Abstract: On the 14th of December 2011, Lord Irvine, the architect of the Human Rights Act 1998 (HRA), incisively criticised the courts for their handling of HRA section 2(1). According to him, the injunction on courts in s.2(1) to take the jurisprudence of the European Court of Human Rights into account has been transmogrified into an obligation to follow it; the courts have thus been too submissive in following Strasbourg. This criticism, however, must be questioned. In the first place, the statute and its legislative history are ambiguous. In light of this, any interpretation of s.2 should rightly defer to ulterior grounds of policy, principle and reason. Considering the UK’s international law obligations and further practical issues, the current construction of s.2 is to be defended as regards the courts’ reluctance to grant lesser protection than Strasbourg. Nonetheless, Lord Irvine’s criticism should be heeded with respect to the courts’ duty under both the European Convention on Human Rights and the HRA to engage Strasbourg in dialogue, not mimicry. In particular, his criticism of the self-abnegation of British courts under the Ullah principle is to be supported. Ultimately, British judges should accept the jurisdiction they have been granted under the HRA to make a distinctive contribution to human rights law.

I – Introduction

British judges have borne much criticism from several quarters over their judgments on the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR). On the 14th of December 2011, for the first time publicly commenting on his intent behind HRA section 2(1), Lord Irvine decisively added his own voice to the debate. He was forcefully critical of the courts’ handling of s.2, scolding them for their submission to Strasbourg. According to him, s.2 of the HRA “means that it is our judges’ duty to decide the cases for themselves and explain clearly to the litigants, Parliament and the wider public why they are doing so. This, no more and certainly no less, is their constitutional duty.” According to him, it is a duty the judges have betrayed.

This is a profound and surely piercing critique from the architect of the HRA. However, the legitimacy thereof must be questioned. Firstly, the claim that the meaning of s.2 is semantically simple and plainly at odds with the courts’ approach is stretched. The statutory wording – and even the legislative history – is ambiguous. In light of this, any interpretation of s.2 should rightly defer to ulterior grounds of policy, principle and reason. These relate in particular to international obligations and practical considerations. In these terms, the courts are in large part to be defended to the extent that they have been reluctant to depart from Strasbourg authority in order to allow a prima facie violation of Convention rights. On the other hand, Lord Irvine’s criticism should be heeded as regards the role of the courts under both the ECHR and the HRA to engage Strasbourg in dialogue, not mimicry. Moreover, Lord Irvine’s voice adds further force to the view that the courts’ timidity in furthering the

---

protection of human rights is undue and regrettable self-abnegation. Ultimately, British judges should accept the jurisdiction they have been given under the HRA to make a distinctive contribution to human rights law.

II - Semantic Ambiguity

Lord Irvine’s criticism is founded foremost on the plain meaning of the statute. Section 2(1) provides: “A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any...judgment...of the European Court of Human Rights...” 2 Herein, “take into account” “can be paraphrased as ‘have regard to’, ‘consider’, ‘treat as relevant’ or ‘bear in mind’.3 In his opinion, however, the courts have unacceptably distorted this meaning by considering themselves “bound (or as good as bound)”4 following Lord Slynn’s statement in the Alconbury5 case:

…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 European Court of Human Rights. 6

The requirement of exceptional circumstances to depart from the European Court of Human Rights (ECtHR) case law is, it is claimed, a fundamental misreading of the statute.

‘Take account of’ is not the same as ‘follow’, ‘give effect to’ or ‘be bound by’. Parliament, if it had wished, could have used any of these formulations.7

According to Lord Irvine, this clearly denies the courts’ approach of following Strasbourg barring exceptional circumstances. It will be argued, however, that beyond the polar prohibitions of absolute ignorance and absolute submission, the statute admits of a wide range of approaches to Strasbourg jurisprudence. The courts’ approach falls within that range. Even though it imposes a requirement not stated in the statute for departure from ECtHR judgments, some such addition was an inevitable result of the ambiguity of s.2. The compatibility of the courts’ approach with the statutory phrasing may finally be confirmed by reference to comparisons.

Firstly, it is to be noted that a requirement that a factor be “taken into account”, though simply worded, is indubitably vague. It does not specify how the factor is to be taken into account, or to what extent. Besides the plain demand that the factor be considered, it gives no instruction as to the weight such consideration should be given.

---

2 The Human Rights Act 1998 c.42.
3 Lord Irvine (n 1) 2.
6 Ibid 313.
7 Lord Irvine (n 1) 3.
This being so, all such a requirement does – at most – is establish two prohibitions. Certainly, it bars a court from wholly ignoring the factor in question. Some consideration must be given to it in whatever way.

Secondly, one might agree with the more specific statement of Lord Irvine that “take into account” in s.2 does not mean “follow”. After all, as Lord Irvine mentions, an amendment to replace the ambiguity with “must follow” was rejected. One might also note the judicial review principle that, given a statutory discretion, the adoption by a decision-maker of a policy without provision for exceptions constitutes unlawful fettering of such discretion. So much, therefore, may properly be considered outside the specified scope of the statute.

However, s.2(1) prescribes or demands nothing further, nothing more specific, than this. Surely, on a plain reading, it therefore allows for a huge range of meaning falling anywhere between these two polar extremes of absolute ignorance and absolute compulsion.

The position adopted by the courts falls within this range. It does not betray the bare instruction that Strasbourg judgments are “to be taken into account”; rather, it specifies how they are to be taken into account: when Strasbourg case law is taken into account and it is “clear and constant”, this has greater weight than other factors, except that “some special circumstances” may have even greater weight.

It is not to be said that the imprecision of that exception of “special circumstances” renders the rule tantamount to an absolute obligation. As Lord Irvine himself notes, the court in Horncastle departed from Strasbourg case law, finding on that occasion that the Strasbourg court did not sufficiently appreciate or accommodate “particular aspects of our domestic process.” Further, Lord Neuberger suggested in Pinnock that even a clear and constant line of Strasbourg jurisprudence might be departed from if it is “inconsistent with some fundamental feature of our law”. This interpretation is commended by Lord Irvine as a “more nuanced” approach; nonetheless, it is consistent with the general position that he criticises, for it is again merely stating an exception. One might even see such a fundamental inconsistency as a “special circumstance” of itself, and thus read it directly in line with the foundational position of Lord Slynn.

Though Lord Irvine claims that this means the court is “as good as bound”, this is certainly not the same as turning “must take into account” into “must follow”. The fact alone that such special circumstances arise only rarely does not mean that the

---

8 Lord Irvine (n 1) 3.
9 Lord Irvine (n 1) 3.
11 Alconbury (n 5) 313 per Lord Slynn.
13 Ibid 432
14 Pinnock v Manchester City Council [2010] 3 WLR 1441.
15 Ibid 125.
16 Lord Irvine (n 1) 5.
17 Ibid 4.
provision has been transformed into an obligation to follow rather than take into account. The courts have merely established an approach to the actual process of taking Strasbourg jurisprudence into account, to the assessment of the relative weight of this factor as against others.

The real objection is that the courts have imposed a requirement that was not specifically directed by s.2(1) – namely that there must be some exceptional circumstance. This is true. However, this is not to be objected to on the ground that it contradicts, or exceeds the ambit of, s.2.

Some assessment of the relative weight of consideration of Strasbourg case law is surely an inevitable result of the obligation to take that factor into account. Then, the question is whether the statute specified in some fashion the measure of that relative weight. On the face of it, it certainly has not; the provision does not go further than the obligation to “take into account”. It provides no terms detailing that it should be taken into account in this way and not in that. Where the provision does not answer this question that arises inexorably from the bare obligation in s.2, it seems an ineluctable conclusion that it is for the court to decide the point. As such, surely the courts are not guilty of misreading the provision in maintaining that the weight of specifically “clear and constant” Strasbourg case law is particularly great, and so requires “special circumstances” to be offset. One might note that the very fact that Strasbourg authority has been singled out for obligatory consideration implies that it is indeed especially significant.

Therefore, so long as following Strasbourg authority is not an absolute obligation, the courts’ approach cannot properly be said to betray the statutory wording. Finding greater merit in the existence of consistent and constant Strasbourg case law than in considerations that do not amount to special circumstances is simply the courts’ process of taking Strasbourg jurisprudence into account. Consequently, the bare meaning of s.2(1) does not of itself deny the courts’ approach.

Indeed one might consider for comparison approaches to such statutory wording in other scenarios. In the Oil Platforms case, the International Court of Justice admitted that following the general rules of treaty interpretation, “interpretation must take into account any relevant rules of international law applicable.” This did not bar it from – nor indeed cause any conflict of mandate in – taking a similarly exceptional approach to departing from the relevant authority. Indeed it noted that “[t]he application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation…”

\[18\] Alconbury (n 5) 313.

\[19\] The Oil Platforms case (Iran v United States of America) (Merits) Reports 2003.

\[20\] Following Art.3(c) of the 1969 Vienna Convention on the Law of Treaties.

\[21\] Oil Platforms (n 19) [41].

\[22\] Oil Platforms (n 19) [41].
Even more revealing is the approach taken to Sentencing Guidelines in the US. Delaware requires an “advisory”, or “voluntary and non-binding”\textsuperscript{23} consideration of State Sentencing Guidelines, and yet requires that judges only depart from the standard sentence range “if they find that there are substantial and compelling reasons justifying an exceptional sentence.”\textsuperscript{24} Indeed, compliance is at ninety per cent.\textsuperscript{25} Furthermore, “[t]he governing factor(s) leading to the exceptional sentence must be stated for the record and should be identified in the sentencing order,”\textsuperscript{26} not unlike Lord Phillips’ requirement that the judge “giv[e] reasons for adopting this [exceptional] course.”\textsuperscript{27} Similarly, the Minnesota Sentencing Guidelines, in its statement of purpose, claims that “[w]hile the sentencing guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist.”\textsuperscript{28} The juxtaposition of the two allegedly incompatible conditions is particularly revealing. That something is non-binding and “advisory” only does not exclude the possibility that it be considered binding barring exceptional circumstances. The same must hold true of something that need only be “taken into account”.

Thus Lord Irvine’s claim as regards the “plain” meaning of the provision is to be doubted. The statute is not clear, and the courts’ construction of it is compatible with the only two prohibitions that the statute does plainly establish. This is confirmed by comparison with the approach taken to departures from relevant rules in the Oil Platforms case and from “advisory” sentencing guidelines in the US. Therefore, if the courts are to be criticised, it is not over the bare meaning of the statute. The language of s.2(1), in the wide discretion that its ambiguity affords, admits of the approach that has been taken. The question then is whether the courts have or have not been properly guided by ulterior principles to adopt the best course left open to them under that discretion.

### III - International Obligations

Lord Irvine emphasises that there is no “magic” in a clear and constant line of Strasbourg jurisprudence that renders it so compelling. This may be “no more than an extended repetition of error”.\textsuperscript{29} However, the courts are to be defended in their commitment to such jurisprudence by consideration of the UK’s international law obligations, traditional rules of statutory construction in respect thereof, and the HRA’s legislative history.

The “magic” seen by the courts in a clear and constant line of Strasbourg jurisprudence is of course implicit. A clear and constant line of Strasbourg


\textsuperscript{24} Ibid 102.


\textsuperscript{26} The Delaware Benchbook (n 23) 102.

\textsuperscript{27} Horncastle (n 12) at 432.

\textsuperscript{28} Minnesota Sentencing Guidelines and Commentary 2011, 1.

\textsuperscript{29} Lord Irvine (n 1) 5.
The Human Rights Act Section 2(1) Taken into Account

Jurisprudence effectively establishes the international law regarding Convention rights. The need to comply with international law has been what might properly be said the major ground for the courts’ deference to Strasbourg. Thus in AF v Secretary of State for the Home Department, Lord Hoffmann, though disagreeing with the relevant Strasbourg decision, submitted that:

As a matter of our domestic law, we could take the decision in A v United Kingdom into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so.

Indeed, the UK is party to the ECHR following ratification in 1951. Under ECHR Art.46, therefore, the UK is bound to “abide by the final judgment of the Court in any case to which they are a party”. It might further be noted that the UK is also effectively bound by the ECHR under EU law, for the “Union shall respect fundamental rights, as guaranteed by the European Convention… as general principles of law”. Via this route, the ECHR has force with parliamentary backing even independently of the HRA.

However, Lord Irvine contends that:

...excessive preoccupation with this consideration [of international obligations] has led the Courts into error. A judge’s concern for the UK’s foreign policy and its standing in international relations can never justify disregarding the clear statutory direction which s.2 of the HRA provides.

Admittedly, Lord Irvine’s wider argument that judges should not be involved in these affairs is a powerful one. However, the argument that they have become over-involved is premised on the view that the judges have let that consideration override the obvious meaning of the statute. As has been argued, there is no such “clear statutory direction”.

Given that the statute is generally ambiguous as to the extent to which it should give weight to the factor taken into account, it is far from unwarranted to rely on international obligations to guide the choice of an appropriate approach within the scope that is granted by s.2. It is hardly an “excessive preoccupation” to follow then what is by no means a novel approach to statutory interpretation. It is indeed a “well-known rule of construction of statutes that requires statutes to be construed, if possible, consistently with the government’s treaty obligations.” Under the ambiguity of s.2, this certainly is “possible”. There is surely therefore a case for presuming that Parliament did not intend to legislate contrary to its ECHR obligations.

---

30 AF v Secretary of State for the Home Department [2010] 2 A.C. 269.
31 Ibid, 357.
32 Maastricht Treaty Article F(2).
33 Lord Irvine (n 1) 7.
34 Attorney-General v Observer Ltd [1990] 1 AC 109 at 158.
Was it otherwise so plain that Parliament had no such intention? Lord Irvine implies that this is evident from the legislative history of the clause. However, he himself confirmed, in the House of Lords debate that he refers to, that “[t]he United Kingdom already accepts that Strasbourg rulings bind”\textsuperscript{35}, and that “it has been the clear desire of all the main political parties, and has had their general assent, that we comply with our convention obligations.”\textsuperscript{36} He further stated that “human rights are valuable and they deserve protection at home—equal protection to the protection to which they are entitled at Strasbourg.”\textsuperscript{37} Does it not appear from such statements that Parliament intended to comply with its ECHR obligations under the HRA?

A potential objection raised by Lord Irvine is that it is not strictly the courts that are bound by Art.46 of the ECHR, but rather the state. The courts are obliged to decide on whether or not to follow a Strasbourg ruling independent of the UK’s treaty obligations. It is a matter for Parliament and the Foreign and Commonwealth Office to consider the potential consequences of a breach of Art.46.

Yet this might just as easily be said of any treaty obligation, for it is rarely specified that the courts must give effect to them. Nevertheless, of course, that is not the position otherwise taken. So long as there is ambiguity in the wording, the presumption is not simply that Parliament intended to abide by the UK’s obligations in general, but that it did not intend to contravene them in the particular provision in question; therefore, the meaning of that provision itself is logically to be read in line with British international treaty commitments. The legislative history cited suggests that Parliament did intend to bring the UK into conformity with its treaty obligations. There is little indication that there is a peculiar exception in this case in that the UK qua the state, and not qua the courts, should be properly concerned with this obligation.

At the least, then, a contrary meaning is not so plain that the courts should turn a blind eye to the UK’s treaty obligations. The ambiguity is far from settled by reference to legislative history. Nor is it to be said that the application of that rule of construction here, given that Parliament must legislate before the Government’s ratifications take effect, would be to “impute to Parliament an intention to import the Convention into domestic law by the back door” as in \textit{Brind}.\textsuperscript{38} Indeed, holding to the contrary might as well be to impute to Parliament an intention most covertly to \textit{evade} treaty obligations by the backdoor. Thereto, it is to be remembered that even besides the HRA, Convention rights have been incorporated into EU law, which does have explicit statutory backing. On the whole, therefore, not only was it left perfectly open to the courts to apply the presumption that Parliament did not intend by s.2 to flout the UK’s international obligations, but this must have appeared to be Parliament’s stance with reference to Hansard.

\textsuperscript{35} HL Deb 3 November 1997, vol  582, col 1228.
\textsuperscript{36} HL Deb 5 February 1998, vol 585, col 755.
\textsuperscript{37} Ibid vol. 585, col. 755.

IV - Practical Considerations

Further practical grounds have been raised in support of the courts’ approach. Indeed it may be regarded as appropriately guided by considerations of international influence, legal certainty and the significant delays attending appeals to the ECtHR.

It is argued that refusing to abide by a Strasbourg decision requiring a minimum level of protection would set a bad example for other states party to the ECHR. Lord Irvine dismisses this firstly on the ground that it is essentially a question of “foreign relations and statecraft”, and secondly on the basis that any such consideration as is warranted is duly paid by giving “considered and respectful regard” to the relevant judgment. Even so, considering the numerous approaches the ambiguity of s.2(1) admits of, it does not seem inappropriate to consider the broader impact of each in practice to determine the best course. In this regard, it would be regrettable if the UK, having played a great role in the erection of the ECHR system, were to lead its decline by undermining the authority of Strasbourg.

Certainly, objections of exceeding the courts’ role cannot be brought against the further argument of legal certainty. The significant judicial discretion given under the ambiguity of s.2(1) raises the well-warranted criticism of a lack of certainty in the law, as argued by Tierney. If the “clear and constant”, viz. the well-established jurisprudence of Strasbourg may be dismissed without exceptional circumstances, human rights law, an area in need of special certainty, is rendered particularly unpredictable. As Masterman notes, the precedential approach sometimes taken by British courts to Strasbourg jurisprudence is one that “places legal certainty at its core and aims to deter accusations of the judge acting without reference to legal authority.”

An additional practical concern informs Lord Slynn’s foundational position:

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 case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.

This is not an undue nor an insubstantial consideration. Though ideally the ECtHR should be suitably equipped, the backlog of cases with which Strasbourg has to grapple is well known. Appeals to it therefore entail significant delay, and thus it is not inappropriate to question their propriety where the relevant case-law irrevocably demonstrates the position that will be taken absenting the necessary exceptional circumstances.

39 Lord Irvine (n 1) 9.
40 Lord Irvine (n 1) 9.
43 Alconbury (n 5) 313.
Of course, one must always be wary of allowing procedural considerations to dictate the substantive law, but this consideration is also relevant to the purposive approach to statutory interpretation. Indeed, the point informed the parliamentary debate. Lord Irvine himself noted that the HRA “provides better and easier access to rights which already exist” and that “human rights are valuable and they deserve protection at home—equal protection to the protection to which they are entitled at Strasbourg [italics added].” Thereto, Lord Bingham, in the speech to which Lord Irvine refers, further noted that

It makes no sense, and, I suggest, does not make for justice that those seeking to enforce their rights have to exhaust all their domestic remedies here before embarking on the long and costly trail to Strasbourg.

Moreover, in his criticism itself, Lord Irvine notes “the uncertainty which is perpetuated in the interregnum.” This reality should not be ignored. Albeit as a practical consideration, it lends weight to the stance that Strasbourg case law should be departed from only in exceptional circumstances, which, by that condition, truly warrant the questioning. Thus there are substantial grounds that vindicate an “exceptionalist” approach to departures from Strasbourg case law.

V - Dialogue, Not Mimicry

However, Lord Irvine’s criticism is at least an important caveat. Judges should not merely attempt to mimic or pre-empt Strasbourg, because they have an important role to play – within the framework both of the ECHR jurisprudence in general and the HRA. This may be seen in Strasbourg’s emphasis on margins of appreciation and subsidiarity, and in the HRA’s purpose of empowering British judges.

As regards the ECHR, even though the courts are justified in considering treaty obligations, those obligations should not be overstated. A significant amount of latitude is allowed by the ECtHR. Even if other cases are regarded as establishing the opinion of the Strasbourg Court, it does not necessarily follow that the same position will be adopted with regard to the UK given the varying “margin of appreciation” granted to different countries in relation to some Articles.

Moreover, Strasbourg has – as is much emphasised – a subsidiary role in the protection of human rights. In *Handyside v United Kingdom*, the ECtHR explained:

> The Convention leaves to each contracting state, in the first place, the task of securing the rights and liberties it enshrines… By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.

---

44 HL Deb (n 36) col 755.
45 Ibid.
46 HL Deb (n 35) col 1245.
47 Lord Irvine (n 1) 10.
48 *Handyside v United Kingdom* (1979-80) 1 EHRR 737.
49 Ibid 748.
As such, there is no indiscriminate obligation on courts to give direct effect to ECtHR decisions; rather, there is indeed discretion for the state to “implement them in accordance with the rules of its national legal system”\textsuperscript{50} as Lord Irvine emphasises.

This should be taken together with a purposive reading of the HRA s.2. Whilst it is far from clear that, in interpreting s.2, the UK’s international obligations should be neglected by the courts, the legislative history of the Bill does, as Lord Irvine states, suggest an intention to allow judges to play an assertive role. In introducing the Bill, Lord Irvine explained that it “will allow British judges for the first time to make their own distinctive contribution to the development of human rights in Europe.”\textsuperscript{51} Lord Bingham in the Lords Debate also commented that

\begin{quote}
\textit{it seems to me highly desirable that we in the United Kingdom should help to mould the law by which we are governed in this area … British judges have a significant contribution to make in the development of the law of human rights. It is a contribution which so far we have not been permitted to make.}\textsuperscript{52}
\end{quote}

Given the latitude admitted by the ECtHR as noted, this intention may be seen as compatible with the presumption that Parliament did not intend to legislate contrary to the Government’s treaty obligations. A preferable reading of HRA s.2(1) can and should therefore account for both of these considerations.

In light of this, it is surely inappropriate to adopt a position that merely “mimics” or “pre-empts” the judgment of Strasbourg.\textsuperscript{53} There is a distinctive role that the British judge has to play. The “more nuanced”\textsuperscript{54} approach of Lord Neuberger that Lord Irvine commends is instructive:

\begin{quote}
This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law… Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.\textsuperscript{55}
\end{quote}

In principle, this strikes the appropriate balance. Courts should not be constrained absolutely from improving human rights law. They are certainly entitled under s.2 of the HRA, even when read together with ECtHR jurisprudence as mentioned, to disagree with Strasbourg case law in some

\begin{itemize}
\item \textsuperscript{50} DJ Harris, M O’Boyle and C Warbrick (ed), \textit{Law of the European Convention on Human Rights} (Butterworths 1995) 26.
\item \textsuperscript{51} HL Deb (n 35) col 1227.
\item \textsuperscript{52} HL Deb (n 35) col 1245.
\item \textsuperscript{53} Lord Irvine (n 1) 9.
\item \textsuperscript{54} Lord Irvine (n 1) 5.
\item \textsuperscript{55} \textit{Pinnock v Manchester City Council} [2010] 3 WLR 1441 at §48.
\end{itemize}
circumstances, and this leeway should be used to “further the dialogue”. This suggestion by Lord Neuberger is by no means novel, either, but echoes Lord Steyn and Lord Hoffmann on the room for “creative dialogue” between domestic courts and Strasbourg. 56

As Lord Irvine notes, however, there can be no dialogue where domestic courts are committed to mimicking Strasbourg or pre-empting their judgment. This is not “constructive”. Thus although the qualification is appropriate, British courts should not feel themselves too restricted under the “exceptional circumstance” requirement for derogation. One might rightly question therefore whether Lord Hoffmann’s submission in AF v Secretary of State for the Home Department was appropriate where he did so

with very considerable regret, because I think that the decision of the ECHR was wrong and that it may well destroy the system of control orders which is a significant part of this country’s defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit. 57

Without considering the merit of his regret, it must be said that the grounds for such disagreement should be considered a “special circumstance”, even if there should be no question that a subsequent rejection by Strasbourg on appeal must be taken as authoritative. In some cases, therefore, Lord Irvine’s criticism in this regard is forceful.

However, this is not to be overstated. As the ECtHR emphasised in Handyside, contracting states do not have an “unlimited power of appreciation.” 58 “The Court… is empowered to give the final ruling” 59 on whether a prima facie breach is reconcilable with the ECHR. “The domestic margin of appreciation thus goes hand in hand with a European supervision.” 60

Furthermore, the margin of appreciation does not and should not affect the broader thrust of fundamental principles, evident from the fact that it is not available for all Articles. A “clear and constant” line of ECtHR jurisprudence on the basic meaning of a particular principle is therefore particularly authoritative, and on such a broad aspect there is little appropriate scope for variation from country to country. Otherwise, the entire basis of the ECHR that marks it as one with a special enforcement system would be undermined. As such, Lord Neuberger’s insistence on an “exceptionalist” approach is to be supported.

VI - A Distinctive Contribution

Lord Irvine’s criticism is particularly forceful with regard to the courts’ failure to provide protection of human rights greater than that provided by Strasbourg case law, whether in the context of an absence of Strasbourg jurisprudence on the position, or in
The Human Rights Act Section 2(1) Taken into Account

the context of unfavourable case law. The courts’ timidity is largely based on considerations of maintaining uniformity between ECHR nations. It shall be argued, however, that such great uniformity is not sought by the ECHR in the first place, and that in any case uniformity should be sought at a higher level of protection.

Firstly, a distinction is to be noted where there is no established case law. S.2(1) of the HRA only requires that the Strasbourg position be taken into account when there is in fact a relevant extant decision. It does not encourage any consideration of the fact that Strasbourg has not established a position. As such, one would think that the court should take into account the relevant factors of the case at hand as is ordinary. There is no warrant for holding, as in *Ambrose v Harris*[^61], that a claim cannot succeed simply on the basis that Strasbourg has not yet considered such a factual situation. Certainly this position does not fall within the ambit of s.2(1). Further, it contradicts Parliament’s intention in providing the terms, under the HRA as a whole, for the courts to make a meaningful contribution to the development of human rights law. As Lord Irvine rightly stresses, “it is this type of case – where the Strasbourg case-law does not offer any clear answer – that gives our Courts the greatest scope to enter into a productive dialogue with the ECHR, and thus shape its jurisprudence.”[^62] In this sense, his criticism is perfectly appropriate. Such a position is indeed unduly “self-abnegating” and is to be lamented.

The same may be said of the courts’ refusal to go beyond the protections afforded by Strasbourg. Lord Bingham’s statement in *Ullah*[^63] represents the prevailing orthodoxy among judges on this issue:

> 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.[^64]

It is surprising that this position originates from Lord Bingham, who took the different position in the Lords Debate, as noted, of recognising the contribution British judges have to make to human rights law, and regretting that until that time they had not been permitted to make it.[^65]

Lord Irvine dismissed the argument in *Ullah* that judges should be concerned about Convention rights bearing the same meaning throughout the Council of Europe, pointing out that British judgments would not in any case be binding on other members or on Strasbourg. Indeed, this concern seems to be somewhat overplayed. One might add firstly that Convention rights are not in any case uniform. The margin of appreciation granted varies from country to country, in effect giving a broader meaning to terms such as “morals” and “public emergency” to some countries than to

[^61]: *Ambrose v Harris* [2011] 1 WLR 2435.
[^62]: Lord Irvine (n 1) 12.
[^63]: *R. (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323.
[^64]: Ibid 350.
[^65]: HL Deb (n 35) col 1245.
others, such that the restrictions on the rights, and therefore their content, may be
greater or lesser. Moreover, if one is committed to “keep[ing] pace with the
Strasbourg jurisprudence”\textsuperscript{66}, one should equally note the statement in \textit{Handyside v United Kingdom}:

\begin{quote}
It is not possible to find in the domestic law of the various Contracting
States a uniform European conception of morals. The view taken by their
respective laws of the requirements of morals varies from time to time and
from place to place, especially in our era which is characterised by a rapid
and far-reaching evolution of opinions on the subject.\textsuperscript{67}
\end{quote}

This has been further emphasised extra-judicially by the then-President of the ECtHR:

\begin{quote}
the Court's judgments are replete with statements that customs, policies and
practices vary considerably between Contracting States and that we should
not attempt to impose uniformity or detailed and specific requirements on
domestic authorities, which are best positioned to reach a decision as to
what is required in the particular area.\textsuperscript{68}
\end{quote}

It is clear, therefore, that as a result of cultural and legal variations, there will
inevitably be some variation in the substantive meaning of the Convention rights.
Strasbourg has accepted this and, in the form of the margin of appreciation, it is very
much part of its jurisprudence. If Lord Bingham was thus committed to the latter, he
and the courts should not at once have been so concerned about national variations in
the law. This is not of itself an overriding concern.

Secondly, even if one desires a greater degree of uniformity, why should British courts,
if they are committed to the genuine protection of human rights, refrain from
attempting to achieve that uniformity on an improved position of the law? Uniformity
may indeed be desirable for fundamental principles, but at what level? If British courts
believe greater protection is needed for human rights in Britain than is currently
provided by case law on the Convention, might it not also be necessary to protect
human rights in other states? British courts should take the lead.

It might be objected that this goes beyond their role and their jurisdiction. Indeed,
much stress is placed on the separation of powers as a reason for not going further.
Lord Hope, for example, claimed

\begin{quote}
Lord Bingham's point…was that Parliament never intended to give the
courts of this country the power to give a more generous scope to those
rights than that which was to be found in the jurisprudence of the
Strasbourg court. To do so would have the effect of changing them from
Convention rights, based on the treaty obligation, into free-standing rights
of the court’s own creation.\textsuperscript{69}
\end{quote}

This reasoning, however, is questionable. Parliament provided that the courts give
effect to “Convention rights”. As far as regards the meaning of those rights, it provides

\begin{itemize}
\item \textsuperscript{66} \textit{Ullah} (n 63) 350.
\item \textsuperscript{67} \textit{Handyside} (n 48) 753.
\item \textsuperscript{68} Sir Nicholas Bratza, “The Relationship between the UK Courts and Strasbourg” [2011] EHRLR 505, 509.
\item \textsuperscript{69} \textit{Ambrose v Harris} (n 61) 2447.
\end{itemize}
only that the courts “take into account” Strasbourg authority. As has been explained, within this term there is substantial scope for discretion. Whereas one might rightly be hesitant about adopting a meaning lesser than one provided for by Strasbourg and thereby likely violating human rights, one need hardly be as diligent in providing too much protection.

Moreover, it is not true that affording greater protection than Strasbourg has thus far provided would take domestic courts beyond their jurisdiction. Affording rights greater than those provided by Strasbourg case law does not transform them into freestanding rights going beyond the Convention and the UK’s treaty obligations. Strasbourg jurisprudence is more nuanced than this. Lord Hope’s position assumes that it is alone Strasbourg’s role to define the Convention rights, just as Lord Bingham claimed:

The Convention is an international instrument the correct interpretation of which can be authoritatively expounded only by the Strasbourg court.  

Similarly, Buxton LJ in the Court of Appeal contended that:

where an international court has the specific task of interpreting an international instrument it brings to that task a range of knowledge and principle that a national court cannot aspire to. 

Under such an interpretation, one might well claim that, Strasbourg alone being capable of defining Convention rights, it would be beyond the jurisdiction of British courts – under a maximum duty to protect “Convention rights” – to afford a definition greater than that already provided by Strasbourg.

However, whilst the ECtHR should certainly have final authority on appeal, it is not specifically the case law that has absolute authority, because this may not have taken into account specific objections relating to the particular domestic, legal and cultural context in question. British society is indubitably especially liberal in its cultural traditions, and as such should rightly be beholden to a higher standard. Simply because the ECHR is a common minimum does not mean the obligations of a specific country do not go further than to maintain that minimum. As former ECtHR Judge Karel Martens has explained:

[domestic courts] should go further than seeing to it that the minimum standards in the ECHR are maintained. That is because the ECHR’s injunction to further realise human rights and fundamental freedoms contained in the preamble is also addressed to domestic courts.”

In conjunction with this, one must remember that, under Handyside, it is for domestic courts in the first place to secure the rights and freedoms the Convention enshrines. Where they believe they have not done so, viz. that they have not provided sufficient protection to secure the rights rather than believing that they have provided too much,

---

70 Ullah (n 63) 350.
71 R (on the application of Anderson) v Secretary of State for the Home Department [2002] 2 W.L.R. 1143, 1168.
73 Handyside (n 48) 753.
there must be especial grounds for going beyond case law. It is part of the Strasbourg jurisprudence that domestic courts may take the lead in interpreting and securing the relevant rights. The meaning of the Convention is not, as Lord Hope seems to suggest, fixed under treaty obligations by ECtHR case law until Strasbourg itself decides otherwise on appeal. Unlike where potentially insufficient protection is granted by domestic courts, it is difficult to imagine a domestic ruling that extends ECHR protection being rejected by Strasbourg. Rather, it is to be seen as requisite under the cultural traditions of the UK that domestic courts are better placed to understand, if not under the UK’s ECHR direction to “further realise human rights and fundamental freedoms” which is just as much addressed to the courts. Therefore, where British courts perceive the need for greater protection than provided in Strasbourg case law, it is entitled to provide it within the ambit of the UK’s ECHR obligation.

One might note also, with regard to Lord Bingham’s Ullah statement cited above, that Strasbourg jurisprudence does not “evolve” independently. Challenges to its position are needed to prompt development. The then-President of the Court has written that:

[The Strasbourg Court] has been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Human Rights Act and this because of the very high quality of the judgments of these courts, which have greatly facilitated our task of adjudication. In many cases, the compelling reasoning and analysis of the relevant case-law by the national courts has formed the basis of the Strasbourg Court's own judgment.

From all this it is evident that British courts are very much a part of the ECHR jurisprudence and a part of its evolution. Strasbourg recognises this, and so the British courts are entitled to do so too. Interpretation of Convention rights as greater than that provided in other cases by the ECtHR is therefore not beyond the legitimate role of British courts.

Furthermore, the objection to the contrary within the Ullah principle is inconsistent. In this particular respect, the courts have restricted themselves for fear of exceeding their jurisdiction, denying themselves the ability to develop the law. Yet on the other hand, they have allowed themselves the freedom to take into account considerations beyond those applying to the protection of British law, namely that divergences of Convention rights between nations is undesirable. It is well noted that the HRA merely incorporated Convention rights into British law. Where then does the court derive its authority to consider issues of ulterior scope – to let what ultimately becomes British law be decided by considerations purely of the Convention as applicable to other states? This in itself is involving the courts in issues of wider diplomacy, foreign affairs and statecraft. To deny protection felt otherwise necessary and within its jurisdiction on the basis merely of its influence beyond Britain is to accept an authority to make a wider impact, to make a “distinctive contribution to human rights”.

---

74 Judge Martens (n 72) 14.
75 Bratza (n 68) 507.
76 As per Lord Hoffman, In re McKerr [2004] 1 W.L.R. 807, 826.
77 HL Deb (n 35) col 1227.
This is not to argue that that approach should not be adopted. However, one should not deny in one instance what one accepts in another. Accept it wholeheartedly. The courts have the jurisdiction to make a “distinctive contribution to human rights” – both within the framework of Strasbourg jurisprudence and within the HRA. Whilst it may not be a duty in the terms referred to by Lord Irvine, this entitlement should be used to raise human rights standards beyond that found in Strasbourg’s case law in consideration of the wider principles at stake.

Indeed, if the UK is truly committed to liberty and democracy, and as such is truly committed to human rights, its judges not only have the jurisdiction to make a distinctive contribution, but they have indeed a distinctive contribution waiting to be made. It is to be remembered that it was British lawyers who played a large part in raising the standard to the level of the ECHR. It would be a shame if domestic courts now deliberately withheld from raising the standard further. This is a truly liberal and democratic country, and this should be reflected by the judiciary. So long as these remain the principles enshrined by the ECHR, it is appropriate and fitting that British courts should take the lead where they believe there is a lead to be taken. The protection of Convention rights by the judges should not be done for the sake of nominal ECHR-compliance only; it should be done for the sake of upholding the underlying principles of the ECHR.

VII – Conclusion
On the whole, Lord Irvine’s criticism may be challenged to the extent that it rejects the courts’ “exceptionalist” attitude to departing from Strasbourg case law. This approach falls within the range of approaches permitted by s.2(1) of the HRA, and is further supported by considerations of the UK’s obligations under international law, the need to set a positive example, legal certainty, and the significant delays attending appeals to Strasbourg. Nonetheless, Lord Irvine’s criticism is to be noted to ensure that the allowance for departures from Strasbourg case law does not become merely theoretical. Moreover, one might rightly echo his regret at the timidity of the courts under the Ullah principle. British judges, like the British drafters of the ECHR, should take the lead in raising the human rights bar.