

## **SALFORD HUMAN RIGHTS CONFERENCE 2010**

**4 June 2010**

It is a somewhat weird experience to be speaking in a building which bears my name – most buildings are named after dead people and I don't think that I'm quite dead yet! But of course it is a great pleasure to be here with you.

It was a privilege to be among the High Court judges sitting on the woolsack to hear the Queen's Speech at the opening of the new Parliament in 1997. There was great excitement at the announced plan to make the European Convention on Human Rights part of United Kingdom law. It was also a privilege to be among the Supreme Court judges sitting behind the woolsack to hear the Queen's Speech at the opening of the new Parliament on 25 May this year. There was some relief to hear that it is not instantly planned to repeal the Human Rights Act.

This is not to suggest that making life more interesting for the judges is an end in itself although the Human Rights Act has certainly done that. But it has enabled a type of legal debate, both in and out of court, which could not have taken place before it was passed. It has enabled some very good things to be done, both in and out of court. But this conference is an opportunity to reflect upon some of the less good things which may have resulted from the Act. It has undoubtedly enjoyed a very poor press. We in the courts have to ask ourselves whether this is simply because of (innocent or deliberate) misunderstanding or whether we are indeed getting some important things wrong.

There is undoubtedly room for more views than one about what has been good and what has been less good about the Act over the past ten years. So I asked the extremely bright young Judicial Assistants in the Supreme Court for their views on the high points and the low points. This was an instructive exercise. They were all human rights enthusiasts but they did not always agree on what was high and what was low: some thought, for example, that *Marper – R (S) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196, about the retention of fingerprints and DNA samples - was a low point – presumably because the United Kingdom lost in Strasbourg; but one thought it was a high point – presumably because he thought that the United Kingdom had got this one right and Strasbourg had got it wrong. Rape victims and people wrongly suspected of rape would surely prefer our approach, although rapists would surely prefer the approach in Strasbourg.

It is not only that one can have two views on particular cases. More fundamentally, it is that many of the questions of constitutional principle which have emerged since the Act came into force are still being worked through. These have to do with the relations between the courts and the other branches of Government and between the United Kingdom and Strasbourg. So I have picked out a few themes to illustrate these. Because this session is headed ‘personal biography’ I have concentrated, not only on cases with which I have personally been involved, but also on cases with a ‘family’ theme. It is remarkable how many of the big constitutional issues have been explored in this context rather than in the politically more visible context of terrorism.

2008 saw whole series of House of Lords cases about migration and family rights. *R (Baiai) v SSHD* [2008] UKHL 53, [2009] 1 AC 287 was about the immigration-

control motivated restrictions on the right to marry protected by article 12 – which were found to be discriminatory and disproportionate. *Beoku-Betts* [2008] UKHL 39, [2009] 1 AC 115, and *Chikwamba* [2008] UKHL 40, [2008] 1 WLR 1420, were about the impact of immigration decisions on family life – should the impact on other family members be taken into account when considering the impact upon the particular claimant? The House of Lords held that it should. Families are greater than the sum of their constituent parts.

These can be seen as very positive developments in immigration law, but they have undoubtedly made the task of immigration control rather more complicated. But the family and immigration context has also raised three of the most substantial questions of principle under Human Rights Act.

### **(1) The role of the courts**

When the Human Rights Act was passed, public lawyers assumed would that it would be their playground. They were mainly correct, although criminal and family lawyers have also been heavily involved. But they also assumed that the usual remedy would be Judicial Review. So what was the role of the court? Was it simply to review – albeit with ‘heightened scrutiny’ in a human rights context – what the administrative decision-makers had done? Or was it to decide whether – as a matter of fact and substance – what they had done was incompatible with the individual’s Convention rights?

In *Mahmood* [2001] 1 WLR 840, the Court of Appeal held that it was the first of these. Heightened scrutiny *Wednesbury* would ‘in broad terms and in most instances suffice’. ‘The HRA does not authorise the judges to stand in the shoes of Parliament’s delegates . . .’ There was some support for this approach in the speech of Lord Steyn in *Daly* [2001] UKHL 26, [2001] 2 AC 532. *Daly* is rightly regarded by the Supreme Court Judicial Assistants as one of the high spots, because it emphasised the differences between ‘heightened scrutiny *Wednesbury*’ and proportionality in human rights adjudication. But Lord Steyn went on to say that it was still not merits review of administrative action.

This begs the whole question. What does it mean for section 6(1) of the Human Rights Act to say that it is unlawful for public authority to act in a way which is incompatible with a Convention right? Does it mean that they must not do it? And who decides whether or not they have done it? The idea that this is not for the courts to decide is questionable enough where the primary decision-maker is a public authority – if a policeman acts incompatibly with a Convention right we do not say that he is the person charged by Parliament with arresting people so the courts cannot decide whether he has acted unlawfully. But the idea that it is not for the courts to decide is obviously wrong when the primary decision-maker is a court or tribunal – as it quite clearly is under the immigration appellate structure. The tribunal is expressly charged with deciding whether the decision is compatible with the Convention rights.

It was finally established in *Huang and Kashmiri* [2007] UKHL 11, [2007] 2 AC 167 that it is for tribunals and courts to make their own judgment – not simply to review the judgment made by the executive. It was also held that there is no presumption that

the immigration rules strike the right balance between family life and immigration control, so that any case falling outside the Rules had to be exceptional for breach of Convention rights to be established.

I am not sure *Huang and Kashmiri* is the end of the story – we may still get cases where the courts are reluctant to decide whether there was in fact a breach of the Convention if statute provides that the primary decision-maker is an executive agency. It may be instructive that *Huang and Kashmiri* did not feature in the Judicial Assistants' list at all. Does that mean that to them it is not as significant as I think it is?

## **(2) 'No more and no less'**

Immigration was also the context for Lord Bingham's famous observation in *Ullah* [2004] UKHL 26, [2004] 2 AC 323, para 20, 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'. Lord Brown later said in *Al-Skeini* [2007] UKHL 26, [2008] 1 AC 153, para 106, that this could just as well have been 'no less, but certainly no more'. I have associated myself with them both, not only at the time and but also in later cases.

But this is a problem. There are several well-known arguments against such caution –

- (i) Human Rights Act rights are rights existing in United Kingdom law and protected by United Kingdom law, not rights existing in European Law and protected by the European Court of Human Rights.

(ii) The Act only requires us to ‘have regard’ to the European case law, not slavishly to follow it.

(iii) There are indications in the Parliamentary history that Parliament did not intend us to hold back just because Strasbourg had not yet arrived. Ironically, this includes Lord Bingham, as Lord Chief Justice, quoting Milton’s *Areopagitica* to the House of Lords: ‘let not England forget her precedence of teaching nations how to live’.

(iv) The stated reason for restraint does not make much sense – that the interpretation of the Convention should be uniform throughout the member states. We cannot commit other Member States or the European Court of Human Rights to our interpretation of the rights – so why should they mind what we do, as long as we do at least keep pace with the rights as they develop over time?

But in fact the question is more complicated than that. Willingness to leap depends upon the type of question being asked. There are at least three cases in which the Law Lords have consciously leapt ahead of Strasbourg. All three are regarded as high points by the Supreme Court Judicial Assistants. What can we learn from them?

First was *Limbuella* [2005] UKHL 66, [2006] 1 AC 396. Deliberately reducing certain asylum seekers to destitution was held to be inhuman and degrading treatment contrary to article 3. They could not get any support from the state, nor could they

work to support themselves, so if they could not find support from family or charity, they would be forced to live and beg on the streets, which is also unlawful. This has been seen as implying some minimum socio-economic rights into article 3. I am not sure that it is, because the breach might have been cured by allowing the asylum seekers to work to support themselves. But it is interesting that a senior Strasbourg judge who has so described it was quite relaxed about our leaping ahead of them.

Second was *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, again regarded as a high point by our Judicial Assistants. The Law Lords struck down a provision of the Northern Ireland Adoption Order, which counts as secondary, not primary, legislation for the purpose of the Human Rights Act. It discriminated against unmarried couples by not allowing them to adopt jointly, even if this would be in the best interests of the child involved. As Lord Hoffmann put it, this blanket ban ‘turned a reasonable generalisation into an irrebuttable presumption’. Strasbourg has not yet decided that married and unmarried couples can be equated for this purpose. Three of Law Lords thought that it would soon do so – although this was based on cases about sole adoption by gay or lesbian applicants, so two of us were not so sure that it would. But the facts were clearly ‘within ambit of article 8’, thus engaging the article 14 right not to be discriminated against in the enjoyment of those rights; not being married was a status within meaning of article 14; so the issue was whether the discrimination could be justified. If Strasbourg would not find against the United Kingdom, it would be because this was regarded as being within our margin of appreciation. *Ullah* was not concerned with something within margin of appreciation. If something is within margin of appreciation, it is for the national authorities to decide what suits us best.

So we are not (quite) leaping ahead of Strasbourg in deciding that an apparent breach of Convention rights cannot be justified.

But in this instance, was it for the courts to decide this or should we leave it to Parliament (in this case the Northern Ireland Assembly)? Strasbourg is supremely indifferent to this internal question. It is concerned only with whether the United Kingdom as a state has violated a person's Convention rights. Four out of five of us thought that the courts had a particular responsibility to guard against unjustified discrimination. The legislature was free to decide upon issues of social policy but not to discriminate on irrational grounds.

Third was *EM (Lebanon)* [2008] UKHL 64, [2009] 1 AC 1198, also on the Judicial Assistants' list. This was definitely in the same territory as *Ullah*. The question was whether it would be a breach by the United Kingdom government to expel a mother and child to another country, where their article 8 rights would inevitably be breached. Strasbourg has long been firm that member states must not expel a person to a place where there is a real risk of torture, however the good reasons for wanting to expel him. Strasbourg has acknowledged that the same could apply to the flagrant denial of fair trial rights in a foreign country. It has declined to rule out the possibility for flagrant denial of other rights, including qualified rights such as article 9 (with which *Ullah* was concerned) or article 8 (with which *EM (Lebanon)* was concerned), but it has never actually so held. One difficulty is that the courts in the expelling country cannot assess the strength and proportionality of the justification in the receiving country. So it has to be clear that the interference cannot be justified. Here the Law Lords thought that the automatic separation of mother and child could not be



justified – the male Law Lords being more concerned with the mother’s rights and the female being more concerned with the child’s.

The case is as interesting for what was not said as it is for what was. The reason why mother and child would automatically be separated on return was substantive sex discrimination but the Law Lords did not want to base their decision on this as opposed to the extreme facts of the case.

Is there a pattern to these examples? If it is likely that the claimant will win in Strasbourg, the courts are more likely to anticipate the predicted outcome even though it has not yet happened. If it is clear that the claimant will lose, the courts are unlikely to leap ahead. But if the decision is within the state’s margin of appreciation the question becomes, not our relations with Strasbourg, but our relations with Parliament.

We are likely to give great weight to a recent Parliamentary verdict on how to strike the balance between competing Convention rights or on the justification for interference with qualified rights – political advertising and hunting with dogs being the two most prominent examples. But it may be different if the legislation was some time ago and without reference to the Convention rights – as in *Re G*. Even if it was some time ago, the legislation may have been going with the grain of human rights developments rather than against it – corporal punishment in schools being good example.

I was initially attracted by the idea that there was a distinction between developing the common law and challenging the will of Parliament – that the courts could get ahead of Strasbourg in developing the common law but should not tell Parliament that it was wrong unless it was clear that Strasbourg would require us to do so: see *DS v HM Advocate* [2007] UKPC 36, para 92. That is still attractive constitutionally. But in the Human Rights Act ‘the Convention rights’ cannot mean different things depending upon whether we are developing the common law, controlling the executive or interpreting the will of Parliament. So I think that we shall continue to strive to reconcile respect for human rights with respect for Parliament.

### **(3) Interpreting legislation**

Respect for Parliament brings me to the power and the duty, in section 3(1) of the Act, to interpret legislation compatibly with the Convention rights if we can. Here again there are some highs and some lows. The high point – although surprisingly not on the Judicial Assistants’ list at all – was *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557. The Court of Appeal anticipated that Strasbourg would hold it unjustifiable to discriminate between opposite and same sex unmarried couples in the right to succeed to a rented family home. In between the Court of Appeal and House of Lords’ decisions, the European Court of Human Rights decided *Karner v Austria* [2003] 2 FLR 623 just as the Court of Appeal had predicted. The House of Lords had no difficulty in agreeing with the Court of Appeal on the substantive issue. Most of the Law Lords also had no difficulty in interpreting ‘living with each other as husband and wife’ so as to include same sex relationships. It was easily within what could be

done with the language, unless you assumed that a ‘husband’ and ‘wife’ had necessarily to be of opposite sexes.

More dramatic was *SSHD v MB* [2007] UKHL 46, [2008] 1 AC 440, when the Law Lords inserted words into the Prevention of Terrorism Act 1995 in order to produce a Convention-compliant interpretation that was the exact opposite of what Parliament had in fact intended – that is, that a control order could not be confirmed if a fair trial could not be had without disclosure of the closed material; it was still up to the Home Secretary to decide whether or not to disclose, but if he or she failed to do so he or she would also fail to get the order. It was a remarkable testimony to how things have changed, because of the Human Rights Act, that when the problem came back to the House of Lords in *SSHD v AF* [2009] UKHL 29, [2009] 3 WLR 74, the Home Secretary accepted this and did not argue that the Lords’ previous interpretation was wrong – despite considerable encouragement from at least one of the Law Lords to do so.

On other hand, one of my personal low points in the interpretation stakes was what became *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291. In the Court of Appeal [2001] EWCA Civ 757, [2001] 2 FLR 582, we had tried to say that the Children Act 1989 should be ‘read and given effect’ in such way that the Convention rights of both parents and children were not infringed as result of the Local Authority’s failure to comply with the care plans which had been approved by the family court in care proceedings. The Law Lords held that we had sinned in two ways: in principle, because section 3 could not be used to contradict ‘cardinal principle’ of the legislation – in this case that once a care order was made,

the Local Authority were in charge of its implementation; and technically, because we had failed to identify a particular provision of the 1989 Act which ought to be read in a different way. We had had in mind that the power to make care orders should be ‘given effect’ in a particular way – by identifying which parts of the care plan were so crucial to compliance with the Convention rights of the parents or the child that any departure should be brought back to court for explanation. This would have involved reading rather a lot of words into section 31(1)(a) of the Children Act 1989 but we would have done so if we had realised that it was required.

So it seems that if Parliament fails to mention something at all, the courts cannot fill the gaping hole by saying how what Parliament *has* said should be put into practice; whereas if Parliament does say something quite clear and precise which the court thinks incompatible with Convention rights, the court can find a different meaning for it in order to avoid the incompatibility. I question whether this is in fact what Parliament intended when enacting section 3(1).

#### **(4) Functions of public nature**

I cannot resist concluding with my own lowest point of all – the majority decision in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95. The majority held that it was not a ‘function of a public nature’ to accommodate an old person in a care home at public expense under arrangements made with the local social services authority acting under the statutory powers in section 21(1) of National Assistance Act 1948. This meant that the care home was not a ‘public authority’ obliged to act

compatibly with the Convention rights in this respect. The Supreme Court Judicial Assistants all strongly agreed that this was a low point.

The Government had intervened to support the claimant's case but to no avail. The actual decision was rapidly reversed by statute. But the problem remains. When more and more public functions are being outsourced to the private and voluntary sectors, what are the criteria for deciding whether or not theirs is a 'function of public nature'? Is there anything which is essentially public rather than private? Is coercion the key – so that privatised prisons and psychiatric institutions admitting compulsory patients are still performing functions of a public nature, whereas privatised care homes and medial facilities are not, even if they are paid for through public expenditure?

## **Conclusion**

There have been some notable individual advances because of the Act. It would be good if we could celebrate these, rather worry about the underlying constitutional problems of implementation with which I have been concerned today. It seems a shame that an Act, which appeared to be so clearly drafted and was trying to do such an important but radical thing, has given rise to so many difficult constitutional issues on which we have had to spend so much of our time. Maybe the previous mind-set of the practitioners and the courts is more to blame than Parliament and the Parliamentary draftsmen. But these are difficult questions in the constitutional relationship between Parliament and the courts. We have still not heard the last word on most of them. I look forward to finding some solutions in the next ten years of the Human Rights Act.