kingdom was an initial party to it.

Under the first article of the convention the parties agreed to 'secure to everyone within their jurisdiction the rights and freedoms defined in the convention'. Remember those words 'within their jurisdiction'. Those rights included the right to life (article 2), freedom from torture and degrading treatment or punishment (article 3), right to liberty (article 5), right to a fair trial (article 6), right to respect for private and family life (article 8) and freedom of expression (article 10).

In 1958 eight signatories to the convention, but not the United Kingdom, accepted the compulsory jurisdiction of the European Court of Human Rights at Strasbourg under terms that gave individual citizens the right to petition the Strasbourg Court to seek compensation for infringement of their convention rights by their own country.

We did not think that we had much to learn about human rights. ... Well, we received something of a shock, because over the years there were quite a number of successful applications against the United Kingdom.

The United Kingdom did not accept this compulsory jurisdiction until 1966. When we did so I doubt whether we thought that the Strasbourg Court would cause us too much trouble. We did not think that we had much to learn about human rights. In drafting the convention we had been concerned to see that our common law rights were reflected in its provisions. In particular, the article 6 provisions in relation to the right to a fair trial were modelled on our own procedures.

Well, we received something of a shock, because over the years there were quite a number of successful

applications against the United Kingdom.

Up to 2008 there were no less than 373 applications to the court that were held to be admissible, of which the United Kingdom was held to have violated the convention in no less than 279.

This stream of cases led the Labour government to introduce the Human Rights Act with the intention of 'bringing rights home'. Public authorities were placed under a duty to comply with the convention. If they did not, they were liable to pay compensation. They had a defence, however, if an Act of parliament required, or authorised them, to act in a way that infringed the convention. This reflected the fact that the Human Rights Act preserved the supremacy of parliament.

Under a written constitution a country's Supreme Court, or Constitutional Court, will usually be given the power to strike down legislation that infringes fundamental rights. This is not the position under the Human Rights Act. That Act effects a typically British compromise. Section 3 of the Act provides that courts must, *so far as it is possible to do so,* read and give effect to legislation in a way which is compatible with convention rights. If it is not possible, however, the court must give effect to the legislation, even though this infringes human rights. In those circumstances section 4 gives the court the power to make a declaration that the Act is incompatible with the convention. Where a declaration of incompatibility is made, parliament has a fast track procedure under which it can rectify the legislation, and it almost invariably does so.

Of particular significance so far as this lecture is concerned is section 2 of the Act. This requires the court, when determining a question in connection with a convention right, to 'take into account' any decision of the Strasbourg Court. The nature of that obligation has proved to be controversial.

I am now going to take you to some of the Strasbourg jurisprudence that the House of Lords, and latterly the Supreme Court, has had to take into account. In considering that jurisprudence it is important to keep in mind an important principle that the Strasbourg court applies. This is the principle that the convention is a 'living instrument' – *Tyrer v United Kingdom*[1] para 16. This is the same as the doctrine of the 'progressive interpretation' of constitutional instruments under which the instrument is seen as 'a living tree capable of growth and expansion within its natural limits' in the famous words of Lord Sankey in *Edwards v A-G of Canada*[2] at 136. The convention specifies human rights in general terms, but the rights embraced by those terms can change over time to accommodate changes in the social attitudes in the member states, such as, for instance, the acceptance of homosexual relations. The principle is diametrically opposed to the approach of some members of the American Supreme Court, such as Justice Scalia, which involves interpreting the US Constitution through the eyes of those who signed it.

The first case I want to talk about involved a gentleman called Mr Soering (*Soering v UK*[3]). There was cogent evidence in the form of his own admissions that he had committed two capital murders in Virginia, in the United States.

The United Kingdom proposed to extradite him to the United States to stand trial for them. He applied to Strasbourg. He contended that if he were returned he would be put on death row, and thus subjected to inhuman treatment. He further contended that if the United Kingdom extradited him to such a fate it would itself violate article 3 of the convention. His application raised an important issue of principle. The convention required the contracting parties to secure the convention rights and freedoms within their jurisdictions. How could extraditing someone from one's jurisdiction infringe the convention if it did not impact on any right enjoyed within the jurisdiction? The Strasbourg Court dealt with this question by holding that 'It would hardly be compatible with the underlying values of the convention…knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture' or inhuman treatment. The court held on the facts that extraditing Soering would violate his rights under article 3.

I do not view this decision as involving the 'living instrument' principle. It was concerned essentially, not with changing values, but with jurisdiction.

Strasbourg's approach could be applied to extraditing or expelling someone to a country where any other of his fundamental rights would not be observed. *Soering* was potentially the thin end of a very large wedge.

The next case in this sequence was *Chahal v United Kingdom*[4]. Mr Chahal was a Sikh separatist leader

who had unsuccessfully sought asylum in the United Kingdom. The secretary of state had concluded that his presence in the United Kingdom posed a threat to national security. He wanted to deport him to India. Mr Chahal applied to Strasbourg against the decision to deport him. He argued, relying on *Soering,* that deportation would infringe his rights under article 3, because he would be exposed to the risk of torture or inhuman treatment if he was sent home.

The United Kingdom Government argued that there was an exception to the *Soering* approach where the individual to be deported posed a threat to national security. It relied upon article 33 of the 1951 Convention relating to the Status of Refugees.

This prohibits returning a refugee to a country where his life or freedom would be threatened, but expressly exempts from that prohibition a refugee whom there are reasonable grounds for regarding as a danger to the security of the country wishing to deport him. The Refugee Convention was concluded very soon after the Human Rights Convention by essentially the same member states.

This and similar decisions of the Strasbourg Court have been anathema to successive UK governments and, I suspect, to the majority of the general public. Their attitude is – we did not ask this man to come to this country. He has no right of abode here. He is a threat to our security. If he insists on staying, then he must stay on our terms – namely in detention.

They could not possibly have believed or intended that the Human Rights Convention would override the Refugee Convention in respect of the removal of aliens. But the Strasbourg Court nonetheless held that article 3 provided wider protection than the Refugee Convention and that it precluded the deportation of Mr Chahal. It also precluded holding him in detention without trial on the ground of national security. This and similar decisions of the Strasbourg Court have been anathema to successive UK governments and, I suspect, to the majority of the general public. Their attitude is – we did not ask this man to come to this country. He has no right of abode here. He is a threat to our security. If he insists on staying, then he must stay on our terms – namely in detention.

These two cases form the background to one with which I was personally concerned, that of *Ullah* (*R Ullah v Special Adjudicator*[5]). There were in fact two cases heard together. They came before me when I was presiding over the Civil Division of the Court of Appeal as master of the rolls. The appellants were failed asylum seekers who were resisting being returned to their own countries on the ground that this would infringe their right of freedom of religion because they would not be permitted to practise their religions on return. We rejected their appeals. In giving the judgment of the court I expressed the view (para 22) that the convention was not designed to impact on the rights of states to refuse entry to aliens or to remove them. The convention was designed to govern the treatment of those living within the territorial jurisdiction of the member states. I went on to accept that Strasbourg had created an exception where the risk of torture or inhuman treatment was involved.

I noted that the Strasbourg Court had recognised that a similar approach might be adopted in relation to other human rights, but observed that Strasbourg had never in fact adopted such an approach. I then said (para 64):

> Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage article 3, the English court is not required to recognise that any article of the Convention is, or may be, engaged.

The House of Lords gave the appellants permission to appeal. It did so not because of doubts about the result that we had achieved, but in order to make it clear that our approach had been wrong. Lord Bingham held that our judgment did not reflect the current effect of the Strasbourg jurisprudence (para 22). He laid down the following principle (para 20):

> The House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court…This reflects the fact that the Convention is an international instrument, the correct

> interpretation of which can be authoritatively expounded only by the Strasbourg court.

From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of Strasbourg case law…It is of course open to member states to provide for rights more generous than those guaranteed by the convention, but such provision should not be the product of interpretation of the convention by national courts, since the meaning of the convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.

In the subsequent case of *Al-Skeini v Secretary of State for Defence*[6] at para 106 Lord Brown suggested that this last sentence should read 'no less, but certainly no more'. This was because if a case is decided by the Supreme Court against a claimant he can always go off to Strasbourg, but if a case is decided against the state, it has no such remedy.

Do these statements mean that we have no alternative but to follow any decision of the Strasbourg Court that deals definitively with a particular issue? Certainly not where the Strasbourg Court gives a one-off decision that cannot be described as 'clear and constant jurisprudence'.

Let me give you a relatively early example of a case where we managed to get the Strasbourg Court to have second thoughts. On 7 March 1988 a deranged man shot and killed a man called Ali Osman and injured his son. The son and his mother brought proceedings against the police in negligence, alleging that they should have prevented the shooting. The police succeeded in getting the action struck out on the ground that the police had, at common law, immunity as a matter of public policy from liability in negligence in relation to the investigation or suppression of crime. An appeal to the court of appeal was dismissed. The Osmans then went to Strasbourg. They alleged that their rights under article 6 of access to a court and of a fair trial had been denied. The Grand Chamber of 20 judges held unanimously that article 6 had been infringed. With respect to them, the court confused an immunity from negligence that the police enjoyed as a matter of substantive law with a procedural bar preventing the Osmans from bringing their claim.

Shortly after that decision the House of Lords gave judgment in *Barrett v Enfield London Borough Council*[7]. The claim was in negligence for breach of a duty of care alleged to have been owed by a local authority to a child in its care. Once again the issue was whether the claim should be struck out on the ground that, as a matter of public policy, the local authority owed no duty of care. Lord Browne-Wilkinson referred to the Strasbourg Court's decision in *Osman* and said that he found it extremely difficult to understand. He then subjected the decision to detailed criticism and declined to follow it.

In 2001 Strasbourg had another strike-out case before it (*Z v United Kingdom*[8]). The applicants had claimed against a local authority for negligence in failing to protect them from ill-treatment by their parents. The claim had been struck out on the ground that the local authority owed no duty of care. Before the Strasbourg Court the applicants relied on *Osman.* The court referred to Lord Browne-Wilkinson's decision in *Barrett* and remarked (para 100):

> The Court considers that its reasoning in the *Osman* judgment was based on an understanding of the law of negligence which has to be reviewed in the light of the clarifications subsequently made by…the House of Lords.

In effect, Strasbourg graciously accepted that they had got it wrong. The applications were dismissed.

This was the first example that I know of what I have come to describe as 'dialogue' between our court and Strasbourg.

Now I am going to give you two examples of dialogue with the Strasbourg Court where the court refused to budge and we had, ultimately, to fall into line. The first is in the field of housing law. Article 8 of the convention provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. That right is not absolute. A public authority can interfere with it if it is proportionate to do so for the protection of the rights and freedoms of others.

In England local authorities own residential premises which they lease to tenants. The respective civil law rights of the landlord and tenant are governed by complex legislation. It is designed to strike a balance between the rights of the tenant and the rights of others, notably the tenant's neighbours and others

on the housing list who are waiting for a home. The tenant is given security of tenure, subject to conditions. If the conditions are breached the local authority can terminate the lease. When the lease is terminated, the tenant becomes a trespasser and can be evicted provided that the authority obtains a possession order from the court. Possession actions used to be summary proceedings. If there was no issue as to the termination of the tenancy, the possession order was granted as of right.

Harrow London Borough Council obtained a possession order against a Mr Qazi upon the lawful termination of his tenancy. Mr Qazi challenged this on the ground that it interfered with his right to respect for his home. He argued that, even though he had become a trespasser, he must be given the right to challenge the making of a possession order on the ground that it would be disproportionate to permit the council to exercise its legal right to evict him.

The case went up to the House of Lords (*Harrow London Borough Council v Qazi*[9]) and split their Lordships. The majority held that the article 8 right to respect for the home could not be relied upon to defeat proprietary or contractual rights. They held that the council showed no lack of respect for Mr Qazi's right to a home when it exercised its legal right to recover possession. Mr Qazi's only possible remedy would have been to bring separate proceedings for judicial review of the council's decision to terminate his tenancy.

After this decision the Strasbourg Court gave judgment in respect of a claim by the Connors family (*Connors v UK*[10]). The Connors were gypsies. They were given a licence by the local authority to pitch their caravans on a gypsy site, but this licence was withdrawn after the family had been alleged to have indulged in anti-social behaviour. They were evicted pursuant to a court order. They applied for permission to seek judicial review of the council's decision to evict them and were refused this. They had greater success before the Strasbourg Court. That court held that their article 8 right to respect for their home had been infringed. Their eviction had lacked the necessary procedural safeguards because they had enjoyed no right to challenge on grounds of proportionality the council's decision to evict them.

Encouraged by this decision another group of gypsies, who had been evicted as trespassers from land owned by a council, challenged the possession order on the ground that it infringed their article 8 rights.

Their appeal went up to the House of Lords, together with an appeal from a decision that I had delivered, as master of the rolls, ruling against a family that sought to challenge a possession order on the same ground. We held that we were bound by *Qazi,* but expressed the view that *Qazi* was in conflict with the Strasbourg decision in *Connors.*

The House of Lords in *Kay v Lambeth London Borough Council*[11] dismissed the appeals. Lord Bingham held (para 28) :

> …it is ordinarily the clear duty of our domestic courts…to give practical recognition to the principles laid down by the Strasbourg court as governing … Convention rights… That court is the highest judicial authority on the interpretation of those rights…

The majority held, however, that the making of a possession order against a defendant who had no legal right to remain on the premises could only be challenged on the ground that the relevant law was not compatible with the convention. No challenge could be based on the personal circumstances of the defendant.

In *Doherty v Birmingham City Council*[12], the House of Lords modified its previous decisions to the extent of holding that a defendant could challenge, on conventional public law grounds, a local authority's decision to evict him in the possession proceedings themselves rather than having to bring separate proceedings for judicial review. But this right did not extend to permitting a proportionality challenge based on the defendant's particular circumstances.

The unsuccessful appellants in *Kay* took their case to Strasbourg (*Kay v UK*[13]). They succeeded. The court applied its reasoning in an earlier case called *McCann v United Kingdom*[14]. In that case it ruled:

> The loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined …notwithstanding that, under domestic law, his right of occupation has come to an end.

And so, inevitably, the Supreme Court had to reconsider the House of Lords jurisprudence. We did so, sitting

nine strong, in *Manchester City Council v Pinnock*[15]. Lord Neuberger wrote the judgment of the court. He said (para 47):

> This court is not bound to follow every decision of the European Court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European Court which is of value to the development of Convention law…Of course we should usually follow a clear and constant line of decisions by the European Court…But we are not actually bound to do so….
>
> Where, however, 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 court not to follow that line'.

And so, finally, we capitulated and held that, before making a possession order, a judge had to consider any issue of proportionality that was raised having regard to all the material facts.

Lord Irvine, who as lord chancellor promoted the Human Rights Act, gave a speech for the Bingham Centre on 14 December last year, in which he attacked our subservience to the Strasbourg Court. He described *Pinnock* as the culmination of a 'notorious line of cases'.

He complained that we had held that the Strasbourg Court's requirements had to be met 'even where parliament had established a tenancy regime which was specifically intended to provide for an expedited eviction procedure in order to protect the rights of those in greater need of the public sector accommodation and the rights of neighbours not to be subjected to anti-social behaviour'. I shall say more about that speech later. First I want to deal with a line of cases that Lord Irvine attacked with equal vigour.

In one of the law lords' finest moments, they struck down regulations introduced after 9/11 which provided for the indefinite detention without trial of aliens suspected of terrorism. Parliament riposted by inventing control orders. Control orders permitted restrictions to be placed on terrorist suspects that fell short of the 'deprivation of liberty' that would violate article 5 of the convention. To justify the imposition of a control order the secretary of state often had to rely upon information that could not be made public because it would injure national security. To meet this problem parliament had introduced a system of closed evidence, which could not be disclosed to the terrorist suspect, but would be disclosed to a special advocate whose duty it was to represent the terrorist suspect's interests.

A control order was placed on a terrorist suspect known as MB. The control order was justified by the home secretary as being necessary to prevent MB travelling to Iraq to fight against British and other coalition forces. But the reasons for suspecting that he was about to behave in this way were not disclosed to him.

They were put before the court as closed material. He challenged the control order on the ground that the admission of closed material was contrary to his convention right to a fair trial under article 6 of the convention.

At first instance the judge accepted his argument and made a declaration that the relevant legislation was incompatible with the convention. The home secretary appealed to the Court of Appeal. I presided as lord chief justice, together with Sir Anthony Clarke, who had succeeded me as master of the rolls and Sir Igor Judge, who was to succeed me as lord chief justice. We allowed the appeal. We held that reliance on closed material was permissible under article 6 provided that appropriate safeguards were in place to protect the individual. We ruled that the use of a special advocate, together with the relevant rules of court, provided appropriate safeguards.

MB appealed to the House of Lords (*Home Secretary v MB*[16]). There was copious citation of Strasbourg authorities. There was a dispute as to whether Strasbourg had approved the use of closed material and special advocates. MB's appeal was dismissed. The House held that the use of closed material would not automatically make a trial unfair. It depended on the circumstances. Sometimes disclosure of material which the home secretary wished to keep closed would be essential if the trial was to be fair and the home secretary would be required to choose between disclosing the evidence or not relying on it. Usually it would be necessary in the interests of a fair trial to disclose the gist of the case against the suspect.

Lord Brown suggested, however, that there might

be some cases where the closed material was so compelling that the court could, without the risk of injustice, found its decision upon it on the basis that it would have made no difference if it had been disclosed to the suspect.

This decision of the House of Lords was not generally well received, though no doubt it pleased the home secretary. The reasoning of their lordships was said to be unclear. In particular it was not clear whether the majority of the House had accepted Lord Brown's 'makes no difference' test.

In these circumstances it is not surprising that permission was given to AF, AN and AE, three further terrorist suspects who had been made subject to control orders, to appeal to the House of Lords (*Secretary of State for the Home Department v AF, AN and AE*[17]). What was perhaps surprising is that the Court of Appeal itself gave leave to appeal against its own decision, observing that it was not sure that it had correctly interpreted the decision of the majority of the House of Lords in MB. I can summarise that interpretation as follows. The appropriate test of a fair trial is what is fair in all the circumstances. The suspect should be provided with as much information as possible, if necessary by giving him the gist of the case against him.

If even this cannot be done because of the demands of national security, he must be provided with a special advocate.

In such a case there is no principle that the hearing will be unfair unless the suspect is given an irreducible minimum of allegation or evidence against him.

This finding was of critical importance, because in the case of each appellant, the grounds for suspecting him of involvement in terrorism were contained almost exclusively in the closed material.

By the time that these appeals came before the House of Lords, I had succeeded Lord Bingham as the senior law lord, so that I presided over the appeals. A week before the hearing, the Grand Chamber of the Strasbourg Court gave judgment in a case called *A v United Kingdom*[18]. That case involved applications by no less than 11 aliens who had been detained as terrorist suspects under the first batch of legislation that followed 9/11. Among the matters of which they complained was the use of closed material, and the Strasbourg Court dealt with this in great detail. It referred to the decision of the House of Lords in MB and the decision of the Court of Appeal in *AF* itself. In giving my judgment I summarised the most material part of the Grand Chamber's decision as follows (para 59):

> The controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.
>
> Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirement of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

Lord Rodger resorted to Latin – 'Argentoratum locutum, iudicium finitum, thankfully adding the translation 'Strasbourg has spoken, the case is closed'.

I held that in circumstances where the Grand Chamber had dealt fairly and squarely with the point at issue, its decision was definitive and that we had to follow it. All my colleagues, and exceptionally we had sat nine strong, agreed. Lord Hoffmann did so with great reluctance, ending his judgment (para 74) 'This, however, is what we are now obliged to declare to be the law'. Lord Rodger resorted to Latin – '*Argentoratum locutum, iudicium finitum*, thankfully adding the translation 'Strasbourg has spoken, the case is closed'.

I have referred to the lecture in which Lord Irvine objected to this decision. He said that the attitude of the House of Lords ran counter to the effect of section 2 of the Human Rights Act. That only required a court to 'take account' of the Strasbourg jurisprudence. This left the court free to make up its own mind on the application of the convention. Not only free to make up its own mind, but obliged to do so.

He said that section 2 obliged the court to confront the question of whether the relevant decision of the Strasbourg Court was sound in principle and should be given effect domestically. The domestic court was bound to decide each case for itself.

Even a recent and closely analogous decision of the Grand Chamber could not absolve a judge from deciding a case for himself. It was not open to him simply to acquiesce to Strasbourg. Lord Irvine has not been alone in this point of view. It echoed views repeatedly expressed by Professor Francesca Klug and Helen Wildbore (see, for instance, their article in European Human Rights Law Review 2010[19]) This is what they said about our decision in *AF:*

> A number of the judges in *AF* profoundly disagreed with the decision of the ECHR and believed that it fundamentally failed to strike the right balance between the Article 6 rights of the terrorist suspects and the Article 2 and 3 rights of the potential victims of any terrorist atrocity. If that disagreement and their estimation of its likely adverse consequences for the national security of the UK were serious enough, then under section 2 the judges were not obliged to follow, and should not have followed, the Strasbourg Court's decision. The point is of foundational importance. It would strike at the very heart of the integrity of our Courts if the Human Rights Act obliged them to declare our law to be something which they regard as fundamentally unsound in principle and damaging to the interests of the people of Britain simply because of the latest decision of the Strasbourg Court. Section 2 emphatically does *not* impose upon our judges so invidious an obligation.

This purple passage was over the top. The reality is that most of us in *AF* reached the conclusion that the Strasbourg Court had got it right.

But it is not only those outside the court who have attacked the 'no more and certainly no less' or 'no less and certainly no more' approach to following Strasbourg. Lord Kerr, who was lord chief justice of Northern Ireland and who moved from that office to become a founder member of the Supreme Court has declined to adopt this approach. In *Ambrose v Harris (Procurator Fiscal)*[20] Lord Hope expressed the opinion that parliament did not intend to confer on the courts of the United Kingdom the power to give more generous scope to convention rights than that found in the jurisprudence of the Strasbourg Court. In this year's Clifford Chance lecture Lord Kerr publicly stated his disagreement with this proposition. He criticised a statement of mine in *Smith v Minister of Defence* that we should not hold that the armed forces of a state fell within its jurisdiction for the purposes of the Human Rights Convention, even when they were outside the territorial jurisdiction of that state, unless and until Strasbourg so held. In *Ambrose v Harris Procurator Fiscal* he dissented from the majority because he could not agree with the statement of Lord Hope that parliament did not intend to confer on the courts the power to give a more generous scope to convention rights than that found in the jurisprudence of the Strasbourg Court.

Lord Wilson, who has recently joined the court from the Court of Appeal, has also placed a question mark on the 'no more and certainly no less' approach. In his judgment in *Sugar v BBC* he said that he would welcome an appeal in which it would be appropriate for the court to consider whether it might now usefully do more than shadow the Strasbourg Court in the manner hitherto suggested – no doubt sometimes in aid of further development of human rights and sometimes in aid of their containment within proper bounds.

Our present coalition government has not criticised the Supreme Court for failing to give a more generous interpretation of the Human Rights Convention than Strasbourg. We have, however, come in for some criticism for the way that we have interpreted the convention. Let me give you an example. In April 2010 we gave judgment in an appeal by the secretary of state for justice – i.e. the lord chancellor – against a judgment of the Court of Appeal in favour of two sex offenders (*R(F) v Justice Secretary)*[21]. The first had been sentenced when he was only 11 years of age. The second was an adult offender. The nature of their offences had the automatic result under the *Sexual Offences Act 2003* that they were, in effect, put on a sex offender's register, which carried with it some quite exacting requirements such as the obligation to report in person to a police station in the event of making a trip abroad or leaving home for a period. They each brought judicial review proceedings claiming a declaration that the Sex Offences Act was incompatible with their article 8 rights to respect for their private life in one respect only.

This was that the Act had no provision under which an individual could apply to be taken off the register on the ground that he no longer posed a risk. You were on the register for life. The Divisional Court made the declaration sought. The Court of Appeal dismissed the secretary of state's appeal, as did we when the case reached the Supreme Court. We examined the Strasbourg jurisprudence and looked at the position in other countries. We reached the conclusion that some

who had committed sexual offences in the past would be able to show that they no longer posed a risk and that there was no justification for an absolute bar of the right to apply to be taken off the register. When we gave this decision the Labour Party was still in power. If they did not like our decision they were under no obligation to change the law, albeit that if they did not do so they might be in breach of the United Kingdom's obligations under the Human Rights Convention. They decided, however, to change the law. When the coalition succeeded them, officials prepared some different proposals for legislative change so as to give sex offenders the right, after a lengthy period, to apply to be taken off the register. When ministers discovered these proposals they were concerned that they would not be popular with the public. So they decided to blame the judges, giving the false impression that we were forcing these changes on them. They did so by a concerted attack. The prime minister and the home secretary each said that they found our decision 'appalling' and the Home Office minister in the House of Lords made a similar statement. The home secretary stated 'It is time to assert that it is parliament that makes our laws and not the courts'. This attack on our court was unjustified and inappropriate.

I do not believe that there was any malice in it. It merely demonstrated that ministers, newly in power, did not appreciate the convention under which ministers do not attack judicial decisions, and judges do not attack government policy. I believe that the lord chancellor had a word with his colleagues and that they are now better informed.

Nonetheless, there is in the United Kingdom a body of opinion, that includes the government, that believes that the Strasbourg Court has been extending its empire into realms that should be left to the individual member states. Strasbourg in theory accords to individual states what it calls a 'margin of appreciation' as to how they comply with the convention. Our court considered a challenge to the practice of the police retaining indefinitely DNA samples of those convicted of, or charged with, criminal offences. We held that this was a justifiable and proportionate interference with the right to private life, because the practice resulted in criminals being caught who would otherwise have got away with their crimes. To our dismay, and that of the government, Strasbourg held that we were wrong and that limits had to be placed on DNA retention. Unfortunately the Strasbourg Court did not spell out what those limits were.

We have signed up to a protocol which guarantees the right of free elections at reasonable intervals by secret ballot.

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The government has been incensed that, in a case called *Hirst v United Kingdom*[22], the Strasbourg Court held that we have breached this protocol by imposing a blanket ban on anyone who is in prison being allowed to vote.

More recently the Strasbourg Court has provoked ministerial dismay and public anger by ruling that it would offend the human rights of a gentleman called Abu Qatada if we deport him to his own country, which is Jordan. He is an Islamic radical cleric whom the Jordanians wish to try on charges of terrorism. We do not want him in our country. He objected to being expelled to Jordan on the grounds that he would risk being tortured there and that he would not receive a fair trial because evidence obtained by torture would be admitted against him. The United Kingdom government obtained specific assurances from Jordan that he would not be tortured and the Supreme Court ruled that the possibility that evidence obtained by torture would be used at his trial was not a bar to his deportation. Strasbourg did not agree. They held that the UK could properly rely upon the Jordanian assurances that he would not be tortured, but that he could not be sent to a country where there was a likelihood that evidence obtained by torture would be used against him. So at the moment we are stuck with him.

Cases such as these have resulted in some organs of our media launching a virulent attack on both the Strasbourg Court and the European Convention itself.

'Strasbourg has neither authority nor legitimacy' says the *Daily Telegraph*; 'The European Court of Human

Rights must mend its ways or Britain should quit' trumpets the *Daily Express*.

Britain has currently the presidency of the Council of Europe and David Cameron has taken advantage of this to try to get agreement to some reforms to the Strasbourg Court. 'Prime Minister tells Euro judges to stop meddling in British Justice' was how the *Mail on Sunday* trailed a speech to be made by Cameron at Strasbourg a few weeks ago. Happily the trailer gave a false impression of the quite balanced speech that Cameron actually delivered. '*Menace sur la Cour Européene des droits de l'homme*' 'the European Court of Human Rights under threat' was the headline in *Le Monde*. In fact, on the face of it, what Cameron is proposing makes a lot of sense. Because individual citizens of the member states have an individual right to petition the Strasbourg Court, there are now over 152,000 cases pending. Cameron is proposing that cases should be screened and that the European Court should only hear applications that raise an issue of principle. If no defect is alleged in the system for protecting convention rights in the member state or in the legal principles applied by the domestic court to the applicant's case, but the applicant simply alleges that the court misapplied those principles, his application should not be entertained.

In short, the Strasbourg Court should not act as a final court of appeal in human rights cases, but only entertain applications that raise issues of principle. The only problem with this is that it will open the door to member states where the rule of law is not as well respected as in the United Kingdom; paying lip service to the convention principles, but not applying them in practice.

Parallel with these developments the government is considering replacing the current Human Rights Act with a British Bill of Rights, under which there will be no requirement for our courts to follow Strasbourg jurisprudence. It would not be right for me to express in public any doubts that I might have about this proposal, but what I can suggest is that concerns about our slavishly following the Strasbourg jurisprudence are out of date. In some recent cases we have gone further than the Strasbourg Court. Let me give you three examples. In *R (Limbuela) v Secretary of State for the Home Department*[23] we held that article 3, which prohibits inhuman or degrading treatment, imposed a positive duty on the state to provide subsistence to asylum seekers.

In *EM (Lebanon) v Secretary of State for Home Department*[24] we held that it would involve a breach of the right to respect for family life guaranteed by article 8 for a mother and daughter to be deported to Lebanon because they would be separated on their return. And in *R (G)(Adoption)*[25] we held that a blanket ban in Northern Ireland on homosexual couples jointly adopting infringed article 8. Each of these decisions was without precedence in the Strasbourg jurisprudence. They were in fact decisions of the House of Lords shortly before the Supreme Court was set up.

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More significant is a decision of the Supreme Court that I delivered that refused to follow a clear statement of principle of the Strasbourg Court. It is called *R v Horncastle*[26]. Let me start with the Strasbourg jurisprudence. The relevant decision was one against the United Kingdom in relation to a gentleman called Al Khawaja. He was a consultant physician who had been charged and convicted on two counts of indecent assault on two female patients. One of them had subsequently committed suicide, but not before she had made a full statement to the police. That statement was essentially the only evidence on the count that related to her. It received support from similar fact evidence. The trial judge allowed it to be given in evidence under the *Criminal Justice Act 1988*, which gave the court discretion to admit the statement of a witness who had died.

Mr Al Khawaja applied to Strasbourg, alleging that his right to a fair trial under article 6 had been infringed by the admission of this hearsay evidence.

The 4th Section of the court upheld his application. They applied a line of Strasbourg jurisprudence to the effect that a conviction could not be founded on hearsay if this was the sole or decisive evidence against the defendant. The United Kingdom invited the Strasbourg Court to refer this case to the Grand Chamber for

reconsideration. The Strasbourg Court agreed to do this, but deferred the Grand Chamber hearing pending the decision of the Supreme Court in *Horncastle,* for this raised the identical issue.

In *Horncastle* the defendants were charged with causing grievous bodily harm with intent. The victim gave a witness statement to the police describing the circumstances of the attack, but died of other causes before the trial. The trial judge admitted the statement in evidence under the *Criminal Justice Act 2003*, which made detailed provision for the circumstances in which hearsay evidence could be admitted in a criminal trial, which were subject to a number of safeguards. The hearsay statement provided evidence that was decisive in leading to the defendants' convictions. They appealed, unsuccessfully to the Court of Appeal and then on to the Supreme Court. The appeals were heard with other appeals raising the same issue. We sat seven, rather than the usual five, and I invited the lord chief justice, Lord Judge, to be one of our number. The defendants naturally relied on the 'sole or decisive' principle of Strasbourg jurisprudence. They argued that our duty under section 2 of the Human Rights Act 'to take account' of this jurisprudence meant that we should apply the principle. We declined to do so. We dismissed the appeals.

I subjected the Strasbourg jurisprudence to critical analysis. I found no discussion of principle that justified the sole or decisive rule. I then summarised the position as follows (para 91):

> The sole or decisive test produces a paradox. It permits the court to have regard to evidence if the support that it gives to the prosecution case is peripheral, but not where it is decisive. The more cogent the evidence the less it can be relied upon. There will be many cases where the statement of a witness who cannot be called to testify will not be safe or satisfactory as the basis for a conviction. There will, however be some cases where the evidence in question is demonstrably reliable.'

I then gave this example:

> A visitor to London witnesses a hit and run road accident in which a cyclist is killed. He memorises the number of the car, and makes a statement to the police in which he includes not merely the number, but the make and colour of the car and the fact that the driver was a man with a beard. He then returns to his own country, where he is himself killed in a road accident. The police find that the car with the registration number that he provided is the make and colour that he reported and that it is owned by a man with a beard.
>
> The owner declines to answer questions as to his whereabouts at the time of the accident.

I suggested that parliament, when formulating the relevant legislation, had put in place safeguards against unfairness from the use of hearsay evidence that were less draconian than Strasbourg's sole or decisive rule.

As to the duty to follow Strasbourg jurisprudence I said this (para 11):

> The requirement to 'take into account' the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. 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 particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case.

And I concluded my judgment:

> I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg court may take account of the reasons that have led me not to apply the sole or decisive test.

I waited, with bated breath, to see what the Grand Chamber did when they reconsidered *Al Khawaja.* They referred to *Horncastle* and went on to say this about the 'sole or decisive' rule:

> It would not be correct, when reviewing the question of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise… To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the way in which the court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.

The court considered the statutory and common law safeguards that exist in relation to the admission of hearsay evidence under our system and concluded that they were 'in principle strong safeguards, designed to ensure fairness'.

The court went on to reverse its decision in *Al Khawaja*, holding that the admission of the hearsay evidence had not infringed the defendant's article 6 right to a fair trial.

I believe that this has been a very significant development in the relations between our court and the Strasbourg Court. Shortly before the Strasbourg Court delivered its judgment in *Al Khawaja,* Sir Nicolas Bratza, the president of that court, delivered a paper on 'the Relationship between the UK courts and Strasbourg'[27]. He referred to the reaction in the UK to the 'prisoners' votes' case and remarked 'The vitriolic, and I am afraid to say, xenophobic fury directed against the judges of my court is unprecedented in my experience, as someone who has been involved with the convention system for over forty years'. He went on to comment on the *Ullah* approach and its reverse 'no less and certainly no more' as suggesting 'a position of deference from which it is difficult to have an effective dialogue. It is not' he said 'the way in which I or my fellow judges view the respective roles of the two courts.' He went on to commend my judgment in *Horncastle,* concluding 'I firmly believe that such dialogue can only serve to cement a relationship between the two courts which, whatever criticisms may be levelled against the Strasbourg Court, is a sound and solid one'. And that, I think, is a good note on which to end this lecture.

Endnotes

1. (1978) 2 EHRR 1
2. [1930] AC 124
3. (1989) 11 EHRR 439
4. (1996) 23 EHRR 413
5. [2004] UKHL 26; [2004] 2 AC 323
6. [2007] UKHL 26; [2008] AC 153
7. [2001] 2 AC 550
8. (2002) 34 EHRR 3
9. [2003] UKHL 43; [2004] 1 AC 983
10. (2004) 40 EHRR 189
11. [2006] UKHL 10; [2006] 2 AC 465
12. [2008] UKHL 57; [2009] 1 AC 367
13. [2011] HLR 13
14. (2008) 47 EHRR 913
15. [2010] UKSC 45; [2011] UKSC 6; [2011] 2 AC 104
16. [2008] UKHL 46; [2008] 1 AC 440
17. [2009] UKHL 28; [2010] 2 Ac 296
18. (2009) 49 EHRR 625
19. 6, 621-630
20. [2011] 1 WLR 2435
21. [2010] UKSC 17; [2011] 1 AC 331
22. (2006) 42 EHRR
23. [2006] 1 AC 396
24. [2009] 1 AC 1198
25. [2009] 1 AC 173
26. [2009] UKSC 14; [2010] 2 AC 373
27. (EHRLR 2011, 5, 505-512)