

# A Timorous Soul Fights Back\*

## BARONESS HALE OF RICHMOND

Law Lord, House of Lords

It is a great pleasure to welcome the first volume of the UCL Human Rights Review. It is a particular pleasure to do so in the room named after Jeremy Bentham, who famously regarded the whole idea of human rights as ‘nonsense on stilts’. Your splendid project shows how wrong he was about that. It is invidious to single out particular contributions to this volume, but I must mention some. For obvious reasons, as a dissident in *YL v Birmingham City Council*<sup>1</sup> I particularly enjoyed the debate between Rodney Austin and Dawn Oliver on ‘functions of a public nature’. And among the student contributions, Tom Rainsbury’s piece attacking their lordships’ (and no doubt her ladyship’s) timorous souls struck a particular chord, because we had so recently been agonising about this issue in an obscure little case from Northern Ireland.<sup>2</sup>

The issue is who defines the convention rights. The starting point is Lord Bingham’s famous statement in *R (on the application of Ullah) v Special Adjudicator*:<sup>3</sup> ‘The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.’ To this might be added the words of Lord Brown in *R (on the application of Al-Skeini) v Ministry of Defence*,<sup>4</sup> ‘no less but certainly no more’. I have associated myself with both, not only at the time but also in other cases.<sup>5</sup>

But there are numerous objections. As Sir Stephen Sedley has pointed out, though logical, ‘it carries the risk that, in trying to stay level, we shall fall behind’.<sup>6</sup> More fundamentally, the Human Rights Act does not in fact incorporate the Convention into our national law. The rights it protects are defined in the same words as the rights in the Convention but they are rights protected by national law. Why should not national law define them? Secondly, the Act itself only requires the courts to ‘have regard’ to the Strasbourg jurisprudence,<sup>7</sup> not to follow

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\* A paper delivered on 29 October 2008 at University College London reflecting on the sixtieth anniversary of the Universal Declaration of Human Rights on the occasion of the launch of the *UCL Human Rights Review*.

<sup>1</sup> [2007] UKHL 27, [2008] 1 AC 95.

<sup>2</sup> What follows is an abbreviated version of my JUSTICE Tom Sargant lecture, ‘Law Lords at the Margin: Who defines Convention Rights?’, delivered on 15 October 2008, which greatly benefited from the thoughts provoked by Tom Rainsbury’s paper.

<sup>3</sup> [2004] UKHL 26, [2004] 2 AC 323, # 20.

<sup>4</sup> [2007] UKHL 26, [2008] 1 AC 153, #106.

<sup>5</sup> See *DS v HM Advocate* [2007] UKPC 36, [2007] HRLR 28, #92: ‘This means that we can only rely on the Convention rights as interpreted in Strasbourg as a basis for invalidating the act of a democratic legislature, for it is only incompatibility with those rights which gives us a ground for doing so.’ Also *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781, #53, where I declared that ‘I do not believe that, when Parliament gave us these novel and important powers [to hold legislation incompatible with the convention rights] it was giving us the power to leap ahead of Strasbourg in our interpretation of the convention rights.’

<sup>6</sup> ‘Bringing rights home: time to start a family?’ (2008) 28 (3) *Legal Studies* 327, 332.

<sup>7</sup> Section 2.

it. We must keep pace with Strasbourg, because the object is to avoid a situation where the UK is in breach of its obligations under the Convention and individuals have to go to Strasbourg to have it put right. That is why we are most unlikely to disregard a clear and constant line of Strasbourg authority which indicates that the claimant should win. (There may be a few exceptions; for example where someone has succeeded in Strasbourg which we find difficult to understand<sup>8</sup> or where the case can be distinguished on its particular facts.<sup>9</sup>) But there is nothing in the Act itself which prevents us from going further than Strasbourg has gone or can confidently be predicted to go in the future (or to prevent us from looking for guidance from elsewhere<sup>10</sup>).

There are also indications that Parliament expected us to develop the law ahead of Strasbourg. The White Paper, *Rights brought home: the Human Rights Bill*, explained:<sup>11</sup> 'In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.' Both the Home Secretary in the House of Commons<sup>12</sup> and the Lord Chancellor in the House of Lords<sup>13</sup> said that the courts must be free to develop human rights jurisprudence and move out in new directions. The Home Secretary also said that:<sup>14</sup>

'Through incorporation we are giving a profound margin of appreciation to British courts to interpret the Convention in accordance with British jurisprudence as well as European jurisprudence. One of the frustrations of non-incorporation has been that our own judges . . . have not been able to bring their intellectual skills and our great tradition of common law to bear on the development of European Convention jurisprudence.'

Lord Bingham himself, then Lord Chief Justice, told the House that 'British judges have a significant contribution to make in the development of the law of human rights.'<sup>15</sup> He quoted Milton's *Areopagitica*: 'Let not England forget her precedence of teaching nations how to live'. But in practice the main contribution our judgments make in Strasbourg is to explain why we have *not* found a violation of the Convention in a particular case. Strasbourg may of course disagree with us, but at least it will have had the benefit of a full human rights analysis from us first.

Nor does the stated reason for the *Ullah* doctrine – that the interpretation of the ECHR should be uniform throughout the member states – make much sense. An expansive interpretation in the UK could not bind the courts of other member

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<sup>8</sup> Eg in *R v G* [2008] UKHL 37, [2008] 1 WLR 1379, #6, Lord Hoffmann said of *Salabiaku v France* (1988) 12 EHRR 379, 'I think that judges and academic writers have picked over the carcass of this unfortunate case so many times to find some intelligible meat on its bones that the time has come to call a halt. The Strasbourg court, uninhibited by a doctrine of precedent or the need to find a ratio decidendi seems to have ignored it. . . . I would recommend your lordships to do likewise'.

<sup>9</sup> Eg *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159 in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781.

<sup>10</sup> Cf *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264, #33.

<sup>11</sup> *Rights brought home: the Human Rights Bill*, 1997, Cm 3782, para 2.5.

<sup>12</sup> *Hansard (HC Debates)*, 16 February 1998, vol 306, col 768.

<sup>13</sup> *Hansard (HL Debates)*, 18 November 1997, vol 583, cols 514-515.

<sup>14</sup> *Hansard (HC Debates)*, 3 June 1998, col 424.

<sup>15</sup> *Hansard (HL Debates)*, 3 November 1997, col 1245.

states or the court in Strasbourg. Strasbourg may be cautious for fear of committing member states, which are bound by its decisions, to obligations which they did not want. UK courts may be cautious for fear of committing the UK to obligations which it did not want. This finds an echo in Lord Brown's point in *Al-Skeini*,<sup>16</sup> that an aggrieved claimant can always go to Strasbourg but an aggrieved government can not. But there is no particular reason why either Strasbourg or the other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law.

So we have the *Ullah* principle and we have all these objections to it and no doubt there are many more. We had to consider how far it went in *Re P and others*.<sup>17</sup> The claimants were an unmarried opposite sex couple who wished jointly to adopt the woman's 10 year old daughter. English law has permitted joint adoptions by unmarried couples, whether of the same or opposite sexes, since the Adoption and Children Act 2002 came into force in 2005. Scotland will permit it once the Adoption and Children (Scotland) Act 2007 comes into force. But Northern Ireland still restricts joint adoptions to married couples (and even failed to include civil partners when the Civil Partnership Act 2004 was passed). Single people, whether or not they are in a stable opposite or same sex relationship, can adopt alone but the child will not become their partner's child or a member of their partner's family. There was strong opposition to proposals for change, mainly from the Protestant churches and political parties associated with them, and particularly to adoption by same sex couples. Then devolution happened and the relevant Minister in the Northern Ireland government had not yet made a decision about what to do. It does not take much imagination to realise how difficult it must be for any elected politician in Northern Ireland to take such a step.

The couple, with the support of the Official Solicitor acting on behalf of the child, argued that to prevent them from adopting was to discriminate against them in the enjoyment of the right to respect for their private and family lives on the ground of their lack of marital status. It was easy to hold that there was a difference in treatment based on status for the purpose of article 14. The real battleground was over whether the difference in treatment could be justified.

I found this much more difficult than at least three of my colleagues, because I had been party to the 1992 Review of Adoption Law<sup>18</sup> which recommended retaining the marriage rule. It survived all later consultations<sup>19</sup> and into the Bill which was introduced into Parliament. It was only changed through back bench pressure in the Commons. The arguments in favour of the change are simple. The best interests of the child are to be the paramount consideration governing the actions of adoption agencies and courts. The refusal of a couple to commit themselves to the legal consequences of marriage (or civil partnership) might well cast doubt upon whether an adoption would be in the best interests of the

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<sup>16</sup> [2007] UKHL 26, [2008] 1 AC 153, #106.

<sup>17</sup> [2008] UKHL 38, [2008] 3 WLR 76.

<sup>18</sup> *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group*, published by the Department of Health and Welsh Office as a Consultation Document in 1992.

<sup>19</sup> *Adoption: The Future*, 1993, Cm 2288; *Adoption – A Service for Children*, 1996; *Adoption: A New Approach*, 2000, Cm 5017.

child. Should the relationship break down for any reason, both the surviving parent and the child will be much less well protected. But it is difficult to find good reasons for a blanket ban. It is, as Lord Hoffmann put it, to turn a reasonable generalisation into an irrebuttable presumption.<sup>20</sup> Bright line rules may be appropriate in some cases, but not where the object is to promote the welfare of children. There could well be cases, especially where the child was already living with the couple and had no contact at all with the other half of her birth family, where adoption by them both would be better for the child than the status quo.

But if it is our task to keep pace with the Strasbourg jurisprudence as it evolves over time, what would Strasbourg say? There is no case directly in point but there are two recent cases about sole adoptions by single gay or lesbian people. In *Fretté v France*<sup>21</sup> it was held by a narrow majority that refusing to allow a single gay man to adopt on his own was justified. But in *EB v France*<sup>22</sup> it was held that refusing to allow a single lesbian woman to adopt was not. Strasbourg has for some time looked with deep suspicion at discrimination based on sexual orientation and sole adoption by single heterosexual people was allowed. We can quite confidently predict that Strasbourg would not approve of the continued exclusion of civil partners from joint adoptions. But this does not necessarily help us to predict what Strasbourg would say about *joint* adoptions by unmarried (or unregistered) couples.

Lord Walker and I thought that this was a case in which Strasbourg might well apply the margin of appreciation. They might accept that secular societies where living together outside marriage was commonplace could take one view on the matter, whereas deeply religious societies where it was still frowned upon might take another. The Irish Constitution, for example, requires that special protection be given to the marital family.<sup>23</sup> The rest of the United Kingdom is in advance of many other European countries. The European Adoption Convention of 1967 requires adoption to be restricted to married couples or single people. We had to denounce that part of it in order to implement the 2002 Act. Northern Ireland still has much higher rates of religious observance and lower rates of living together and extra-marital birth than the rest of the United Kingdom so perhaps a different rule for them could be acceptable in Strasbourg.

So was this a case where we should make a small but significant advance upon the Strasbourg jurisprudence? Lord Walker would have left the matter to the Northern Ireland Assembly.<sup>24</sup> First, he thought it 'far from clear that the Strasbourg court would hold that the Adoption Order infringes the ECHR. So long as the 1967 Convention remains in force the Court would be more likely, in my opinion, to reach the opposite conclusion'. Second, the decision was one which ought to be made by a democratically elected legislature. Third, judges, lawyers, officials and agencies would be faced with a very abrupt change in the law and he suspected that there would be many practical difficulties. He would therefore have dismissed the appeal, but with a clear warning that if within two or three

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<sup>20</sup> [2008] UKHL 38, [2008] 3 WLR 76, #20.

<sup>21</sup> (2002) 38 EHRR 438.

<sup>22</sup> *EB v France* (2008) 47 EHRR 21.

<sup>23</sup> Article 41.3.1.

<sup>24</sup> #82.

years a clear consensus emerged in Europe and Northern Ireland did not legislate in line with that consensus, the issue would have to be reconsidered and the result would probably be different.<sup>25</sup>

Lord Hoffmann thought it 'not at all unlikely' that Strasbourg would hold that the discrimination violated article 14.<sup>26</sup> But even if Strasbourg would leave it to the margin of appreciation, this should make no difference. He pointed out that Lord Bingham's famous words in *Ullah* were not made in the context of a case in which Strasbourg has declared a question to be within the national margin of appreciation. Different states could give different answers. Nor would Strasbourg be concerned about whether it was the legislature, the executive or the judiciary which gave that answer. None of the normal reasons for following the Strasbourg decisions – the desirability of uniformity and respect for the decisions of a foreign court – apply where the foreign court has deliberately said that the matter is up to us. In a rather swift leap from this conclusion, he then decided that it was for the court to 'apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom'.<sup>27</sup> Normally, Lord Hoffmann is happy to defer to Parliament on matters of social or economic policy. But in his view, although Parliament was free to decide between two rational solutions to a social problem, it was not free to discriminate on an irrational basis.<sup>28</sup>

Lord Mance also agreed that if the matter was within our domestic margin of appreciation the court was free to put it right. He made the additional point,<sup>29</sup> that there is a distinction between the basic content of the right, which should generally receive a uniform interpretation throughout the member states, and the justifications for interference, where different cultural traditions might be material. And he agreed with me that the cultural differences between Great Britain and Northern Ireland would not justify a different approach on this question.<sup>30</sup> In fact, it was those very differences which might make it more difficult for the legislature to act to put the matter right.

The ban was contained in the Adoption (Northern Ireland) Order 1986. This is subordinate legislation within the meaning of the Human Rights Act so it could simply be disregarded by the courts. We therefore declared that it was unlawful for the Family Division of the High Court of Northern Ireland to reject the claimants' application to adopt on the ground only that they were not married to one another. Had it been primary legislation, of course, we could only have made a declaration of incompatibility. But in the general approach to the interpretation of the Convention rights it made no difference whether it was primary or subordinate legislation.

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<sup>25</sup> #83.

<sup>26</sup> #27.

<sup>27</sup> #37.

<sup>28</sup> #20.

<sup>29</sup> Based on some observations of Lord Steyn in *R(S) v Chief Constable of South Yorkshire Police* [2004] UKHL 49, [2004] 1 WLR 2196, #27; see also *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, #130.

<sup>30</sup> [2008] UKHL 38, [2008] 3 WLR 76, #121.

I found the whole matter a great deal more difficult than the others. But I take comfort from the thought that ‘democracy values each person equally even if the majority does not’. The courts in a democracy should therefore be especially vigilant to protect people from unjustified discrimination. But I have had to rethink one or two of my more extreme *Ullah* based statements. In the Hunting Act case I may have put it too high in saying that in a matter falling within our margin of appreciation ‘this House should not attempt to second guess the conclusion that Parliament has reached’.<sup>31</sup> *Re P* shows us that it may be otherwise with legislation passed some time ago and without reference to human rights. And in *DS v HM Advocate*,<sup>32</sup> I said that ‘The legislature can get ahead of Strasbourg if it wishes and so can the courts in developing the common law. But it is not for us to challenge the legislature unless satisfied that the Convention rights, as internationally agreed and interpreted in Strasbourg, require us to do so.’ It is tempting to draw a distinction between leaping ahead of Strasbourg when developing the common law<sup>33</sup> and leaping ahead of Strasbourg in telling Parliament that it has got things wrong. It is in the latter context that most of the stronger *Ullah* type statements have been made. Yet the concept of the ‘Convention rights’, upon which all our powers and duties under the Human Rights Act depend, cannot mean different things depending upon whether we are developing the common law, controlling the executive, or confronting the legislature. So the dilemma remains, even if *Re P* has softened it at the margin.

We seem therefore to have reached the following position. The ‘Convention rights’ are rights which are given effect in national law. National law is free to define them for itself. But in defining the substantive content of a right, the courts will generally respect a clear and constant line of Strasbourg jurisprudence unless there is good reason not to do so. If it is clear that the claimant would win in Strasbourg, then we will not hesitate to tell the politicians so, whatever the subject-matter. We may also make reasonable predictions of how Strasbourg might answer the same question if it has not recently done so. If it is clear that the claimant would lose in Strasbourg, we are still unlikely to forge ahead regardless.<sup>34</sup> And if the matter is or likely to be within the margin of appreciation which Strasbourg would allow to member states, then it is up to us to define the right as best we can. The margin tends to be applied to the justifications for interferences with rights, rather than to the scope of the right itself. We still have to decide whether we should go it alone or leave it to Parliament. This is not always easy, as *Re P* shows. But perhaps the timorous souls are fighting back just a little bit.

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<sup>31</sup> *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719, #126

<sup>32</sup> [2007] UKPC 36, [2007] HRLR 28, #92; see note 9 above.

<sup>33</sup> Lewis’ argument, note 11 above, was concerned with developing the common law, not with finding legislation incompatible.

<sup>34</sup> There are statements to this effect in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, #25, ##33-34, # 88, although it is on a rather different point of territorial application.