

THE INDEFINITE ARTICLE 8

Robert Walker

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Before embarking on my prepared text I have to tell you that during the last 24 hours, when I thought I had put the finishing touches to my lecture, two events have occurred to disturb such equanimity as I may have had about addressing this distinguished audience. One was the wonderful FA Mann lecture given last evening in the Old Hall by Jonathan Sumption QC. In the course of his lecture he addressed some of the matters (and indeed some of the cases) which I shall be covering – covering, I must warn you, in a much more plain vanilla sort of way. And then later that evening I read an article by Sir Nicolas Bratza, *The Relationship Between the UK Courts and Strasbourg*, which has just come out in the European Human Rights Law Review.¹ It is, as you would expect, a closely-reasoned, moderate and yet spirited defence of the Strasbourg Court; and again it refers to several cases that I shall be mentioning.

My first panic reaction was “back to the drawing board”. My second, more sensible reaction was that it is far too late to add anything that would begin to do justice to these two very important contributions to the ongoing debate. So I have made just one small addition to my text, that is a brief quotation from Sir Nicolas Bratza’s article. Both the lecture and the article are required reading for anyone interested in the jurisprudence of the Strasbourg Court.

¹ [2011] EHR Law Review 505

Sixty years on

It is now more than sixty years since the United Kingdom became one of the first parties to the European Convention on Human Rights. Whether or not we were alive in 1950, we may need to be reminded of the huge changes that have taken place since then, especially in the way that unpopular or disadvantaged minorities are dealt with by criminal justice, civil justice, and society generally.

For a start we then had capital punishment: a mandatory death sentence, subject only to the executive's prerogative of mercy, for murder (including killing brought in under the felony-murder rule). Suicide and attempted suicide were criminal offences. Abortion was illegal in all circumstances, subject only to a doubtful defence of necessity on which only a very courageous doctor would risk his reputation and his liberty.

Male homosexual activity was a criminal offence, even when it took place in private between consenting adults. Even if they avoided prosecution, same-sex couples received none of the housing, social security or fiscal advantages afforded to married couples. Transsexuals received no sympathy from the law, as can be seen from a remarkably unsympathetic judgment given in 1970, which makes uncomfortable reading today².

Discrimination in employment and housing was widespread. It was controlled neither by legislation nor (with honourable exceptions) by public opinion. It took place against women, gays, jews, roman catholics

² *Corbett v Corbett* [1971] P 83

and foreigners of all sorts. Divorce law was fault-based and beset by arcane pitfalls – collusion, connivance and conduct conducing – to ensure that it was not too easy to get out of an unhappy marriage. Theatrical productions were subjected to censorship by an unelected official called the Lord Chamberlain, who objected to even moderate sexual explicitness (whatever its dramatic merit) and to less than obsequious references to the royal family. The publishers of the Penguin edition of *Lady Chatterley’s Lover* were prosecuted for obscenity, and prosecuting counsel invited the jury to consider whether it was a book that they would wish their wives or servants to read. It was before the epoch referred to in Philip Larkin’s much-quoted words:

“Sexual intercourse began
In nineteen sixty-three
...
Between the end of the ‘Chatterley’ ban
And the Beatles' first LP.”

I could go on. But that is enough to give some flavour of the bleakness, narrow-mindedness and repression of Britain at the time when the government signed up to the European Convention on Human Rights. Many distinguished British lawyers were involved in its drafting. What, against that background, can we conjecture about their understanding and expectations in respect of Article 8? Article 8(1) provides

“Everyone has the right to respect for their private and family life, their home and their correspondence.”

It is not necessary to go far into the travaux préparatoires to see that the founding fathers of the Convention did not perceive it as inconsistent with, and potentially subversive of, large tracts of British law and social custom, from homosexual offences to social housing.

“An Englishman’s home is his castle” has always been a much-loved, if over-optimistic, article of saloon-bar lore. A significant British insight into the perceived purpose of Article 8 is provided by the dissenting judgment of the United Kingdom judge, Sir Gerald Fitzmaurice, in the case of *Marcks v Belgium*³. The issue concerned Belgium’s then rather uncongenial rules as to the registration of illegitimate children. The majority of the European Court of Human Rights at Strasbourg decided that Ms Marcks (who was a strong-minded journalist as well as an unmarried mother) had a well-founded complaint under Article 8. Sir Gerald thought this an inappropriate extension of its scope. I give an abbreviated extract from his rather florid judgment:

“It is abundantly clear (at least it is to me) - and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view - that the main, if not indeed the sole, object and intended sphere of application of Article 8 was that of what I will call the ‘domiciliary protection’ of the individual. He and his family were no longer to be subjected to the four o’clock in the morning rat-a-tat on the door [and so on for another dozen lines] - in short the whole gamut of fascist and communist inquisitorial practices [and so on]. It was for the avoidance of these horrors, tyrannies and vexations that

³ (1979) 2 EHRR 330, 366

‘private and family life . . . home and . . . correspondence’ was to be respected . . . not for the regulation of the civil status of babies.”

The rights conferred by Article 8 are, as we all know, qualified rights. The qualifications in Article 8(2) suggest that the British input to the drafting was unwilling to rely on the wide language found, for instance, in section 1 of the Canadian Charter: “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Instead we have a detail enumeration of interests:

“national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

What I want to look at this evening is the extraordinary growth or extension, during the last sixty years, of the scope of Article 8. It is a striking illustration of the principle that human rights instruments are similar to living entities capable of organic growth. Some people (including some politicians and columnists in some of our most widely-read newspapers) would say that it is a monstrous, unhealthy and un-British growth. On any view it is a very topical issue. How did we get from there to here, and where is it going to end?

As the jurisprudence has developed there are four main strands: personal autonomy; personal privacy; the importance of the home; and the importance of the family. I shall look at these in turn, but they are not watertight compartments. Each (and especially the concept of private life) informs and influences the others. In the *Countryside Alliance* case

about hunting, counsel's ingenuity produced four different lines of argument for reliance on Article 8, but none of them was accepted by the House of Lords, and the Strasbourg Court declared the complaint inadmissible.⁴

Personal autonomy

The Strasbourg Court has often recognised that “private life” is a broad term not susceptible of exhaustive definition.⁵ It has been suggested that this was a deliberate choice. In his speech in *Pretty*⁶ Lord Steyn quoted a memo written by the Lord Chancellor in 1950⁷:

“Vague and indefinite terms have been used just because they were vague and indefinite, so that all parties, hoping and expecting that the terms will be construed according to their separate points of view could be induced to sign them.”

But there was not a complete free for all. From early days the Strasbourg court paid close attention to any emerging consensus in the way in which the legal systems of the contracting parties dealt with difficult social and moral questions.

Personal autonomy includes the right to take decisions about one's own body and one's own sexuality. It covers matters on which religious, moral and social opinions have changed over time, and still differ markedly in different parts of Europe - what Sir Stephen Sedley referred

⁴ *R (Countryside Alliance) v Attorney-General* [2008] AC 713, paras 10-14; *Countryside Alliance v United Kingdom* (2010) 50 EHRR SE6

⁵ For instance *Peck v United Kingdom* (2003) 36 EHRR 41, para 57

⁶ *R (Pretty) v DPP* [2002] 1 AC 800, para 56

⁷ Cabinet Office memo CAB/130/64

to the vertical and horizontal dimensions in his 2005 Holdsworth lecture⁸, “Are human rights universal, and does it matter?” The most sensitive matters include abortion, homosexuality, transsexuality and assisted suicide. The Strasbourg court has made its way carefully through this ethical minefield, paying close attention (as I have said) to any emerging consensus among contracting states, but also allowing a fairly wide margin of appreciation for religious and social differences.

In relation to abortion this can be seen by comparison of two decisions separated by nearly thirty years, that is the decision of the Commission in *Bruggemann v Germany*⁹ and the recent decision of the Grand Chamber in *A, B & C v Ireland*¹⁰. In *Bruggemann* the Commission did not disagree with a decision of the Federal Constitutional Court restricting the scope of Germany’s Fifth Criminal Law Reform Act, passed in 1974, so far as it liberalised the law on abortion. The background to the Irish case is that the eighth amendment to the Irish constitution recognises “the right to life of the unborn ... with due regard to the equal right to life of the mother”, which has been held to mean that abortion is illegal in Ireland unless there is a real risk to the mother’s life (not merely to her health). But later amendments allow women to obtain advice about abortion, and to travel abroad (usually to England) for an abortion, without breaking the law. All three claimants had done this, but C’s position was different in that she had, unexpectedly and unintentionally, become pregnant while receiving chemotherapy and had not received adequate medical advice as to whether pregnancy would be, for her, a life-threatening condition. C’s claim under Article 8 was unanimously allowed, but the other claims

⁸ Reprinted in Ashes and Sparks (CUP, 2011) p365

⁹ (1981) 3 EHRR 244

¹⁰ (2010) 53 EHRR 13; see also *Tysiac v Poland* (2007) 45 EHRR 42

were rejected by eleven votes to six. The powerful joint dissenting opinion considered that Ireland's margin of appreciation should have been narrowed because of the strong European consensus (put at 35 to 40 of the contracting states) permitting abortion (subject, of course, to conditions of varying stringency).

Male homosexual relations were considered in *Dudgeon*¹¹ in 1981. Mr Dudgeon lived in Northern Ireland, where male homosexual activities were still criminal, though rarely prosecuted. They had ceased to be criminal (between consenting adults in private) in England and Wales in 1967 and in Scotland in 1980. In 1977 Mr Dudgeon was questioned by the police about his homosexuality but was not prosecuted. Northern Ireland was then under direct rule and proposals for changing the law were put forward in 1978. Catholics and Protestants united in opposing this. The Reverend Ian Paisley vowed to "save Ulster from sodomy" and the Catholic bishops were equally vocal. The proposal was dropped. The Strasbourg court upheld Mr Dudgeon's complaint by fifteen votes to four. The majority recognised that the criminal law had a legitimate aim (protecting the young, and maintaining the community's strongly-held convictions) but considered the measures to be disproportionate.

In 1999 the Strasbourg Court¹² addressed the attitude of the British armed forces towards male and female homosexuality in two cases, each brought by two claimants, that is Senior Aircraftwoman Smith and Sergeant Grady, and Lieutenant Commander Lustig-Prean and Weapons Engineering Mechanic Bennett, as they were before they were dismissed from the services. Their applications for judicial review of the

¹¹ *Dudgeon v United Kingdom* (1981) 4 EHRR 149

¹² *Smith & Grady v UK* (1999) 29 EHRR 493 and *Lustig-Prean & Beckett v UK* (1999) 29 EHRR

Ministry of Defence's policy had been rejected by the Court of Appeal¹³, with some reluctance, before the coming into force of the Human Rights Act. The Strasbourg Court recognised that the United Kingdom government had a wide margin of appreciation as regards military discipline, but held in each case that Article 8 had been breached because of the exceptionally intrusive and offensive interrogation, its profound effect on the claimants' careers, and the inflexible character of the official policy.

Article 8 imposes on the state not only negative but also positive obligations. The positive obligations are to take reasonable steps to protect and promote the citizen's article 8 rights and to prevent or punish infringement of those rights by others. A relatively early case illustrating this is *X & Y v Netherlands*¹⁴ in 1986, a shocking case in which the Dutch criminal justice system failed to act against the rapist of a 16-year old girl with severe learning difficulties, because she was regarded as incapable of making a complaint. The Strasbourg court has observed¹⁵ that "the boundaries between the state's positive and negative obligations do not lend themselves to precise definition". That is inevitable. For instance statutes decriminalising homosexual activity or abortion may be seen by some as a positive contribution to personal autonomy, while others may regard built-in statutory safeguards (for instance, as to the same-sex age of consent) as objectionably negative. I have already mentioned *Pretty*, the sad case of the 42 year old woman whose neuro-degenerative disease was incurable, progressive and already

¹³ *R v Ministry of Defence ex parte Smith* [1996] QB 517 Lord Brown has in his 2011 Halsbury Lecture given an illuminating account of the correspondence that he received after his earlier judgment in the Divisional Court, which began "Lawrence of Arabia would not be welcome in today's armed forces"

¹⁴ (1986) 8 EHRR 235, para 23

¹⁵ *Van Kuck v Germany* (2007) 37 EHRR 973, para 71

sufficiently advanced that she could not take her own life. She wanted to get an undertaking from the DPP that her husband would not be prosecuted if he assisted her to die. She relied on articles 2,3, 8 and 9 of the Convention. The House of Lords¹⁶ was sympathetic but felt unable to give relief under any of these heads. None of the House considered that Article 8 was engaged, though Lord Hope¹⁷ accepted that Mrs Pretty had a right of self-determination.

The Strasbourg Court also felt unable to grant her any relief, though it recognised personal autonomy as an important underlying principle.¹⁸ Article 8 was engaged, but the prohibition on complicity in suicide was clearly imposed by law. It was not arbitrary, and Article 8(2) applied. The judgment is of interest in many ways, not least because it quotes in its entirety the 40 paragraphs of Lord Bingham's opinion in the House of Lords, and also part of Lord Hope's. This can be seen as an example of a real dialogue between our final appeal tribunal and the Strasbourg Court, and there are other examples that I shall mention later.

Pretty has had a sequel, that is *Purdy*¹⁹, the very last case in which judgment was given by the House of Lords in its judicial capacity. Mrs Purdy was in similar circumstances but her condition, multiple sclerosis, was less advanced, and she was less ambitious in her aim: that is to obtain a more detailed statement of the DPP's policy for prosecuting for complicity in suicide. She was successful. Lord Hope and the other members of the House²⁰ followed the Strasbourg Court and departed from the Lords' decision in *Pretty* to the extent of holding that Mrs Purdy's

¹⁶ *Pretty v DPP* [2002] 1 AC 800

¹⁷ para 100

¹⁸ *Pretty v United Kingdom* (2002) 35 EHRR 1

¹⁹ *R(Purdy) v DPP* [2010] 1 AC 345

²⁰ paras 35-39, 61, 71 and 95

Article 8 rights were engaged, and she was entitled to a clearer statement of the DPP's policy.

Personal privacy

I now move on to personal privacy. This part of the content of Article 8 has many subdivisions including official powers of search, surveillance and crowd control; the interception of communications; the retention by the police of DNA samples and other personal materials; and media intrusions into private life. I propose to say very little about the last of these topics, not because it is not of great importance and interest, but because it has been so fully discussed during the past few months, both in legal journals and more generally, that your appetite has probably reached satiety. I would only make a brief mention of the important decision of the Strasbourg Court in the *Von Hannover*²¹ case about the pursuit by paparazzi of Princess Caroline of Monaco. Although it was decided six years ago the scope of the decision is still a matter of controversy.

Buxton LJ has considered it in his admirable judgment in *McKennitt v Ash*²², commenting that there is little doubt that it extends the reach of Article 8 beyond what had previously been understood and that with the benefit of *Von Hannover* the House of Lords might have taken a shorter course in the Naomi Campbell case.²³ The decision has been seized on by some as suggesting that celebrities (unless they are politicians or public officials) have the right not to be photographed, even in a public place, and even in circumstances that are not embarrassing. Others stress

²¹ *Von Hannover v Germany* (2005) 40 EHRR 1

²² [2008] QB 73, paras 37-42. There is also an interesting discussion in Nicole Moreham, *The Right to Respect for Private Life: a re-examination* [2008] EHR Law Review 44, to which I am indebted for many insights

²³ *Campbell v MGN Ltd* [2004] 2 AC 457

the degree of harassment and covert surveillance of Princess Caroline by the paparazzi. The judgment has caused some offence in Germany because of its criticism of the distinction drawn by German law between those who are par excellence public figures and those who are only relatively public figures. There is clearly a lot of room for development in this area of the law.

I want to mention two recent cases on police powers in connection with personal privacy. The object of the Human Rights Act was to “bring rights home” and reduce the number of cases in which the United Kingdom is taken before the Strasbourg Court. But in these two cases the Strasbourg Court has differed from the House of Lords as to whether statutory powers conferred on the police, and the way in which they were exercised, infringed Article 8.

The first is *S and Marper*²⁴, the cases on retention of DNA samples and fingerprints taken from persons who were not convicted of any offence. Mr S was tried and acquitted of attempted robbery. Mr Marper was accused of domestic harassment but the charge was dropped. Both men challenged the retention by the police of their samples and fingerprints. The police acted under a statutory power²⁵ conferred in 1991 which was invariably exercised in accordance with a general policy. The House of Lords²⁶ held that this was lawful and did not infringe the men’s Article 8 rights. Lord Steyn considered that Article 8 was not engaged, but that if it was the interference was modest and justified because of its important contribution to the detection and prosecution of serious crime. Lord

²⁴ *S and Marper v United Kingdom* 4 December 2008

²⁵ s 64 (1A) of PACE 1984 as amended

²⁶ *R(Marper) and R(S) v Chief Constable of South Yorkshire Police* [2004] 1 WLR 2196

Steyn made an important general point about the article. Differing from Lord Woolf in the Court of Appeal, he said²⁷ that a particular state's cultural traditions may be relevant to justification under Article 8(2), but "the question whether the retention of fingerprints and samples engages Article 8(1) should receive a uniform interpretation throughout member states, unaffected by different cultural traditions". The rest of the House agreed, except that Lady Hale²⁸ considered that Article 8 was engaged by what she referred to as an aspect of informational privacy.

The Strasbourg Court disagreed. It was strongly influenced by the indiscriminate way in which the power had been exercised, regardless of the nature of the suspected offence and the age of the suspect. It did not accept the argument that the interference was minimal unless and until the samples were used in a later investigation of serious crime.

The other important case on which the Strasbourg Court has differed is the decision of the Grand Chamber in *Gillan and Quinton v United Kingdom*²⁹. It concerned the exercise by the police of wide stop and search powers granted by sections 44-47 of the Terrorism Act 2000. These powers were exercisable without the need for reasonable suspicion of criminal activity or intention. They were challenged by Mr Gillan, a white postgraduate student, and Ms Quinton, a white freelance journalist, who were stopped and searched for 20 or 30 minutes while attending a demonstration against an arms trade exhibition at the Excel Centre in London's Docklands. They relied on Articles 5 and 8 of the Convention.

²⁷ para 27

²⁸ para 68

²⁹ (2010) 50 EHRR 1105

The House of Lords³⁰ held that there was no deprivation of liberty under Article 5. As to Article 8, Lord Bingham said³¹

“It is true that ‘private life’ has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level.”

The rest of the House agreed. Lord Brown³² added some thoughtful observations about the risk of race discrimination in the exercise of the powers.

Again the Strasbourg Court disagreed as to Article 8. As in Mrs Pretty’s case, the judgment of the Grand Chamber pays close attention to the judgments in the domestic courts, with quotations from the opinions of Lord Bingham, Lord Hope and Lord Brown. It also pays close attention to the striking statistics (taken from annual reports by the statutory independent reviewer, Lord Carlile QC) as to the number of occasions on which the powers were exercised, rising from about 33,000 in 2004/05 to about 117,000 in 2007/08, with minimal results in terms of discovering terrorist activity. It is of interest that the latest annual total, published

³⁰ [2006] 2 AC

³¹ para 28

³² paras 81-92

three weeks ago, is under 10,000. The Grand Chamber recognised a clear risk of the powers being used in a way that was arbitrary and amounted to discrimination on racial grounds. It drew attention to Lord Carlile's observation that the police had a practice of stopping and searching white people purely in order to produce a greater racial balance in the statistics.

Family Life

Next I come to the topic of family life, on which I shall have to be very selective. Like private life, it is not easy to define. It is a topic with a hard core and fairly loose edges. The hard core is the relationship of love, trust and support which should exist between husbands and wives, same-sex couples, and long-term cohabitants; and similarly between parents and children, even if they are separated by force of circumstances. The loose edges include, for instance, a widow's entitlement to a social security pension, which has been held to come within the scope of family life, since it enhances the quality of family life.³³

This is one example of the state's positive obligation to promote family life. Another more unusual example is provided by *Dickson*.³⁴ In 1994 Mr Dickson received a life sentence for murder, with a tariff of 15 years; in 1999 he formed a pen-pal friendship with a woman prisoner in another prison; and in 2001, after her release, they got married. They applied to the authorities for facilities for Mrs Dickson to receive artificial insemination, as she was likely to be past childbearing when her husband was released on licence. The request was refused on the grounds that

³³ *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, para 9

³⁴ *Dickson v United Kingdom* (2008) 46 EHRR 927

there were no exceptional circumstances. The Grand Chamber held by twelve to five that this was an infringement of their Article 8 rights. The requirement of exceptional circumstances contravened the general principle established in *Hirst*,³⁵ the controversial votes for prisoners case, that in general prisoners continue to be entitled to their fundamental rights and freedoms, with the sole exception of personal liberty.

There has been a quartet of cases in Strasbourg where decisions under Article 8 have appeared to run contrary to the terms of the Hague Convention on Civil Aspects of International Child Abduction. That Convention provides, with strictly limited exceptions, that an abducted child should be returned home promptly for decisions about the child's welfare to be taken by the family courts of the home country. In the most controversial of the quartet, *Neulinger v Switzerland*³⁶, the Strasbourg Court overruled the decision of the Swiss Federal Court, itself hearing a second appeal, that a child abducted from Israel by his mother should be returned there. There had been long and highly regrettable delays. The Grand Chamber's judgment appeared to require the returning court to undertake "an in-depth examination of the entire family situation and a whole series of factors"³⁷ before making an order for return, which seems contrary to the swift and summary procedure called for by the Convention. The topic has been fully explored by Lady Hale in a recent Hague Convention case in the Supreme Court.³⁸

Family ties and responsibilities are often relied on as a reason for mitigating the severity of official action, whether in sentencing in our

³⁵ *Hirst v United Kingdom* (2006) 42 EHRR 849

³⁶ [2001] 1 FLR 122

³⁷ Paras 138 and 139

³⁸ *Re E (Children)* [2011] 2 WLR 1326, paras 19-26

criminal courts, or in deportation or extradition proceedings. That is entirely natural, and it occurred routinely long before Article 8 was made part of our law. Judges and magistrates are always reluctant to pass a custodial sentence on a mother with young children, and regularly take account of the effect that a custodial sentence may have in inflicting emotional and economic hardship on the prisoner's family.

There is now quite a body of authority as to the weight to be given to family ties in deportation and extradition cases, and this is now a subject of acute political controversy. The leading case on deportation was *Huang*³⁹ in 2007. Proportionality (based on “a careful and informed evaluation of the facts of the particular case”⁴⁰) is of the essence. There are some important recent decisions of the Supreme Court in this area, including *Norris*⁴¹, *ZH (Tanzania)*⁴² and *Quila*⁴³. *Norris* was concerned with the extradition to the United States of a 67-year old businessman in poor health. *ZH (Tanzania)* was concerned with the proposed deportation (abandoned, in fact, before the appeal hearing) of a Tanzanian woman whose asylum claims had repeatedly failed, but who had been in this country for 15 years and had two children aged 12 and 9 who were British citizens. *Quila* was concerned with (and disapproved) the official policy of withholding a “marriage visa” from a sponsor aged under 21, so as to reduce the risk of forced marriages. *ZH Tanzania* is particularly important as showing how the protection that Article 8 affords to children has been reinforced by other international conventions and instruments.

³⁹ *Huang v Secretary of State for the Home Department* [2007] 2 AC 167

⁴⁰ *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, para 12

⁴¹ *Norris v Government of USA* [2010] 2 AC 287

⁴² *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166

⁴³ *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45

The Home

I now move on to my last topic, respect for the home, but I am going to approach it obliquely. Many of you will remember the curious case of *Wilson v First City Trust*⁴⁴. It was a small consumer credit case which started in the Kingston-upon-Thames County Court. The Court of Appeal of its own motion raised an issue of incompatibility with Article 1 of the First Protocol of a draconian provision in section 127 of the Consumer Credit Act 1974. By the time the case reached the Lords the original parties had had enough and had dropped out, and the case was argued between numerous official and commercial interveners.

The appeal was finally decided on the issue of when the Human Rights Act starts to bite in an incompatibility case. But Lord Nicholls said this on the question of substance⁴⁵:

“This course is open to Parliament even though this will sometimes yield a seemingly unreasonable result in a particular case. Considered overall, this course may well be a proportionate response in practice to a perceived social problem. Parliament may consider the response should be a uniform solution across the board. A tailor-made response, fitting the facts of each case as decided in an application to the court, may not be appropriate.”

In that case the social problem was consumer credit agreements which might not be understood by pressured or innumerate customers. In the case of social housing the problem tends to be “neighbours from hell”.

⁴⁴ [2004] 1 AC 816.

⁴⁵ Para 74

But the general point to which I draw attention is that Lord Nicholls is describing what most lawyers, and indeed most of the public, would regard as a constitutional commonplace. Parliament makes laws in general terms. They may give rise to hard cases, but the court must apply the law, except so far as it has a legal discretion to make adjustments to meet the particular circumstances of a particular case.

That was the general thinking of the majority of the House of Lords in *Harrow LBC v Qazi*,⁴⁶ decided three weeks after *Wilson*, but by a differently constituted committee. Mr and Mrs Qazi were secure tenants under a joint tenancy granted by the local authority. Mrs Qazi left her husband and gave notice to quit. The local authority refused to grant Mr Qazi alone a new tenancy of what was family-sized accommodation. That was the situation in which the issue on Article 8 arose. With Lord Bingham and Lord Steyn dissenting, the majority held that Article 8 could not be relied on to defeat a proprietary right to possession. The majority view was most forcibly expressed by Lord Millett⁴⁷ and Lord Scott⁴⁸, who said:

“There is no case in which a balance has been struck between the tenant’s interests and the landlord’s rights. In every case the landlord’s success has been automatic. And so it must be unless Article 8 is to be allowed to diminish or detract from the landlord’s contractual and proprietary rights. In my opinion, the Strasbourg jurisprudence has shown, in effect, that Article 8 has no relevance to these landlord/tenant possession cases.”

⁴⁶ [2004] 1 AC 983

⁴⁷ Para 103

⁴⁸ Para 146

In short, the majority thought that the balance had already been struck by Parliament. That was the beginning of a lengthy period of tension between the House of Lords (or from October 2009 the Supreme Court) and the Strasbourg Court (and also, I should add, the Court of Appeal, on whose behalf Carnwath LJ⁴⁹ delivered a courteous and, I have to say, well-merited remonstrance about the number, length and opacity of our judgments). The principal landmarks, after the Lords' 3-2 decision in *Qazi* in July 2003, were the Strasbourg Court's decision in *Connors*,⁵⁰ the gypsy case, in May 2004; the 4-3 decision of the House of Lords (on the point of principle) in the linked cases of *Kay* and *Price*⁵¹ in March 2006; the Strasbourg Court's decision in *McCann*⁵² in May 2008; the unanimous (but inscrutable) decision of the House of Lords in *Doherty*⁵³ in July 2008; the decision of the Strasbourg Court in *Kay v United Kingdom*⁵⁴ in September 2010; and finally (I hope) the decisions of the Supreme Court in *Pinnock* and *Powell*⁵⁵ in November 2010 and February 2011.

I shall not try to give a blow-by-blow account of this struggle between our highest appellate tribunal and the Strasbourg Court. It would take far too long to do so, and I find it painful to dwell on this episode; in the words that Virgil puts in the mouth of Aeneas, when Dido asks him to tell his story, I am reluctant "infandum . . . renovare dolorem."⁵⁶ But I want to make three points.

⁴⁹ *Doherty v Birmingham City Council* [2007] LGR 165

⁵⁰ *Connors v United Kingdom* (2005) 40 EHRR 189

⁵¹ *Kay v Lambeth LBC and Leeds City Council v Price* [2006] 2 AC 465

⁵² *McCann v United Kingdom* (2008) 47 EHRR 913

⁵³ *Doherty v Birmingham City Council* [2009] AC 367

⁵⁴ Noted in [2011] EHR Law Review 105

⁵⁵ *Manchester City Council v Pinnock* [2010] 3 WLR 1441; *Hounslow LBC v Powell* [2011] 2 WLR 287

⁵⁶ Aeneid 2, 2

The first is very general. Towards the beginning of this lecture I posed the question, where is it going to end? The developing jurisprudence on social housing is a further demonstration of the indefinite Article 8's tendency to expand its scope. The Strasbourg Court will probably continue to expand its scope, but (especially on controversial social and ethical issues) only in line with a general consensus among the contracting states. British courts are not bound to follow the Strasbourg Court, only to take account of its decisions,⁵⁷ but where there is clear Strasbourg authority on the scope of the obligations imposed by the Convention, British courts will in practice treat that as binding authority. As Lord Bingham famously said in *Ullah*⁵⁸:

“The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”

In *Al-Skeini*⁵⁹ Lord Brown suggested a variant, “no less, but certainly no more,” as particularly appropriate to cases on the scope of the Convention under Article 1. Lord Rodger, whose recent death has been such a grievous loss, put it even more succinctly:⁶⁰ “In reality we have no choice: *Argentorum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed.” Sir Nicolas Bratza commented on that in his recent article⁶¹ “Brilliantly latinised as was the sentence . . . ‘Strasbourg has spoken, the case is closed’ is not the way I and my fellow judges view the respective roles of the two courts, even though I accept that where, as

⁵⁷ Human Rights Act 1998 section 2(1)

⁵⁸ *R(Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20

⁵⁹ *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, para 106

⁶⁰ *Secretary of State for the Home Department v AF (No 3)* [2010] 2AC 269, para 98

⁶¹ The relationship between the UK courts and Strasbourg [2011] EHR Law Review 505

in that case, a clear principle was laid down by the Grand Chamber, it was plainly important that it should be followed and applied by the House of Lords.”

The second point is that in adjudicating on alleged infringements of the Convention the Strasbourg Court looks at the performance of the member state as a whole. It is not greatly interested in the constitutional arrangements for the separation of powers adopted in any particular member state, or whether the summary eviction of a former council or housing association tenant should be ascribed to the inflexibility of the statute, or the decision-making processes of the social landlord, or the district judge’s decision, without hearing evidence, that there is no possible defence to the claim for possession. The Strasbourg Court’s concern is that no one should lose their home without the possibility of a hearing on the merits, as opposed to merely the possibility of judicial review of the social landlord’s decision.

This insistence on due judicial process is admirable, but it comes at a price. Although much of the jurisprudence is concerned with the potency of the landlord’s property rights, I would prefer, in the case of social landlords (which is what we are considering), to stress their responsibilities as custodians for the public of a limited housing stock. Social landlords are in practice slow to evict their tenants, because they are aware that evictions may lead to worse problems elsewhere in the social security system. But sometimes it is their duty to do so in fairness to other tenants whose lives are being made miserable by antisocial behaviour – people to whom the evicted tenants are the “neighbours from

hell” to whom I referred earlier.⁶² Mounting a case with oral evidence, sometimes from intimidated neighbours, is difficult and costly in resources, so it is understandable if social landlords are inclined to resort to the simplest available course, such as getting a separated wife to give notice to quit (as happened in *McCann* and may have happened in *Qazi*). At a time of stretched resources both for local authorities and for county courts, we are all going to have to learn to live with the new system.

Third and finally, the dialogue between London and Strasbourg was rather more strained, during this episode, than in cases such as *Pretty* and *Gillan*. But there still was a dialogue. The judgments of the Strasbourg Court in *Connors*, *McCann* and *Kay* refer very fully to the English judgments and show real understanding of the difficulties that the domestic courts were encountering. I have little doubt that this was due primarily to the active participation in those cases of the United Kingdom judge, Sir Nicolas Bratza. I say with great pride that Nicolas Bratza was my first pupil, about forty years ago. I confidently expected him to have a distinguished career at the Chancery Bar, but he spent his next six months with Gordon Slynn, and Lincoln’s Inn never saw him (as a practitioner) again. His dedication to the European Court of Human Rights has been beyond praise, in terms of intellectual brilliance, commitment to human rights, and sheer unremitting hard work. As I close I hope you will join with me in expressing our delight that he has recently and most deservedly been appointed as the President of the Court.

⁶² See *Manchester City Council v Pinnock*, paras 108-131 for a striking example