# ALBA 8th Annual Human Rights Act Seminar

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**Matrix**

**Introduction:**

1. 2010 is the happy tenth anniversary of the coming into force of the Human Rights Act ("HRA") and the 60th anniversary of the signing of the European Convention. But it is also the year in which Lord Bingham of Cornhill sadly passed away. I am sure you will all wish to join me in recording and paying tribute to Lord Bingham's remarkable contribution to the HRA. He was a passionate supporter of the HRA. When the Human Rights Bill was before the House of Lords, he was then the Lord Chief Justice and he famously quoted Milton in support of the new legislation: *"*Let not England forget her precedence of teaching nations how to live.*"*[1]

2. Most importantly, when leading the House of Lords ("HL") from 2000-08 he helped, through his incomparably erudite and eloquent Opinions, to refine the HRA into the sophisticated and respected tool that it is today. He ensured that the House of Lords and now the UK Supreme Court ("UKSC") is truly a constitutional court in all but name. In short, the HRA is forever Bingham-infused.

**HRA – reasons to be cheerful:**

3. The good news is that, although things looked decidedly uncertain when the coalition government was elected earlier this year[2], in my view, the future of the HRA is now secure. Lord McNally, the Minister of State for Justice, recently told the Liberal Democrat Party conference[3] that the Ministry of Justice is looking at the HRA, not to "see how we can diminish it", but so it can be "better understood and appreciated." There will be, he said, "no retreat" over human rights.

4. The still better news is that even if the HRA were repealed, the judiciary might well provide equivalent protection via other sources. Lord Phillips in his Lord Alexander of Wheedon lecture (Apr 2010)[4] said that "in contrast to section 3 [of the HRA], the common law principle of legality does not permit a court to disregard an unambiguous expression of Parliament's intention. [But] I wonder whether in years to come the art of the possible will prove me wrong.". In other words, he was hinting that common law rules of statutory interpretation could, if necessary, evolve to become as powerful as s.3.

[1] http://hansard.millbanksystems.com/lords/1997/nov/03/human-rights-bill-hl ; HL Deb 03 Nov. 1997 vol. 582 col. 1245.

[2] See e.g. http://www.guardian.co.uk/commentisfree/libertycentral/2010/may/19/human-rights-act-human-rights

[3] http://www.epolitix.com/latestnews/article-detail/newsarticle/speech-in-full-lord-mcnally/

[4] http://www.supremecourt.gov.uk/docs/speech_100419.pdf

5. Lord Hope in a media interview in June 2010[5] showed equally constitutionally revolutionary tendencies. He noted that Parliament was assumed to have passed legislation in conformity with treaty obligations (including those under the European Convention) and that the right of individual petition to the European Court of Human Rights ("ECtHR") has existed since 1966. He concluded:

> "But if you were to take away the Human Rights Act now, all that jurisprudence is there … And the right of individual petition will [still] be there. And we will still have to recognise that if we take a decision which is contrary to the human rights convention, somebody is going to complain to Strasbourg and that may cause trouble for the UK. … So it's very difficult to see how simply wiping out the Human Rights Act is really going to change anything until we withdraw from the Convention – which, personally, I don't think is conceivable".[6]

6. The constitutional importance of protecting fundamental human rights was emphasised by Lord Bingham in his book *The Rule of Law* (Allen Lane, 2010), p84:

> "Which of the [Convention/HRA] rights … would you discard? Would you rather live in a country in which these rights were not protected by law? … the rule of law requires that the law afford adequate protection of fundamental human rights."[7]

**HRA-induced dialogue between domestic courts and ECtHR is at a critical stage:**

7. Three key features of the HRA (i.e. the absence of any strike-down power for primary legislation, declarations of incompatibility and s.2 HRA) create a subtle dialogue between the domestic courts and the ECtHR. Recent cases reveal that the dialogue is currently in a very intense phase.

8. An excellent example of the dialogue in action is *Gillan & Quinton v UK* (2010) 50 EHRR 45 which concerned anti-terrorist police powers to stop and search without reasonable suspicion. The police powers were very broad indeed (permitting a searches "for articles which could be used in connection with terrorism") and there were slender legislative safeguards (authorisation was based on expediency not necessity and was not published in advance). The government won a resounding victory in the HL which held that Article 8 and Article 5 were scarcely engaged by superficial, coercive searches of persons in public. The ECtHR firmly and unanimously rejected that view. It found a "clear" violation of Article 8 and also gave strong signals concerning Article 5. The government responded swiftly by modifying the use of the offending law (to reflect the ECtHR ruling) within a week of the ECtHR Grand Chamber ("GC") refusing to hear the government's appeal.

9. Another good example of the dialogue working well was the House of Lords' decision in *SSHD v AF (No. 3)* [2009] 3 WLR 74. After a horrific sequence of control order litigation, a nine-judge House of Lords, with slightly varying degrees of judicial enthusiasm, felt bound to follow the ECtHR GC decision in *A and others v UK* (2009) EHRR 29 ("Belmarsh case"). The result is that an

[5] http://www.lawgazette.co.uk/opinion/joshua-rozenberg/are-supreme-court-justices-more-assertive-they-were-law-lords; http://news.bbc.co.uk/today/hi/today/newsid_8876000/8876083.stm

[6] On the ECHR pre-HRA, see further e.g. Murray Hunt, *Using Human Rights Law in English Courts* (Hart, 1997).

[7] Echoing what he said in his opening address to the Liberty Annual Conference and AGM (5 Jun 2009).

affected person must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.

10. The legislative and judicial responses to those ECtHR decisions both make it clear, in my view, that the HRA has teeth.

11. The worst example of the dialogue is probably the response to the ECtHR GC decision in *Hirst v UK (No.2)* (2006) 42 EHRR 41 which held that the blanket ban on prisoners' voting is disproportionate. Until last month (when the Deputy PM announced that the government will reconsider the ban, after the Council of Europe had given the UK a 3-month ultimatum[8]), the government had effectively ignored the ECtHR ruling for over 5 years. If that state of affairs reigned supreme then the HRA would be, frankly, toothless.

12. Somewhere between those extremes lies the legislative and judicial reaction to the ECtHR GC decision in *S & Marper v UK* (2009) 48 EHRR 50. The government had won in the House of Lords which held that the blanket and indefinite retention of the DNA profiles of non-convicted persons involves at most a minimal interference with Article 8, which could be amply justified by the over-arching policy. The GC unanimously rejected that approach. The government responded with very controversial proposals (18 months after the decision) in the pre-election Parliamentary wash-up[9]. The new government intends to modify the legislative response[10]. But in the meantime, over a million non-convicted persons remain on the national database and cases must be re-litigated up to UKSC because in the lower courts precedent trumps s.2 HRA (save in very exceptional circumstances): *R(GC) v Commissioner of Police for the Metropolis* [2010] EWHC 2225 (Admin), applying *Kay v Lambeth LBC* (see below). That might suggest that the HRA only has milk teeth.

13. The dialogue may be at risk of turning into international judicial ping-pong in the litigation recently culminating in *Kay v UK* (App. No. 37341/06, 21 Sep 2010) which concerns the relevance of tenants' personal circumstances in deciding whether eviction violates their Article 8 rights. Prior to its decision in *Kay*, the ECtHR in *McCann v UK* (2008) 47 EHRR 40, whilst endorsing the minority view in *Kay* in the HL, noted that it was not its role but rather that of the competent national courts to interpret UK domestic law. When *Kay* had been before the domestic courts (*Kay v Lambeth LBC* [2006] 2 AC 465) the HL held that the doctrine of precedent obliged the lower courts to follow a binding domestic ruling, even if that conflicted with a subsequent Strasbourg decision. Fortunately, however, *R(Purdy) v DPP* [2010] 1 AC 345 and *AF (No. 3)* do confirm that the HL/UKSC is free to depart from its own prior decisions following a conflicting ECtHR decision (*Pretty v UK*; *A v UK*, respectively). But in the meantime, *Kay* and other pending cases[11] will have to follow the same, drawn-out route as *R(GC) v MPC*.

14. The most controversial example of the dialogue is the UKSC decision in *R v Horncastle* [2010] 2 WLR 47. The UKSC held that s.2 HRA only requires the domestic courts to take into account Strasbourg case law, not slavishly to follow it. A seven-judge Court (including Lord Judge LCJ)[12]

[8] http://www.guardian.co.uk/society/2010/sep/20/nick-clegg-prisoner-voting-ban

[9] Broadly speaking, a blanket 6-year retention period for arrested but non-convicted adults in s.14-23 of the Crime & Security Act 2010 (no commencement order to date).

[10] to follow the approach in Scotland.

[11] UKSC judgments/hearings are pending in *Manchester CC v Pinnock; Hounslow LBC v Powell; Leeds CC v Hall* and *Birmingham CC v Frisby*.

[12] The Court of Appeal (Criminal Division) is increasingly sitting as a five-judge Court, resulting in fewer certifications of points of public importance. The small number of HRA criminal appeals being heard in the UKSC is notable: see further: http://ukscblog.com/do-we-want-less-crime-maybe-not . The UKSC's role in shaping criminal law is critical: see e.g. Lord Bingham's masterly analysis of anonymous witnesses in *R v Davis* [2008] 1 AC 1128, correcting a whole body of Court of Appeal case law to the contrary.

specifically refused to follow the ECtHR decision in *Al-Khawaja & Tahery v UK* (2009) 49 EHRR 1 (which held that Article 6(3) does not permit criminal convictions based solely/decisively on the evidence of an absent witness). The reasons given by the UKSC for declining to follow the ECtHR were that it had failed to have full regard to UK common law and statutory safeguards that made the sole/decisive rule unnecessary and that the rule would create severe practical difficulties. Ultimately, the alleged problems for domestic law if the sole/decisive rule were adopted are not necessarily reasons that *Al-Khawaja* is wrong i.e. that there is no such requirement contained in Article 6. *Al-Khawaja* has subsequently been heard by the GC. A head-on clash with ECtHR GC would cause substantial tension, especially given the lengths to which the UKSC went to explain its reasons in its judgment. The case is critical to the operation of the HRA and suggests that the HRA is neither hawk nor dove**.**

**Has the HRA started to reached its outer-limits?**

15. The HRA survived an attempt to derogate from Article 5 when it was only 4 years-old[13]. So, despite its relative youth, it is certainly no pushover. But does recent case law suggest that we have started to reach the boundaries of what it can achieve?

16. A resounding 'no' to that question is surely given by the House of Lords' final judgment in *R(Purdy) v DPP* [2010] 1 AC 345. It is unthinkable that such a result would have been achievable without the HRA – all the more remarkable given that the ECtHR had circumvented the issue somewhat in *Pretty v UK* (2002) 35 EHRR 1. The law on assisted suicide is abundantly clear. So is the CPS Code for Crown Prosecutors. But its application is not wholly predictable in advance. The House of Lords held that Article 8 operates in relation to death and the manner of death such that offence-specific guidance is mandatory in order to comply with the accessibility and forseeability requirements of Art 8(2). A pending case of *R(Nicklinson) v DPP*[14] contends that the same should apply to mercy killings; a hair's breadth may separate the medical conditions in question.

17. But, despite the overall result, the human rights buffers were certainly felt in *HM Treasury v Ahmed and others (Nos. 1 & 2)* [2010] 2 WLR 378, which concerned the draconian asset-freezing provisions applicable to persons designated by United Nations as suspected terrorists but who had no access to a meaningful court capable of delisting. The HRA argument failed in the UKSC: *R(Al-Jedda) v SoS for Defence* [2008] 1 AC 332 meant that UN Charter obligations trumped Convention rights, even post- *Kadi* [2008] 3 CMLR 1207 in the ECJ[15]. But the common law principle of legality and rights of access to a court (which are part of the rule of law) came to the rescue and gave what HRA did not. The case serves further to emphasise the importance of the pending ECtHR GC decision in *Al-Jedda v UK*. The interaction of Convention rights with public international law is evidently in a state of flux[16]. *Ahmed* is also noteworthy because the UKSC struck down the offending secondary legislation as *ultra vires* (and could have done likewise

[13] *A v SSHD* [2005] 2 AC 68 ("Belmarsh case").

[14] http://www.bbc.co.uk/news/health-10689822

[15] re-enforced by *Kadi v Commission* (Case T-85/09, 30 Sep 2010, CFI).

[16] For the importance of customary international law in common law see e.g. *Trendtex* [1977] QB 529; *I Congreso del Partido* [1983] 1 AC 244; *R v Jones* [2007] 1 AC 136 and Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Hamlyn Lectures, 2009). For the importance of 'soft law' in common law and human rights law see e.g. *A v SSHD (No. 2)* [2006] 2 AC 221; *In re McFarland* [2004] 1 WLR 1289. For the importance of international law in interpreting the ECHR see e.g. *Al-Adsani v UK* (2002) 34 EHRR 273 (ECHR, so far as possible, to be interpreted in harmony with rules of international law); Art. 31(3)(c) of the Vienna Convention on the Law of Treaties (in interpreting a treaty, take into account any relevant rules of international law applicable in the relations between the parties).

under the HRA if that argument had succeeded). In contrast, it has been suggested that the absence of a strike-down power in the HRA as regards primary legislation emboldens judges more than if they actually held a loaded gun. c.f. the position of the US Supreme Court to quash unconstitutional legislation.

18. In *R(Smith) v SoS for Defence* [2010] 3 WLR 223 a nine-judge UKSC held that, although British soldiers are subject to UK law wherever they go, they are not entitled to the protection of the HRA unless they are at a UK military base. Strasbourg had (at the very least) given a tentative green light in a number of its decisions[17] touching on (but perhaps not finally deciding) jurisdiction for military operations abroad and an incremental approach would not have been especially legally courageous[18]. Perhaps, as Lady Hale explained in a recent lecture, "Willingness to leap [ahead of Strasbourg] depends upon the type of question being asked"[19]. The human rights of soldiers, victims and detainees in military operations abroad is undoubtedly very difficult legal territory and the litigation raising these issues is certainly putting HRA through its paces. The case further underscores the significance of the pending ECtHR GC decision in *Al-Skeini v UK*.[20]

19. On the vexed topic of special advocates, fortunately we have moved on from the horrific twilight zone which existed post-*Roberts* [2005] 2 AC 738: as noted above, *Belmarsh* (ECtHR) and *AF (No.3)* have finally cured most of the uncertainty regarding the core disclosure requirements. But that still leaves, for example, the issue of whether closed material procedures can extend to private-law actions in the absence of statutory authority/consent: *Al-Rawi v Security Service* [2010] EWCA Civ 482 (UKSC hearing in Jan 2011). And Lady Hale has also asked whether the vetting of judges by Security Services for control order and other SIAC cases involving closed material carries with it "the implication that not all judges are to be trusted with top secret material"?[21]

**Conclusion:**

20. Have we really started to reach the boundaries of the HRA? Will the 'art of the possible' or other superhuman judicial powers come to the rescue if I am wrong and the HRA is unexpectedly repealed? Is the dialogue between the domestic and Strasbourg courts about to enter a testing and more argumentative phase? Whatever the answers to those questions, it is well worth remembering just how far we have come in such a short space of time.

21. Contrast, for example, the outcome and extent of the *Binyam Mohamed* litigation[22] with what happened in *R v SSHD ex p Cheblak* [1991] 1 WLR 890. Following the start of the Gulf War in 1991, a Lebanese journalist who had been in the UK for 15 years with his family was served with a deportation notice on the basis that his removal was conducive to public good on undisclosed

[17] e.g. *Issa v Turkey* (2004) 41 EHRR 567; *Cyprus v Turkey* (1976) 4 EHRR 482; *Cyprus v Turkey* (1978) 13 DR 85; *Cyprus v Turkey* (1992) 15 EHRR 509; *Cyprus v Turkey* (2001) 35 EHRR 731; *Varnava v Turkey* (10 Jan 2008, 16064/90).

[18] See Lord Bingham in *Ullah* [2004] 2 AC 323 at [20]: "the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less". Lord Brown later said in *Al-Skeini* [2008] 1 AC 153 at [106] that this could equally have been expressed as "no less, but certainly no more".

[19] http://www.supremecourt.gov.uk/docs/speech_100604.pdf

[20] The ECtHR decision in *Al-Saadoon & Mufdhi v UK* (App No. 61498/08, 2 Mar 2010), which became final on 4 Oct 2010, regarding whether the UK was exercising jurisdiction over prisoners transferred to the Iraqi authorities may also be relevant.

[21] http://www.supremecourt.gov.uk/docs/speech_100512.pdf

[22] culminating in [2010] 3 WLR 554.

national security grounds. After an unsuccessful application to the 'Three Wise Men', the Court of Appeal held that national security was exclusively the responsibility of executive and, absent bad faith, the Home Secretary's decision was effectively irreviewable. No disclosure at all was ordered. The Court of Appeal applied *R v SSHD ex p Hosenball* [1977] 1 WLR 766 at 783 in which Lord Denning MR then evinced extreme judicial deference[23] to the executive:

> "There is a conflict between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. … In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England. Both during the wars and after them, successive ministers have discharged their duties to the complete satisfaction of the people at large".

22. That approach stands against Lord Bingham's magisterial *dictum* in the *Belmarsh* appeal (which he regarded as the most important case of his career[24]), emphasising the constitutional importance of the HRA:

> "... Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself"[25].

[23] Now more properly categorised as a 'discretionary area of judgment'.

[24] http://www.guardian.co.uk/uk/2010/feb/08/iraq-war-illegal-lord-bingham

[25] *A v SSHD* [2005] 2 AC 68 at [42].