

Il ruolo sussidiario del CEDU nel sistema giudiziario britannico

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The principle of subsidiarity and the related concept of the margin of appreciation are not found in the Convention but have formed part of the Strasbourg doctrine from an early stage. In an early case¹ the court spoke of the “subsidiary nature” of the enforcement machinery established by the Convention, adding:

“The national authorities remain free to choose between different measures which they consider appropriate in those matters governed by the Convention. Review by the Court concerns only the conformity of those measures with the requirements of the Convention.”

The principle of subsidiarity recognises that the national authorities (and especially the judicial authorities) have an independent role under the Convention as the primary guarantors of the Convention rights and freedoms at national level and that, when they fulfil that role, the Strasbourg Court's review can be less intensive. This is reflected in article 1 of the Convention which requires member states to secure the protected rights and freedoms for all those within their jurisdiction, article 13 which requires there to be effective national remedies, and article 35 which requires applicants to exhaust their local remedies before applying to the Strasbourg court.

The United Kingdom has been a party to the Convention since 1950 and has recognised a right of individual petition to the Strasbourg court since 1964. But the Convention was not given direct legal effect until 2000, when the Human Rights Act 1998 came into force. However, since the Convention had been drafted in large part by British lawyers, and based on principles which were regarded as part of the common law as developed since Magna Carta, the lack of direct effect did not cause many problems in practice. The UK courts were able to rely on the principles of the common law to ensure that their decisions generally complied with the requirements of the Convention. They were also able to take account of Strasbourg decisions as “persuasive” authorities in developing domestic law, in the same way as they took account of decisions of other common law jurisdictions. Thus for example in a case in 1993, in deciding that local authorities did not have a right to sue for defamation under the common law, the House of Lords referred to precedents from South Africa and United States as well as Strasbourg.² By the late 1990s the UK courts were

¹ *Belgian Linguistics case No 2* (1979) 1 EHRR 252 para 10

² *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534

increasingly pressed by advocates to take account of the developing Strasbourg case-law, and as judges we were having to familiarise ourselves with that jurisprudence.³

There were some important cases in which the government was successful in the domestic courts, only to be reversed in Strasbourg. For example, in the 1990s a member of the armed forces, who was discharged under a policy of the Ministry of Defence banning practising homosexuals from the service, lost his case in the English courts but succeeded in Strasbourg.⁴ The Strasbourg court held that the ban was a violation of his right to private life under article 8 and that the evidence relied on by the Ministry was not sufficient to show that it was “necessary in a democratic society”. The main difference was the greater willingness of the Strasbourg court to question the evidence relied on by the government. The government accepted the decision and changed its policy to comply. In this way, it may be argued, the influence of Strasbourg helped us to bring our own law up to date.

Even when the Human Rights Act came into force in 2000, the decisions of the Strasbourg court were not made binding on the domestic courts. Section 2(1) of that Act simply requires the UK courts to “take account” of decisions of the Strasbourg court so far as relevant. The Act also preserves the principle of parliamentary sovereignty which is a fundamental part of our constitutional tradition. The courts were not given power to declare primary legislation unlawful or invalid. Instead, the Act requires the courts “so far as possible” to interpret and apply domestic legislation in a manner compatible with the Convention. Where this is not possible, the Act enables the court to make a “declaration of incompatibility”. The effect of this is, not to invalidate the law, but to require the issue to be put before Parliament for reconsideration. In practice Parliament has generally ensured that an appropriate amendment is made, but it is not bound to do so.

There has been a continuing debate, both in the courts and outside, about the extent to which the courts should in practice regard themselves as bound by Strasbourg decisions, notwithstanding the apparent freedom given by the Act. In 2004, Lord Bingham stated what has become known as the “Ullah principle”⁵ noting that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court: “the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”

The most recent statement of principle by the Supreme Court was given in 2010 by Lord Neuberger on behalf of a unanimous Supreme Court in:

“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.....section 2 of the 1998 Act requires our courts to “take into account”

³ I was fortunate in 2000 to be able to sit myself as an ad hoc judge in a Grand Chamber case (*Caballero v UK* [2000] ECHR 53). I was impressed by the depth of consideration and the quality of the debate, between judges most of whom were necessarily operating in a second language.

⁴ *Smith v UK* (1999) 29 EHRR 493

⁵ (*R (Ullah) v Special Adjudicator*) [2004] 2AC 976 par 20

European court decisions, not to follow them. 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.”⁶

This cautious approach has been subject to some criticism, most significantly by Lord Irvine, who as Lord Chancellor in the Blair Government was principally responsible for the introduction of the Act. In a recent speech⁷, he pointed out that the words of the Act had been carefully chosen to provide the court with the freedom to depart from Strasbourg where appropriate, and that an opposition amendment proposing that their decisions should be binding was defeated. He thought that the Supreme Court had been unduly concerned by the obligations of the government under article 46 of the Convention to comply with a final judgment of the Strasbourg court, under a dualist system such as ours in which public law obligations rest with the government not the courts:

“My own view is that excessive preoccupation with this consideration 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 provide. It goes without saying that a recent and closely analogous decision of the Grand Chamber should always be afforded great respect by our Courts... However, the existence of such a decision can never absolve the domestic Judge from the high Constitutional responsibility incumbent upon him under s.2. He must decide the case for himself and it is not open to him simply to acquiesce to Strasbourg....

Treaty obligations bind the UK only because the UK qua State has consented to it. If the UK does not comply with its obligations then the consequences which may follow are a matter of international relations, and inter-State diplomacy. It is the UK as a State, and in particular Parliament, which are principally responsible for the UK’s compliance with its Treaty obligations”

The debate continues, and it remains to be seen how the UK courts will respond if faced with a Grand Chamber decision which they regard as contrary to our own principles. Happily that has not yet arisen.

An important aspect of subsidiarity is the opportunity for judicial dialogue. In an article in 2011 Sir Nicholas Bratza, former UK judge and President of the Strasbourg court, expressed concern at the “intemperate and inaccurate” criticism made of the court by some parts of the UK political establishment and press . He contrasted this with the respect shown by his court for judgments emanating from the UK courts. He gave examples of several cases where the court was “emboldened to go further than it might otherwise have done” in the protection of human rights by the reasoning of the

⁶ *Pinnock v Manchester City Council* [2011] 2AC 104 para 48

⁷ Lord Irvine *A British Interpretation of Convention Rights*, speech for Bingham Centre on 14 December 2011.

English courts.⁸ In a case concerning the return of Tamils to Sri Lanka, the Strasbourg court relied heavily on the analysis and conclusions of the UK immigration tribunal, while considering the wider context of an issue which affected a number of member states.⁹ The number of UK cases taken by the Strasbourg court was very small. Of the 1200 cases considered by the court in the previous year (2010) all but 23 (less than 3%) were declared inadmissible.

A case which had attracted particular hostility within the UK had been a 2006 case about prisoners' voting rights (*Hirst*)¹⁰ in which the court held that a blanket ban on the right of any convicted prisoner to vote, irrespective of the nature of the offence or the length of sentence, was contrary to the rights of suffrage guaranteed by the Convention. Since the issue is still highly controversial, and currently subject to consideration by the Supreme Court, I cannot comment on the merits. However, it is of interest to compare the approach of the Grand Chamber in 2012 (*Scoppola*)¹¹ in accepting the legality of the less rigid Italian system, under which allowance was made for different levels of sentence. The court affirmed the general principle that, within certain limits, such matters were for each state to determine in accordance with "historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision"¹².

Recent years have seen signs of the development of a more constructive debate between the UK Supreme Court and the Strasbourg court. Two cases illustrate this. The first (*Al-Khawaja*) concerned the circumstances in which hearsay evidence can be used in criminal proceedings where the maker of the statement is not available to be cross-examined. Article 6(3) of the Convention provides:

(3) Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

The sequence of events is significant because of the opportunities it gave for the British courts to influence what happened in Strasbourg. In January 2009 a chamber of the Strasbourg Court of Human Rights, had given a decision against the UK on the same issue in another case (*Al-Khawaja*)¹³. A statement had been admitted in evidence at a criminal trial of a witness who was not called to give evidence. The court held that the statement was "the sole or, at least, the decisive basis" for the applicant's conviction, and that its admission was therefore contrary to article 6(3).

⁸ *Bratza The relationship between the UK courts ad Strasbourg* (2011) EHLR 505 The examples include *Pretty* (2002) 35 EHRR 32 (assisted suicide), *Stafford* (2002) 35 EHRR 32 (mandatory life prisoners); *Christine Goodwin* (2002) 35 EHRR 18 (rights of transsexuals to marry)

⁹ *NA v UK* (2009) 48 EHRR 15

¹⁰ *Hirst v UK* (2006) 42 EHRR 41

¹¹ *Scoppola v Italy No 3* [2012] ECHR 868

¹² *Ibid* para 102, quoting *Hirst (no 2)* para 61

¹³ *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1

This followed a ruling in an Italian case *Lucà v Italy* (2001) 36 EHRR 807 at paragraph 40:

"...where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by article 6".

On 16 April 2009 the United Kingdom requested that the decision of the Chamber in *Al-Khawaja* be referred to the Grand Chamber.

By that time the same issue had come again before the English Court of Appeal in the case of *Horncastle*. Horncastle was convicted of causing grievous bodily harm, with intent, to Peter Rice. Mr Rice had made a witness statement to the police about what had happened to him, but had died before the trial from other causes. His statement was read to the jury at the trial. It was admitted pursuant to the Criminal Justice Act 2003 which contains special provisions for allowing subject to safeguards the admission of statements of a witness who cannot give evidence because he has died.

Because of the importance of the issue the Court of Appeal sat with five judges (rather than the usual three). On 22 May 2009 it gave a unanimous judgment accepting that Mr Rice's evidence had been a decisive element but nonetheless upholding the conviction. There was an appeal to the Supreme Court. On 5 June 2009 the Panel of the Grand Chamber adjourned consideration of the UK request pending the judgment of the Supreme Court. The Supreme Court sat with seven justices, instead of the usual five. On 9 December 2009 Lord Phillips President of the Court gave a unanimous judgment agreed by all seven members of the court. Although he affirmed that the court would normally apply principles clearly established by the Strasbourg court, there would be –

“rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.”

There followed a detailed discussion of the background of the common law rules for admitting hearsay evidence, including reference to the extensive consultation and review carried out by the Law Commission in 1997 leading to the statutory code enacted in the 2003 Act; and a comparative review of the law in other common law jurisdictions and the USA (which takes a stricter approach); and a detailed study of the Strasbourg case-law (including an appendix reviewing 18 Strasbourg cases on

hearsay by reference to UK law) and showing that the decision of the Chamber had been inconsistent with the court's own case law.¹⁴

Following this judgment, the Grand Chamber reviewed the decision of the Fourth Section in *Al Khawaja* and gave its judgment on 15 December 2011 in favour of the government. The judgment is notable not only for its length (175 paragraphs), but for the care with which it examines all aspects of the case, including the relevant UK legislation and its background, the judgments of the Court and Appeal and Supreme Court in *Horncastle*, previous Strasbourg case-law, and comparative practice from around the world. The court did not abandon the "sole or decisive" test, but it accepted that it should be applied more flexibly:

"147. ... where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales,... and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case."

In *Al-Khawaja's* case it was satisfied that, having regard to the judge's direction and the supporting evidence, the jury were able to conduct a fair and proper assessment of the reliability of the allegations.

Sir Nicholas Bratza in a concurring judgment commented on the benefits of "judicial dialogue" :

"2. The present case affords, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention to which Lord Phillips was referring. The *Horncastle* case was decided by the Supreme Court after delivery of the judgment of the Chamber in the present case, to which I was a party, and it was, in part, in order to enable the criticisms of that judgment to be examined that the Panel of the Grand Chamber accepted the request of the respondent Government to refer the case to the Grand Chamber....

I share the view of the majority that to apply the rule inflexibly, ignoring the specificities of the particular legal system concerned, would run counter to the traditional way in which the Court has, in other contexts, approached the issue of the overall fairness of criminal proceedings."

¹⁴ Citing *Kostovski v The Netherlands* (1989) 12 EHRR 434: "... the admissibility of evidence is primarily a matter for regulation by national law. Again, as a general rule it is for the national courts to assess the evidence before them. In the light of these principles the Court sees its task in the present case as being not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair...."

From the British perspective this was regarded as a very significant test case. This is evident in the care which was taken in both Court of Appeal and Supreme Court to make the case in support of procedures which are an important part of our justice system, and which we regarded as sound, fair and well-tested in practice. Had the final decision in Strasbourg gone the other way, it is difficult to speculate whether the British courts would have felt able to depart from it, or whether they would have left this as an issue for Parliament.

The case was also a good example of the potential for judicial exchange and dialogue. It is less easy to see it as an example of subsidiarity in the accepted sense. There was no reference to subsidiarity or margins of deference in the reasoning of the court. Rather the Strasbourg court embarked on a detailed discussion of the reasoning of the Supreme Court, parts of which it rejected, but was in the end persuaded to adopt a modified rule, accepting that the principle as stated and applied by the Chamber was too inflexible. Having done so, it did not merely defer to the view of the domestic courts, but formed its own independent view of the overall fairness of the procedure in the particular case.

A better example of subsidiarity in the true sense perhaps is the *Animal Defenders* case¹⁵ decided by the Grand Chamber in April 2013. The applicants were a campaigning organisation opposed to the use of animals in commerce and science. They sought clearance from the Advertising Clearance Centre for a short television advertisement drawing attention to the exploitation of animals in television advertising. Clearance was refused on the grounds that it contravened section 321(2) of the Communications Act 2003 which prohibits television advertisements “wholly or mainly of a political nature”. This did not prevent publication by other means, such as the internet. The decision was challenged under article 10 of the Convention. The English courts upheld the decision, departing from a previous Strasbourg judgment on a similar case in Switzerland (the *VgT* case¹⁶). In the House of Lords Lord Bingham observed that there was no clear consensus among member States on how to legislate for the broadcasting of political advertisements, and that, in line with Strasbourg jurisprudence, each State was best fitted to judge the checks and balances necessary to safeguard, consistently with Article 10, the integrity of its own democracy.

The judgment of the Grand Chamber is again notable for the detail of the discussion, in particular of the debate which had proceeded the enactment of the 2003 Act, which had included consideration of its legality in the light of the *VgT* decision, the reasoning of which was strongly criticised. The court focused on the validity of the “general justifications for the general measure” rather than their “impact in the particular case”:

“The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the

¹⁵ *Animal Defenders International v UK* [2013] ECHR 362

¹⁶ *VgT Verein gegen Tierfabriken v. Switzerland* no. 24699/94, ECHR 2001-VI

general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.”

In assessing the position, and in the absence of a consensus among states:

“The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.”

The court concluded, but only by a narrow margin (9-8) that there had been no violation of article 10.

Conclusion

This has been a necessarily short survey of the development of relations between the UK courts and Strasbourg. There is a high degree of respect from both sides, and this is encouraged by regular meetings between judges, formal and informal. The principle of subsidiarity or margin of appreciation is frequently reaffirmed but its application in practice may seem somewhat variable, and it cannot be taken for granted. Recent cases such as *Horncastle* and *Animal Defenders* have shown that the Strasbourg court is receptive to solidly based reasoning in support of a particular national position, especially where the measure in question has been subject to extensive consultation and debate at national level.

The 2012 Brighton Declaration included a reaffirmation of the principle of subsidiarity:

“This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.” (para 11)

Following that declaration, it has been decided that the principles of subsidiarity and the margin of appreciation should be written into the preamble to the Convention.¹⁷ If ratified, it would now affirm –

“... that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,”

¹⁷ Protocol 15 art 1

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It remains to be seen how in practice this will affect the working of the court in individual cases.

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