

# THE FIRST NINE YEARS OF THE UK HUMAN RIGHTS ACT

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The UK Human Rights Act 1998 has now been in force for nine years<sup>1</sup>. Its object was to enact into the domestic law of the United Kingdom treaty obligations entered into as long ago as 1950, when countries in Western Europe joined together in the European Convention on Human Rights with the aim of restoring and preserving liberal democratic values after the horrors of the second world war. The Convention has been updated from time to time by protocols, 13 in all<sup>2</sup>, but it is in some respects showing its age, especially as regards equality and non-discrimination. It has its own Court in Strasbourg, whose decisions must be taken into account by United Kingdom courts, but are not formally binding on them<sup>3</sup>.

The official forecast of the Act's impact on the UK justice system was for a surge of litigation which would last for about three years and then begin to subside. In practice its effect has been much more permanent. In the Appellate Committee of the House of Lords (now transformed into the Supreme Court of the United Kingdom) at least two-fifths of the appeals, including some of the most controversial ones, have been concerned with the application of the Act. Even if one looks only at the House of Lords and the Civil and Criminal Divisions of the Court of Appeal, leaving aside lower courts, the Act is already the subject of several hundred reported decisions.<sup>4</sup>

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<sup>1</sup> It came fully into force on 2 October 2000.

<sup>2</sup> But only seven remain in force, the rest having been superseded.

<sup>3</sup> Section 2(1) of the Act; see also *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323, para.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."

<sup>4</sup> The subject index of the official Law Reports may give a misleading impression. Although there is a heading "Human Rights" cases on the Act may also be found under (as a random selection) Children, Crime, Defamation, Education, Housing, Immigration, International Law, Judicial Precedent, Local Government, Mental Disorder, Police, Prisons and Statutes.

Any attempt to make a quick survey of the whole of this terrain is in obvious danger of getting bogged down in a mass of detail. What I aim to do is to identify some general themes which recur (and to some extent overlap) in our human rights jurisprudence. The main ones (so that you know roughly where I am going) are human rights as a balancing exercise; personal liberty and fair trial; judicial decision-making; the effect of the Act on statutory interpretation; and what are sometimes called the vertical and horizontal effects of the Act.

But first I would like to reflect for a few minutes on why the impact of the Act has been so heavy, and (I would add) so controversial. Some of the reasons are peculiar to the United Kingdom, but most are shared, I suspect, by many liberal democracies as they face the alarming history, so far, of the 21<sup>st</sup> century. First and foremost is Islamic extremism, which presents us with grave and continuing problems in trying to reconcile public safety with the rule of law. Apart from extremism, multicultural societies generate many tensions, including those of reconciling manifestations of religious faith with competing social interests.

It is not only multicultural tensions that trouble the United Kingdom at present. Violent crime and anti-social behaviour, and fear of violence and hooliganism, have led to a torrent of legislative changes to the criminal law, both by the creation of many new offences and by changes in the law of criminal evidence and the court's sentencing powers. Some sections of the press and the public rightly demand higher standards in child protection, and in schools, mental hospitals and prisons, while others disparage what they call the softness of the nanny state. Gays and lesbians rightly press for full equality and are often not slow to complain of perceived discrimination. In all these ways the Human Rights Act has tended to become a focus of competing discontents.

The case of the Muslim schoolgirl who wanted to wear a jilbab (the *Denbigh High School* case<sup>5</sup>) is a good illustration of the general truth that most human rights adjudication consists of a balancing exercise<sup>6</sup>. I do not have time to quote from the opinions of Lord Bingham, Lord Hoffmann and Lady Hale, but I commend them to you. That is not to say that all human rights are qualified: under the Convention the right to life (in its primary sense of a right not to be killed by agents of the state<sup>7</sup>) and the right not to be tortured are absolute rights. But other rights such as the right to respect for one's private and family life, or to freedom of thought, conscience and religion, or to freedom of expression and assembly, are limited<sup>8</sup>. Article 8, for instance, qualifies the right to respect for private and family life by permitting such interference "as is in accordance with the law and is necessary in a democratic society in the interests of 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."

Freedom of expression is a right of particular constitutional importance in a democracy<sup>9</sup>. But it is also particularly susceptible of qualification, because one individual's freedom of expression may be, in the eyes of the government, or in the eyes of one or more of his fellow citizens, sedition, betrayal of state secrets, racial abuse, obscenity, defamation, invasion of privacy, breach of confidence or contempt of court. All these possibilities are recognised in the qualifications set out in Article 10(2) of the Convention.

Some of the most interesting developments as to freedom of expression are in connection with personal privacy and the media, where Article 8 and

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<sup>5</sup> *R (SB) v. Governors of Denbigh High School* [2007] 1 AC 100.

<sup>6</sup> See the European Court of Human Rights in *Sporrong & Lonnroth v. Sweden* (1982) 5 EHRR 35, para.69.

<sup>7</sup> Capital punishment was formally abolished, except in time of war, by the Sixth Protocol, adopted in 1983 (extended to wartime by the 13<sup>th</sup> Protocol in 2002).

<sup>8</sup> Articles 8(2), 9(2), 10(2) and 11(2).

<sup>9</sup> *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520, 571.

Article 10 come into collision. Even a publicity-seeking celebrity is entitled to a measure of privacy, and the press and broadcasters may not go too far even if they are (as they see it) exposing lies and hypocrisy: that is the message (though it is still rather an unclear message) of the *Naomi Campbell* case<sup>10</sup>. I shall come back to Naomi Campbell in the context of vertical and horizontal effect. Now I want to move on to the topics of liberty and fair trial, especially in connection with suspected terrorists.

Two of the most important articles of the Convention are Articles 5 and 6, dealing with personal liberty and fair trial. Article 5 prohibits deprivation of liberty except in six cases prescribed by law, the first of which is “the lawful detention of a person after conviction by a competent court”. The Strasbourg jurisprudence requires these exceptions to be applied quite strictly<sup>11</sup>. But deprivation of liberty has itself been construed fairly strictly. The Strasbourg Court has held that it does not apply to the “special supervision” (a form of internal exile) on a small Italian island of a suspected Mafia boss who had not been convicted of crime<sup>12</sup>. In a recent decision<sup>13</sup> the House of Lords held that Article 5 rights were not infringed when in central London on May Day 2001 the police kept over a thousand people in a close cordon for about seven hours, causing many of them inconvenience and distress. Some had been demonstrating violently, some had been demonstrating peacefully, and some were simply caught up in the demonstration. The judge found that the police were lawfully engaged in an exceptionally difficult exercise in crowd control, and in trying to avoid serious or even fatal injuries, and his decision was upheld by the appeal courts. But some recent events in London and elsewhere in England suggest that the police may have misunderstood this decision as a general licence, which it certainly is not, for indiscriminate “kettling” operations.

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<sup>10</sup> *Campbell v. MGN Ltd* [2004] 2 AC 457.

<sup>11</sup> *Secretary of State for the Home Department v. JJ* [2008]1 AC 385 para.5.

<sup>12</sup> *Guzzardi v. Italy* (1980) 3 EHRR 333.

<sup>13</sup> *Austin v. Commissioner of Police of the Metropolis* [2009] 1 AC 564.

Article 6(1) provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Articles 6(2) and 6(3) add further safeguards for criminal matters, including the presumption of innocence.

There is already a large volume of authority on the various problems that arise on the words, “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. These include the consequences of a prosecution exceeding a reasonable period of time; reverse burdens of proof imposed by criminal statutes; the grant of anonymity to intimidated witnesses; and what a trial judge should do about a jury which appears to be racially prejudiced. But the most urgent and difficult problems of personal liberty and fair trial are to be found in what is sometimes called the *Belmarsh* case<sup>14</sup> and the saga of control orders that followed it.

The background was that the United Kingdom already had extensive anti-terrorist legislation in force (introduced partly but not solely because of the situation in Northern Ireland) before the events of 9/11. But soon after 9/11 Parliament passed the Anti-Terrorism Crime and Security Act 2001, which provided for the detention without trial of suspected terrorists who were not British subjects. These provisions were used for the detention in Belmarsh (a high-security prison in south London) of a small number of suspected terrorists. These men could not be deported because of the perceived risk of their being tortured if returned to their own countries<sup>15</sup>.

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<sup>14</sup> *A v. Secretary of State for the Home Department* [2005] 2 AC 68.

<sup>15</sup> The risk of torture on return to another jurisdiction is an exception to the normal territorial operation of the Act: see *Chahal v. United Kingdom* (1996) 23 EHRR 413 and compare *Al-Skeini v. Secretary of State for Defence* [2008] 1 AC 153 (unlawful violence by British forces in Iraq).

In order to pass this legislation the UK government had to make a derogation from the Convention, as the government had in 1972 during the ill-advised and short-lived regime of internment in Northern Ireland. A derogation is permitted by Article 15 of the Convention,

“In time of war or other public emergency threatening the life of the nation . . . [but only] to the extent strictly required by the exigencies of the situation.”

The Lords (sitting, unusually, in an Appellate Committee of nine) held that there was such an emergency, and that conclusion has recently been upheld by the Grand Chamber of the Strasbourg Court<sup>16</sup>. But the Lords held that for Parliament to aim the measures only at non-nationals was discriminatory and irrational, since many suspected extremists were British nationals. Moreover the detention of non-nationals could not be justified under the last exception to Article 5(1) (that is “the lawful arrest or detention . . . of a person against whom action is being taken with a view to deportation”) since there were no deportation proceedings in train. It was not enough for the government to be keeping the possibility under active review. This conclusion was also upheld by the Grand Chamber<sup>17</sup>.

The House of Lords gave judgment in the *Belmarsh* case on 16 December 2004. The detained suspects were not immediately released. Their detention was still lawful under the United Kingdom statute, although in breach of the Convention. Instead the government urgently introduced a Bill which was enacted on 11 March 2005 as the Prevention of Terrorism Act 2005. It provided for control orders which (depending on their terms) could amount to a sort of closely-supervised house arrest severely restricting the freedom and autonomy of the person subjected to it. When the Belmarsh suspects were released most of them were immediately made subject to control orders. The Secretary of State can make an order, subject to review by the court, if he

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<sup>16</sup> *A v. United Kingdom* 19 February 2009 paras 175-181.

<sup>17</sup> Paras 162-170.

- “(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and
- (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on the individual.”

Unsurprisingly control orders have given rise to a great deal of litigation in the UK courts, and are likely to lead to more cases in Strasbourg as well. The orders have raised two different issues, the first under Article 5 of the Convention and the other under Article 6. The first issue is whether subjection to an order which includes an eighteen-hour curfew, and numerous other restrictions, is a deprivation of personal liberty breaching Article 5, as opposed to a mere restriction of movement (falling within Article 2 of the Fifth Protocol, which the UK has not adopted). In three important appeals heard together during 2007<sup>18</sup> the Lords decided (Lord Hoffmann dissenting) that an order which imposed an eighteen-hour curfew did amount to a deprivation of liberty, but (unanimously) that orders (in other respects similar) imposing fourteen-hour and twelve-hour curfews did not. In reaching this conclusion the Lords drew extensively on Strasbourg jurisprudence, including *Guzzardi*<sup>19</sup>, the Italian “special supervision” case already mentioned.

The other, even more difficult, issue is whether the Court’s review of the Secretary of State’s decision is compatible with fair trial rights under Article 6. The difficulty arises because the 2005 Act, and special rules of court made under it, provide for the court to consider not only open evidence shown to the suspect and his advisers, but also closed evidence, and to hear submissions on the closed evidence, in the absence of the suspect and his advisers. Instead, a special advocate is appointed to act in the suspect’s interests; but once the special advocate has seen the closed material he or she is not permitted to take any further instructions from

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<sup>18</sup> *Secretary of State for the Home Department v. JJ* [2008] 1 AC 385, *Secretary of State for the Home Department v. MB* [2008] 1 AC 440 and *Secretary of State for the Home Department v. E* [2008] 1 AC 499.

<sup>19</sup> *Guzzardi v. Italy* (1980) 3 EHRR 333.

the suspect (except by written question and answer with the consent of the court). This extraordinary procedure is adopted because of the sensitivity of the Security Service about revealing their sources of information, whether those sources are human contacts or are derived from electronic or other surveillance.

The system of special advocates, as developed in the United Kingdom, was intended to act as a Convention-compliant means of reconciling fair trial with the need for maintaining the secrecy of intelligence sources. Whether it achieved that aim was considered by the House of Lords in 2007<sup>20</sup> and again earlier this year<sup>21</sup>, the first decision being before and the second after the important judgment of the Strasbourg Grand Chamber in the *Belmarsh* case, which went to Europe as *A v. United Kingdom*<sup>22</sup>.

It is now clear that the system does often fail to be Convention-compliant. The essence of the Grand Chamber's decision is that detention proceedings under the 2001 Act, though not strictly classified as criminal proceedings, must carry substantially the same fair trial guarantees. The adoption of the special advocate procedure was not itself a sufficient guarantee. The issue must be decided, the Grand Chamber stated, on a case-by-case basis, and the open material might be sufficient for a fair hearing. Provided that the open allegations were specific, much of the detail of the underlying evidence might be withheld:

“Where, however, the open material consisted of purely general assertions and [the tribunal's] decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of article 5(4) would not be satisfied.”<sup>23</sup>

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<sup>20</sup> *Secretary of State for the Home Department v. MB* [2008] 1 AC 440, one of the three cases heard together as already mentioned.

<sup>21</sup> *Secretary of State for the Home Department v. AF (No 3)* [2009] 3 WLR 74.

<sup>22</sup> Application No. 3455/05, 19 February 2009.

<sup>23</sup> Para.20.



Earlier this year the House of Lords (again, sitting in an Appellate Committee of nine) had to apply the Grand Chamber's ruling to the special advocate procedure used in connection with control orders. The Lords decided unanimously<sup>24</sup> that the appeals of three controlled persons must be allowed and the cases remitted for further consideration at first instance. The likely outcome is that far fewer control orders will be made; possibly the system will lapse entirely.

As will be apparent from what I have said so far, UK courts pay very close attention to judgments of the Strasbourg Court, although not formally bound by them; and the reasoning of the Strasbourg Court tends to be expressed in fairly broad terms. How do UK courts go about applying these broad principles? Apart from the special problems of suspected terrorists which have preoccupied us during the last few years, fair trial is a subject on which judges have a great deal of experience and skill. It is their job to ensure that criminal and civil trials are fair. *R v. A (No. 2)*<sup>25</sup> is an example. In that case amendments to the law of criminal evidence, enacted in order to prevent complainants in rape cases being unduly harassed by cross-examination, were interpreted (under section 3 of the Human Rights Act) as subject to the overriding requirement of fairness to the accused.

That gives trial judges quite a wide discretion, but it is exercisable in an area that they are familiar with. Similarly judges can decide whether giving intimidated witnesses anonymity (and further practical courtroom safeguards against identification) may put such difficulties in the way of the defence as to make the trial unfair<sup>26</sup> and whether apparent racial prejudice in a jury, threatening the impartiality of the tribunal, can be dealt with otherwise than by a new trial<sup>27</sup>.

Judges are in less familiar territory when they have to carry out a balancing exercise involving social and cultural values. This can be illustrated by

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<sup>24</sup> *Secretary of State for the Home Department v. AF (No 3)* [2009] 3 WLR 74.

<sup>25</sup> [2002] 1 AC 54.

<sup>26</sup> *R v. Davis* [2008] 1 AC 1128.

<sup>27</sup> *R v. Mirza* [2004] 1 AC 1118; *R v. Smith* [2005] 1 WLR 704.

the many problems that arise in trying to balance one individual's right under Articles 9 and 10 to freedom of thought and expression (including the manifestation of religious beliefs) against other people's rights (and especially their rights to privacy under Article 8). The cases range from the *Denbigh High School* case to a video, intended for transmission on television as a party election broadcast, depicting "the terrible truth about abortion" with graphic colour images<sup>28</sup>; a front page story in a popular newspaper with the headline "Naomi: I am a Drug Addict" illustrated by a photograph captioned "Therapy: Naomi Outside Meeting"<sup>29</sup>; and several pages of coverage, with photographs, in another popular newspaper headlined "F1 Boss in Sick Nazi Orgy with Five Hookers"<sup>30</sup>.

To these problems judges can hope to bring an open mind, common sense and a willingness to listen to both sides. They can consider factual evidence and see how similar problems have been resolved in other jurisdictions. But they cannot (and do not) claim that their training as judges gives them any special expertise on questions of this sort. Why should unelected judges take decisions of this sort? Our answer must be: because Parliament has chosen to give us that responsibility. It is our job to make these decisions, and to give reasons for them.

The Court's approach has been well described by Eady J, the much-maligned judge in the *Mosley* case. There is no automatic precedence, he said, between free expression and privacy:

"In order to determine which should take precedence, *in the particular circumstances*, it is necessary to establish the facts closely as revealed in the evidence at trial and to decide whether (assuming a reasonable expectation of privacy to have been established) some countervailing consideration of public

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<sup>28</sup> *R (Pro-Life Alliance) v. BBC* [2004] 1 AC 185.

<sup>29</sup> *Campbell v. MGN Ltd* [2004] 2 AC 457.

<sup>30</sup> *Mosley v. News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

interest may be said to justify any intrusion which has taken place. This is integral to what has been called ‘the new methodology’: *Re S (A Child)*.<sup>31</sup>

This modern approach of applying an ‘intense focus’ is thus obviously incompatible with making broad generalisations of the kind to which the media often resorted in the past such as, for example, ‘Public figures must expect to have less privacy’ or ‘People in positions of responsibility must be seen as “role models” and set us all an example of how to live upstanding lives.’ Sometimes factors of this kind may have a legitimate role to play when the ‘ultimate balancing exercise’ comes to be carried out, but generalisations can never be determinative.”

Because there must be an intense focus on the particular facts, the evidence before the court is very important. In the *Denbigh High School* case the court had detailed evidence about the reasons for the school’s policy on pupils’ uniform, and the way in which it had been worked out and implemented, and that was important to the outcome of the case. In the *Pro-Life Alliance* case there was evidence about the editorial judgment regularly exercised by TV broadcasters before transmitting film of carnage caused by suicide bombers.

But the essential evidence is as to the facts, not (as with traditional judicial review) the decision-making process itself. Lord Bingham<sup>32</sup> gave three reasons why the Court of Appeal in the *Denbigh High School* case had erred in taking too “procedural” an approach:

“... the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant’s Convention rights have been violated . . .

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<sup>31</sup> [2005] 1 AC 593.

<sup>32</sup> *R (SB) v. Governors of Denbigh High School* [2007] 1 AC 100, paras 29-31.

Secondly, it is clear that the Court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting . . .

Thirdly, I consider that the Court of Appeal's approach would introduce 'a new formalism' and be 'a recipe for judicialisation on an unprecedented scale'. The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them."

An intense focus on the facts of the particular case has another practical consequence – that the outcome of human rights adjudication can be very unpredictable. The most striking – some would say shocking – illustration of this is the *Naomi Campbell* case which I have already mentioned. At first instance Miss Campbell won modest damages of £3,500 for invasion of her privacy; she lost them under a unanimous decision of the Court of Appeal; and had them restored, by a 3-2 majority, in the House of Lords. I have to tell you, with a heavy heart, that the unsuccessful newspaper group had to pay over £1m for Miss Campbell's costs, as well as its own. Her enormous costs bill was swollen by success fees under conditional fee agreements. The costs award was challenged by a separate petition<sup>33</sup> asserting (unsuccessfully) that it was so disproportionate as to infringe Article 10 rights.

Now I want to say something about vertical and horizontal effect. To explain this I must say a bit more about the structure of the UK Human Rights Act. A key part of its structure is section 6, subsection (1) of which declares:

"It is unlawful for a public authority to act [defined as including a failure to act] in a way which is incompatible with a Convention right."

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<sup>33</sup> *Campbell v. MGN Ltd (No 2)* [2005] 1 WLR 3394.

Subsection (2) qualifies this obligation when a public authority is required by statute to act in a particular way (that is, I should add, an anodyne summary of a provision with many hidden difficulties). Subsection (3) provides an incomplete definition of “public authority” as including a court or tribunal (but not Parliament) and as including “any person certain of whose functions are functions of a public nature”. Sections 7, 8 and 9 spell out the consequences of a breach of this duty by a public authority. They include a free-standing right for a victim to obtain damages in appropriate cases.

The court as a public authority is therefore subject to the general duty under section 6 of the Act to observe Convention rights, except when statute makes that impossible. The court has two specific functions in relation to statute law, first the interpretative obligation imposed by section 3:

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

Secondly, if it is impossible for the court to construe primary legislation so as to be compatible with the Convention, it may (if it is a superior court) make a declaration of incompatibility under section 4. That does not invalidate the statutory provision, but it sends a clear message to Parliament which has always, so far, acted to change the law either by new primary legislation or by subordinate legislation under section 10 of the Act.

If the court awards damages (or some other remedy) against a public authority for a breach of Convention rights, that may be called the vertical effect of the Act – that is, on the vertical relationship between the public authority and the citizen. Horizontal effect is when the court makes a decision under the Act which affects the relationship between one citizen (or company which is not a public authority) and another.

There was initially a good deal of academic discussion as to whether the effect of section 6 was to put the court under a statutory duty to remould the common law in any case where it seemed to produce results incompatible with the Convention. Most commentators were sceptical about this, and the House of Lords seemed to give powerful confirmation to their scepticism in *Wainwright*<sup>34</sup>, a case about irregular strip-searching of visitors to a prison (the incident happened before the Act came into force). However in *A v. B Plc*<sup>35</sup> the Court of Appeal presided over by Lord Woolf CJ took a different line:

“Under section 6 of the 1998 Act, the Court, as a public authority, is required not to act ‘in a way which is incompatible with a Convention right’. The Court is able to achieve this by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those Articles.”

This was a precursor to the *Naomi Campbell* case<sup>36</sup> two years later. In this area at least the Act has directly and obviously influenced the development of the common law.

I have not left myself much time to try to pull the threads together, and in any case it is an impossible task. Even after nine years it is too early, I think, to draw many firm conclusions about the Act. It has certainly had a big impact, changing the landscape of public law in the UK. It is certainly not particularly popular with the general public, and Lord Hoffmann marked his retirement by delivering an important lecture<sup>37</sup>, which was quite sharply critical of the Strasbourg Court:

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<sup>34</sup> *Wainwright v. Home Office* [2004] 2 AC 406, paras 31-35.

<sup>35</sup> [2003] QB 195, para.4.

<sup>36</sup> [2004] 2 AC 457.

<sup>37</sup> The University of Human Rights, Judicial Studies Board Annual Lecture, 19 March 2009.

“Even if the Strasbourg judges were omniscient, knowing the true interests of the people of the United Kingdom better than we do ourselves, it would still be constitutionally inappropriate for decisions of the kind which I have been discussing to be made by a foreign court.”

The Government has recently published a consultation paper<sup>38</sup> proposing a new Charter which emphasises responsibilities as well as rights. The government in waiting (as it may be) has similar plans. That reflects one of the main themes of this talk, that human rights adjudication is not simply a matter of vindicating individual rights, but of balancing the rights of one individual against the rights of others, and against the general public interest.

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<sup>38</sup> Rights and responsibilities: developing our constitutional framework Cm 7577 (March 2009).