Country Report: United Kingdom - Dr Ed Bates, Associate Professor, University of Leicester (epb3@le.ac.uk)

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1) Overview: Has the Court overstretched its competence by its evolutive interpretation so that cases of ‘principled resistance’ may be explained as reactions necessary to preserve national identity?

1.1 In the preparatory materials for the Conference, Professor Breuer refers to cases of (potential) ‘principled resistance’, and frames a ‘research question’ as noted above.

1.2 Approaching that question in the light of the UK experience of recent years, and, at the risk of over-simplification, I would summarise the matter in the following way.

1.3 The short answer to the above question, based on the very limited number of actual examples of ‘principled resistance’, would appear to be ‘no, the Court has not overstretched its competence by its evolutive interpretation’. However, this short answer may give a false impression of matters:

- it may overlook the extent to which there is a mood of threatened ‘principled resistance’ in the UK, principally by political authorities.

- it may overlook the extent to which the UK courts have evolved in their approach to the domestic application of the Convention. As Lord Neuberger (President of the UK Supreme Court) recently put it: ‘… while UK judges may well initially have been too readily prepared to follow decisions of the Strasbourg court, we are now more ready to refuse to follow, or to modify or finesse, their decisions, as we become more confident in forming our own views about Convention rights’. ¹

I will try to expand upon these points under the headings # 1 below. After that, the other specific questions identified by Professor Breuer are addressed: headings 2-end.

The UK as a vocal critic of Strasbourg but loyal implementer of the ECHR

1.4 The UK is a vocal critic of the Court;² however, in fact, there are very few actual examples of what may be termed ‘resistance’ to / ‘principled resistance’ to Strasbourg.

1.5 As to the implementation of human rights judgments, the headline figures are positive, revealing a very good rate of compliance compared to most States,³ despite the well-known example of non-compliance with respect to prisoner voting.

² The UK is identified as a ‘Strong Criticism’ State with respect to the ECHR, in P Popelier, S Lambreacht and K Lemmens (eds.), Criticism of the European Court of Human Rights, (Intersentia 2016).
³ See Ministry of Justice, Responding to Human Rights judgments (Report to the Joint Committee on Human Rights on the Government’s response to Human Rights judgments 2014–16), November 2016. Addressing the years 2013/14/15 the UK Ministry of Justice produced a table of ‘Judgments under supervision of the Committee of Ministers at the end of years 2013–2015 by State Party to the Convention’ (see pp 64-65 of the above Report). This ranked the States according the number of judgments pending before the Committee of Ministers (and according to leading judgments). A low ranking indicates that a State has relatively few pending judgments: Italy, Turkey, Russia, Ukraine and Romania headed the table (as those in the worst position i.e. with most judgments pending). The UK was toward the positive end of the table at 31⁰ (or 16⁰ 'best') with those in more positive positions being nations with much smaller populations.
1.6 Taking the term ‘principled resistance’ to mean an *unwillingness* to implement a ruling *as a matter of principle*, one could argue that there has only been one instance of this in recent times: prisoner voting. Even here, however, the picture is not entirely clear-cut; see below.⁵

1.7 There are many examples of dialogue between the UK courts and Strasbourg. These are best seen as genuine engagement, rather than ‘principled resistance’. In cases when Strasbourg’s standards have not been followed by UK courts this has tended to be because the latter sought to resolve reasonable doubts as to the quality, integrity and certainty of the position adopted by Strasbourg (rather than as a reaction, or pushback of Strasbourg ‘activism’). Examples are identified below;⁶ special attention should be given to the affair concerning prisoners serving life sentences without parole/ reducibility of life sentences.

**Political, extra-judicial and popular criticism of the E CtHR**

1.8 The symptoms of the strained relationship between the UK and Strasbourg have been manifested not so much in actual examples of resistance – prisoner voting being the stand-out example – as in political and popular criticism of the E CtHR in various fields (much of it exaggeration and inaccurate). The actual expression of this has come in politically-inspired calls to reform the mechanisms by which the E CtHR has an influence over UK law.

1.8.1 In the UK in recent years the Convention and Court have become topics of national debate and importance. There are a variety of reasons for this, and, to be clear, much of the debate has been fuelled by, sadly, an anti-Strasbourg, anti-Europe, anti-migrants etc agenda. Within this mix, however, one of the persistent arguments raised is that the Court has overstretched its competence (at least, that is the argument/ perception of the critics). Whether this is valid or not, the narrative fits with the premise of the research question noted above: the need for (principled?) resistance against a Court which has overstretched its competence by its evolutive interpretation, perhaps as a basis to preserve national identity.

1.8.2 Indeed, on this there has been a long-enduring criticism *in some quarters* in the UK, going back to the 1970s, critical of inappropriate Strasbourg judicial activism.⁷ This has intensified in the period after 2009.

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⁴ On the use of the term ‘principled non-execution’, with specific reference to the non-implementation of Strasbourg judgments, see A Donald, ‘Tackling Non-Implementation in the Strasbourg System: The Art of the Possible?’, *EJILTalk!,* 28 April 2017, available at [https://www.ejiltalk.org/author/adonald/](https://www.ejiltalk.org/author/adonald/) (‘the concept of principled non-execution is unhelpful as an explanatory category and, ... it risks dignifying behaviour which is severely and insouciantly corrosive of respect for the Convention system’).

⁵ See below at 1.18-1.21 and 2.7.

⁶ See below at 1.17.

1.8.3 Over 2009-2013, in particular, the narrative of an ‘aggrandised’ Strasbourg jurisdiction, meddling in matters that should be the preserve of the States, and micromanaging matters appropriate for national level decision, has been in evidence. Statements by politicians (often misguided and exaggerated) have promoted this agenda, apparently in the knowledge that it can be politically popular to do so.

1.9 There have been a small number of extra-judicial speeches by members of the senior judiciary, some of which have been amounted to strong and direct criticism of the Court, others of which could be categorised as, at most, a mild reproach of Strasbourg (either generally, or with respect to specific cases).\(^8\) Other speeches have been more supportive of the Convention and Court when seen overall.\(^9\)

1.10 Meanwhile, as is well-known, aspects of the UK press have been very hostile toward the Court and Convention, and here again the line is not infrequently taken that the Court has inflated and aggrandized its jurisdiction.

1.11 Against the above background, a narrative has developed to the effect that the UK’s overall relationship with the ECtHR needs to be reconfigured. In this regard reference may be made to the various positions adopted by the UK Conservative party (in power under a coalition government 2010-2015; in power with a small majority 2015-present; at the time of writing there is an election pending in the UK [8 June 2017]).

1.11.1 In October 2014 the Conservative Party issued a document that was highly critical of the Court for aggrandizing its jurisdiction. It set out a scenario which envisaged potential UK withdrawal from the ECHR.

1.11.2 The Conservative Party manifesto for the May 2015 election, which it won, did not mention withdrawal. It stated that the ‘[t]he next Conservative Government [would] scrap the Human Rights Act, and introduce a British Bill of Rights’ (the ‘Rights and Responsibilities’ label being dropped). Such a Bill would ‘break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK’.\(^10\) The Bill would ‘restore common sense to the application of human rights in the UK’. It would remain ‘faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights’, but it would ‘reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society’.\(^11\)

1.11.3 The Conservative Party manifesto for the June 2017 is much briefer on human rights issues. It states that the UK will remain a signatory to the ECHR ‘for the duration of the next Parliament’. It adds that the Conservatives will not ‘repeal or replace’ of the Human Rights Act ‘while the process of Brexit is underway’, but that ‘we will consider our human rights legal framework when the process of leaving the EU

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8 See below at 1.24 and 2.-2.3.
10 The Conservative Party Manifesto 2015 at 60.
11 ibid at 73. The document went on: ‘[a]mong other things the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation’.
concludes’. It maintains that, ‘British troops will in future [not] be subject to… the [law of] the European Court of Human Rights’.

1.11.4 Many commentators agree that 2017 manifesto does not reflect a new respect for the ECHR as much as certain political realities confronting the next would-be Conservative government.

1.12 Summing up so far with respect to the investigation of principled resistance in the UK context:

1.12.1 There may be only one clear example of actual principled resistance to the implementation and application of defined Strasbourg judgments (prisoner voting; see below).

1.12.2 This is at odds with a very clear, general, persistent and strong narrative of negativity toward certain aspects of Strasbourg law since around 2009-2010, which has generated backing for general ‘push-back’ against Strasbourg on the part of the Conservative Party, supported by the tabloid press. But it is worth adding too that such proposals have been given more credibility and legal respectability by certain speeches delivered by senior members of the UK judiciary expressing concern about expansion in the ECtHR’s power.

The limited capacity of the courts to adopt stances of principled resistance

1.13 Our inquiry should not end with the above, however. The research question asks, have there been cases of ‘principled resistance’ to evolutive interpretation explained as reactions necessary to preserve national identity? When looking at the role of the courts the apparent answer to that is ‘no’; however, here we need to keep in mind the limited capacity that the UK courts have to adopt a stance of principled resistance in the first place.

1.14 In other words, the lack of examples of principled resistance by the UK courts (in specific judgments) is not necessarily conclusive evidence of a judicial view that Strasbourg has not overstretched its competence etc..

1.15 This is not to suggest, either, that there would be many examples of the national courts taking the view that Strasbourg has ‘overstretched its competence by its evolutive interpretation’ such that there has been a need for ‘principled resistance’ as a reaction necessary ‘to preserve national identity’ (to employ Professor Breuer’s terminology). That said, reference may be made to speeches delivered by senior judges (i.e. outside court) that have been hostile and critical of the Court.\footnote{See below at 1.24 and 2.2-2.3.}

1.16 As interpreted by the courts, the Human Rights Act 1998 (HRA) regime (section 2(1), in particular) does not give the individual judge latitude to refuse to apply Strasbourg law on the basis that the ECtHR has ‘overstretched its competence by its evolutive interpretation’ (to requote the research question). Indeed, it is only in relatively extreme circumstances (under the current HRA regime, as understood by the UK courts) that a UK
court would be entitled to explicitly reject a position authoritatively reached by the ECtHR.¹³

1.17 Regarding the national courts, then, the various positions they have adopted need to be looked at carefully, and with an eye to the subtlety of their stances:

‘Principled resistance’ by the courts?

1.17.1 To repeat, I am not aware of any case in which, based on the premise of the research question above (‘principled resistance’ explained as a reaction to inappropriate evolutive interpretation, and as necessary to preserve national identity), a UK court has explicitly refused to follow or apply an ECHR standard that has been clearly, conclusively and authoritatively reached by Strasbourg.

Following Strasbourg when no room for dialogue:

1.17.2 As an illustration of domestic judicial loyalty to Strasbourg we note that there have been at least two judgments at the most senior level where individual judges expressed their disagreement with the ECtHR, yet followed it nonetheless (this includes the controversial issue of prisoner voting).¹⁴

1.17.3 They have done so on the basis that there was no room for dialogue on the matter as the issue had been authoritatively resolved by a Strasbourg Grand Chamber already (and as the matter did not put in issue a ‘fundamental or substantive aspect of UK law’).

Dialogue, not resistance?

1.17.4 There have been several examples of reluctance – rather than ‘resistance’ – to follow Strasbourg, based on the premise that the ECtHR may not have understood an aspect of UK law, or misunderstood a point, or, in one recent case, not taken the UK position seriously enough when resolving a UK case (at chamber level).¹⁵

1.17.4.1 That recent judgment was UK Supreme Court ruling in Poshteh (Appellant) v Royal Borough of Kensington and Chelsea (Respondent).¹⁶ It illustrates the growing confidence to enter not just submissively accept Strasbourg’s position, but demand that it listens and takes into account relevant UK arguments as a condition to the UK courts respecting Strasbourg’s position. This case demonstrates a real evolution in the courts’ approach compared to the early days of the HRA (in the early 2000s).

1.17.5 Putting aside the Poshteh case (the issue in which may yet go to the Strasbourg, Grand Chamber), in each instance of judicial ‘dialogue’ thus far Strasbourg has responded positively to the national judge’s perspective. As result the national courts

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¹³ See below at 5.3-5.16 and Appendix pp 28-29. Indeed, the perception (held by politicians and the press) that the UK courts are too often and inappropriately bound by the Strasbourg Court – which may be something of a false and dated narrative –, has been a catalyst for calls for reform or repeal of the Human Rights Act in order to give the UK courts greater scope to disagree with Strasbourg, and restore ‘supremacy’ to the UK Supreme Court.

¹⁴ See below at 2.2.

¹⁵ See below at 5.8-5.16.

have yet to be confronted with a situation in which, having expressed disagreement with Strasbourg, the latter has insisted on its position, so subsequently requiring the national courts to make a choice on which interpretation (its own, preferred one or Strasbourg’s) to adopt. In this sense the potential for ‘principled resistance’ based on straight-forward disagreement has been defused.

1.17.6 Accordingly, as far as I am aware, the examples of dialogue so far can be characterised as good faith, genuine dialogue, and not, in fact, dialogue masquerading as ‘principled resistance’. The one possible exception is the ‘Vinter- McLoughlin-Hutchinson cases’, which is now considered.

The 'Vinter- McLoughlin-Hutchinson cases' (prisoners serving life sentences without parole/ reducibility of life sentences):

1.17.6(i) Against the above backdrop, the position in relation to the compatibility of UK law of prisoners serving life sentences without parole and Article 3 ECHR needs careful analysis. It is important to distinguish, on the one hand, willingness to follow the Strasbourg Court’s interpretation of the ECHR (obedience to Strasbourg standards/ acceptance of the European boundaries it imposes) from, on the other hand, the question of whether UK law can be made compatible with it.

1.17.7 Importantly the national judicial reaction (in the form of the Court of Appeal judgment in McLoughlin) to Vinter v UK (Grand Chamber) does not reflect the UK courts’ refusal to accept Strasbourg’s interpretation of a Convention Article and the European boundaries that this imposes on the UK, i.e. the standards the ECHR provides. That is, in McLoughlin the Court of Appeal accepted that (post-Vinter) Article 3 requires life prisoners who have served a fixed tariff to benefit from a possibility to seek a review of their situation allowing, if deemed appropriate, conditional release, with such decisions being subject to judicial review. In this sense the Court of Appeal has not opposed or rejected the standard of law Strasbourg has expounded (whether based on inappropriate evolutive interpretation or other reasons). The European boundaries Strasbourg imposed are accepted as a matter of principle.

1.17.8 Rather, McLoughlin saw the Court of Appeal disagree with Strasbourg on the issue of whether existing UK law (including how it may be re-read under the Human Rights Act 1998 (HRA)) adequately offered a level of protection that Article 3, as interpreted by Strasbourg (Vinter), required. Could UK law be modified to make it fit within the boundaries Strasbourg delineated in Vinter? No, according to Strasbourg in Vinter, which found a violation of Article 3; yes, according to the Court of Appeal in McLoughlin, reacting to Vinter; and ‘okay, then, if you say so’, according to the Strasbourg Grand Chamber in Hutchinson.

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18 Vinter and Others v The United Kingdom: 9 Jul 2013 ECHR GC.
1.17.8.1 After the initial ruling in Vinter v UK (which advanced standards under Article 3 and found UK law incompatible with the same),\textsuperscript{19} in the subsequent case of McLoughlin the UK Court of Appeal (the second most senior court) revisited UK law. It insisted that UK law could be reinterpreted to make it complaint with Article 3 as Strasbourg had developed it in Vinter (which would require a creative interpretation facilitated by the HRA).\textsuperscript{20}

1.17.8.2 When the issue was reconsidered at both Chamber and then Grand Chamber levels (Hutchinson)\textsuperscript{21} Strasbourg deferred to the Court of Appeal’s position as regards whether UK law could be re-read to make it compatible with the ECHR. No violation of Article 3 was found (14 to 3).\textsuperscript{22} The Court stated (by way of conclusion):

70. The Court considers that the McLoughlin decision has dispelled the lack of clarity identified in Vinter arising out of the discrepancy within the domestic system between the applicable law and the published official policy. In addition, the Court of Appeal has brought clarification as regards the scope and grounds of the review by the Secretary of State, the manner in which it should be conducted, as well as the duty of the Secretary of State to release a whole life prisoner where continued detention can no longer be justified on legitimate penological grounds. In this way, the domestic system, based on statute (the 1997 Act and the Human Rights Act), case-law (of the domestic courts and this Court) and published official policy (the Lifer Manual) no longer displays the contrast that the Court identified in Vinter cited above, § 130). Further specification of the circumstances in which a whole life prisoner may seek release, with reference to the legitimate penological grounds for detention, may come

\textsuperscript{19} For convenience I will quote from the Action Report presented by the United Kingdom to the Committee of Ministers regarding the implementation of Vinter v UK (doc: DH-DD(2017)381; 31/03/2017). Referring to Vinter, the Grand Chamber: ‘held that an irreducible life sentence violates Article 3 of the Convention, and that the violation arises at the time the sentence is imposed. It went on to consider whether a whole life order imposed in England and Wales was an irreducible life sentence, or was reducible by reason of the Secretary of State’s power of release under section 30 of the Crime (Sentences) Act 1997 (CSA 1997). The ECtHR held that there was a lack of clarity in the domestic law as to the compatibility of whole life orders with Article 3 of the Convention’.

\textsuperscript{20} Referring again (for convenience) to the Vinter UK Action Report, after Vinter: ‘the Court of Appeal … delivered its own judgment in three appeals against the imposition of a life sentence with a whole life order (Bridger, Thomas and Newell), and a reference by the Attorney General of a life sentence with a determinate tariff of 40 years (McLoughlin) sentence. In each of these cases the sole or central legal issue was the nature of the sentencing scheme for whole life orders and the compatibility of such an order with Article 3 of the Convention.

The Court of Appeal confirmed that the Secretary of State has a duty to exercise his or her powers under section 30 of the CSA 1997 compatibly with Article 3 and that there was no lack of clarity as to the applicable domestic law. The Court of Appeal judgment set out the operation of domestic law and held that at the point of sentence domestic law does indeed provide a prisoner with hope or the possibility of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable’.

\textsuperscript{21} Hutchinson v UK 17 January 2017 GC.

\textsuperscript{22} Referring again (for convenience) to the Vinter UK Action Report: ‘In the Hutchinson v UK judgment handed down by a Chamber of the Fourth Section of the ECtHR on 3 February 2015, the ECtHR agreed with the reasoning of the Court of Appeal that whole life orders were open to review under the UK domestic law and were therefore compatible with Article 3 of the Convention. The ECtHR found that the power to release under section 30 of CSA 1997, exercised in a manner delineated by the Court of Appeal, is sufficient to comply with the requirements of Article 3 of the Convention. Further to this, on 17 January 2017, the Grand Chamber of the ECtHR delivered its judgment in the case of Hutchinson v UK in which it agreed that whole life orders are reducible and therefore compatible with Article 3 of the Convention. The Grand Chamber found that the Court of Appeal’s judgment dispelled the lack of clarity identified in Vinter v UK and made clear the scope and grounds of the Secretary of State’s power under section 30 of the CSA 1997 and the manner in which it should be conducted, as well as the duty on the Secretary of State to release a whole life order prisoner where continued detention can no longer be justified on legitimate penological grounds’. 

through domestic practice. The statutory obligation on national courts to take into account the Article 3 case-law as it may develop in future provides an additional important safeguard.

71. As the Court has often stated, the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities (see for example O.H. v. Germany, no. 4646/08, § 118, 24 November 2011). It considers that the Court of Appeal drew the necessary conclusions from the Vinter judgment and, by clarifying domestic law, addressed the cause of the Convention violation (see also Kronfeldner v. Germany, no. 21906/09, § 59, 19 January 2012).

72. The Court concludes that the whole life sentence can now be regarded as reducible, in keeping with Article 3 of the Convention. …

1.17.9 Seen this way, then, this is not a case of ‘principled resistance’ by the UK courts.

1.17.10 Or is it? The matter may be seen another way. A striking feature of this affair is that, on its face, current UK law seems hard to reconcile with Strasbourg’s interpretation of Article 3: it requires a rather creative interpretation by the courts (if not invalidation) to achieve this. In reaction to Vinter, the executive could have initiating certain changes to domestic law (contained in secondary legislation) to bring far more clarity to the situation. However, it did not do so. It sat back and has been (and remains) content to leave the relevant law in a state which requires a legal challenge to it for it to be made compatible with Article 3.

1.17.11 These and other points were emphasised in some of the Separate Opinions attached to the Hutchinson judgment. Judge Pinto de Albuquerque was highly critical of the UK national authorities, and the Strasbourg Court’s approach.\(^{23}\) He expressed broader concerns about what this signalled regarding the relations between the national authorities and Strasbourg, concerned that the judgment would have ‘seismic consequences… for Europe’.\(^ {24}\) The fear was that ‘[d]omestic authorities in all member States will be tempted to pick and choose their own “rare occasions” when they are not pleased with a certain judgment or decision of the Court in order to evade their international obligation to implement it’.\(^ {25}\)

\(^{23}\) See the Separate Opinion of Judge Pinto de Albuquerque in Hutchinson:

‘[12]... it is implicit in the Court of Appeal's formulaic reasoning that it would be unlawful for the Secretary of State to follow his own published policy, which the Court of Appeal also regarded as “highly restrictive”...’

‘[33]. ... The present lack of clarity and certainty in the domestic legal framework is saved by the Court’s generous assumption that the Secretary of State will follow a certain policy while exercising section 30 powers, different from that which he has deliberately maintained in force since Vinter and Others.

[34]. It is odd that the majority pretend that a future clarification of the law is capable of remedying its present lack of clarity and certainty and thus the violation that exists today, but it is even odder to assume that this clarification will result from the adhesion of the Secretary of State to the Court’s desired policy...’.

\(^{24}\) Ibid, [35]-[40]. In [35] reference is made to ‘an existential crisis’ faced by the Court given national resistance to its judgments in the UK, and in respect of which it is suggested that the Court has adopted a submissive approach. See also [38]: the ‘majority’s decision [in Hutchinson] represents a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards...', (footnotes omitted).

\(^{25}\) [36].
1.17.12 The critique offered by Judge Pinto de Albuquerque here might fit with the argument that, under the guise of a dialogue with Strasbourg, some national authorities act strategically – principled resistance? - in their unwillingness or inability to apply a Strasbourg judgment.

1.17.13 Personally, and with great respect to Judge Pinto de Albuquerque, I think this puts the matter too strongly as regards the UK with respect to this affair. Then again, the matter is not free from controversy.

1.17.14 On the one hand, the response of UK national authorities may be said to comply with the Strasbourg judgment in a very technical way. So it may be an exaggeration to say that what has occurred amounts to an evasion of international obligations, or a form ‘principled resistance’. To reiterate, the UK courts did not contest the existence of the Convention obligation on reducibility of life sentences. Presumably the current regime will now be subject to further legal challenge domestically: consistent with the Court of Appeal’s ruling, this should lead to a re-reading of the domestic regime. Depending on how that proceeds perhaps this will even be challenged at Strasbourg in a third round of litigation?

1.17.15 Thus, and on the other hand, one may question whether what occurred at the domestic level demonstrated compliance with the spirit of the Convention and the relevant Strasbourg judgments. A convoluted route is required to secure Convention rights in the national context. It would have been far better, to bring clarity to the situation and demonstrate true compliance, for domestic law to have been amended by the executive/Parliament and made unambiguous. Perhaps, then, there is a shadow of principled resistance in evidence here?

1.17.16 Before concluding, however, one further point may be added. The matter has been highly contentious in the sense that, for some politicians and the tabloid press, what was in issue (in part mistakenly) was the UK’s ability to retain mandatory life sentences for the worst offenders. Here it is worth keeping in mind that the resolution of the case as noted above has led to a situation which should result in an eventual change to UK law, via judicial interpretation of existing law (and so far with little controversy or fuss). Had that law been found to be directly incompatible with the ECHR, on a basis that it would need amending by executive action or legislative reform, resolution of the matter would have been left with the executive/Parliament. Here it may be speculated that there would have been political (anti-Strasbourg, principled) resistance to the change. Did such considerations silently influence the rather deferential approach of the Grand Chamber in Hutchinson? Was the outcome arrived at a strategically wise one, avoiding the risk (quite high, I would suggest) of direct ‘principled resistance’ by the executive and/ or Parliament? We are reminded of the prisoner voting saga, to which we now turn.

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26 The Action Report presented by the United Kingdom to the Committee of Ministers regarding the implementation of Vinter v UK (doc: DH-DD(2017)381; 31/03/2017) states: ‘Given the clear position that has been set out by the Court of Appeal about the operation of domestic law and now by the Grand Chamber of the ECtHR in Hutchinson, clarifying that such an approach does not violate the Convention, the Government considers that no further general measures are necessary in the present case [i.e. Vinter].’
Parliament and the ECtHR – ‘principled resistance’ to prisoner voting

1.18 The previous section mainly examined the role of the courts under the HRA. The situation is different regarding Parliament. Political resistance to the implementation of the *Hirst* judgment\(^{27}\) (on prisoner voting) seems to accord with the proposition associated with the research question noted above. The blanket (statutory) ban on convicted prisoners voting has not been amended; however, the precise reasons why are not easy to state definitively.

1.18.1 When appearing before the Committee of Ministers’ (in the context of execution of the relevant judgments) the UK government’s position (somewhat disingenuously, I suggest) is essentially that it is *unable* (not unwilling) to execute *Hirst*, as the UK Parliament (in fact, the (lower) House of Commons) is not willing to change the law.

1.18.2 However, this seems to hide a more fundamental disagreement, both on prisoner voting, and as regards the role of the Court more generally, which may be equated with ‘principled resistance’ on the part of politicians.

1.18.3 This is said for, in part at least, the resistance to the implementation of the judgment by British MPs has been based on the claim that the law in the field reflects a matter of social policy that is properly (it is said) within the province of the legislature to resolve, not Strasbourg.\(^{28}\)

1.19 Arguably the prisoner voting issue is seen by certain MPs as a totemic matter: that (as certain MPs see it) considered overall, the ECtHR has aggrandised its jurisdiction; that, therefore, principled resistance of some sort is justifiable; that the ECtHR needs to be ‘reined in’; and that the relationship between UK human rights law and Strasbourg needs to be rebalanced. Here there seems to be a deliberate stance of political resistance toward Strasbourg, in order to demonstrate: (i) the sovereignty of the UK Parliament in respect of a matter that certain politicians regard themselves as legitimately having ‘the last word’ on; and (ii) objection to Strasbourg having that last word on the prisoner voting matter (whatever the strength of the arguments on it!), on the basis that it has aggrandized its jurisdiction in the original, *Hirst* judgment.

1.20 At this point one sees a connection with the broader political agenda points noted above, i.e. regarding the Conservative Party’s proposals concerning the HRA and the ECHR generally (see 1.11 above).

1.21 To this extent the prisoner voting affair may be seen from the perspective of resistance and ‘national identity’ broadly understood, and linked to the broader claim that the UK’s relationship with Strasbourg needs to be reconfigured (or so the critics say),

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\(^{28}\) The text of the motion debated in the House of Commons (11 February 2011), and carried by 234 votes to 22 (twenty two) was as follows:

‘That this House notes the ruling of the European Court of Human Rights in *Hirst* v the United Kingdom in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand’.
with the latter pushed back and required to respect a greater margin of appreciation for the States. In this connection, Protocol 15 to the Convention, and the reform process of recent years (in particular the Brighton Declaration) may be mentioned.

Threatened ‘principled resistance’ in the form of calls for pushback of Strasbourg law on the basis that it is perceived as having become ‘too big’?

1.22 I therefore return to the notion of potential ‘principled resistance’ expressed via threatened overall pushback of aspects of Strasbourg law (not all aspects of course).

1.23 In this connection, recall the various positions adopted by the Conservative Party as noted above.

1.24 It is worth adding that this is a field that is not just confined to the Conservative party. Resistance to the implementation of prisoner voting was not confined to Conservative politicians. Consider here the comments made by Sir John Laws (former Lord Justice of Appeal). A sense in which ‘national identity’ (to use Professor Breuer’s phrase) may in issue may be apparent from the following paragraph of a lecture delivered by Laws LJ in 2013.

[35]. .... By our constitution, there is an important difference between the protection of fundamental values and the formulation of State policy: broadly the former is the business of the courts and the latter the business of elected government. The greatest challenge of our human rights law is that it appears to merge these two ideas. Not least in the litigation of claims for the protection of private or family life under ECHR Article 8 we encounter muscular disputes as to whether the government measure in question, perhaps a deportation decision, is properly within the sphere of policy or is an unwarranted intrusion upon the individual’s rights. In such a case, the debate is not only about the weight to be accorded to the Convention right on the merits. It is about the respective roles of government and judiciary. In this jurisdiction, despite the brickbats daily thrown at politicians, there remains a deep sense that matters of State policy are in essence the responsibility of the elected arms of government. But in other States, no less democratic than our own, a different view may be taken of the respective roles of the judicial and the elected arms of State power. Constitutional conditions – including the actual and perceived authority of legislature, executive and judiciary – differ from State to State, and cultural and historic factors may feed the differences.

1.35 The sense in which evolutive interpretation, or what others would see as more general aggrandisement of the Court’s jurisdiction, may be in issue, may be evident from this passage of Laws LJ’s lecture:

[36]. The historic role of the law of human rights is the protection of what are properly regarded as fundamental values. It is not to make marginal choices about issues upon which reasonable, humane and informed people may readily disagree. I acknowledge that the boundary between proper policy and the vindication of rights is difficult. What is a policy issue to one man’s mind is a human rights issue to another. Certainly there will come a point – and it is a very important point – where the law of human rights must be allowed to say, Thus

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far but no further. Fundamental values possess at the very least an irreducible minimum. Torture, the suppression of free speech, or disregard of due process are not matters of legitimate disagreement, but of shame. However in a debate on Convention issues where there may be more than one civilised view, the balance to be struck between policy and rights, between the judiciary and government, is surely a matter for national constitutions. This is why with very great respect I would venture to question Lord Bingham’s statement in Ullah that “the correct interpretation of [the Convention] can be authoritatively expounded only by the Strasbourg court... the meaning of the Convention should be uniform throughout the states party to it”. There may perfectly properly be different answers to some human rights issues in different States on similar facts. I think the Strasbourg court should recognise this. The means of doing so is readily at hand: the doctrine of the margin of appreciation. As Lord Reed said in his lecture at the Inner Temple, “in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation”.

1.36 I am left wondering whether this reflects a rather ‘British’ perspective on ‘human rights’. The above comments also bring to mind those made by Lord Neuberger (see below) when he suggests that, because of the UK’s particular constitutional background, ‘the effect of the Convention seems far more revolutionary in the UK than in other European countries’. The purported ‘alienating effect’ of the HRA could be relevant here too.

Other examples of ‘principled resistance’ expressed via potential pushback of Strasbourg

1.37 The comments above have mainly referred to prisoner voting and the legal regime relevant to life sentence prisoners. There are other areas in respect of which there is the potential for a form of resistance from UK national authorities (principally the executive/Parliament). Briefly the relevant fields include:

1.37.1 immigration law, to facilitate the deportation non-nationals who have committed serious criminal offences (potential conflict with Article 8);

1.37.2 deportation law/anti-terrorism laws; in particular, Article 3 and the ability to deport non-nationals who are said to represent a threat to the UK’s national security.

1.37.3 The extra-territorial application of the Convention (Article 1). In 2016 the government suggested that it may derogate form the Convention for future overseas armed conflicts. See also the Conservative Party’s 2017 manifesto at 1.11.3 above. (There has also been criticism of this feature of Strasbourg law by certain judges speaking extra-judicially, albeit no resistance to its actual application in domestic law).

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30 See below, Appendix at pp 26-27.
31 See below, Appendix at p 27.
2) Did a court [or other national actor] argue that the ECtHR went too far in interpreting the Convention?

2.1 I will interpret this question as asking whether a court/ national authority regarded the ECtHR’s interpretation of the ECHR (its scope and the standards it sets) as exceeding appropriate boundaries.

Regarding the Courts

2.2 I am not aware of any judgments when the outcome of a case rested on the proposition that the ECtHR had gone too far, and so should not be followed. That said, as noted above, this point needs to be seen in the context of the loyal approach that the UK courts adopt to the Strasbourg Court under the HRA.

2.2 At least two examples can be located when, within judgments, individual judges have expressed the view that Strasbourg’s position is suspect or wrong (and so, one may assume, ought not be followed) yet was followed nonetheless:

2.2.1 See Lord Hoffmann’s and Lord Rodger’s individual judgments in AF (strong direct and implied criticism of Strasbourg). In this case the ECtHR’s position on due process/ fair trial rights in the context of anti-terrorism measures was followed, as the relevant case (a Grand Chamber ruling (A v UK)) delivered a few months previously to consideration of AF was regarded as the definitive ruling on the precise legal point in issue, such that there was no alternative to applying it.

2.2.2 See Lord Sumption’s individual judgment in Chester. The ECtHR’s position that a blanket ban on convicted prisoners voting was incompatible with Article 3 Protocol 1 was followed in this case, even though the UK government pleaded that it should not. Even so there was strong criticism from Lord Sumption that, on close analysis, Strasbourg’s position as it applied to UK law was dubious, if not incoherent, and failed to afford an appropriate margin of appreciation to the UK. Despite this, Lord Sumption accepted that Strasbourg’s position should be followed as it was clear that no further scope for dialogue existed with it on the matter (Strasbourg had ruled on the prisoner voting issue in two Grand Chamber judgments), and the retention of a blanket ban on convicted prisoners voting could not be regarded as a ‘fundamental substantive or procedural aspect’ of UK law (as required by Pinnock criteria (iii)/ the ‘constitutional redline’ UK law envisages). It should be noted, however, that the result of the UK Supreme Court’s ruling was that a previously issued declaration of incompatibility (under S 4 HRA) remained in place: there was no duty under domestic law to amend the offending legislation, such that the issue remained for politicians to resolve.

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32 Secretary of State for the Home Department (Respondent) v AF (Appellant) [2009] UKHL 28, at [70].
33 Ibid [98].
34 A v UK (2009) 49 EHRR 29 (GC).
35 R (on the application of Chester) v Secretary of State for Justice [2013] UKSC 63.
36 See below at 5.4.2.
Judges speaking in individual, ‘non-judicial’ capacity

2.3 There have been several examples of judges speaking extra-judicially (i.e. outside court, and in an individual capacity) suggesting that in certain respects the ECtHR had gone too far in interpreting the Convention.

The critique ranges in strength. Examples of strong criticism include:

- Lord Hoffmann, “The Universality of Human Rights”, 19 March 200937
- Lord Sumption, “The Limits of Law”, 20 November 201338
- Lord Justice Laws, “The Common Law and Europe” (Hamlyn Lecture III), 27 November 201339
- Lord Judge, “Constitutional Change: Unfinished Business”, 4 December 201340

2.4 Much more commonly the criticism is measured, amounting to expressions of concern/polite warnings in relation to individual judgments (notably prisoner voting and the extra-territorial effect of the ECHR), usually tempered by clear overall support for the Convention and its achievements. Even so there has been a consistent (mild) reproaching of Strasbourg for, in certain cases, being too ready to ignore subsidiarity, and override a reasonable national view by narrowing the MoA.41

2.5 On this matter more generally, including the supportive comments that have been made in respect of the Strasbourg Court, see E. Bates, ‘The Senior Judiciary on ‘Strasbourg’ – More Supportive Than Some Would Have You Believe’ UK Const. L. Blog (28th May 2015) (available at http://ukconstitutionallaw.org).

Political actors and the House of Commons

2.6 There are plenty of examples of senior government (Conservative) ministers directly criticising European human rights law. Such incautious and sometimes emotive remarks have tended to amount to swipes at the Court, implying it is irrational. It would be hard to see these as ‘principled’ in the sense of expressing a reasoned and coherent engagement in disagreement with the rationale adopted by the Court in specific cases. For this reason, I will not develop this further, except to say that the criticism may feed into an overall narrative of Strasbourg law having become ‘too big’ and so needing to be brought under control.

2.7 In terms of the role of the House of Commons, criticism of the Strasbourg Court has been most apparent in relation to the prisoner voting issue.

40 http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/constitutionunit/research/judicial-independence/lordjudgelecture041213/.
41 Regarding criticism of the margin of appreciation see: Mary Arden L J, in: Dialogue between judges, Council of Europe, 2010, 22-29 at p. 27; Brenda Hale (Baroness Hale), in: Dialogue between judges, Council of Europe, 2011, 11-18 at pp. 17-18 (could not ‘pretend that we have not sometimes been deeply troubled by an apparent narrowing of the margin’); and Lord Phillips “European Human Rights -- A Force for Good or a Threat to Democracy?”, Kings College London (17 June 2014) at p. 7 ('Insufficient margin of appreciation'; hoping Court will 'pay regard' to Protocol 15), also p. 13.
In particular, the Backbench Business debate on prisoner voting of February 2011 saw strong (but unsophisticated) criticism of the Court for its employment of the ‘living instrument’ doctrine and for generally aggrandising its jurisdiction.

There followed a debate in the House of Lords (i.e. the second chamber of Parliament) in May 2011 when the ECHR was defended and generally praised.

Regarding the prisoner voting matter generally, a Joint Committee of Parliament was established to consider the options for reform. It reported in December 2013. A majority of the Committee supported reform of domestic law on this matter, and compliance with the Strasbourg judgment. In other words, the conclusion was that Strasburg had not gone ‘too far’.

Since that Report was published, three and a half years ago, it has not been debated or considered by either House in Parliament. Nor has the UK government provided a proper response to the Report (as has been promised). It has made no effort at all to make or promote the case for reform to the House of Commons.

Only a relatively minor amendment to UK law would be required to secure compliance with Strasbourg’s ruling. The latest Action Report presented by the UK government to the Committee of Ministers (regarding implementation of Hirst) is a somewhat opaque, if not confusing document, that appears to contradict the apparent lack of action undertaken by the UK government in respect of this matter so far.

42 In March 2017 a government Minister provided the following explanation for the situation (Baroness Buscombe: House of Lords Debates (Hansard, 16 March 2017: Volume 779): ‘there is no realistic prospect of bringing forward legislation to amend the Representation of the People Act 1983 or of Parliament lifting the current ban on prisoner voting in the current Parliament. The Government continue to engage in dialogue with Strasbourg on this issue’. She added: ‘A number of countries have argued that we should implement the judgment to ensure that the authority of the court and the power of the convention are upheld. However, we also know that a number of other countries—members of the Council of Europe—sympathise with our position. They recognise that, on the one hand, we want to respect the judgment of the European Court of Human Rights, as we do in other cases, but, on the other, this parliamentary sovereignty is the essence of our democracy. We have no reason to suppose that our Parliament thinks any differently from when this whole issue was last debated in another place [the House of Commons, February 2011], whereby a Back-Bench Motion to enfranchise prisoners was resoundingly defeated by a margin of 234 to 22 on a free vote’.

43 Arguably the enfranchisement of prisoners in the last six months of their sentence would suffice. Voting for prisoners on remand (i.e. not yet convicted) is already permitted.

44 1273 meeting (6-8 December 2016) (DH) - Communication from the authorities in the Hirst No. 2 and others group of cases against the United Kingdom (Application No. 74025/01). (Amongst other things, this states ‘[11] We have been examining any and all options that could potentially help to address this judgment. The process will now move to a phase of filtering these options, developing further options, and weighing up which might be more suitable and achievable. We would present these at a future human rights meeting of the Ministers’ deputies’ – '[12] Premature disclosure of options which may not be deliverable or meet the expectations of the Committee of Ministers would harm the ability of the United Kingdom to implement the required general measures’).
3) Did a court argue that the ECtHR misinterpreted the applicable national law and that a given judgment should not be followed for that reason?

3.1 The stand-out example here is that concerning the ‘Vinter- McLoughlin-Hutchinson cases’ (prisoners serving life sentences without parole/ reducibility of life sentences), as discussed above. 

3.2 More examples exist of when UK courts have been reluctant to apply Strasbourg law in the UK context as it was considered that that law was not sufficiently authoritative to merit application in a binding way. See 5 below.

3.3 With respect to the prisoner voting issue, one argument presented by political opponents is that Strasbourg was wrong to identify UK law as amounting to a blanket ban on prisoner voting. Under current arrangements prisoners on remand, imprisoned for contempt of court and detained for default in complying with his/her sentence remain enfranchised.

4) Does the categorisation of your country as monist or dualist have relevance for cases non-implementation?

4.1 The UK is a dualist nation. Its unwritten constitution is dominated by the doctrine of Parliamentary sovereignty. Legislation found to be incompatible with ‘Convention rights’, and which cannot be read down under s 3 of the Human Rights Act (HRA) is likely to be subject to a declaration of incompatibility (s 4 HRA). Such a declaration is not binding on the parties to the case; the offending law remains in effect. It is up to Parliament/ the executive to amend the offending legislation, but under domestic law there is no duty to do so.

4.2 Between 2 October 2000 (when the Human Rights Act came into force) and 2015 there were approximately 29 declarations of incompatibility, of which 20 became final (they may be subject to appeal). The rate of declarations has declined over time: over 2010-2015 just three declarations of incompatibility were made.

4.3 With one exception, all declarations of incompatibility have resulted in amendment to the relevant law (or the legal change was in process/ envisaged). The only exception is the declaration made in connection with the domestic litigation that has occurred on prisoner voting, this following the relevant Strasbourg ruling on the matter.

5) Is there a difference, from the perspective of your national courts, between settled ECtHR case law and isolated judgments in terms of their binding force?

5.1 Yes.

5.2 The overall position adopted by the UK courts under the HRA is explained fully in the Appendix. In essence, there is a rebuttable presumption that the UK courts will follow clear and consistent Strasbourg jurisprudence (this could be derived from a series of chamber judgments, although most weight is placed on authoritative Grand Chamber rulings).

45 See below at 1.17.6.
5.3 How does that rebuttable presumption operate? Under what may be referred to as the ‘Pinnock criteria’, the UK courts look carefully at relevant ECtHR’s law, expecting to follow it when:

(i) there is ‘a clear and constant line of decisions’;

(ii) ‘whose reasoning does not appear [from the UK perspective] to overlook or misunderstand some argument or point of principle’, and

(iii) ‘whose effect’ is ‘not inconsistent with some fundamental substantive or procedural aspect of our law’ (emphasis added).

5.4 Two comments may be made.

5.4.1 Firstly, ‘Pinnock criteria’ foresee criterion (i) and (ii) as, potentially, offering a basis for ‘dialogue’ with Strasbourg. The criterion were set out most clearly after 2009-2010. Since then, when necessary, in specific cases, an increasingly confident UK Supreme Court has subjected the Strasbourg jurisprudence to (intense) judicial scrutiny, and, potentially, set out its respectful disagreement with Strasbourg as part of a robust engagement with it on the relevant issues.

5.4.2 Secondly, if no dialogue is not possible ‘Pinnock criteria’ (iii) amounts to a constitutional redline when the Supreme Court ultimately reserves the right not to follow even a clear and consistent Strasbourg Grand Chamber judgment, fully appreciating UK legal arguments. This constitutional redline has never been invoked (to date). Note, however, that the threshold for that line is set at a high level. So, for example, despite the controversy associated with prisoner voting, the UK Supreme Court followed Strasbourg rulings on the matter (there being no scope left for dialogue) as retention of a blanket ban on convicted prisoners voting was not regarded as a ‘fundamental substantive or procedural aspect of [UK] law’.

Pinnock criteria (i): Strasbourg case law is not sufficiently ‘clear and consistent’

5.5 With reference to the specific research question above (question 5), criterion (i) above entails that, if the Strasbourg case law is not ‘clear and consistent’ then there is no duty to follow it. There are a number of examples when this has happened.

5.6 Article 5/ Hicks - See, for example, R (on the application of Hicks and others) (Appellants) v Commissioner of Police for the Metropolis (Respondent): para 32-40, concerning the refusal of the UK Supreme Court to follow the Strasbourg ruling in Ostendorf

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46 See below. Appendix at pp 28-29.
v Germany49 (which aspect of Article 5(1) would apply to preventive detention under Article 5(1)).50

5.7 Article 6 - Horncastle - In the Horncastle case51 the UK Supreme Court expressed its reluctance to follow Strasbourg’s position in Al-Khawaja v UK (chamber judgment), which concerned the fairness of trials (Article 6(1)) for convictions based solely or decisively on evidence which was not subject to cross-examination (hearsay evidence). In part the Supreme Court’s position rested on the importance of the issue at stake and a lack of confidence that Strasbourg’s position, articulated in a chamber ruling, was authoritative enough to be relied upon in relation to an important aspect of UK law. Part of the argument presented by the Supreme Court was that the apparently bright-line rule failed to take into account aspects of the common law system, and the safeguards it afforded for a safe trial. It was hoped that the Grand Chamber would clarify the law and recognise that UK domestic legislation was compatible with Article 6. As Lord Phillips (then President of the UK Supreme Court) put it:

[11] ‘... The requirement to “take into account” [under section 2(1) HRA] the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, 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’.

As is well-known, in the ensuing Grand Chamber judgment in Al-Khawaja v UK,52 Strasbourg modified its position.

Pinnock Criteria (ii): from the UK court’s perspective Strasbourg ‘reasoning’ appears to ‘overlook or misunderstand some argument or point of principle’

5.8 A recent example of the UK Supreme Court refusing to follow Strasbourg, based on the reasoning of the latter, is Poshteh (Appellant) v Royal Borough of Kensington and Chelsea (Respondent).53 The case is striking because of the focus on a precise issue of UK law as heard initially in the UK, then in Strasbourg and again in the UK.

5.9 In issue in Poshteh was the scope of Article 6(1), regarding whether the duties imposed on housing authorities (regarding social housing allocation/ Part VII of the Housing Act 1996) under domestic legislation amounted to the determination of a civil right and obligation (such that disputes in this field would require access to scheme that guaranteed a right to a fair hearing before an independent and impartial tribunal).

49 (2013) 34 BHRC 738.
50 Ibid [32]: ‘There is, however, a difficult question of law as to how such preventive power can be accommodated within article 5. The Strasbourg case law on the point is not clear and settled, as is evident from the division of opinions within the Fifth Section in Ostendorf. Moreover, while this court must take into account the Strasbourg case law, in the final analysis it has a judicial choice to make’.
52 Al-Khawaja v UK (2012) 54 EHRR 23 (GC).
5.10 On that issue, after a number of UK cases on and related to this point, in 2010 a unanimous UK Supreme Court adopted what was viewed at the time as the determinative and authoritative ruling of the matter. Under the HRA it was concluded that Article 6(1) did not apply to Part VII of the Housing Act 1996 (Ali v Birmingham City Council [2010] 2 AC 39).

5.11 Mr Ali took his case to Strasbourg: it decided the precise same question of domestic law under the Convention. Contrary to the UK Supreme Court, the chamber judgment (Ali v UK)\(^{54}\) concluded that Article 6(1) was engaged\(^{55}\) in relation to Part VII of the Housing Act 1996 (albeit there was no violation on the facts).\(^{56}\) The UK government did not seek a rehearing before the Grand Chamber.

5.12 In May 2017, when the same issue of UK law reached the UK Supreme Court again, it refused to follow the Strasbourg, chamber judgment regarding the applicability of Article 6(1): its unanimous conclusion, flatly contrary to Strasbourg, was that Article 6(1) was not engaged in the first place.

5.13 A striking feature of Poshteh, then, was the UK Supreme Court’s refusal to follow Strasbourg, even though the latter had apparently settled the precise legal issue at stake (that Article 6(1) did apply to housing allocation decisions). The decision not to follow was justified on the basis of Strasbourg’s failure (in Ali) to appreciate, or give due consideration to, the seriousness of the issues at stake, as the UK Supreme Court understood them. As such, the latter indicated that it remained open for it to maintain its own position, which could be reconsidered if Strasbourg gave full consideration to the relevant issues in a later Grand Chamber judgment. This rationale was set out in a UK Supreme Court ruling that made the following points:

- The Secretary of State had expressed concern about the applicability of Article 6(1) to the field in question, as well as ‘other areas of government activity relating to community care and education’.\(^{57}\)
- The original 2010, unanimous UK Supreme Court judgment in Ali followed detailed consideration of the authorities, domestic and European. Those authorities included at least two other domestic cases heard before the UK Supreme Court when concern was expressed about similar issues related to the applicability of Article 6(1) (including concerns about resource implications for public authorities related to the judicialisation of welfare claims).\(^{58}\) On this the Judgment in Poshteh included several paragraphs highlighting the issues and concerns raised by preceding cases (as set out by various Judges).\(^{59}\)
- The judgment in Poshteh included a detailed analysis of the Strasbourg ruling in Ali,\(^{60}\) with certain direct\(^{61}\) and implied criticisms of its failure to take into

\(^{54}\)(2015) 63 EHRR 20.  
\(^{55}\)Ibid [60].  
\(^{56}\)Ibid [74]-[88].  
\(^{57}\)Poshteh [19]. See also [32].  
\(^{58}\)Ibid [22].  
\(^{59}\)See [21]-[28].  
\(^{60}\)[29]-[31].  
\(^{61}\)See [33]: ‘The Chamber acknowledged (in line with the Grand Chamber decision in Boulois) the weight to be given to the interpretation of the relevant provisions by the domestic courts. It is disappointing
account aspects of the controversy as it had arisen in the national case law
context.\textsuperscript{62}
- It identified the importance of the issues at stake for which, it stated, ‘the
views of the Chamber are unlikely to be the last word’.\textsuperscript{63} Poshteh was,
therefore, ‘a case in which, without disrespect to the Chamber, we should not
regard [Strasbourg’s] decision as a sufficient reason to depart from the fully
considered and unanimous conclusion of the [preceding UK Supreme Court
ruling, 2010] in Ali’.\textsuperscript{64} It was ‘appropriate that we should await a full
consideration by a Grand Chamber before considering whether (and if so how)
to modify our own position’.\textsuperscript{65}

5.14 These points are set against the backdrop of the ‘constitutional redline’ set out in
\textit{Pinnock}. Some might regard that as setting a low threshold and potentially giving
Strasbourg too much influence over UK law.

5.14.1 In that connection, \textit{Poshteh} communicates strong messages to Strasbourg about the
quality of its jurisprudence: the UK Supreme Court insists upon Strasbourg showing a
full consideration of the arguments previously presented in UK courts and a conscious
regard for the implications of its ruling (it being critical of the chamber in \textit{Ali} on these
grounds)

5.14.2 With specific reference to the Article 6(1) issue at stake, assuming the \textit{Poshteh} case
proceeds to Strasbourg, it appears that the UK Supreme Court has warned that the
case must be heard by the Grand Chamber and engage with the points made by in the
2017 ruling.

5.15 In summary, arguably \textit{Poshteh} is not a case of ‘principled resistance’.

5.15.1 However, it reiterates a post-2009 trend whereby the UK courts will not just adopt a
submissive and supine stance to Strasbourg judgments but will, if necessary, subject
them to intense judicial scrutiny. Would it be correct to say that stronger (but fair)
conditions are now being set to the quality of Strasbourg’s work before the UK courts
accepts the same? This places a heavy responsibility on (an over-worked) Strasbourg
Court.

Therefore that it failed to address in any detail either the reasoning of the Supreme Court, or indeed its
concerns over "judicialisation" of the welfare services, and the implications for local authority resources
(see para 23 above). Instead the Chamber concentrated its attention on two admittedly obiter statements,
respectively by Hale LJ (as she then was) in the Court of Appeal in \textit{Adan}, and Lord Millett in \textit{Runa Begum}.
However, its treatment of these two statements is open to the criticism that they were taken out of context,
and without regard to their limited significance in the domestic case law’.

And see at [36] : ‘... it is apparent from the Chamber’s reasoning (see para 58 cited above) that it was
consciously going beyond the scope of previous cases. In answer to Lord Hope’s concern that there was “no
clearly defined stopping point” to the process of expansion, its answer seems to have been that none was
needed. That is a possible view, but one which should not readily be adopted without full consideration of
its practical implications for the working of the domestic regime’.

\textsuperscript{62}[32]-[33].
\textsuperscript{63}[37].
\textsuperscript{64}[37].
\textsuperscript{65}[37].
5.16  *Poshteh* illustrates one of the most interesting features of the HRA: the juxtaposition – potential rivalry - it can create between the domestic courts and Strasbourg. The former are required to apply ‘convention rights’ (under the HRA) to national law, after which there is a possibility that the case proceeds to Strasbourg, where the ECtHR applies its understanding of Convention rights (under the ECHR) to national law. This can provoke the question, if both courts have applied Convention rights, and there is a reasonable disagreement, why should the Strasbourg Court’s understanding prevail (at least for the purposes of domestic law)? With that in mind, the following points are put forward tentatively, albeit requiring further research:

5.1.6.1. Is the UK Supreme Court slowly moving to a point when, for important matters at least, it will not be content (for the purposes of resolving a question of domestic law) with the resolution of a matter via a single chamber judgment, but will require a clear, compelling and authoritative Grand Chamber ruling on the precise issue?

5.1.6.2. What happens in the event of a conflict between the UK Supreme Court and a Strasbourg *Grand Chamber*, i.e. if the former’s considered view is that a specific aspect of UK law *does not engage* Convention rights, but the latter’s position is that it *does*? (This is a different issue to the ‘*Vinter-McLoughlin-Hutchinson cases*’, when the disagreement was not on whether Article 3 applied, but whether UK law respected it). Strasbourg is the authoritative body for interpretation of the Convention. So, how would the domestic courts react to the above scenario? When would the ‘constitutional redline’ envisaged in *Pinnock* criteria (iii) apply?

6) Is there a difference, from the perspective of your national courts and in terms of their binding force, between ECtHR cases decided against your own country and against other countries?

6.1 There can be. The general position adopted by the UK courts is explained fully in the Appendix, and above.

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66 Although I need to research this matter further, this scenario could arise in the case of *R (on the application of Nealon) (Appellant) v Secretary of State for Justice (Respondent)* UKSC 2017/0001 - *R (on the application of Hallam) (AP) (Appellant) v Secretary of State for Justice (Respondent)* UKSC 2016/0227, which the UK Supreme Court accepted for hearing on 13 April 2017. To reiterate, I need to examine this case more closely (it is extremely complex) but it appears to raise to prospect of conflicting interpretations regarding whether the definition of a "miscarriage of justice" in s.133(1ZA) of the Criminal Justice Act 1988 is incompatible with the presumption of innocence in Article 6(2) ECHR. (Section 133 has the effect of restricting awards of compensation to cases in which a new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence). As far as I can tell the situation is as follows. The UK Supreme Court has held that s 133 does *not engage* Article 6(2) (this in *R (Adams) v. Secretary of State for Justice* [2012] 1 AC 48 (11 May 2011, a nine-judge panel of the Supreme Court, although there was variation in reasoning), Strasbourg in *Allen v UK* 12 July 2013 GC, has ruled that Art 6(2) *does* apply. The *Nealon* case will now address this.
6.2 As noted, under the HRA, for the courts there is a presumption to follow (i) ‘a clear and constant line of [Strasbourg] decisions’, (ii) ‘whose reasoning does not appear [from the UK perspective] to overlook or misunderstand some argument or point of principle’, provided the effect is (iii) ‘not inconsistent with some fundamental substantive or procedural aspect of our law’.

6.3 Assuming the first (i) test is satisfied, there is a greater chance that the second (ii) will be for a case concerning the UK, since the UK government will have had the chance to plead its case before Strasbourg. However, see, for example, the Poshteh case as discussed under 5 above.

6.4 Related to this is the scope that remains for ‘dialogue’ between domestic courts and Strasbourg. In accordance with the criteria above (which may yet be developed), the UK Supreme Court will follow an authoritative Grand Chamber ruling that has satisfied the first two criterion, unless the last (‘constitutional redline’) applies.

7) What is the role of the (superior) rank of the national constitution vis-à-vis the Convention for cases of non-implementation of ECtHR judgments?
7.1 There is no real equivalent of this under the UK’s constitutional arrangements (it does not have a codified, written constitution).

7.2 The most relevant doctrine is that of Parliamentary sovereignty. As the prisoner voting issue demonstrates, Parliament cannot be forced to amend legislation found to be incompatible with the Convention. The ‘cost’ for not so amending is political, and one that Parliament/ the government may be prepared to pay.

7.3 Also of relevance is the potential ‘constitutional redline’ associated with Pinnock criteria (iii), although this has never been invoked. Indeed, it is not at all clear what would count as a ‘fundamental substantive or procedural aspect of [UK] law’ for purpose of the invocation of this redline? Perhaps retention of the right to trial by jury (eg potentially conflicting with Art 6)? Perhaps the law on parliamentary privilege (potentially conflicting with Art 10)?

8) Are there cases where courts relied on national identity to justify non-implementation of an ECtHR judgment?
8.1 The term ‘national identity’ may put it strongly; I am not aware of any examples of this (although see the overview comments above, regarding the relevance of this to general arguments on ‘pushback’ of Strasbourg law).

67 As far as I am aware only on two occasions has the UK Supreme Court addressed the matter, and in each instance it readily dismissed the notion that the matter came close to the constitutional redline. See Chester (blanket ban on convicted prisoners voting). See also Pinnock at para 49 (Article 8: judicial order for possession of a person’s home at the suit of a local authority; need for judicial assessment of the power to assess the proportionality of the order, and, resolve any relevant dispute of fact).
9) Are there examples where national courts relied on the ‘lex posterior’ rule for justifying non-implementation of an ECtHR judgment? If not, could this scenario materialise in your country?

9.1 Insofar as I understand the question, I am not aware of any examples.

10) Are there other factors (e.g. separation of powers arguments) that were adduced for justifying non-implementation of ECtHR judgments?

10.1 In relation to prisoner voting there has been a strong narrative that the matter is for parliament not the Strasbourg court to resolve. See xxx above.

10.2 Of general relevance here are the point made above with respect to ‘pushback’ of Strasbourg law that is perceived to have grown ‘too big’.
APPENDIX - Some brief comments on the relevant UK constitutional framework

Although it is appreciated that it is not the aim of the Conference or each Report to provide an overview account of the relevant constitutional framework, some comments on this may be necessary to properly appreciate the UK’s overall position in relation to the major lines of inquiry for the Conference. It may help us appreciate some (not all) aspects of the paradox noted above: that of considerable legal ‘loyalty’ to the Convention and the Court, sat alongside some strong voices of discontent, even hostility, against them.

The HRA uses ‘Convention rights’ as the focal point for human rights protection in the UK. The extent to which this places great focus on the Convention and the Strasbourg jurisprudence may make the UK’s position relatively unusual amongst western democracies. This may not fully explain UK ‘attitudes’ toward the Convention, but it may offer an insight into an important aspect of the same. Here lets us proceed in two steps:

a. the first raises the suggestion that the HRA, with its exceptional focus on ‘Convention rights’ (as opposed to a nationally-inspired human rights jurisprudence) may have served to have an ‘alienating effect’, with negative effects on the way the ECHR is viewed in the national context;

b. the second highlights the fact that the regime of the HRA leaves little latitude for the UK courts to adopt a stance of principled resistance against the Court (here I elaborate on the points made above).

The ‘alienating effect’ of the HRA?

Regarding the way in which UK law places Convention rights at the centre of the perspective of human rights protection, it is worth quoting at length from a speech delivered by the President of the Supreme Court, Lord Neuberger. In a lecture in which he provided an overview of the HRA, against the backdrop of the UK’s unwritten constitution, he went on to state (in 2014):  

‘...I believe that the points made in the brief discussion so far serve to demonstrate why the Convention, through the medium of the HRA, has had much more of an impact on the UK constitutional settlement between the courts and the legislature than on those of other countries which have written and coherent constitutions. In Germany, for example, not only has a Constitution, but it is one which generally grants parallel or even greater rights to citizens than they are accorded by the Convention. Therefore, unlike in the UK, (i) Germans are used to their courts challenging statutes and (ii) judgments of German courts, involving issues on which UK courts’ decisions would be based on the Convention, are based on constitutional rights and either involve no consideration of the Convention or include a throw away paragraph, sometimes a cross-check, on the Convention.’

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68 See sections 1, 2, 3, 6, 10 and 19 HRA.
On this basis Lord Neuberger opined that: ‘This means that the effect of the Convention seems far more revolutionary in the UK than in other European countries’. He added:

‘[t]here is little danger of the Convention leading to… public suspicion of judicial aggrandisement in such other countries, particularly in the light of their history which gives rise to rather less confidence in the democratic process than that of the UK’.  

In a similar vein, it is worth quoting from Lord Lester (one of the most venerated human rights lawyers in the UK, who has appeared as an advocate before the ECtHR for over 40 years). Speaking as a member of the Commission on a Bill of Rights in late 2011 he agreed that there was a case for repealing the HRA, and replacing it with a British Bill of Rights (on condition that the reform was conducted in good faith, and not in a way that would reduce human rights protection). After praising the HRA he stated:

‘The weakness in the Human Rights Act is that it depends upon the Convention to define our rights and freedoms. Instead of asking whether our constitutional rights have been infringed, the Human Rights Act asks whether our Convention rights have been infringed. That is not the way it works in the rest of Europe and the common law world where written constitutions protect the universal civil and political rights anchored in international treaties. Instead of bringing rights home, the Human Rights Act has an alienating effect, especially among those for whom "Europe" is a dirty word’.  

The reference to the anti-European sentiment existing in the national context (I am sorry to say) also needs to be taken into consideration when assessing the hostile ‘attitude’ to the ECHR that exists in some quarters (it is, of course, not the only factor).

The situation described above leads to a dilemma for defenders of the Convention and the ECtHR in the UK: as Lord Lester puts it, ‘change [to the HRA] would in principle be desirable’ (due to the alienating effect of the HRA as it now works), but there is considerable concern that the change would lead to more harm than good (for there are strong indications that the Conservative party would like to use the repeal and of the HRA

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70 See also Lord Neuberger, ‘Reflections on significant moments in the role of the Judiciary’, 16 March 2017 (‘20. The Human Rights Convention is particularly prone to play an important part in the law of a country such as ours which unusually has no overriding coherent constitution. The rights contained in the Convention would be regarded as established constitutional rights in a country with a formal written constitution, and those rights would be expected to be enforced as a matter of routine by domestic judges. It is largely because we have no such constitutional rights in this country that the introduction Convention into our law has been seen to have such a significant effect’).

71 Lord Lester, ‘A Personal Explanatory Note’, Individual Paper included within A UK Bill of Rights: The Choice Before Us, 231 at 233

72 Ibid at p 233.

73 Lord Lester, House of Lords, Hansard, 20 Jun 2013 : Column 432: ‘There are two main reasons in favour of a modern constitutional Bill of Rights: a good reason and a bad reason. The good reason is that, instead of relying upon a European treaty to define and protect our fundamental civil and political rights and liberties, we need a home-grown constitutional measure based on our constitutional and legal heritage that will command widespread public confidence beyond the courts and the legal profession. The bad reason is that a home-grown Bill of Rights would enable us to withdraw from the European Convention on Human Rights and the ability to seek redress from the European Court of Human Rights where our courts are unable to provide a remedy. According to this view it would enable the Human Rights Act to be scrapped and replaced by a measure that gave more power to the Executive and Parliament to restrict or limit our civil rights and freedoms’.
and the introduction of a British Bill of Rights to reduce the level of protection that the Convention affords, in some fields at least).

**What scope does the HRA provide for a stance ‘principled resistance’?**

In answering the question immediately above the actual regime of the HRA needs to be considered: it leaves relatively little scope for principled resistance, at least on the part of the UK courts. In what follows I will consider the position of the UK Parliament and courts.

**Parliament:** Parliament’s role mainly comes into play if primary legislation has been found to be incompatible with human rights standards, whether that be as a direct result of a Strasbourg Court ruling, or as a result of a domestic court’s interpretation of ‘Convention rights’ under the HRA. In both instances the doctrine of Parliamentary sovereignty entails that it is up to Parliament to amend the offending legislation. The only enduring example when it has squarely refused to do so has been that in relation to prisoner voting.

**The courts:** here it is important to emphasise that the scope for judicial resistance to Strasbourg jurisprudence is, in fact, relatively limited, as shall now be explained.

Under section 2(1) of the HRA UK courts ‘must take into account’ relevant Strasbourg jurisprudence in any case when an issue of ‘Convention right’ is at stake. Here we recall the emphasis placed on the Convention jurisprudence in UK cases. As Lord Neuberger (President of the UK Supreme Court) puts it: ‘[w]hen we are called on to decide a human rights law point, we will always look to see whether the Strasbourg court has had anything to say on the topic’. 74

In their human rights work, therefore, the UK judiciary pays very great attention to the Strasbourg jurisprudence. I believe it is not an exaggeration to say that that jurisprudence is sometimes examined in greater depth than Strasbourg itself does in its own judgments.

The wording of section 2(1) HRA (‘must take into account’) confirms that the UK courts are not bound to follow the Strasbourg jurisprudence, and would appear to grant the domestic courts considerable latitude in that regard. However, the approach adopted to interpretation of this provision entails that the courts displayed very considerable loyalty to Strasbourg in the first decade of the HRA’s life, and this remains so even though there has a reappraisal of the relationship between the UK courts and Strasbourg over the last decade or so.

As to that reappraisal, from around 2009-2010 onwards there was a considerable debate about the courts’ approach to section 2(1), and criticism of this (including extra-judicial criticism from senior judicial figures) for being too subservient and submissive toward Strasbourg. This criticism occurred in parallel with a growing general, public hostility toward aspects of the Convention (note, for example, the prisoner voting affair started to come to a head over 2010-2011). In fact, even before this criticism gathered pace the UK Supreme Court had

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74 Lord Neuberger, ‘Has the identity of the English Common Law been eroded by EU Laws and the European Convention On Human Rights?’, Faculty of Law, National University of Singapore, 18 August 2016 [32].
(over 2009-2010) signalled an evolved approach to section 2(1), one that set out the basis upon which UK courts might decline to follow the Strasbourg jurisprudence in certain circumstances.

The new direction was especially evident in the cases of Horncastle (2009) and Pinnock (2010), when the Supreme Court (instituted in October 2009) undertook a reappraisal of Lord Rodger’s famous Latinised dictum in the case of AF. This is now reflected in an approach by which there is a rebuttable presumption that the UK courts will follow the clear and consistent Strasbourg jurisprudence.

How does that operate? The UK courts now look more generally at the ECtHR’s law, expecting to follow it when:

(i) there is ‘a clear and constant line of decisions’;
(ii) ‘whose reasoning does not appear [from the UK perspective] to overlook or misunderstand some argument or point of principle’, and
(iii) ‘whose effect’ is ‘not inconsistent with some fundamental substantive or procedural aspect of our law’ (emphasis added).

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75 The evolved approach to the application of ‘Convention rights’ under the HRA is confirmed by the following comments from Lord Neuberger 25 June 2014 before Select Committee on Constitution: he noted the section 2(1) HRA duty to take into account observing that the ‘general presumption’ to follow Grand Chamber judgments, in particular, and those of the Chamber sections, ‘all of which point the same way’. That represented an evolution of approach for ‘[i]Initially, the attitude... was that we would almost certainly follow all decisions’. The evolved position occurred as the UK courts ‘developed and matured’ in their approach to the HRA and became ‘a bit more self-confident’. The evolution was to be seen against the background of the court’s constitutional position: on the one hand, ‘we are the court in the United Kingdom that decides issues and we have to decide what we think is right’; on the other hand, the HRA aimed ‘to ensure that you did not have inconsistent decisions in this country and in Strasbourg’. There was ‘no doubt that we can and do depart from Strasbourg decisions’, should it was recognised that the courts should be cautious about doing so, and especially for ‘a strong decision of the Grand Chamber or a consistent line of section decisions’. At the same time the evolved position was to be seen in the context of possibilities of ‘dialogue’ with Strasbourg, it sometimes being the UK courts’ duty to tell Strasbourg to think again’, and when Strasbourg has then ‘thought again and changed its mind’. There remained the possibility of Strasbourg not changing its mind, which would then require the UK courts to consider their response. In that regard Lord Neuberger added: ‘I have no doubt that 10 years ago the answer from more or less any judge would have been that we follow Strasbourg. Now, I think that more judges would be prepared to contemplate not following Strasbourg, but we are in a speculative area’.

76 Cf Lord Neuberger, ‘Has the identity of the English Common Law been eroded by EU Laws and the European Convention On Human Rights’, 18 August 2016, [48] ‘... while UK judges may well initially have been too readily prepared to follow decisions of the Strasbourg court, we are now more ready to refuse to follow, or to modify or finesse, their decisions, as we become more confident in forming our own views about Convention rights’.


These ‘Pinnock criteria’ foresee criterion (i) and (ii) as, potentially, offering a basis for ‘dialogue’ with Strasbourg; if that is not possible ‘Pinnock criteria’ (iii) amounts to a constitutional redline when, contrary to Lord Rodger’s suggestion, the Supreme Court ultimately reserves the right not to follow even a clear and consistent Strasbourg Grand Chamber judgment, fully appreciating UK legal arguments.

As yet, there has been no case in which this ‘constitutional redline’ has been invoked so as to resist the application of Convention law. That is not to say that there have not been several examples of ‘dialogue’ with Strasbourg based on Pinnock criteria (i) and (ii).

For the purposes of this Report perhaps the most notable and relevant features of the position just outlined are as follows:

1) In the UK great emphasis is placed on Strasbourg case law (as opposed to an independent or ‘homegrown’ human rights jurisprudence) to frame the debate and set out the parameters to and standards for how far UK human rights law should go in the national context.

2) As to the potential for a disagreement between the national and Strasbourg judiciary on what those parameters or standards should be, the HRA regime, as interpreted and applied by the domestic judiciary, tends to put Strasbourg in the ascendancy: if its case law is clear and consistent, and it is evident that is has not misunderstood a particular argument in relation to the UK context, its position will be followed, unless the ‘constitutional redline’ in Pinnock is invoked.

Those concerned about the influence of Strasbourg law on the UK might suggest that, as things stand, the constitutional redline envisaged is drawn inappropriately. Their point might be that it potentially constrains the domestic courts into accepting the ECtHR’s final and unequivocal view (not the domestic judge’s own preferred one) on a particular human rights matter that may still be of national interest and importance (eg prisoner voting?) even though it falls short of being a ‘fundamental substantive or procedural aspect’ of UK law (as required by Pinnock).

80 In Pinnock (above), Lord Neuberger stated that Strasbourg law should not ‘[cut] across our domestic substantive or procedural law in some fundamental way’: para 49. See also R (on the application of Chester) v Secretary of State for Justice [2013] UKSC 63, Lord Mance, paras 27 and 35 and Lord Sumption, para 137 (‘fundamental feature of the law of the UK’); R (on the applications of Haney, Kaiyam, and Massey) v Secretary of State for Justice [2014] UKSC 66, paras 18–21 (Lords Mance and Hughes: relevant tests developed in Pinnock and Chester offer ‘general guidelines’ which are context specific: para 21). A tentative comparison may also be made with respect to the limits of the reception of EU law into UK law: see R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3.

81 This would seem to be the view of Lord Judge (n 40) and Laws LJ (n 39, and point 1.24 above). Lord Irvine would seem to agree: see n 84.
Put another way, the critic’s argument would be that the criteria leave UK law too vulnerable to Strasbourg’s influence, potentially at least. 84

END.

84 Compare to Lord Irvine, ‘A British Interpretation of Convention Rights’, 14 December 2011 (UCL): ‘In terms of fostering a ‘dialogue’ with Strasbourg about the development of its own case-law, the standing of our Courts is likely to be enhanced if their position is more rather than less assertive. A Court which subordinates itself to follow another’s rulings cannot enter into a dialogue with its superior in any meaningful sense. Importantly, this will influence Strasbourg’s approach to decisions of our Supreme Court. If Strasbourg always proceeds secure in the knowledge that our Judges will inevitably “roll-over”, we should not be at all surprised if we find ourselves being “rolled over” with increasing regularity. An appropriately critical, but respectful, approach on the part of our own Courts will have positive influence in encouraging Strasbourg to observe the appropriate limitations inherent in its own role, and to respect the State’s margin of appreciation.

This approach would enhance our Courts’ own institutional prestige and credibility domestically, both with the man in the street and Parliament. The domestic Court must act, and be seen to act, as an autonomous institution which determines cases of high Constitutional import according to its interpretation of our fundamental values and national interest. It would be damaging for our Courts’ own legitimacy and credibility if they are perceived as merely agents or delegates of the ECHR and Council of Europe (“CoE”). A perception that our Judges regard it as their primary duty to give effect to the policy preferences of the Strasbourg Court should not be allowed to take root, since this would gravely undermine, not enhance, respect for domestic and international human rights principles in the UK. This risk can be obviated by holding fast to the obvious intention of s.2(1).’