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Background and Interpretation

1. The Protection of Human Rights Prior to the Human Rights Act

Interest in the promotion and protection of human rights in the countries of the United Kingdom did not start on 2 October 2000 with the coming into force of the Human Rights Act 1998 (HRA). For many years the common law, primary and secondary legislation, and European Union (EU) law have provided legal protection for human rights whilst international human rights law, although not directly enforceable in national courts,[1] has provided an important benchmark for the courts, executive and legislature. With the coming into force of the HRA, these other mechanisms of protection have not disappeared but operate alongside the HRA, in some instances filling the gaps[2] and in others providing equivalent[3] or even stronger legal protection for human rights.[4] Section 11 of the HRA provides that a person's reliance on a Convention right does not restrict 'any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom' or restrict 'his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9' of the HRA.[5]

[1] See eg *R (Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13, [2007] 2 AC 189, where it was confirmed by the House of Lords that decision-makers are under no obligation to exercise discretionary powers conferred upon them so as to comply with unincorporated international obligations.

[2] In some instances the HRA may not apply. For example, if the act occurred before 2 October 2000 or the claimant does not fall within the definition of victim in s 7 of the HRA.

[3] For example, in *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532 the House of Lords reached the conclusion that the Secretary of State's policy governing the searching of prisoners' cells was unlawful on an 'orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review even though the same result was achieved by reliance upon Art 8 of the Convention. See also *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 AC 534 and *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531.

[4] For example, in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, in deciding that the meaning of family in the Rent Act 1977 encompassed a same sex partner, a majority of the House of Lords was not influenced by the fact that the European Court of Human Rights had not so far accepted claims by same sex partners to family rights.

[5] It is clear that legislation can be compatible with Convention rights if it actually provides greater protection. See the comments of Lord Woolf in *R v Broadcasting Standards Commission, ex p British Broadcasting Corporation* [2001] QB 885, [17].

Whilst the common law has remained fairly static in relation to the protection of human rights following the coming into force of the HRA, over the last ten years the national protection of human rights through EU law has grown and there are now some judgments where human rights law is clearly given effect to in this way. For example, in the *Rugby Football Union* case[6] the Supreme Court considered and applied the EU Charter of Fundamental Rights where the Rugby Football Union sought, under *Norwich Pharmacal* principles, the identity of those who had advertised for sale or sold tickets for the autumn international and 'six nations' rugby matches. It was argued by the respondent that to make such an order would breach Article 8 of the EU Charter which guaranteed the protection of personal data. The Supreme Court accepted that in making the order it could be regarded as implementing EU law, namely the Data Protection Act 1998, which gave effect to the EU data protection directive. The EU Charter therefore had to be considered but no breach of Article 8 was established.[7]

Much has been written about these other important mechanisms for the promotion and protection of human rights and the essential features of this machinery will not be repeated here.[8] The focus of this book is the HRA, which, whilst not the only means for the legal protection of human rights domestically, is at present clearly the most effective.

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2. Background to the Human Rights Act

2.1 The Incorporation Debate

Constitutional tradition, in particular the principle of the sovereignty of Parliament and the protection for human rights provided by common law and statute, meant that for a long time there was very little interest in adopting a modern form of a Bill of Rights. But by the late 1970s this had changed, with bodies such as the National Council for

[6] *The Rugby Football Union v Consolidated Information Services Limited* [2012] UKSC 55, [2012] 1 WLR 3333.

[7] See also *R (S) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin); *R (Zagorski) v Secretary of State for Business, Innovation & Skills* [2010] EWHC 3110 (Admin), [2011] HRLR 6; and *Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736, [2013] 2 CMLR 23. It is possible for different interpretations of human rights law to be reached in the two jurisdictions. See eg *EM (Eritrea) v Secretary of State for the Home Department* [2012] EWCA Civ 1336, [2013] HRLR 1.

[8] See further C McCrudden and G Chambers (eds), *Individual Rights and the Law in Britain* (Oxford, Oxford University Press, 1994) ch 1; F Klug, K Starmer and S Weir, 'The British Way of Doing Things: The United Kingdom and the International Covenant on Civil and Political Rights, 1976–94' [1995] *Public Law* 504; B Dickson (ed), *Human Rights and the European Convention* (London, Sweet & Maxwell, 1997); M Hunt, *Using Human Rights Law in English Courts* (Oxford, Hart Publishing, 1998); D Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford, Oxford University Press, 2002) ch 2; D Fottrell, 'Reinforcing the Human Rights Act—The Role of the International Covenant on Civil and Political Rights' [2002] *Public Law* 485; MA Dauses, *The Protection of Fundamental Rights in the Legal Order of the European Union* (Bern, Peter Lang, 2010); R Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012) ch 12; P Craig, 'The Charter, the ECJ and National Courts' in D Ashiagbor, N Countouris and I Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge, Cambridge University Press, 2012) ch 3.

Civil Liberties (now Liberty) campaigning for just such a bill. Agitation for a Bill of Rights soon transformed into calls for 'incorporation' of the European Convention on Human Rights (ECHR) into domestic law as the first—or only—step in the process of improving the legal protection of human rights.[9] Many non-governmental organisations (NGOs) joined the campaign, including JUSTICE, the Runnymede Trust, the Constitutional Reform Centre, the Institute for Public Policy Research, the British Institute of Human Rights and Charter 88. The shared view was that the traditional freedom of the individual 'under an unwritten constitution to do himself that which is not prohibited by law' gave no protection from misuse of power by the state, nor any protection from acts or omissions of public bodies which harmed individuals in a way that was incompatible with their human rights.[10]

Around this time judicial interest in human rights was also stirred. For example, in their decisions judges began referring to the 'right to freedom of expression', sometimes the 'constitutional right to freedom of expression'.[11] In many cases, Article 10 of the ECHR was also mentioned.[12] It is likely that this development was in some part driven by the finding in 1979 of a violation of Article 10 by the European Court of Human Rights (ECtHR) in *Sunday Times v UK*.[13] In many quarters, the finding had shattered the illusion that acceptance of the Convention would have 'few implications for the United Kingdom' and the assumption that the United Kingdom 'as a democracy would have nothing to be concerned about'.[14]

The judicial interest in human rights continued, and by the 1990s many judges, writing and speaking extra-judicially, had entered the rights debate. For example, in the 1993 Denning Lecture, Lord Bingham, then the Master of the Rolls, stated that:

> [T]he ability of English judges to protect human rights in this country and reconcile conflicting rights in the manner indicated is inhibited by the failure of successive governments over many years to incorporate into United Kingdom law the European Convention on Human Rights.[15]

He saw the European Convention as an instrument which lay ready to hand which, if not providing an ideal solution, nonetheless offered a clear improvement on the present position.[16] In the 1994 FA Mann Lecture Lord Woolf considered that it was unaccep-

[9] Whilst the prospect of a UK Bill of Rights and Responsibilities was mentioned in the Labour Party consultation paper by Jack Straw MP and Paul Boateng MP, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' (London, Labour Party, 1996) 14, there was no mention of such an instrument in the Home Office White Paper *Rights Brought Home: The Human Rights Bill* (Cm 3782) (London, TSO, 1997), published once Labour assumed office.

[10] HL Deb, vol 582, col 1228 (3 November 1997), Lord Chancellor. On the campaign for incorporation, see KD Ewing, 'The Futility of the Human Rights Act' [2004] *Public Law* 829.

[11] See eg *Cassell & Co v Broome* [1972] 2 WLR 645 per Lord Kilbrandon at 726; *Harman v Secretary of State for the Home Department* [1982] 2 WLR 338 per Lord Scarman at 351; *Secretary of State for Defence v Guardian Newspapers Ltd* [1984] 3 WLR 986 per Lord Fraser at 1001.

[12] See eg *R v Lemon* [1979] 2 WLR 281 per Lord Scarman at 315; *Associated Newspapers Group Ltd v Wade* [1979] 1 WLR 697 at 708–09 per Lord Denning; *A-G v BBC* [1980] 3 WLR 109 per Lord Scarman at 130; *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 WLR 848 per Lord Denning at 862, 864.

[13] *Sunday Times v UK* (1979) 2 EHRR 245. See the comments of Lord Scarman in *A-G v BBC* [1980] 3 WLR 109, 130.

[14] E Wicks, 'The United Kingdom Government's Perceptions of the European Convention on Human Rights at the Time of Entry' [2000] *Public Law* 438, 441. This was not the first finding of a violation on the part of the United Kingdom which had occurred in *Golder v UK* (1975) 1 EHRR 524.

[15] See TH Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 *Law Quarterly Review* 390, 390.

[16] Ibid, 393.

table 'that our citizens should be able to obtain a remedy which the Government will honour in the European Court of Human Rights, which they cannot obtain from the courts in this country'.

In his view, a 'British Bill of Rights would avoid the difficulty which exists at present in protecting some of our basic rights. It would enable us to play our part in the development of human rights jurisprudence internationally.'[17]

Various attempts were also made via private members' bills in Parliament to achieve some measure of statutory human rights protection.[18] However, all suffered from the fact that although there was considerable interest and enthusiasm for such a measure elsewhere, there was very little interest in the Conservative government. In 1994, in its Fourth Periodic Report to the UN Human Rights Committee under the Covenant on Civil and Political Rights,[19] the government of the day maintained that the rights and freedoms recognised in international instruments and in the constitutions of those countries that had enacted a comprehensive Bill of Rights were inherent in the United Kingdom's legal system and were protected by it and by Parliament unless they were removed or restricted by statute.

> The Government does not consider that it is properly the role of the legislature to confer rights and freedoms which are naturally possessed by all members of society. It also believes that Parliament should retain the supreme responsibility for enacting or changing the law, including that affecting individual rights and freedoms, while it is properly the role of the judiciary to interpret specific legislation.[20]

Furthermore, it stated its belief that the incorporation of an international human rights instrument into domestic law was not necessary to ensure that the United Kingdom's obligations under such instruments was reflected in the deliberations of government and of the courts.

> The United Kingdom's human rights obligations are routinely considered by Ministers and their officials in the formulation and application of Government policy, while judgments of the House of Lords have made clear that such obligations are part of the legal context in which the judges consider themselves to operate.[21]

It was clear that only a change in government would make any chance of incorporation possible.[22]

[17] The Rt Hon Lord Woolf of Barnes, 'Droit Public—English Style' [1995] *Public Law* 57, 70. See also Sir Nicolas Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] *Public Law* 405; The Hon Sir John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] *Public Law* 59 and id, 'Law and Democracy' [1995] *Public Law* 72; The Hon Sir Stephen Sedley, 'Human Rights: A Twenty-First Century Agenda' [1995] *Public Law* 386.

[18] See eg the Human Rights Bill 1994 presented and First Reading HL Deb, vol 559, col 150 (22 November 1994). See further M Zander, *A Bill of Rights?* (London, Sweet & Maxwell, 1985).

[19] CCPR/C/95/Add.3, 19 December 1994.

[20] Ibid, [4].

[21] Ibid, [5].

[22] For a background to the Human Rights Act generally, see F Klug, *Values for a Godless Age: The Story of the UK's New Bill of Rights* (London, Penguin, 2000); and H Fenwick, *Civil Liberties and Human Rights* (London, Cavendish, 2002) 117–32.

2.2 The Human Rights Bill

In March 1993, 'incorporation' of the ECHR was adopted as Labour Party policy. In December 1996 the Labour Party published 'Bringing Rights Home',[23] outlining its plans to incorporate the Convention into UK law and thereby enable British people 'to bring grievances against the state covered by the Convention to a British court whilst still retaining a right of ultimate recourse to the Strasbourg court'.[24] The Labour Party saw incorporation as a way to 'change the relationship between the state and the citizen, and to redress the dilution of individual rights by an over-centralising government'. It also saw incorporation as a way to encourage citizens to better fulfil their responsibilities and to improve awareness of human rights thus nurturing a culture of understanding of rights and responsibilities at all levels in our society.[25]

With 'incorporation' a key manifesto commitment, Labour won the General Election in May 1997 with a majority of 179 seats. In October 1997 the Home Office published the White Paper *Rights Brought Home*,[26] which accompanied a draft Bill. The Bill was an important part of the new government's commitment to a comprehensive policy of constitutional reform, including the establishment of a Scottish Parliament and a Welsh Assembly, reform of the House of Lords, freedom of information, an elected Mayor for London and a referendum on the voting system for the House of Commons.[27] It was seen as a 'key component' of the government's

> drive to modernise our society and refresh our democracy. It is part of a blueprint for changing the relationship between the Government and people of the United Kingdom to bring about a better balance between rights and responsibilities, between the powers of the state and the freedom of the individual.[28]

In *Rights Brought Home* the case for change comprised a number of points. First, the rights and freedoms guaranteed under the Convention were ones with which the people of this country were plainly comfortable.[29] Secondly, the growing awareness that it was not sufficient to rely on the common law and that incorporation was necessary.[30] Thirdly, the fact that the rights were no longer seen as British rights, and enforcing them took too long and cost too much.[31] Fourthly, the approach which the UK adopted towards the Convention did not sufficiently reflect its importance and had not stood the test of time—the most obvious proof lying in the number of cases in which violations had been found by the Commission and the Court.[32] The key argument was put as follows:

[23] Straw and Boateng, 'Bringing Rights Home' (n 9).
[24] Ibid, 4.
[25] Ibid, 14. For a discussion of possible models for incorporation, see B Emmerson, 'Opinion: This Year's Model—The Options for Incorporation' [1997] *European Human Rights Law Review* 313. On the motivations for incorporation, see M Amos, 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act' (2013) 35 *Human Rights Quarterly* 386.
[26] Home Office, *Rights Brought Home* (n 9).
[27] Ibid, 1.
[28] HC Deb, vol 306, col 783 (16 February 1998), Secretary of State for the Home Department, Mr Jack Straw.
[29] Home Office, *Rights Brought Home* (n 9), [1.3].
[30] Ibid, [1.4].
[31] Ibid, [1.14].
[32] Ibid, [1.15]–[1.16].

> Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts—without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctly British contribution to the development of the jurisprudence of human rights in Europe.[33]

Following lengthy parliamentary debates,[34] the Human Rights Bill was passed by both Houses and received the Royal Assent on 9 November 1998. However, it was not brought fully into force until 2 October 2000.

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3. Purpose of the Human Rights Act

The purpose of the HRA is not obvious from the Act itself. In the Long Title it is described as 'An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. The reason the word 'further' was used was that prior to the HRA the courts already applied the Convention in many different circumstances.[35] More information is contained in the White Paper *Rights Brought Home*,[36] where the purpose of the Act is stated succinctly as 'to make more directly accessible the rights which the British people already enjoy under the Convention … to bring those rights home'.[37]

The longer version provides as follows:

> [T]he time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their rights. Enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of case law on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom. …Enabling the Convention rights to be judged by British courts will also lead to closer scrutiny of the human rights implications of new legislation and new policies.[38]

The further purposes of nurturing a culture of understanding of rights and responsibilities at all levels in society and assisting public discussion of what might be the character of any future UK 'Bill of Rights and Responsibilities', originally present in

[33] Ibid, [1.14].
[34] See generally F Klug, 'The Human Rights Act 1998, *Pepper v Hart* and All That' [1999] *Public Law* 246.
[35] HL Deb, vol 583, col 478 (18 November 1997).
[36] Home Office, *Rights Brought Home* (n 9).
[37] Ibid, [1.19].
[38] Ibid, [1.18]; see also [2.4].

the consultation paper 'Bringing Rights Home',[39] were not included, although it was noted that the Act would 'enhance the awareness of human rights in our society' and stand alongside the decision to put the promotion of human rights at the forefront of foreign policy.[40] In the Parliamentary debates the Lord Chancellor also noted that our 'courts will develop human rights throughout society. A culture of awareness of human rights will develop.'[41] Lord Williams expanded on this, stating that every public authority 'will know that its behaviour, its structures, its conclusions and its executive actions will be subject to this culture,'[42] and in the House of Commons the Home Secretary noted that, over time, 'the Bill will bring about the creation of a human rights culture in Britain.'[43] Furthermore, in evidence to the Parliamentary Joint Committee on Human Rights, the Home Secretary stated that the HRA was intended, over time, to help bring about the development of a culture of rights and responsibilities.[44]

Early judicial comment on the purpose of the HRA was reflective of the observations in *Rights Brought Home*. For example, in *Lambert*[45] Lord Clyde stated that the HRA did not incorporate the rights set out in the Convention into the domestic laws of the United Kingdom:

> The purpose of the Act, as set out in its preamble, was 'to give further effect to rights and freedoms' guaranteed under that Convention. The Convention rights have not become part of the constitution so as to obtain any superiority over the powers of Parliament or the validity of primary legislation … One principle achievement of the Act is to enable the Convention rights to be directly invoked in the domestic courts. In that respect the Act is important as a procedural measure which has opened a further means of access to justice for the citizen, more immediate and more familiar than a recourse to the Court in Strasbourg.

Lord Rodger emphasised in *Attorney General's Reference No 2 of 2001*[46] that these rights were to have effect in a way that had not previously been possible in domestic law in that the national courts were to have power to grant victims remedies in terms of the Act for violations of their rights.[47] However in more recent years, judges have found purposes beyond that of simply bringing rights home. Baroness Hale has observed that the HRA 'is for the benefit of ordinary people who lead ordinary lives'. In her view:

> [The HRA] is to protect them inter alia against arbitrary interceptions of their mail, email and telephone conversations, searches of their homes and persons, arrest, prolonged imprisonment without charge or trial, enforced separation from their children and families, trials in secret before military tribunals, inhuman and degrading treatment in hospital and care homes. … It may well be that, in practice, the people who have had the most need of its protection are rather out of the ordinary; but that does not alter the fact that it is there to protect us all as we go about our everyday lives.[48]

[39] Straw and Boateng, 'Bringing Rights Home' (n 9), 14.
[40] Home Office, *Rights Brought Home* (n 9), 1.
[41] HL Deb, vol 582, col 1228 (3 November 1997).
[42] Ibid, col 1308.
[43] HC Deb, vol 317, col 1358 (21 October 1998).
[44] Minutes of evidence taken on Wednesday 14 March (2000–01 HL 66 HC 332). Building a culture of respect for human rights law is now seen to be primarily the responsibility of the Equality and Human Rights Commission created by the Equality Act 2006.
[45] *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545.
[46] *Attorney General's Reference No 2 of 2001* [2003] UKHL 68, [2004] 2 AC 72.
[47] Ibid, [173].
[48] *Friend v Lord Advocate* [2007] UKHL 53, [2008] HRLR 11, [38].

Baroness Hale has also observed that the HRA is a limit upon what a democratically elected parliament may do in order to 'protect the rights and freedoms of individuals and minorities against the will of those who are taken to represent the majority'.[49]

4. Structure of the Human Rights Act

The structure of the HRA has been described as unique[50] in that it addresses each of the three aspects of government.

> The Act … follows a scheme which recognises that the role of the judiciary is to apply and enforce the 'Convention rights' municipally, treats the executive branch of government, in the form of any public authority, as being civilly liable for any breach of the 'Convention rights' on its part and makes their offending conduct unlawful, and recognises that laws passed by the Legislature may be incompatible with a 'Convention right'.[51]

Section 1 defines the Convention rights given further effect by the HRA. Section 2 provides that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account, inter alia, any judgment, decision, declaration or advisory opinion of the ECtHR or opinion of the Commission. Section 6, a key provision, provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. However, this section also provides a defence to a public authority if, as a result of primary legislation, it could not have acted differently. The HRA clearly preserves the sovereignty of Parliament and this part of section 6 is an important part of that objective. Where primary legislation is itself incompatible with a Convention right, the courts have only two alternatives. First, they must apply section 3 of the Act and read and give effect to the legislation in a way which is compatible with Convention rights, so far as it is possible to do so. If this is not possible, the court may make a declaration of incompatibility under section 4 of the Act. However, such a declaration does not affect the validity, continuing operation or enforcement of the provision. Once a declaration is made, section 10 of the Act applies, empowering a minister to make such amendments to the legislation as he considers necessary to remove the incompatibility. Schedule 2 of the Act makes further provision about such remedial orders. Section 7 provides that only the victims of the unlawful acts of public authorities as defined in section 6 may bring proceedings under the HRA or rely on the Convention rights in any legal proceedings. Finally, section 8 sets out the remedies that may be granted for the acts of public authorities incompatible with Convention rights.

As Lord Rodger commented in *Wilson*,[52] the HRA applies across the board:

[49] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2007] 3 WLR 922, [114].
[50] See eg the comments of Lord Hobhouse in *Wilson v First County Trust* [2003] UKHL 40, [2003] 3 WLR 568.
[51] Ibid, [126].
[52] Ibid.

> While most statutes apply to one particular topic or area of law, the 1998 Act works as a catalyst across the board, wherever a Convention right is engaged. It may affect matters of substance in such areas as the law of property, the law of marriage and the law of torts. Or else it may affect civil and criminal procedure, or the procedure of administrative tribunals.[53]

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5. Convention Rights Given Further Effect

5.1 The Nature and Scope of the Convention Rights

The HRA gives further effect to the 'Convention rights', and in section 1 these are defined as Articles 2–12 and 14 of the ECHR, Articles 1–3 of Protocol No 1 to the ECHR and Articles 1–2 of Protocol No 6 to the ECHR. All must be read with Articles 16 to 18 of the ECHR and have effect subject to any designated derogation or reservation.

These rights are predominantly what are known as civil and political rights and, given that the ECHR was drafted in 1950 and Protocol No 1 in 1952, are obviously not the most modern list of rights that could be given effect in domestic law.[54] However, it is often observed that these are the most fundamental and important rights.

> Those who negotiated and first signed the convention were not seeking to provide a blueprint for the ideal society. They were formulating a statement of very basic rights and freedoms which, it was believed, were very largely observed by the contracting states and which it was desired to preserve and protect both in the light of recent experience and in view of developments in Eastern Europe. The convention was seen more as a statement of good existing practice than as an instrument setting targets or standards which contracting states were to strive to achieve. … Thus the rights guaranteed by the convention were minimum rights.[55]

In addition, it is clear that the rights and freedoms guaranteed under the Convention are ones with which the people of the United Kingdom are plainly comfortable.[56]

There remains a divergence of views over whether the Convention rights are a part of domestic law or remain international law. The question was first addressed by Lord Hoffmann in his speech in *R v Lyons*[57] where he stated as follows:

> Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates

[53] Ibid, [182].

[54] Compare eg the EU Charter of Fundamental Rights. See further G Van Bueren, 'Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act' [2002] *Public Law* 456 and id, 'Socio-economic Rights and a Bill of Rights—An Overlooked British Tradition' [2013] *Public Law* 821.

[55] *Procurator Fiscal, Linlithgow v Watson* [2002] UKPC D1, [2004] 1 AC 379, [48]–[49] per Lord Bingham. See also the comments of Lord Bingham in *Brown v Stott* [2003] 1 AC 681 and in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, [8]. As to the background to the rights included in the EHCR, see generally D Nicol, 'Original Intent and the European Convention on Human Rights' [2005] *Public Law* 152.

[56] Home Office, *Rights Brought Home* (n 9), [1.3].

[57] *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976.

> the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so.[58]

Returning to the topic in *McKerr*[59] his Lordship stated that the HRA had created domestic rights expressed in the same terms as those contained in the Convention. However, he saw these as domestic rights, not international rights: 'Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.'[60] As he later summarised, '[t]he Act did not transmute international law obligations into domestic ones. It created new domestic human rights.'[61] In the same case Lord Nicholls explained that 'by enacting the 1998 Act Parliament created domestic law rights corresponding to rights under the convention'.[62] Picking up on these observations in his judgment in *Al-Skeini*,[63] Lord Bingham noted that there was a distinction between (1) rights arising under the Convention and (2) rights created by the 1998 Act by reference to the Convention.[64] However, in *Animal Defenders*[65] his Lordship expressly disagreed with the comment of Lord Scott that the articles were a part of domestic law and the House of Lords was the final court of appeal on the interpretation and application of the Convention rights.[66] As discussed below, the prevailing view remains that expressed by Lord Bingham in *Ullah*[67] that it is not possible for UK courts to adopt an interpretation of Convention rights more generous to a claimant than that adopted by the ECtHR. Most judges see the Convention rights as part of an international instrument, the interpretation of which can only be authoritatively expounded by the ECtHR.[68]

5.2 The Impact of Other International Conventions

The interpretation of the Convention rights in this way has in practice meant that where another international convention is relevant to a HRA claim, as a matter of international law this may displace the ECHR and alter the application of the Convention right at the national level.[69] This was the position in *Al-Jedda*[70] where the claimant, a national of the UK and Iraq, was held in custody by British troops at a detention facility in Iraq. He

[58] Ibid, [27]. See also [40].
[59] *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807.
[60] Ibid, [65]. See also Lord Nicholls at [26], Lord Steyn at [50], Lord Rodger at [77].
[61] Ibid, [68].
[62] Ibid [34].
[63] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.
[64] Ibid, [10].
[65] *R (Animal Defenders) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312.
[66] Ibid, [44].
[67] *R v Special Adjudicator, ex p Ullah* [2004] UKHL 26, [2004] 2 AC 323.
[68] Ibid, [20].
[69] See further C Eckes and S Hollenberg, 'Reconciling Different Legal Spheres in Theory and Practice' [2013] *Maastricht Journal of European and Comparative Law* 220.
[70] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332.

claimed under the HRA that his detention was in breach of Article 5 of the ECHR. The question before the House of Lords was whether Article 5(1) of the ECHR was qualified by the legal regime established pursuant to UN Security Council Resolution 1546, and subsequent resolutions, by reason of the operation of Articles 25 and 103 of the UN Charter such that his detention was not actually in violation of Article 5(1). The House of Lords concluded that a binding Security Council decision taken under Chapter VII of the Charter of the United Nations superseded all other treaty commitments.[71] Lord Bingham stated as follows:

> I do not think that the European Court, if the appellant's article 5(1) claim were before it as an application, would ignore the significance of article 103 of the Charter in international law. The court has on repeated occasions taken account of provisions of international law, invoking the interpretative principle laid down in article 31(3)(c) of the Vienna Convention on the Law of Treaties, acknowledging that the Convention cannot be interpreted and applied in a vacuum and recognising that the responsibility of states must be determined in conformity and harmony with the governing principles of international law.[72]

The House of Lords held that where there was a clash between a power or duty to detain exercisable on the express authority of the UN Security Council and a fundamental right which the UK had undertaken to secure to those within its jurisdiction, this could only be reconciled by ruling that the UK may lawfully, where it was necessary for imperative reasons of security, exercise the power to detain authorised by the UN Security Council Resolutions but must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention.[73]

5.3 The Convention as a 'Living Instrument'

The ECtHR regards the ECHR as a 'living instrument'. The language in which the Convention rights are written is open textured and permits adaptation to modern conditions.[74] The House of Lords has also held that: 'As an important constitutional instrument the convention is to be seen as a "living tree capable of growth and expansion within its natural limits".'[75]

As will become apparent in Part II of this book, what is written down in the ECHR and Protocol No 1 to the ECHR is only the starting point for determining the scope of the Convention rights. For example, the right not to incriminate oneself, the right of access to a court and the right to equality of arms are all rights that have been implied into Article 6, the right to a fair trial. The concept of living instrument also means that the scope of a Convention right may change over time. For example, in *Bellinger*[76] the House of Lords took account of the fact that although previously the ECtHR had

[71] Ibid, per Lord Bingham at [35].

[72] Ibid, [36].

[73] Ibid, per Lord Bingham at [39]. See also *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221; *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 AC 534.

[74] *R (on the application of Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2001] 3 WLR 1598 per Lord Steyn at [56].

[75] *Brown* (n 55). See also the comments of Lord Clyde and the observations of Lord Bingham in *Procurator Fiscal, Linlithgow v Watson* [2002] UKPC D1, [2004] 1 AC 379, [48]–[49].

[76] *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.

determined that non-recognition of a change of gender by a post-operative transsexual person did not constitute a violation of either Article 8 or Article 12, it had recently changed this view in *Goodwin v UK*,[77] finding that non-recognition by the state of a sex change constituted a violation of Articles 8 and 12.[78]

Under the HRA the higher courts have made clear that there are limits to the living instrument approach. In *Brown*[79] Lord Clyde stated that the Convention is dealing with the realities of life and it is not to be applied in ways which run counter to reason and common sense. In his Lordship's view, if the Convention rights were to be applied by the courts in ways which would seem absurd to ordinary people then the courts would be doing a disservice to the aims and purposes of the Convention, and the result would simply be to prejudice public respect for an international treaty which seeks to express the basic rights and freedoms of a democratic society. Similarly in *Matthews*[80] Lord Bingham observed that

> the exact limits of such rights are debatable and, although there is not much trace of economic rights in the 50-year-old Convention, I think it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery. But they certainly do not include the right to a fair distribution of resources or fair treatment in economic terms—in other words, distributive justice. Of course distributive justice is a good thing. But it is not a fundamental human right.[81]

Nevertheless, as discussed below, in the relationship between UK courts and the ECtHR, there is considerable willingness on the part of UK courts to follow the jurisprudence of the ECtHR regardless of the path that it has taken.

5.4 The Non-absolute Nature of the Majority of the Convention Rights

As discussed in detail in Part II of this book, very few of the Convention rights are expressed in absolute terms. The majority are subject to exceptions, and it is the determination of the limits of these exceptions which forms the bulk of judicial decision making under the HRA. In relation to absolute rights, such Article 3, it has been held that such rights should not be capable in any circumstances of being overridden by the majority, even if it is thought that the public interest so requires.[82] This belief was of considerable importance in the case of *Millar*,[83] where the absolute right to an independent and impartial tribunal was upheld notwithstanding the prediction that the Scottish legal system would be 'plunged into chaos' as a result.[84]

With respect to the non-absolute rights, as Lord Steyn noted in *Brown*,[85] the framers

[77] *Goodwin v UK* (2002) 35 EHRR 18.

[78] See also *R v Secretary of State for the Home Department, ex p Anderson* [2002] UKHL 46, [2003] 1 AC 837 and *Re McCaughey* [2011] UKSC 20, [2012] 1 AC 725 concerning the extension of the ambit of Art 2.

[79] *Brown* (n 55).

[80] *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163.

[81] Ibid, [26]. See also the comments of Lord Scott in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, [123].

[82] *R v Secretary of State for the Environment, Transport and the Regions, ex p Alconbury Developments Ltd* [2001] UKHL 23, [2001] 2 WLR 1389 per Lord Hoffmann.

[83] *Millar v Procurator Fiscal* [2002] 1 WLR 1615.

[84] See eg J Oldham and A Jamieson, 'Law Lords Rule Against Sheriffs', *The Scotsman*, 26 July 2001, 2.

[85] *Brown* (n 55).

of the Convention realised that from time to time the fundamental right of one individual may conflict with the human right of another.

> They also realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights.

Such an interpretation was of particular importance in *McCann*,[86] which concerned a challenge to the making of anti-social behaviour orders. Lord Steyn pointed out that in Parliament the view was taken that proceedings for an antisocial behaviour order would be civil and would not 'attract the rigour of the inflexible and sometimes absurdly technical hearsay rule which applies in criminal cases'. In his view, if this supposition was wrong 'it would inevitably follow that the procedure for obtaining anti-social behaviour orders is completely or virtually unworkable and useless'. His starting point was 'an initial scepticism of an outcome which would deprive communities of their fundamental rights'.[87] Similarly Lord Hope stated that 'respect for the rights of others is a price that we all must pay for the rights and freedoms that it guarantees.'[88] He noted that if the proceedings were classified as criminal

> much of the benefit which the legislation was designed to achieve would be lost … It would greatly disturb the balance which section 1 of the Crime and Disorder Act 1998 seeks to strike between the interests of the individual and those of society.[89]

5.5 Derogations and Reservations

Section 1(2) of the HRA provides that the Convention rights given further effect are subject to any designated derogation or reservation. Derogations may be made pursuant to Article 15 of the ECHR and reservations pursuant to Article 57.[90] Following the withdrawal of a derogation to Article 5 in April 2005,[91] the United Kingdom currently maintains no derogations and only one reservation to Article 2 of Protocol No 1 accepting the second principle of Article 2 'only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'.

Although the HRA refers to derogations and reservations in sections 14–17, neither Article 15 nor Article 57 of the ECHR is included in the Convention rights given

[86] *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787.
[87] Ibid, [18].
[88] Ibid, [41].
[89] Ibid, [43]. See also Lord Hutton at [85] and [113].
[90] On derogations, see A Mokhtar, 'Human Rights Obligations v Derogations: Art 15 of the European Convention on Human Rights' (2004) 8 *International Journal of Human Rights* 65 and J Allain, 'Derogation from the European Convention of Human Rights in the Light of "Other Obligations" under International Law' [2005] *European Human Rights Law Review* 480.
[91] This followed the declaration of incompatibility by the House of Lords in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, the repeal of the detention provisions in the Anti-Terrorism Crime and Security Act 2001 and their replacement with control orders under the Prevention of Terrorism Act 2005.

further effect by the HRA. Whilst few rules attach to the making of a reservation under Article 57, there are a number of requirements specified in relation to derogations under Article 15. Article 15(1) provides that

> in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Pursuant to Article 15(2), no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(1) and 7 is possible under this provision. As Article 15 is not given further effect by the HRA, it is not clear how challenges to derogation orders can be brought domestically. Even in *A v Secretary of State*,[92] where a derogation order was successfully challenged, it was not made clear exactly how this was possible.[93]

Despite the questions surrounding the power to quash the derogation order in this case, it is important to examine the reasoning of their Lordships. The Order subject to challenge provided for a derogation from Article 5(1)(f) to allow legislation to detain a person against whom no action was being taken with a view to deportation.[94] The first argument of the claimants was that there was no public emergency threatening the life of the nation within the meaning of Article 15. A majority of their Lordships rejected this claim. Lord Bingham held that it had not been shown that the Special Immigration Appeals Commission or the Court of Appeal had misdirected themselves on this issue. He also found support in the conclusion of the ECtHR in *Lawless v Ireland (No 3)*[95] and stated that great weight should be given to the judgment of the Home Secretary, his colleagues, and Parliament on this question, because they were called upon to exercise a 'pre-eminently political judgment'.[96]

However, Article 15 also requires that the derogating measures must not go beyond what is 'strictly required by the exigencies of the situation'. 'Thus the Convention imposes a test of strict necessity or, in Convention terminology, proportionality.'[97] A majority of their Lordships found that this test was not satisfied in the present case and that the Order was disproportionate. Lord Bingham noted that the courts were not effectively precluded by any doctrine of deference from scrutinising the issues raised.[98] His Lordship concluded that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing a severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda,

[92] [2004] UKHL 56, [2005] 2 AC 68.

[93] It is likely that it was possible due to provisions of the Anti-terrorism, Crime and Security Act 2001, notably ss 30 and 25(2)(b), which provide that the Special Immigration Appeals Commission must cancel a certificate (certifying an individual as a terrorist) if it considers 'for some other reason the certificate should not have been issued'. It appears that the Secretary of State conceded that if the derogation order was not compatible with Art 15, this would constitute 'some other reason' within the meaning of s 25(2)(b).

[94] Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644).

[95] *Lawless v Ireland (No 3)* (1979–80) 1 EHRR 15.

[96] Ibid, [27]–[29]. See also Lord Hope at [116], Lord Scott at [154], Lord Rodger at [166], Lord Walker at [208], Baroness Hale at [226].

[97] Ibid, per Lord Bingham at [30].

[98] Ibid, [42].

may harbour no hostile intentions towards the United Kingdom.[99] A quashing order was made in respect of the Derogation Order.[100]

6. Principles of Interpretation

As discussed above, a number of principles of interpretation relate to the Convention rights themselves, including the view that the rights given further effect are the most important and fundamental; the concept of the Convention as a living instrument, within limits; and the non-absolute nature of the majority of Convention rights. Other principles of interpretation of Convention rights, such as the principles of legality and proportionality and the practice of judicial deference, are discussed in Chapter 4, which concerns the process of determining incompatibility. There are also some principles of interpretation relating to the HRA itself. First, it has been held that a generous and purposive construction is to be given to that part of a constitution which protects and entrenches fundamental rights and freedoms, and that such an approach should be applied to the HRA.[101] It has also been held that the HRA 'must be given its full import' and that 'long or well entrenched ideas may have to be put aside, sacred cows culled'.[102]

However, the utilisation of a strong purposive approach to the construction of the HRA does not yet appear widespread, as evidenced by the approach of the courts to the issue of retrospective effect. As already discussed, it is clear that one purpose of the HRA is to allow claims of violations of Convention rights to be heard in domestic courts rather than in the ECtHR. However, in *Lambert*,[103] only Lord Steyn interpreted section 6 of the HRA in the 'broader framework of an Act which was undoubtedly intended "to bring home" the adjudication on fundamental rights'[104] and thereby found that it could apply to a trial which took place before the Act came into force.[105] A strong purposive approach was far more evident in the case of *B*,[106] where the Court

[99] Ibid, [43]. See also Lord Hope at [131]–[132], Lord Scott at [155]–[156], Lord Rodger at [189], Baroness Hale at [231].

[100] See further TR Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 *Modern Law Review* 655; S Tierney, 'Determining the State of Exception: What Role for Parliament and the Courts?' (2005) 68 *Modern Law Review* 668; A Tomkins, 'Readings of *A v Secretary of State for the Home Department*' [2005] *Public Law* 259.

[101] *R v Director of Public Prosecutions ex p Kebilene* [2000] 2 AC 326 per Lord Hope endorsing the observations of Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 328 and Lord Diplock in *Attorney-General of The Gambia v Momodou Jobe* [1984] AC 689, 700. See also the speeches of Lord Steyn in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 and *Brown* (n 55).

[102] *Lambert* (n 45), per Lord Slynn. See also *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2000] QB 48 per Lord Woolf CJ at [58]. See further RA Edwards, 'Generosity and the Human Rights Act: The Right Interpretation?' [1999] *Public Law* 400; D Pannick, 'Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment' [1998] *Public Law* 545.

[103] Ibid.

[104] Ibid, [29]. See also the speech of Lord Clyde at [135].

[105] See also Lord Steyn's speech in *Kebilene* (n 101).

[106] *R (on the application of B) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344, [2005] QB 643.

of Appeal held that, in determining whether the HRA could be applied to acts of UK public authorities outside of the territory of the United Kingdom, the approach taken to the interpretation of the Convention in such circumstances by the ECtHR should be followed.[107]

Second, it has also been held that, in accordance with section 3 of the HRA, the HRA itself must be read and given effect in a way that is compatible with Convention rights.[108] Whilst this has had some impact on the interpretation of section 12 of the HRA, which concerns freedom of expression,[109] as Article 13 of the ECHR, the right to an effective remedy, is not a Convention right given further effect by the HRA, the potential for radical reinterpretation of the key provisions of the HRA using section 3 is limited. Indeed, it is likely that one of the fears prompting the non-inclusion of Article 13 was the possibility that a court would declare the HRA itself incompatible with Article 13 in that it failed to provide an effective remedy to those who had been subject to a violation of Convention rights perpetrated by primary legislation.

Third, satellite litigation within the criminal justice system utilising the HRA has been discouraged. For example, in *Kebilene*[110] prior to trial it was argued that the enactment of the HRA gave rise to an enforceable legitimate expectation that the Director of Public Prosecutions would exercise his prosecutorial discretion in accordance with the ECHR. Lord Steyn, with whom Lords Slynn and Cooke agreed, held that once the HRA was fully in force it would not be possible to apply for judicial review on the ground that a decision to prosecute was in breach of a Convention right and the only available remedies would be in the trial process or on appeal.

> If the Divisional Court's present ruling is correct, it will be possible in other cases, which do not involve reverse legal burden provisions, to challenge decisions to prosecute in judicial review proceedings. The potential for undermining the proper and fair management of our criminal justice system may be considerable.[111]

His Lordship continued:

> While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system.[112]

[107] Ibid, [75]–[79]. See also *R (on the application of Al-Skeini) v Secretary of State for Defence* [2004] EWHC (Admin) 2911, [2005] 2 WLR 1401; and *Al-Jedda* (n 70).

[108] See the speeches of Lords Hope and Clyde in *Lambert* (n 45).

[109] See *Douglas v Hello! Ltd* [2001] QB 967.

[110] *Kebilene* (n 101).

[111] Ibid, per Lord Steyn.

[112] Lord Hope commented that he could see no reason why, in a clear case where the facts of the case were of no importance, a decision that a provision was incompatible should not be capable of being taken at a very early stage. However, he agreed that, absent dishonesty, bad faith or some other exceptional circumstance, the DPP's decisions to consent or not to consent to a prosecution were not amenable to judicial review. In *Pretty* (n 74) Lord Steyn at [67] stood by this rule as did Lord Hobhouse at [119], [121] and [123]. Lord Hope at [78] held that in these exceptional circumstances it was open to Mrs Pretty to raise the issue by judicial review. In *R v Hertfordshire CC ex p Green Environmental Industries Ltd* [2000] 2 AC 483 Lord Cooke stated that the comments in *Kebilene* (n 101) concerning satellite litigation in the criminal justice system had nothing to say about the general ability by a citizen to challenge by appropriate civil proceedings

Finally, although the coming into force of the HRA has meant that many areas formerly regarded as non-justiciable by the courts have come under scrutiny, there are still limits to how far a court is prepared to go. For example, in *Gentle*[113] the House of Lords was reluctant to find that Article 2 imposed upon the government a duty to establish an independent public inquiry into all the circumstances surrounding the invasion of Iraq by British forces in 2003. Lord Bingham observed that if the claimants had a legal right it was justiciable in the courts, but in deciding whether a right existed, it was relevant to consider what exercise of the right would entail:

> Thus the restraint traditionally shown by the courts in ruling on what has been called high policy—peace and war, the making of treaties, the conduct of foreign relations—does tend to militate against the existence of the right.[114]

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7. The Relationship between UK Courts and the European Court of Human Rights

7.1 The Current Approach

Of all the principles of interpretation developed in relation to the HRA, it is those which concern the relationship between UK courts and the ECtHR that are the most important. This relationship is governed by the HRA itself and many years of judicial development and interpretation. The starting point is section 2 of the HRA, which provides that a court or tribunal determining a question which has arisen in connection with a Convention right, must take into account, inter alia, any judgment, decision, declaration or advisory opinion of the ECtHR, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. It has been confirmed by the House of Lords that section 2(1) does not make these decisions directly binding as a matter of domestic law on the courts.[115] However, this jurisprudence has been very warmly received by UK courts. In his speech in *Alconbury*[116] Lord Slynn observed:

> Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the ECtHR. If it does not do so, there is at least a possibility that

the validity of a requisition issued against him or her by a public authority—here a request for information under the Environmental Protection Act 1990. Lord Hobhouse agreed. See further *Alconbury* (n 82).

[113] *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356.

[114] Ibid, [8]. Contrast the approach of the majority of the Supreme Court in *Smith v Ministry of Defence* [2013] UKSC 41, [2013] 3 WLR 69. See further R Moosavian, 'Judges and High Prerogative: The Enduring Influence of Expertise and Legal Purity' [2012] *Public Law* 724.

[115] *R v Lyons* (n 57), per Lord Millet at [105].

[116] *Alconbury* (n 82).

> the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence.[117]

A few years later Lord Bingham held in *Ullah*[118] that it was not possible for UK courts to adopt an interpretation of Convention rights more generous to a claimant than that adopted by the ECtHR. In his opinion, the ECHR was an international instrument, the correct interpretation of which could be authoritatively expounded only by the ECtHR:

> From this it follows that a national court subject to a duty such as that imposed by s 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under s 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a convention right. 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.[119]

Similarly in *Al-Skeini*[120] Baroness Hale stated that if Parliament wished to go further, or if the courts wished to develop the common law further, this was possible. 'But that is because they choose to do so, not because the Convention requires it of them.'[121]

7.2 Exceptions to the Current Approach

The current approach of the UK courts to ECtHR jurisprudence, as outlined above, is subject to exceptions which have been employed in a small number of cases. Clearly, a judgment of the ECtHR cannot prevail if it conflicts with primary legislation and it is not possible for the court to utilise the interpretative power contained in section 3 of the HRA. All that a court may do in such instances is issue a declaration of incompatibility pursuant to section 4 of the HRA. It is also not possible for a UK court to follow a judgment of the ECtHR which conflicts with a binding domestic precedent. It has been held that a court below the level of the Supreme Court faced with this dilemma can only express its views and give leave to appeal.[122]

There are also two further exceptions that are more complex. Firstly, a judgment of the ECtHR might not be followed if a UK court considers that it is wrong. In *Alconbury*[123] Lord Hoffmann stated that the House of Lords was not bound by decisions of the ECtHR which compelled a conclusion fundamentally at odds with the distribution

[117] Ibid, [26].
[118] *Ullah* (n 67).
[119] Ibid, [20].
[120] *Al-Skeini* (n 63).
[121] Ibid, [90]. See also *Jones v Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270; *Secretary of State for the Home Department v AF* [2009] UKHL 28, [2009] 3 WLR 74; *Cadder v HM Advocate* [2010] UKSC 43 where the SC noted that a unanimous decision of the Grand Chamber was a formidable reason for following it at [46]; *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; and *Re McCaughey* [2011] UKSC 20, [2012] 1 AC 725.
[122] *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, per Lord Bingham at [44] with whom the others agreed. See also *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 per Lord Neuberger at [59]–[67].
[123] *Alconbury* (n 82).

of powers under the British constitution.[124] In *R v Lyons*[125] again Lord Hoffmann stated that if an English court considered that the ECtHR had misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invited the ECtHR to reconsider the question. 'There is room for dialogue on such matters.'[126]

It is not usual for UK courts to question ECtHR jurisprudence in this manner and there are not many examples of this exception being applied in practice. Almost all concern Article 6 of the ECHR where UK judges obviously feel more comfortable questioning the jurisprudence of the ECtHR than they do in relation to other Convention rights. One example is *Boyd*.[127] In determining whether the appointment of junior officer members to courts martial and the role of the reviewing authority were compatible with Article 6 of the ECHR, the House of Lords did not follow the judgment of the ECtHR in *Morris*[128] which concerned the same issue and where the ECtHR had found a violation. Lord Bingham explained that there were a large number of points in issue in *Morris* and it seemed clear that on this particular aspect the European Court did not receive all the help which was needed to form a conclusion.[129]

The clearest example to date of this exception in operation is the judgment of the Supreme Court in *Horncastle*.[130] The appeal of each of the appellants was based on the fact that there was placed before the jury the statement of a witness who had not been called to give evidence and it was argued that this was in breach of Article 6. The appellants based their appeal on the judgment of the ECtHR in *Al-Khawaja*[131] where a breach of Article 6 had been found when statements had been admitted in evidence in a criminal trial of a witness who was not called to give evidence. The Supreme Court accepted that the requirement to 'take into account' would normally result in the court applying the principles that were clearly established by the ECtHR. However, it concluded that in this case, *Al-Khawaja* would not be followed, noting that there would be

> rare occasions where this 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 this 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 this court and the Strasbourg Court. This is such a case.[132]

It is also possible that rather than finding the decision of the ECtHR wrong, a court may conclude that a particular decision is not in keeping with the 'clear and constant jurisprudence' requirement set out in *Alconbury*. For example, in *Quila*[133] the Supreme Court declined to follow a judgment of the ECtHR given in 1985. Its reasons were that

[124] Ibid, [76].
[125] *R v Lyons* (n 57).
[126] Ibid, [46].
[127] *Boyd v The Army Prosecuting Authority* [2002] UKHL 31, [2003] 1 AC 734.
[128] *Morris v UK* (2002) 34 EHRR 1253.
[129] *Boyd* (n 127), [12]–[13]. See also *Brown* (n 55); *Al-Skeini* (n 63); *Doherty v Birmingham City Council* [2008] UKHL 57, [2008] 3 WLR 636 per Lord Hope at [20]; *R (Animal Defenders International) v Secretary of State for Culture, Media & Sport* [2008] UKHL 15, [2008] 2 WLR 781 per Lord Bingham at [29].
[130] *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373.
[131] *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.
[132] *R v Horncastle* (n 130), [11].
[133] *Quila v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621.

it was an old decision, there was dissent from it at the time and more recent decisions of the ECtHR were inconsistent with it—it found no clear and constant jurisprudence to follow.[134]

Secondly, a judgment of the ECtHR may also not be followed if the UK court considers that the subject matter of the claim engages the UK's margin of appreciation. This is the principle employed by the ECtHR to allow a degree of latitude to states as to how they protect the individual rights set out in the Convention. It is 'especially important in areas where there is said to be an absence of consensus or common practice across Europe'.[135] Again this exception is very rarely employed and early case law indicated that the possibility was subject to much doubt.[136] However, in its judgment in *In re P*[137] the House of Lords confirmed and applied this exception. The question was whether or not it was compatible with Articles 8 and 14 for a couple to be excluded from consideration as the adoptive parents of a child on the ground only that they were not married to each other. Having considered the judgments of the ECtHR, Lord Hoffmann found support for the conclusion that there was a violation of Article 14, although he was concerned that in reaching this conclusion, the House of Lords may have been going further than the ECtHR. He considered that Lord Bingham's observations in *Ullah* had no application here as the remarks were not made in the context of a case where the ECtHR had declared a question to be within the national margin of appreciation. In his view this meant that the question was one for the national authorities to decide for themselves and it followed that different Member States may well give different answers.[138] The House of Lords concluded here that the question was within the national margin of appreciation and it could reach its own judgment:

> [I]t is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom . . . It follows that the House is free to give, in the interpretation of the 1998 Act, what it considers to be a principled and rational interpretation to the concept of discrimination on the ground of marital status.[139]

Finally, it is also important to note that there may be the rare occasion where there is actually no relevant ECtHR jurisprudence for a UK court to follow. In such instances, the UK courts are free to interpret and apply the particular Convention right for themselves. For example, in *Austin*[140] the House of Lords recognised that the application of Article 5(1) to measures of crowd control was something the ECtHR had not considered. As Lord Hope stated, there was no direct guidance as to whether Article 5(1) was engaged where the police imposed restrictions on movement for the sole purpose of protecting people from injury or avoiding serious damage to property.[141] The House of

[134] Ibid, per Lord Wilson at [43] with whom the majority agreed.

[135] T Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395, 397.

[136] See *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465 per Lord Bingham at [44]; *Secretary of State for Work and Pensions v M* [2006] UKHL 11, [2006] AC 91 per Lord Nicholls at [30] and per Lord Mance at [136]; *R (Countryside Alliance) v Her Majesty's Attorney General* [2007] UKHL 52 per Baroness Hale at [124]–[132] and Lord Brown at [141].

[137] *In re P* [2008] UKHL 38, [2008] 3 WLR 76.

[138] Ibid, [31].

[139] See also Lord Hope at [50], Baroness Hale at [120], Lord Mance at [129].

[140] *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] 1 AC 564.

[141] Ibid, [23].

Lords' conclusion that the police cordon restricting the claimant's liberty was not the kind of arbitrary deprivation of liberty proscribed by the Convention was eventually approved by the ECtHR itself, demonstrating the contribution which can be made by UK judges to the jurisprudence of the court where the opportunity is taken.[142]

7.3 Assessment of the Current Approach

The approach adopted by UK courts to section 2 of the HRA and the jurisprudence of the ECtHR has generated considerable academic interest.[143] Many question why the UK courts have chosen this path when there is no strict legal basis for it in common law, statute law or international law. It is also clear that the drafters of the HRA never intended to make ECtHR jurisprudence binding. During the parliamentary debates the Lord Chancellor stated that there may be occasions when it would be right for UK courts to depart from ECtHR decisions.[144] The reasons put forward by UK courts themselves do not stand up to scrutiny. Lord Bingham's observations in *Ullah* applied to Convention rights, but not the jurisprudence of the ECtHR. A UK court adopting an interpretation of Convention rights different to that adopted in the ECtHR might be acting incompatibly with international law but not with the obligations imposed by the HRA.

In *Ullah* Lord Bingham also explained that only the ECtHR could correctly interpret the ECHR and that the meaning of the ECHR should be uniform throughout the states party to it.[145] It is clear that a more narrow interpretation of Convention rights by a state may undermine the effectiveness of the ECHR system and make a mockery of that state's international obligations. However, it is difficult to see how a national court adopting a more generous interpretation of Convention rights could impact on the effectiveness of the ECHR system. Furthermore, to see the ECtHR as the only institution capable of correctly interpreting the ECHR leaves the Convention rights as creatures of international law when these are very clearly considered by many judges as part of UK law. As noted above, in *McKerr*[146] Lord Hoffmann held that the HRA had created domestic rights expressed in the same terms as those contained in the Convention:

> But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.[147]

[142] *Austin v United Kingdom* ECtHR Grand Chamber 15 March 2012. See also *Ali v Birmingham City Council* [2010] UKSC 8.

[143] See eg R Clayton, 'Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law' [2012] *Public Law* 639; Lord Irvine, 'A British Interpretation of Convention Rights' [2012] *Public Law* 237; P Sales, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' [2012] *Public Law* 253; A Kavanagh, 'Strasbourg, the House of Lords or Elected Politicians: Who Decides about Rights after Re P?' [2009] *Modern Law Review* 828; J Wright, "Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights' [2009] *Public Law* 595.

[144] HL Deb vol. 584, col. 1271 (19 January 1998).

[145] *Ullah* (n 67), [20]. This was repeated by the House of Lords in its judgment in *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356.

[146] *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807.

[147] Ibid, [65] See also Lord Nicholls at [26], Lord Steyn at [50] and Lord Rodger at [77].