RESPONSE TO CALL FOR EVIDENCE BY THE INDEPENDENT REVIEW OF THE HUMAN RIGHTS ACT

1. According to the Terms of Reference of the Independent Review, one of the key themes to be examined is the relationship between domestic courts and the European Court of Human Rights, it being stated that the review will consider the approach taken by domestic courts to jurisprudence of the ECHR, including how the duty to "take into account" that jurisprudence has developed.

2. As a former judge of the European Court of Human Rights, I had no responsibility for applying the Human Rights Act or for interpreting its provisions, including the effect to be given to the words "take into account" in section 2. However, during my term of office on the Strasbourg Court, I was able to follow the manner in which the Act had been applied by the national courts in cases which reached the ECHR and to make an assessment of the relationship between the national and international courts. These views are offered as a contribution to one of the important issues identified in the review.

3. It was certainly not envisaged in the pre-legislative history of the Human Rights Act that judgments of the Strasbourg Court should be determinative of issues under the Act, the White Paper emphasising that the interpretation of the rights by British judges would be "subtly and powerfully woven into our law" and that through that interpretation judges here would be "enabled to make a distinctly British contribution to the development of the jurisprudence of human rights in Europe".

4. The meaning to be given to section 2 of the Act was first examined by the House of Lords in the *Alconbury* case of 2003. Lord Slynn in that case stated that, although the Act did not provide that a national court was bound by decisions of the Strasbourg Court, in the absence of some special circumstances, the court "should follow any clear and constant jurisprudence of the European Court", for the very pragmatic reason that there was at least a possibility that the case would proceed to Strasbourg and that the Strasbourg Court would be likely to follow its own constant jurisprudence.

5. It was Lord Bingham's judgment in the *Ullah* case the following year, introducing the so-called mirror principle, that has been said by some to have taken the wrong turning and to have radically changed the meaning to

be given to section 2. Lord Bingham reiterated what had been said in *Alconbury,* which in his view reflected the fact that the Convention was an international instrument, the correct interpretation of which could be authoritatively expounded only by the Strasbourg Court. From this it followed in his view that a national court, subject to the duty imposed by section 2, should not without strong reason dilute or weaken the effect of the Strasbourg case-law. It should also not, by interpretation of the Convention, provide for rights more generous than those established by Strasbourg "since the meaning of the Convention should be uniform throughout the states party to it". He concluded with the words that became the most controversial: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less". This principle was reformulated - "no less but certainly no more" - in the judgment of Lord Brown in the *Al Skeini* case, Lord Brown emphasising that there was a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly, since in the former case the mistake would necessarily stand, while, in the latter, an aggrieved individual could have the decision corrected in Strasbourg.

6. In the years that followed, much of the judicial discussion of section 2 focused on the question of the extent to which the mirror principle, in its original and adapted form, should be applied.

7. To an external observer, it appeared that the 'no more' injunction had been more honoured in the breach than in the observance by the House of Lords and the Supreme Court. As Lady Hale observed, in an extra-judicial capacity, the reasoning behind the *Ullah* principle was itself of dubious validity, since a national court could not in any event commit other Member States or the Strasbourg Court to its own interpretation of the rights and a decision of a court here which forged ahead of Strasbourg in developing Convention rights in UK law was unlikely to have any effect on other Member States. As Lady Hale went on to point out, there was nothing in the Act or its purposes to suggest that the national courts should refrain from devising what was thought to be the correct result in a case where Strasbourg had not spoken or to support the reluctance shown in early cases to seek guidance from the jurisprudence of foreign courts with comparable human rights instruments, where Strasbourg had so far been silent.

8. Despite statements in subsequent cases to the effect that national courts should not "expand the scope of Convention rights further than the

jurisprudence of the Strasbourg Court justifies" and that "if Strasbourg has not yet spoken clearly enough on this issue, the wiser course must surely be to wait until it has done so" (see *Ambrose v Harris*), there exist several examples over the years where the national courts have not felt constrained in developing case-law under the Act by the absence of any direct guidance from Strasbourg. Even in the *Ullah* case itself, which concerned two asylum seekers who feared religious persecution in breach of Article 9 if returned to their countries of origin, the mirror principle does not appear to have been strictly applied. While the Strasbourg Court had certainly contemplated extending the *Soering* principle beyond Article 3, it had not, as the Court of Appeal pointed out, yet taken that step. Nevertheless, the House of Lords was prepared to go further than Strasbourg had gone and to rely on the underlying principle in *Soering* to find that the risk of a flagrant breach of Article 9 could prevent the removal of the two asylum seekers.

9. There exist other clearer examples where the national courts ventured further than Strasbourg had been prepared to go at the time.

- In the case of *EM (Lebanon)* the *Soering* principle was extended by the House of Lords to the case of a mother and son who risked a flagrant breach of their Article 8 rights if returned to Lebanon.

- In *Limbuela* the House of Lords arguably went far further than the Strasbourg Court would have been prepared to go in holding it to be inhuman and degrading treatment to deny asylum seekers the right to earn their own living and the right to any assistance from the state, thereby reducing them to utter destitution. As Lady Hale put it, this did look like creating a species of socio-economic right which, by and large, the Convention had not done.

– In *Re G* the prohibition on an unmarried couple in Northern Ireland jointly to adopt the child of one of them was found to amount to discriminatory treatment in breach of Article 14, in the absence of any ruling at that time by Strasbourg in an equivalent case. Lord Hoffmann there pointed out that it was irrelevant that Strasbourg had not yet declared that States must allow unmarried couples to adopt, because under the Act the UK courts had to uphold Convention rights in a way *they* thought was appropriate.

- In the *Rabone* case the Supreme Court held, in the absence of any clear Strasbourg jurisprudence, that the operational duty on a health authority

under Article 2 of the Convention applied to a voluntary psychiatric patient, Lord Brown on this occasion holding that it would be absurd to have to await an authoritative decision of the Strasbourg Court more or less directly on point before finding a violation of the Convention.

10. It is the original formulation – "certainly no less" – that proved more problematic and gave rise to what has been described as the "strained relationship" between the national courts and the Strasbourg Court.

11. The beginning of this strained relationship coincided with a period of more general criticism of the Strasbourg Court by senior politicians, in the tabloid press, the Court being accused of judicial imperialism by using its "living instrument" doctrine to expand Convention rights into areas beyond those that the framers of the Convention had in mind when the Convention was signed and by trespassing into areas of State policy, the judgment of the Court in the *Hirst* case relating to the voting rights of convicted prisoners attracting particular fury. This appeared to lead to growing doubts as to whether the *Ullah* principle imposed undue constraints on the national courts to follow Strasbourg jurisprudence even where there was strong disagreement on the application of the Convention rights. While, as Lord Hoffmann accepted in *Re G*, if Strasbourg decided that the international Convention conferred a right, it would be unusual for a United Kingdom Court to come to the conclusion that domestic law applying the Convention did not, the claim was made that, by applying the *Ullah* principle, the national courts had shown themselves to be too deferential to Strasbourg case-law and, to use the words of Lord Justice Laws in his Hamlyn Lectures, to "have fettered their historic autonomy and undercut their own power of judgment".

12. The example most frequently cited to illustrate such alleged subservience is the judgment of the Supreme Court in the cases of *AF and others*, containing the oft-cited, colourful Latin dictum in the judgment of Lord Rodger. The *AF cases* related to the control orders that replaced the administrative detention that had been examined by the Strasbourg Court in *A and Others* – the so-called *Belmarsh cases*. The cases concerned the compatibility with the Convention of reliance by the judge making a control order on material received in a closed hearing, the nature of which was not disclosed to the applicant. The cases had a complicated history, having already been to the House of Lords and remitted to judges for reconsideration in the light of its reasoning. That reasoning in essence held that there was no rigid principle that a hearing would be unfair in the absence of open disclosure of an irreducible minimum of allegation or

evidence and that, whether a hearing was unfair, would depend on all the circumstances of the case.

13. Shortly before the cases were reheard by the House of Lords, the Strasbourg Court delivered its judgment in *A and Others.* The Court there held, among other things, that the closed material procedure, whereby the only material disclosed to a detainee amounted to general assertions, the decision to detain being based solely or to a decisive degree on material not made available to the detainee, did not comply with the requirements of fairness in Article 5 (4) of the Convention. The Strasbourg Court's decision had a very mixed reception in the House of Lords. While Lord Scott took the view that the common law would have led to the same conclusion, Lord Hoffman considered the case to have been wrongly decided, contrasting the rigidity of the Strasbourg test with the flexibility of the English law approach, under which substantial justice might still be possible even if the decision to detain was based solely or decisively on closed material. But he, like the other Law Lords, felt compelled to follow the Court's case-law, although doing so with, as he put it, "very considerable regret". Lord Rodger was much pithier in his remarks, confining himself to saying: 'Strasbourg has spoken, the case is closed".

14. This case has been described as the high-water mark of the application of the mirror principle. Certainly, the language used disclosed not merely a strong reluctance to follow Strasbourg but a lack of any freedom of choice on the part of certain of the judges of the House of Lords, who considered that the more flexible test that had recently been agreed on ensured sufficient fairness. However, I do not believe that the decision revealed an excessive deference to the views of Strasbourg. It seems to me that, in the context in which it was made, the decision was reasonable, if not inevitable: the judgment of the Grand Chamber was both recent and unanimous; it dealt with the very applicants who had previously been subject to administrative detention and who were now to be subject to control orders; it was clear in its reasoning and it was not inconsistent with any fundamental substantive or procedural aspect of UK law.

15. The same may be said of the case of *Chester,* in which the Supreme Court declined the invitation of the Attorney General not to apply the principles firmly established by the Grand Chamber in the cases of *Hirst (No 2)* concerning prisoners' voting rights and reiterated in the subsequent case of *Greens and M.T.*, as well as in *Scoppola v Italy*, Lord Mance emphasising that "it would have to involve some truly fundamental principle of our law or some egregious oversight or misunderstanding

before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level". See, to similar effect, the case of *In re McCaughey and another*, in which the Supreme Court followed and applied the judgment of the Strasbourg Court in *Šilih v. Slovenia* in the context of the procedural obligation to investigate deaths in the United Kingdom, despite reservations about the correctness of the judgment, Lord Hope observing that it was the practice to follow the guidance of the international court unless there were strong reasons for not doing so.

16. In his Hamlyn lecture Lord Justice Laws accepted that there had been some "slippage from the unqualified *Ullah* position", citing the judgment of Lord Phillips in *Horncastle* to the effect that there would be rare occasions where the domestic court had concerns whether a decision of the Strasbourg court sufficiently appreciated or accommodated aspects of the domestic process and would decline to follow the Strasbourg decision. But, Lord Justice Laws concluded, the *Ullah* doctrine had still not been overturned.

17. Even if *Ullah* has not been overturned, I do not consider that the reference to "slippage" did justice to the developments in the approach of the national courts. Leaving aside cases of the kind of *AF and Others*, involving a recent and authoritative ruling of the Grand Chamber of the Court on the very issue before the national courts, it is I consider possible to detect a deliberate moving away from the mirror principle and a greater readiness on the part of national courts to question and depart from decisions of Chambers of the Court, even those which appeared directly in point and even in cases where the national court did not consider that Strasbourg had misunderstood English law.

18. Allied to this has been a growing and, I believe, healthy readiness on the part of the national courts not only to decline to follow Strasbourg where its case-law is disapproved of but to give, so far as possible, primacy to national law. In *Osborn v The Parole Board*[27], relating to procedural fairness before the Board, the Supreme Court stressed that the values underlying the Convention required that Convention rights should be protected primarily by a detailed body of domestic law and rejected the appellants' argument that the analysis of the problem before it should begin and end with the Strasbourg case-law, reminding us, to use the words of Lord Reid that "the Convention cannot be treated as if it were Moses and the prophets". And in *Kennedy v. The Charity Commissioners*[28], concerning the withholding of information by the Commissioners, Lord Mance observed

that the Convention rights represented a threshold protection and, especially in view of the contribution which common lawyers had made to the Convention's inception, they might be expected to reflect and to find their homologue in the common or domestic statute law; the natural starting point in any dispute was in his view to start with domestic law and certainly not to focus exclusively on the Convention rights without surveying the wider common law scene. I abelieve that this process of mutual enrichment can only serve to benefit the wider protection of fundamental rights.

19. The national courts had, from an early stage, not felt constrained to follow judgments of the Strasbourg Court where it was considered that the Court had not fully understood English law. This was illustrated by the early case of *Boyd, Hastie and Spear*, concerning the independence of the court martial system, which had been found by the Strasbourg Court in the *Morris* case to be inconsistent with Article 6. However, the later cases reveal a more general willingness to question decisions of the Strasbourg Court where the case-law failed in the view of the national courts to strike an appropriate balance or to pay proper respect to national traditions, laws or practices. In his judgment in the *Pinnock* case, Lord Neuberger qualified the *Alconbury* test, by saying that the national courts might be expected to follow Strasbourg case law where there was a clear and constant line of decisions but adding two provisos: that the reasoning did not appear to overlook or misunderstand some argument or point of principle and that its effect was not inconsistent with some fundamental substantive or procedural aspect of national law. He went on to emphasise that it would not only be impractical to follow every decision of the European Court but it would sometimes be inappropriate "as it would", as he put it "destroy the ability of the court to engage in the constructive dialogue with the European Court which is of value in the development of Convention law".

20. The example that Lord Neuberger gave of such dialogue was the *Horncastle* case. The case was in many respects an ideal channel for such a dialogue: a Chamber of the Court in the *Al-Khawajah* case, applying its own established case-law, had decided that it was a breach of Article 6 to admit hearsay, where this was the sole or decisive evidence against the defendant, even where there was significant corroborative evidence; before the case was referred to the Grand Chamber, an enlarged composition of the Supreme Court had the opportunity to subject the reasoning of the Chamber to a critical analysis and declined to follow it, drawing attention to the specific safeguards in the 2003 Act which in its

view struck the correct balance between ensuring the fairness of the defendant's trial and protecting the interests of the victim in particular and of society in general and which rendered the application of a sole or decisive test unduly rigid; when the *Al-Khawajah* case reached the Grand Chamber, the Supreme Court's reasoning was endorsed, the Court concluding that the fairness of the proceedings would not automatically be breached where hearsay was the sole or decisive evidence against a defendant, thereby reversing the judgment of the Chamber.

21. The *Horncastle/Al-Khawajah* debate is perhaps the most striking example of the Strasbourg Court's acceptance of the open invitation from the Supreme Court to engage in judicial dialogue. But it is not the only example of such dialogue. The prolonged, and even heated, dispute between the national courts and the Strasbourg Court concerning the eviction of tenants from social housing, which culminated in the decision of the Supreme Court in *Pinnock* itself is a further example, The national courts originally held in *Kay* that domestic law was compatible with Articles 6 and 8 since an evicted tenant had what amounted to a public law challenge to the decision to evict. The Strasbourg Court in *McCann* held that, since eviction was the most extreme form of interference with the right to respect for the home, the occupier was entitled to have the proportionality of the eviction assessed by an independent tribunal. As a result of the debate, both courts altered their positions. The Strasbourg Court accepted in *Kay* that the availability of a public law challenge, suitably modified to enable a court to determine disputed issues of fact, might be sufficient to render domestic law compliant with Articles 6 and 8. The Supreme Court for its part accepted in *Pinnock* that the occupier of social housing had the procedural entitlement to a determination by a court of the proportionality of his eviction, even if it would only be in the most exceptional case that this entitlement under Article 8 would assist a tenant.

22. More recently, a similar dialogue took place in the *McLoughlin/Hutchinson* cases concerning whole life sentences. A Chamber of the Court concluded in the case of *Vinter and Others* that the lack of clarity in the powers of the Justice Secretary and the absence of a dedicated mechanism to review whole life-sentences amounted to a violation of Article 3 of the Convention, since the prisoner was deprived of any hope of release. This view was rejected by the Court of Appeal in *McLoughlin*. The court there held that, as a matter of domestic law, if a whole life prisoner could establish that exceptional circumstances had arisen subsequent to the imposition of the sentence, the Justice Secretary was required to

consider whether such circumstances justified release and his decision, which had to be reasoned, would be subject to judicial review. When the issue returned to the Court in the case of *Hutchinson*, the Grand Chamber found that, having regard to the fact that the national court had specifically addressed the Court's doubts and had set out a clear statement of the legal position, the power of the Justice Secretary to release was sufficient to comply with Article 3.

23. Some scepticism was expressed at the time as to whether these three cases marked a true era of dialogue between the two courts. Professor Brice Dickson pointed out that, however the Supreme Court might try to present matters, in the first two cases the voice that won the day in the dialogue was that of Strasbourg and that it was only on the third occasion that the view of the national judges prevailed. Speaking in an extra judicial capacity, Lord Kerr was more blunt. It was his view not only that instances of dialogue such as that in *Horncastle* were relatively rare – a view shared by Lord Hoffmann in *Re G* - but that, as a matter of principle, international and national courts could not be engaged in much of a dialogue because they were necessarily having different conversations.

24. I do not share these views. Comparatively rare as these examples of a real-time debate between the courts might have been, they reflected in my view a welcome development in the relationship between the courts, involving a genuine interchange of views as part of the shared responsibility of the two courts to uphold the rights guaranteed by the Convention. Such exchanges were not new, regular meetings having taken place over the years between judges of the UK and Strasbourg Courts. But it was the exchange of views through judgments of the courts themselves that did much in my view to further ease any strain in the relationship.

25. If, as I believe, the cases revealed an increasing independence on the part of the national courts in addressing human rights issues, they also disclosed a corresponding sensitivity on the part of the Strasbourg Court to national requirements, as those requirements appeared from the judgments of the national courts. As a member of the Strasbourg Court, I never considered that judges of the Court saw their relationship with national courts in the stark terms suggested by Lord Rodger's statement. On the contrary, it remains my view that the Strasbourg Court has been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Act and this because of the universally accepted high quality of the analysis of the Convention issues in those judgments.

26. The Strasbourg Court has shown itself to be receptive to arguments by the higher courts that it had misunderstood national law or has given insufficient weight to national traditions or practices. The *Cooper* case in which the Court accepted the view of the House of Lords that it had misunderstood the nature of the safeguards of independence of a court-martial in the earlier *Morris* case is one example; the early *Osman* case is a further example, where the Strasbourg Court was subsequently shown to have misinterpreted the law of negligence, an error which was corrected in the case of *Z and Others*.

27. In many cases, the persuasive reasoning and analysis of the relevant case-law by the national courts had either formed the basis of the Strasbourg Court's own judgment or had had a direct impact on the result reached: the *Pretty* case concerning the issue of assisted suicide is a good early example, as are the cases of *Stafford*, concerning mandatory life prisoners, *Christine Goodwin*, relating to the rights of transsexuals to recognition of their change of identity and to marry and *MGN* concerning the balance between privacy and the right of freedom of expression. Even in cases where the courts disagreed – as in *S and Marper*, concerning the retention by the police of cellular samples and fingerprints of those arrested but not ultimately convicted of any offence, and *Gillan and Quinton*, concerning the use of wide stop and search powers without any reasonable suspicion of an offence – the Strasbourg Court paid close regard to the judgments of the national courts before concluding that the interference with the right to respect for private life had been disproportionate.

28. However, having regard to continuing criticisms of the Strasbourg Court for not sufficiently respecting its subsidiary role in protecting Convention rights, it was appropriate that the Declaration, which emerged from the Brighton Conference in 2012 and which encouraged national courts to continue to have regard to the case-law of the Strasbourg Court, should also encourage that Court to give greater prominence to, and apply consistently, its principles of subsidiarity and the margin of appreciation, both of which principles are now included in the Preamble to the Convention.

29. It may be open to question whether, as has been suggested, the case-law following the Brighton Conference, notably that in the *Animal Defenders* case concerning the use of political advertising, reveals, if not a new deference to national authorities, a new age of subsidiarity. This was a

view shared at least in part by the Joint Parliamentary Committee on Human Rights, which noted the significant and growing number of recent cases against the United Kingdom in which the Court had demonstrated its willingness to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations. The Committee invoked, in addition to *Animal Defenders*, the cases of *Schindler* relating to the right of British citizens overseas to vote in Parliamentary elections and the *National Union of RMT Workers*, concerning the prohibition of secondary strike action.

30. I readily accept that the inclusion in the Preamble to the Convention of express reference to the margin of appreciation and subsidiarity has meant that the Court has become more explicit in its references to these concepts. Whether it has in fact led to a change in the approach of the Court when applying either concept and whether the *Animal Defenders* case demonstrates any reformulation of the substantive or procedural criteria traditionally applied by the Court over many years, I have some doubt. Nevertheless, I firmly believe that the perception that the Strasbourg Court has recently shown itself to be more ready to extend a margin of appreciation where national authorities have already diligently applied the Convention has helped to contribute to a new sense of stability in the relations between the national courts and Strasbourg.

31. The relationship has in recent times been further strengthened by the creation of the Superior Courts Network, the aim of which is to enrich the jurisprudence on the Convention and encourage the Court's dialogue with the highest national courts through an exchange of information on Convention case-law and related matters. As noted by the current President of the Court, the Network "brings together a community of judges who have central role to play, implementing the principles and values of the European Convention, which we have been sharing and defending for 70 years".

32. In the light of the history of the application of section 2, does the section require amendment or should the section be repealed entirely, thereby severing the formal link between the national courts and the Strasbourg Court? It was this latter proposal that was at the heart of the Conservatives' Proposals for Changing Britain's Human Right's Laws. The proposals were grounded on what was said to be "two basic facts", the first being that the requirement to treat the Strasbourg Court as creating legal precedent for the United Kingdom had been introduced by the 1998 Act. Whatever might have been the perception in the early days of the Act, it is not true to say

that this was either the intention of the provision or that this was its effect in practice. Nor is it in any event likely that the repeal of the section would have the effect that the national courts would, when applying the Convention rights directly incorporated into domestic law, cease to take into account an authoritative judgment of the Strasbourg Court on those rights, even if declining to follow that judgment in the particular circumstances of the case. I remain similarly unconvinced that qualifying the provision by, for instance, specifying that the national courts should only take account of case-law which was clear and constant or which did not offend against some fundamental aspect of substantive or procedural national law would add to what is an already established part of the case-law of the national courts.

33. More importantly, it is my firm view, as someone who was a judge of the Strasbourg Court during the formative years of the Human Rights Act, in the last year as its President, that the provisions of section 2 linking the interpretation of the Convention rights by the national and international courts have amply achieved the purposes set out in the White Paper. The dialogue which the section encouraged has not only brought about immeasurable improvements in the effective protection of fundamental rights in this country but the judgments of the national courts have, because of their universally accepted high quality, made a major and distinctly British contribution to the development of the jurisprudence of human rights throughout Europe and far beyond.

SIR NICOLAS BRATZA

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