THE SUPREME COURT IN A FINAL PUSH TO GO BEYOND STRASBOURG

By Nuno Ferreira*

The judgment of the UK Supreme Court in *R (on the application of Nicklinson and another) v Ministry of Justice, and R (on the application of AM) (AP) v The Director of Public Prosecutions*¹ provides a glimpse of the future in UK human rights law. The decision, with a leading judgment by Lord Neuberger, deals with two separate appeals: one on the prohibition of assisted suicide in the UK, under the 1961 Suicide Act, and whether such prohibition is compatible with UK obligations under the European Convention on Human Rights (ECHR);² and the other one on the legality of the policy issued by the Director of Public Prosecutions (DPP) relating to the prosecution of individuals who have allegedly assisted a suicide.

To tackle these two key issues, the judgment first considers the domestic legal and policy framework on killing and suicide, and then shifts to the application of Articles 2 and 8 ECHR and case law including *Pretty v UK*³ and subsequent decisions of the European Court of Human Rights (ECtHR). The Supreme Court dedicates considerable attention to the role of

* Senior Lecturer in Law at the University of Liverpool. The author wishes to thank Dr Michael Gordon, Professor Maurice Sunkin, and the anonymous reviewer for their insightful and critical comments on this piece, and Alison Morley for the thorough copy-editing.

¹ [2014] UKSC 38. A summary of the judgement can be found on <http://supremecourt.uk/decided-cases/docs/UKSC_2013_0235_PressSummary.pdf> accessed 2 March 2015.

² Council of Europe, 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

³ *Pretty v The United Kingdom*, Application no. 2346/02, 29 April 2002.

the DPP in the context of assisted suicide, the DPP's 2010 policy on this matter and some of the usual moral and policy arguments against and in favour of assisted suicide and related practices.⁴ The leading judgment concludes that section 2 of the 1961 Suicide Act is, indeed, incompatible with Article 8 ECHR, but a declaration of incompatibility should not be issued at this moment in time because it would be inopportune (paras. 111 ff). Similarly, on the DPP's policy in question, the leading judgment reaches the conclusion that, for policy and constitutional reasons, it would be inopportune at this time to order the DPP to amend the policy in a particular way, even though Lord Neuberger does express his negative assessment of the uncertain and confusing results produced by the policy. Ultimately the judgment dismisses the appeal brought by Mrs Nicklinson and Mr Lamb on the incompatibility of the 1961 Suicide Act with the ECHR, and allows the appeal brought by the DPP and dismisses the cross-appeal brought by Martin on the legality of the DPP's policy.

The judgment is particularly significant in relation to what is said about the relationships between the UK and the Strasbourg Court, and between the UK domestic courts and the UK Government in the enforcement of the ECHR. It is upon these matters that this analysis will focus.

⁴ See, on the range of relevant arguments, Nuno Ferreira, *Revisiting euthanasia: A comparative analysis of a right to die in dignity*, ZERP Discussion Papers, DP 4/2005, <<http://www.jura.uni-bremen.de/institute/zentrum-fuer-europaeische-rechtspolitik/publikationen/diskussionspapiere/?publ=2167&page=1>> accessed 2 March 2015.

...from mirroring and deferring...

Since the 1998 Human Rights Act (HRA) came into force, giving further effect to the ECHR in the UK, scholars, judges and politicians alike have had to tackle the difficult matter of whether the UK should simply adhere to the (minimum) standards imposed by the Strasbourg Court or feel free to go beyond that 'minimum jurisprudence' and develop their own human rights jurisprudence. Lord Bingham's dictum in *Ullah* in this regard has for some time now played an important role in this debate: '[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less' (para. 20).⁵ This dictum, often referred to as the 'mirror principle', quickly became the orthodox approach in this debate. Until very recently, it was still possible to read enthusiastic defences of the 'mirror principle' and assertions that this principle required UK courts to follow the judgments of the Strasbourg Court unless there were convincing reasons for them to do otherwise.⁶

This development, however, has also meant an enormous reluctance to depart from the Strasbourg jurisprudence even in cases where the Strasbourg Court allows Member States some margin of appreciation and domestic courts are free to enforce higher human rights standards. A limited degree of autonomy for domestic courts has occasionally been recognised by UK judges, namely on the basis of slight departures from the 'mirror principle' and more

⁵ *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323.

⁶ Philip Sales, 'Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine', *Public Law* 2012, 253-267.

generous interpretations of Section 2 HRA, which in fact only requires Convention rights and case law to be taken into account, not to be followed under every circumstance. For example, in *Re P*, several dicta recognised the possibility of the domestic court diverging from Strasbourg decisions with regard to the compatibility with the ECHR of Northern Irish regulations preventing unmarried couples from adopting children.⁷ Still, the scope for exceptions to the ‘mirror principle’ has consistently remained restricted to a very well delineated list of instances, which reflects an inadequate interpretation and use of the margin of appreciation accorded by the Strasbourg Court to Member States. Indeed, the principle of the margin of appreciation applies to a greater or lesser extent to most cases involving human rights judicial claims – very few cases involve only absolute rights and obliterate any margin of appreciation to which a state may resort, as most human rights claims relate to qualified rights and require a judgement call by national authorities.⁸ Furthermore, even claims relating to rights traditionally perceived as being absolute – such as Article 3 ECHR on freedom from torture and other inhuman or degrading treatment or punishment – are adjudicated on the basis of some margin of appreciation being afforded to Member States.⁹

This reluctance to depart from and go beyond the Strasbourg jurisprudence – caused by the ‘mirror principle’

⁷ See paras. 21–29, 53 and 136–142 in *Re P* [2008] UKHL 38, [2009] 1 AC 173.

⁸ Mark W. Janis, Richard S. Kay and Anthony W. Bradley, *European Human Rights Law*, third edition, OUP, 2008, pp. 242 ff.

⁹ Pieter Van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, Intersentia, 2006, pp. 412ff; Andrew Legg, *Margin of appreciation in international human rights law: Deference and proportionality*, OUP, 2012, especially Chapter 8.

and despite the potential offered by Section 2 HRA and the principle of margin of appreciation – was the recipe for a poor human rights framework, to the detriment of victims of human rights’ violations and society at large. Examples of the resulting disappointing outcomes in the early post-HRA case law are numerous and can be found in such different fields as planning law,¹⁰ retention of fingerprints and samples,¹¹ deportation,¹² remedies,¹³ amongst others.¹⁴ Several ECHR provisions have been read particularly restrictively, including Article 5 with regard to the right to liberty and security,¹⁵ and Article 10 with regard to freedom of expression.¹⁶ Indeed, in all these instances the outcome could have been much more positive from a human rights perspective had the courts not adhered to the spirit of the ‘mirror principle’ and overlooked the margin of appreciation accorded to them. Such disappointing outcomes have occasionally been compounded by unduly light proportionality tests, as in *ProLife Alliance*.¹⁷

In sum, the ‘mirror principle’ has joined forces with a restrictive reading of Section 2 HRA, an inadequate application of the principle of margin of appreciation and light-touch proportionality tests to prevent the development of a rich body of uniquely UK human rights case law. This range of factors has worked differently in different cases, leading

¹⁰ *R (on the application of Alconbury) v Secretary of State for the Environment* [2001] 2 All ER 929.

¹¹ *R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196.

¹² *N v Secretary of State for the Home Department* [2005] 2 WLR 1124.

¹³ *R (Greenfield) v Home Office* [2005] 1 WLR 673.

¹⁴ For a discussion of the decisions in cases on these and other fields, see Helen Fenwick, *Civil liberties and human rights*, fourth edition, Routledge-Cavendish, 2007, pp. 192-196, 244-247.

¹⁵ See, for example, *R (on the application of Gillan) v Commissioner of Metropolitan Police* [2006] UKHL 12.

¹⁶ See, for example, *R v British Broadcasting Corporation ex parte ProLife Alliance* [2003] UKHL 23.

¹⁷ *Ibid.*

judges to remain below Strasbourg (which overall has been uncommon, but not always avoided),¹⁸ to match Strasbourg (the most common type of decisions reached), or to go beyond Strasbourg (an outcome with as yet insufficiently untapped potential). Dangerously, the 'below Strasbourg' and 'match Strasbourg' options, and the 'mirror principle' approach in particular, leave an empty space, free of judicial intervention both by the Strasbourg Court and domestic courts, thereby facilitating human rights abuses both by public authorities and by private parties.

To avoid any suspicion of undue criticism of Lord Bingham's human rights credentials, it should be said to his credit that Lord Bingham was an important actor in the protection of human rights in the UK. For instance, in *A v SSHD*,¹⁹ Lord Bingham supported a declaration of incompatibility under section 3 HRA on account of the Anti-terrorism, Crime and Security Act 2001 violating Article 3 ECHR in relation to foreigners. Nonetheless, this was strictly within the narrow framework defended by the dictum in *Ullah*.

As such, the 'minimalist approach' became widespread and gained the status of legal orthodoxy. The HRA is not necessarily incompatible with this approach, at least based on a literal interpretation of it. Indeed, it was clear from the parliamentary debates on the HRA that courts should have the 'discretion under the HRA to afford greater weight to the Convention rights than Strasbourg affords, although they are not placed under an obligation to do so'.²⁰ There is no denying the crucial distinction between 'may' and 'must': judges may

¹⁸ See, for example, *Gillan*, above n 15, and comments on this case in Fenwick, above n 14, pp. 269ff and 277ff.

¹⁹ *A v Secretary of State for the Home Department* [2004] UKHL 56.

²⁰ Fenwick, above n 14, p. 279.

go beyond Strasbourg, but they are not obliged to do so. Nonetheless, the detrimental effects of the 'minimalist approach' were compounded by a generous notion of 'judicial deference' to Parliament,²¹ a notion which has been criticised as 'either empty or pernicious'.²² Hence the subsequent scholarship criticising the 'no more, but certainly no less' dictum and the excessive judicial deference to Parliament, trying, amongst other things, to classify, contextualise and limit the impact of Lord Bingham's words.²³ The debate about the 'minimalist v activist' approach was thus launched and grew over time.

... to a change of winds ...

The Supreme Court's decision in *Nicklinson* has clarified beyond doubt that domestic courts (and authorities, more generally) are not only allowed to go beyond Strasbourg jurisprudence, but are even expected to do so (paras. 70, 73). In fact, it is the HRA itself (especially sections 2 and 4), that requires limits to the courts' deference to Parliament (paras. 73-74, 78) and places on courts the responsibility to make judgments of human rights compatibility (para. 112). Lord Kerr phrases this in the strongest way: 'In making that declaration [of incompatibility] we do not usurp the role of Parliament. On the contrary, we do no more than what Parliament has

²¹ Ibid, pp. 265 ff.

²² Trevor R. S. Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' 2006 *Cambridge Law Journal* 65 (3), 671-695, 675.

²³ See, for example, Richard Clayton, 'Smoke and mirrors: The Human Rights Act and the impact of Strasbourg case law', *Public Law* 2012, October, 639-657; Fenwick, above n 14, pp. 265 ff.

required us to do. (...) [the courts] much less offend the separation of powers. A declaration of incompatibility is merely an expression of the courts' conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right' (paras. 327 and 343).

Lord Neuberger makes sure that he does not become entangled with questioning Lord Bingham's dictum in *Ullah*. Indeed, Lord Neuberger carefully avoids taking issue with Lord Bingham's approach by stating that '[i]n those circumstances [of a wide margin of appreciation], it does not appear to me that the dictum quoted above from *Ullah* is in point. (For this reason, this is not the occasion to address the question whether, and if so how far, the principle enunciated by Lord Bingham in *Ullah*, para 20, should be modified or reconsidered.)' (para. 70). It is submitted, however, that Lord Bingham's dictum in *Ullah* and the mirror principle are, in fact, very much in question, and undoubtedly questioned by this Supreme Court decision, in general, and Lord Neuberger's leading judgment, in particular. The bold statements that can be found in this judgment regarding the space for autonomy that needs to be secured for domestic courts on human rights matters may have been facilitated by the wide margin of appreciation that the Strasbourg Court leaves to domestic authorities with regard to assisted suicide (para. 70). Still, one cannot doubt that these same statements will apply in other contexts, even when a narrower margin of appreciation may be in question. This increases the significance of these statements and enhances their wide-ranging ramifications.

There is, therefore, a clear departure from the 'mirror principle', and this move is crucial to counteract the damage

which such a limiting approach has had (and could go on having) on the UK human rights legal framework and, perhaps more crucially, mind-set. Indeed, this decision contains the strongest assertions to date of judges' prerogative to intervene in matters that have traditionally been seen as only pertaining to Parliament's remit. Although the majority (seven to two)²⁴ either is against in principle or declines on this occasion to issue a declaration of incompatibility, another majority (of five to four)²⁵ is keen on asserting the constitutional legitimacy of the judiciary to issue such a declaration on the basis of a 'beyond Strasbourg' interpretation when it is held that the circumstances so require and justify. This still remains some distance from the powers of courts in most other Council of Europe Member States, which generally include the possibility of, in some shape or form, striking down or otherwise not applying a piece of legislation for contravening a supra-ordinary, often human rights related, legal norm.²⁶ This would clearly go beyond what is possible within the current UK constitutional framework, so the Supreme Court in this decision has done as much as it could in the current circumstances.

²⁴ Lord Neuberger, Lord Mance, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed and Lord Hughes in the majority, and Lady Hale and Lord Kerr in the minority.

²⁵ Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson in the majority, and Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes in the minority.

²⁶ For a short survey, see Janis, Kay and Bradley, above n 8, pp. 829ff and 849ff; and van Dijk, van Hoof, van Rijn and Zwaak, above n 9, pp. 26ff. The contrast between the UK constitutional and human rights landscape and that of other European countries is made more acute by the position which the ECHR assumes in the legal hierarchy: whilst in the majority of European countries the ECHR is placed above ordinary legislation and sometimes even above national constitutions, in the UK the ECHR is placed below ordinary legislation 'in that it cannot *automatically* override pre-existing law': Fenwick, above n 14, p. 172.

The decision in *R (G) (Adoption: Unmarried Couple)*²⁷ is used throughout this Supreme Court decision as a useful predecessor to widen the space of manoeuvre for UK domestic courts on human rights matters (paras. 71 ff). Other decisions, such as the judgments in *Horncastle*,²⁸ *Sugar v BBC*,²⁹ and other cases, have also offered support to a 'going beyond' approach, rather than a 'no more, no less' approach.³⁰ Nonetheless, such support was always carefully qualified and limited. On this occasion, however, the Supreme Court 'stepped up' its stance on this matter, and is ready to declare, positively and boldly, that it has the right (and obligation) to make its own judgement on the matter. Also, Lord Neuberger had already expressed a strong view on the way in which section 2 HRA should be interpreted and the degree of autonomy which domestic judges should have with regard to following, or not following, ECHR case law,³¹ but on this occasion it became clearer that Lord Neuberger expects this autonomy to work in favour of allowing domestic judges both to diverge from *and* to go beyond Strasbourg. So, in *Nicklinson*, whilst not contradicting past dicta, the Supreme Court went much further than other courts have so far done, even if the outcome may have not been substantially different. It is submitted that the symbolism of the dicta in *Nicklinson* is much more powerful than that of past dicta advocating a similar approach. This is particularly interesting in the context of a consistent line of Strasbourg jurisprudence asserting the compatibility between the prohibition of assisted suicide and

²⁷ *R (G) (Adoption: Unmarried Couple)* [2009] 1 AC 173.

²⁸ *Horncastle* [2009] UKSC 14, para. 11.

²⁹ *Sugar (Deceased) (Represented by Fiona Paveley) (Appellant) v British Broadcasting Corporation and another (Respondents)* [2012] UKSC 4, especially para. 59.

³⁰ For a review of the 'activist' approach to the ECHR and HRA, see Fenwick, above n 14, pp. 278 ff.

³¹ *Manchester City Council v Pinnock* [2010] UKSC 45, para. 48.

Articles 2 and 8 ECHR (for example, *Pretty v UK*³² and *Haas v Switzerland*³³). Let us make it clear: this bold move is certainly not to be lamented. Indeed, Parliament may have stronger democratic credentials, but courts are in a much better position to effectively address individual human rights violations in a timely fashion.

... slowly, but steadily...

As mentioned above, the majority in this decision (seven to two) opted for not issuing a declaration of incompatibility on this occasion, despite the strong assertions on the courts' right (and obligation) to make, as a matter of principle, their own judgement on any human rights related matter. The fact that, following the work of the Commission on Assisted Dying,³⁴ Parliament is currently considering an Assisted Dying Bill,³⁵ will have influenced this Supreme Court decision and encouraged judges to refrain from interfering with an on-going legislative process (para. 116) – this is probably particularly the case with those three judges who agreed with the possibility, in principle, of issuing a declaration of incompatibility, but decided against it in this particular case.³⁶ This accounts for the subsequent dismissal of the appeal on the request for a declaration of violation of Article 8 ECHR. Although

³² Above n 3.

³³ *Haas v Switzerland*, Application no. 31322/07, 20 January 2011.

³⁴ <<http://www.demos.co.uk/publications/thecommissiononassisteddying>> accessed 2 March 2015.

³⁵ Assisted Dying Bill [HL] 2014-15, <<http://services.parliament.uk/bills/2014-15/assisteddying.html>> accessed 2 March 2015.

³⁶ Lord Neuberger, Lord Mance and Lord Wilson.

unsatisfactory for the individual appellants, this can be seen as a sensible way of entering into a constructive dialogue with Parliament (para. 117),³⁷ reflective of what is believed to be the most proportional course of action (para. 115), rather than producing confrontational decisions. One may almost identify here a new judicially-created legal figure of ‘last warning’ before a declaration of incompatibility (para. 118).

Such reluctance to resort to a Section 4 HRA declaration of incompatibility and, instead, giving preference to a newly created ‘last warning’ mechanism, may indeed be seen as the ultimate tool to endow the HRA with greater political and public support, and remove some resistance built up against this statute since its inception. In doing so, the Supreme Court may be attempting to achieve the aims of the HRA – law and decision making that is more human rights friendly – according to a more dialogical and contextual format, rather than limiting itself to mechanistic and unimaginative schemes. This may result in frustrating outcomes for the claimants in question, but a declaration of incompatibility under section 4 HRA is no remedy in itself anyway. At any rate, the way in which the Supreme Court was ready to confidently discuss and pronounce the very real possibility of issuing a declaration of incompatibility of the 1961 Suicide Act with Article 8 ECHR (para. 118), is extremely significant and it should now be simply a matter of time until this approach becomes pervasive throughout UK courts.

³⁷ ‘Dialogue’, in this context, usually refers to the relationship between the UK domestic courts and the Strasbourg Court (see, for example, para 117 of this judgment and Nicola Bratza, ‘The relationship between the UK courts and Strasbourg’, *European Human Rights Law Review* 2011, 5, 505-512, 511), but it is the dialogue between the domestic courts and the UK Parliament that is envisaged here.

Lady Hale and Lord Kerry would have gone further, and would have used this opportunity to declare section 2 of the 1961 Suicide Act incompatible with Article 8 ECHR (paras. 299 ff). The arguments against this course of action are not always convincing: for instance, Lord Wilson argues on the grounds of the sanctity of life and the ‘slippery slope’ argument (paras. 198 ff); Lord Sumption also highlighted that, in relation to such matters where there is a lack of consensus across society on the moral values that should be prioritised, Parliament should be the institution taking the final decision (para. 230); Lord Hughes also adopts a more conservative, pro-parliamentary sovereignty approach (especially paras. 259 and 267).³⁸ Still, it is not clarified where the victims of any human rights’ violations can seek redress in such circumstances – this is still the case even if both the courts and Parliament believe that there is indeed a human rights’ violation, but Parliament is simply not able to address the matter in a timely and appropriate fashion due to the (lengthy and intricate) nature of the legislative procedure.

For the sake of leaving certain matters to be dealt with by a democratically elected body, individuals seem to be left at the mercy of a Parliament that may never decide to act.³⁹ Some might argue that this may be a matter to be dealt with purely at a political level (by letting voters make their choices when elections take place) and/or at the international level (in the context of the relationship between the Council of Europe and the UK). Yet, that is entirely inadequate, especially in the context of a modern legal framework that should ensure the

³⁸ On why such arguments are overall insufficiently persuasive, see Ferreira, above n 4.

³⁹ That may, however, end up not being the case with assisted suicide, in the light of the current Assisted Dying Bill, mentioned above.

protection of the human rights of any individual, even against violations sanctioned by democratically elected bodies. A richer notion of democracy, one that incorporates the protection of those most vulnerable, is required here. Accordingly, Lady Hale has rightly pointed out, in *Chester and McGeoch*, that ‘in any modern democracy, the views of the public and Parliamentarians cannot be the end of the story. Democracy is about more than respecting the views of the majority. It is also about safeguarding the rights of minorities, including unpopular minorities.’⁴⁰

... until a better balance is reached

Overall, and without ignoring the UK’s own constitutional arrangements (para. 76), this decision reflects more closely the approach of all other countries under the jurisdiction of the Strasbourg Court, whereby domestic courts see Strasbourg’s jurisprudence as a ‘floor’, not a ‘ceiling’: they develop their own human rights case law, provided it goes above and beyond what the Strasbourg Court requires.⁴¹ Although the Supreme Court applies this approach to both primary and

⁴⁰ *R (on the application of Chester) v Secretary of State for Justice, McGeoch (AP) v The Lord President of the Council and another (Scotland)* [2013] UKSC 63.

⁴¹ See, for example (albeit drawing attention to the rather more complex nature of this assertion than is usually observed), Federico Fabbrini, *Fundamental Rights in Europe: Challenges and transformation in comparative perspective*, OUP, 2014, p 38. Somewhat ironically, it is Lord Bingham himself who also asserted that ‘[t]he Convention provides a minimum standard of protection, a floor not a ceiling. Any member state which wants to give better protection than the Convention affords is free to do so.’: Lord Bingham, *Speech at Liberty’s 75th Anniversary*, 2009, <<https://www.liberty-human-rights.org.uk/sites/default/files/lord-bingham-speech-final.pdf>> accessed 2 March 2015.

secondary legislation (para. 75), it seems, in principle, to wish to limit the impact of a 'going beyond' approach to cases where there is a wide margin of appreciation (para. 70). Yet, it also concedes that it all depends on the circumstances of the case (para. 75), opening up room for a declaration of incompatibility in virtually all cases. The Supreme Court may hesitate to eventually do this and, instead, favour a sort of 'last warning' mechanism in the light of a dialogical and contextual framework, but the willingness to discuss and issue declarations of incompatibility remains very much present. Also, in the great majority of cases there is at least *some* degree of margin appreciation available to domestic jurisdictions, so UK courts should have the possibility of forming their own judgement on human rights matters *above and beyond* Strasbourg in practically all cases.

This gradual, but steady, move towards a 'going beyond Strasbourg' approach has already produced positive results in UK law in some isolated instances. For example, it has introduced greater flexibility for judges to develop principles of common law in the field of private law, as in relation to privacy in *Campbell*⁴² and freedom of expression in *Reynolds*,⁴³ as well as departing from precedent in the light of subsequent Strasbourg decisions as, similar to the decision in *Nicklinson*, in relation to assisted suicide in *Purdy*.⁴⁴ In addition, this trend has received the blessing of the (now former) Strasbourg Court's President himself, Nicolas Bratza.

⁴² *Campbell v MGN Ltd* [2004] 2 WLR 1232.

⁴³ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

⁴⁴ *R(Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2009] 3 WLR 403. For a lengthier analysis of these examples and, more generally, the role of common law rights in the context of human rights claims, see Alison Young, 'Precedent' (chapter 5), in David Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law*, Cambridge University Press, 2011, pp. 91-109, and Richard Clayton, 'The empire strikes back: Common law rights and the Human Rights Act' *Public Law* 2015 (January), 3-12.

Indeed, Bratza could not have been clearer when, inspired by Lady Hale's words, he stressed that national courts should sometimes consciously leap ahead of Strasbourg.⁴⁵

Furthermore, this Supreme Court decision is particularly timely, considering that the Conservative Party's manifesto for the 2015 General Election has promised to curtail the role of the ECHR in the UK, accord the Strasbourg Court a mere advisory role, and replace the HRA with a British Bill of Rights – even at the possible cost of expulsion from the Council of Europe.⁴⁶ This Supreme Court decision can thus be used in political and broader public debates to highlight that, contrary to what the Conservative manifesto argues, there is the need to adhere to the ECHR but one should rather see it as 'floor' instead of a 'ceiling', hence allowing for the development of specific UK human rights standards. In this context, a British Bill of Rights would, of course, not be negative in itself, but it would nonetheless represent a risk if so many of the human rights achievements made in the UK on the basis of the ECHR and the HRA were to be destroyed by the HRA's successor. And to risk losing the status of Member State of the Council of Europe and the right of individual petition to the Strasbourg Court would constitute a drastic loss of international reputation to the UK and create unthinkable harm to the protection of human rights in the UK.

It should be crystal clear by now to all UK lawyers that the Strasbourg Court is there only to set minimum standards

⁴⁵ Bratza, above n 37, 512.

⁴⁶ David Cameron, *Speech to Conservative Party Conference 2014* <<http://press.conservatives.com/post/98882674910/david-cameron-speech-to-conservative-party-conference>> accessed 2 March 2015; Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws*, <https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf> accessed 2 March 2015.

and that the domestic courts should be more autonomous, ambitious and demanding of their own legal framework. An 'activist' approach is, of course, only positive if it is used appropriately, with a net result of increased fairness and justice in the legal system (assessed by the number and nature of human rights claims that are, precisely due to such an approach, rightly vindicated in court). Naturally, there need to be due safeguards to prevent courts over-stretching the limits of the principle of separation of powers. At the end, by avoiding the detrimental effects of judicial minimalism and over-activism, we all have something to gain. And Lord Bingham's 'no more, but certainly no less' dictum can now rest in peace.