DIVERGENT VIEWS OF THE EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS

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Summary: On 10 May 2001 the European Court of Human Rights gave judgment in the cases of Z v UK and TP & KM v UK. The significance of these cases for present purposes is that they were the last occasion when the Court was considering British cases in which the European Commission of Human Rights had given an opinion on the merits of an application.[1] This article considers those cases in recent years in which the Commission and Court disagreed over whether there had been a violation of the Convention by the United Kingdom. Some tentative conclusions are drawn with particular reference to the implications for English law in the light of the Human Rights Act 1998. The review begins with one of the most notorious instances of the Court reversing a finding by the Commission, the Gibraltar death on the rock case in 1995.[2]

Prior to entry into force of Protocol 11 to the European Convention on Human Rights[3] it was the function of the European Commission of Human Rights, where it found an application admissible and in the absence of a friendly settlement, to draw up a report on the facts and state its opinion as to whether those facts disclosed a breach by the State concerned of its obligations under the Convention.[4] Those reports, whilst not binding under international law, were usually highly persuasive and in many cases were the only official view by the Strasbourg machinery on the merits of an application. Only the more significant cases went on to be heard by the Court which would, in due course, give a final judgment which was binding on the parties.[5]

In some quarters the Court's role was often perceived as merely rubber-stamping the Commission's view of the merits. In reality the proceedings before the Court were entirely *de novo* and the parties pleaded their cases afresh (provided only that an applicant could not raise complaints which had already been declared inadmissible or invoke Articles which it had not invoked before the Commission). A delegate of the Commission appeared before the Court to present the findings of the lower body, but these were in no way binding on the Court. In a surprising number of cases the Court came to a different conclusion on the merits from the Commission.

There are numerous examples where commentators, no doubt encouraged by the applicant or his representative, predicted that the Court would find a

[1] At the time of writing, three judgments in cases brought against Turkey in which the Commission had adopted a Report are awaited. These will be the final such judgments in respect of cases against all member States.

[2] This article is an updated version of a talk given by the author at the British Institute of International and Comparative Law in January 1998. I am grateful to Karen Reid at the Registry of the European Court of Human Rights and Stanley Naismith, Head of the Information and Publications Unit at the Registry, for their help in updating the statistics.

[3] On 1 November 1999.

[4] Called Article 31 reports, taking their name from the relevant article under the Convention prior to its amendment by Protocol 11.

[5] In the case of the United Kingdom, which was not a party to Protocol 9 ECHR, this could only be where the Commission or the Government referred the case to the Court within three months of the Commission's Article 31 Report.

violation on the sole basis that the Commission had done so. My own personal favourite appeared in the Daily Express on 22 October 1996 under the headline *"Euro move axes time limit on child-sex cases"* with the sub-heading *"Victory at last for victim, 39"*. Citing the Commission's finding of the previous year that the limitation period under English law of six years for bringing a civil claim for assault violated the rights of victims of child sexual abuse it claimed that "the verdict will almost certainly be confirmed by the Court of Human Rights today." Unfortunately for the Daily Express, it wasn't.[6] Predicting cases in which the Court would find a violation where the Commission had not was even harder, but instances did arise, perhaps the most well-known in recent years being the starting point for this review.[7]

[6] The fact that the piece was by-lined from a correspondent in Brussels might have had something to do with the error.

[7] In the interests of keeping this article to a reasonable length, some arbitrary cut off point had to be chosen to commence the comparison. The McCann case has been selected because of its overall significance in the jurisprudence of the Court and the United Kingdom's relationship with it. Happily, the period also coincides with the length of time which the European Human Rights Law Review has been in existence: McCann was the subject of a special case note in the Launch Issue in 1995. This review also only considers those cases in which the Court reversed a finding of the Commission on the main point at issue in the proceedings or where the finding affected whether there had been a breach of the Convention at all. Differences of opinion over whether a particular Article fell to be addressed in the light of the main finding or minor variations of findings in cases which raised complaints under several Articles are not considered. Hence the cases of Z v UK and TP & KM v UK are not themselves included, since both the Commission and Court agreed that there had been a violation on the substantive issue raised under Article 3 but differed in their view as to whether the failure to provide a domestic remedy for such a violation was a beach of Article 6 or Article 13.

McCann and others v United Kingdom[8]

The applicants were relatives of three members of the IRA who were shot and killed by the security forces in Gibraltar in 1988. It was accepted that the terrorists were on a mission to cause an explosion in the territory, but at the time of their deaths the car bomb was still located on the Spanish side of the border. The Commission found (by a majority of 11 votes to 6) that there had been no violation of Article 2 in that the killings resulted from use of force which was no more than necessary to protect others from unlawful violence and to effect their lawful arrests. By the slenderest of majorities (10 votes to 9) the Court found there had been a violation of the right to life. In a much criticised judgment[9] the Court did not blame the soldiers who fired the shots (whom they found to be under an honest and reasonable belief that an explosion was imminent) but found that the State's control and organisation of the operation at a higher level in the chain of command was lacking. It was the Court's first finding of a violation of Article 2 against any State and until very recently[10] was the only finding of a violation of that Article in respect of the United Kingdom.

[8] (1996) 21 EHRR 97. Because the opinion of the Commission is inserted into the judgments of the Court in the European Human Rights Reports references to those reports are given where available.

[9] Even the then President of the Court, the late Rolv Ryssdall, who was in the minority, described the majority judgment as "unfortunate" at the third Doughty Street lecture at Café Royal in London on 2 November 1995 (reprinted in (1996) 1 EHRLR 18).

[10] The judgments of the European Court on 4 May 2001 in Hugh Jordan and three other applications found a violation of the procedural obligation under Article 2 to conduct a proper investigation into the circumstances of deaths caused by the RUC.

Pullar v United Kingdom[11]

The applicant had been convicted of corruption by a Scottish jury which included an employee of one of the prosecution's main witnesses. He complained under Article 6 of the Convention that he had not received a fair hearing by an independent and impartial tribunal. The Commission unanimously agreed, but the Court (by a majority of 5 votes to 4) reversed that finding. The Court pointed out that the juror in question had been made redundant by the witness's firm only three days before the trial began, a factor which was as likely to make him biased against the prosecution's evidence as it was biased in favour of it. It also noted the safeguards which existed in the Scottish criminal justice system, namely the participation of 15 jurors and the possibility for majority verdicts, and placed reliance on the directions given by the judge and the oath taken by jurors to decide the case according to the evidence.

Buckley v United Kingdom[12]

A gypsy complained under Article 8 of the Convention that a refusal of planning permission which would have allowed her to live in a caravan on land which she owned in Cambridgeshire was a violation of her right to respect for private and family life. The interference was found by both the Commission and Court to pursue a number of legitimate aims, namely the interests of public safety or the economic well-being of the country, the protection of health and the protection of rights and freedoms of others. The issue was whether the measures taken in pursuit of those aims were no more than necessary in a democratic society. The Commission found that they were not. They considered that the applicant's gypsy status had not been sufficiently taken into account by the domestic authorities and that the alternative site offered to her was not suitable. Consequently they found, by a majority of 7 votes to 5, that there had been a violation of Article 8. The Court disagreed. It considered that the applicant's status as a gypsy had been given sufficient weight in the domestic system which had a number of safeguards in place such as the possibility of judicial review. The Court noted that the applicant had been offered alternative accommodation very near by and did not feel as well placed as the domestic authorities to assess the suitability of those other sites. It therefore found by 6 votes to 3 that there had been no violation of Article 8.[13]

Stubbings and others v United Kingdom[14]

The applicants were alleged victims of sexual abuse committed against them when they were children. Evidence supported their assertion that such victims suppress the events giving rise to a claim for damages against the alleged tortfeasors into their adult years, well beyond the 6 year limitation period for instituting civil proceedings. The House of Lords held that, unlike in cases of negligently inflicted injuries (where the limitation period is 3 years), there was no discretion under section 33 of the Limitation Act 1980 to extend the time limit to allow victims to bring their claims. The Commission held unanimously that this state of affairs constituted a violation of the applicants'

[11] (1996) 22 EHRR 391
[12] (1997) 23 EHRR 101

[13] This was the occasion for more red faces in Fleet Street. An article in the Independent on Sunday on 15 September 1996 under the headline "Government faces new Euro defeat" predicted "a damning verdict on the way Britain's planning laws have violated [gypsies'] traditional way of life." This was followed, two weeks later, after the judgment had been delivered, by a piece in the Observer entitled "Gypsies lose the right to be human."
[14] (1997) 23 EHRR 213

rights of access to court inherent in Article 6 in conjunction with Article 14, the non-discrimination clause. The Court, on the other hand, found that the Commission had been wrong to find Article 14 applicable at all. The applicants did not claim to have been discriminated against on any of the specified grounds in Article 14 such as sex or race, but relied upon the general category of "other status." The Court considered that the comparison with victims of negligently inflicted injuries was wholly artificial in that it emphasised the superficial similarities between the two groups but ignored the distinctions. Even if they were in an analogous situation, the Court held that there was a reasonable and objective justification for the difference in treatment between the two groups. The Court therefore found by a majority of 8 votes to 1 that there had been no violation of Article 6 on its own or in conjunction with Article 14. This remains the largest reversal in numerical terms of any British case.

Wingrove v United Kingdom[15]

This case concerned the refusal by the British Board of Film Classification to grant a distribution certificate for the applicant's video "Visions of Ecstasy" on the grounds that it was blasphemous. The effect was that the applicant was unable to distribute his work at all to the public which, he claimed, was a violation of his right to freedom of expression guaranteed by Article 10. It was accepted by both the Commission and Court that the interference pursued the legitimate aim of protecting the rights of others, especially the right under Article 9 not to be offended in one's religious beliefs. The issue turned on whether the refusal of any certificate was a proportionate response to that aim. The Commission expressed the view, by 14 votes to 2, that such a restriction was not necessary in a democratic society. They considered that the short video was unlikely to be watched by those it might offend and could have been distributed under a restricted certificate. The Court, however, took a different view of the way the video market works. They considered that once a video was available on the open market, even to a restricted audience, it could be copied, lent, rented and viewed in different homes, thereby escaping effective control by the authorities. They held, therefore, by 7 votes to 2, that a complete ban was a proportionate measure and that consequently there had been no violation of Article 10.

X, Y and Z v United Kingdom[16]

These applications concerned the refusal by the British authorities to register a post-operative transsexual as the father of a child born to his partner by artificial insemination by donor. The applicants, who were the family concerned, complained that this was in breach of the United Kingdom's positive obligation to respect their right to family life under Article 8 of the Convention. By a majority of 13 votes to 5 the Commission agreed, noting that the failure to recognise the male partner as father would have implications under the nationality and inheritance laws, as well as creating a social stigma. The Court, however, took a different view. Acknowledging that it was a difficult case and that there was conflicting evidence as to the seriousness of the interference which refusal to register would cause, they held by 14 votes to 6 that there was no violation of Article 8. The attitude of one member of the Court was expressed in these words in the concurring opinion of Judge De Meyer: "It is self-evident that a person who is manifestly not the father of a child has no right to be recognised as her father."

[15] (1997) 24 EHRR 1

[16] (1997) 24 EHRR 143

Robins v United Kingdom[17]

The drafters of the Convention might not have foreseen that a dispute over sewerage would be the kind of complaint that would end up in a finding of a breach of international law, but that is exactly what happened in this case. The applicants, who sued their neighbours for nuisance after sewerage seeped onto their land, complained that the length of time it took to resolve the issue of costs in relation to those proceedings exceeded the reasonable time requirement in Article 6. The issue was a narrow, if not technical one: should proceedings which related only to the issue of costs be seen as part of the determination of civil rights and obligations for the purposes of Article 6? The Commission, by 16 votes to 9, were of the opinion that the costs proceedings were subsidiary to the substantive dispute and that Article 6 was therefore not applicable to them. The Court, however, unanimously agreed that the costs proceedings were to be viewed as a continuation of the substantive litigation and that the reasonableness of their length fell to be considered under Article 6. The resulting length of 4 years 2 months was found to be unreasonable, and thus a breach of Article 6, taking into account the attitude of the parties, the complexity of the case and the number of levels of jurisdiction at which it had been considered.

National Provincial Building Society and others v United Kingdom[18]

A voluntary scheme whereby building societies paid tax on investor's savings direct to the Inland Revenue was put on a mandatory footing by section 40 of the Finance Act 1985. The transitional arrangements were governed by Regulations which the Woolwich Building Society successfully challenged in the domestic courts as being void for imposing double taxation. £57 million was returned to the Woolwich as a result. Three other Building Societies, encouraged by this success, wished to commence similar proceedings on behalf of their investors, but their claims were defeated by legislation which retrospectively validated the void Regulations. Those Societies complained that this gave rise to a violation of their rights under the Convention. The main issue was whether the deprivation of property occasioned by the retrospective legislation satisfied the requirements of Article 1 of Protocol 1. Both the Commission and the Court held that it did, it being in the public interest to reinstate Parliament's intention under the 1985 Act. But the Commission had been of the view that the effect of the legislation on these applicants was to deprive them of their right of access to court and therefore concluded, by 9 votes to 7, that there had been a violation of Article 6. The Court unanimously reversed this finding and found no violation of the Convention at all.

McGinley and Egan v United Kingdom[19]

The applicants were retired servicemen who had been stationed on or near Christmas Island in 1958 when the United Kingdom carried out nuclear tests in the vicinity. They both suffered ill health in later life which they claimed was caused by their exposure to radiation during these tests. As a result they sought increases to their service pensions and claimed that the MoD's refusal to disclose documents pertaining to the tests denied them effective access to the Pensions Appeal Tribunal, an inherent right under Article 6(1) of the Convention. They further claimed that as the records might contain important information which would either

[17] (1998) 26 EHRR 527
[18] (1998) 25 EHRR 127
[19] (1999) 27 EHRR 1

confirm or allay their concerns the failure to disclose them also constituted a violation of the United Kingdom's positive duty under Article 8 to respect their rights to private and family life. The Commission unanimously upheld the applicants' complaints under Article 6 in relation to records that might exist concerning the amount of radiation to which they could have been exposed. A majority of 23 to 3 also agreed that the facts disclosed a violation of Article 8, for the reasons given by the applicants and because no explanation or information had been given by the Government in response to their legitimate concerns about the effect of the exposure on their health. The Court reversed the Commission's conclusions under both Articles. By a majority of 6 to 3 it found that there was no violation of Article 6 because the applicants had failed to apply for disclosure of the relevant documents under the applicable domestic procedure. The Court considered that there was no evidence to support the Commission's finding that the avenues available to the applicants to access the records under domestic law were more theoretical than real. For similar reasons a majority of the Court (5 votes to 4) considered that the facts disclosed no violation of Article 8.

Sheffield and Horsham v United Kingdom[20]

The applicants were both male to female post operative transsexuals who claimed that the United Kingdom's refusal to recognise their new gender in law amounted to a failure to respect their rights to private and family life guaranteed by Article 8 of the Convention. By a majority of 15 votes to 1 the Commission concluded that the degree of distress and embarrassment caused to the applicants in the (albeit) limited circumstances in which they were required to disclose their former gender was sufficient to amount to a violation of Article 8, having particular regard to advances in medical research as to the causes of transsexualism and an apparent growing European consensus on the issue. The Court, on the other hand, by a majority of 11 votes to 9, concluded that refusal to recognise a change of sex legally (effectively by an amendment to the register of births) was not sufficiently serious for practical purposes when other documentation which did not reveal the applicants' former gender (such as passports and driving licenses) were taken into account. Advances in medical research did not alter the fact that transsexualism still raised complex scientific, moral, legal and social issues in respect of which there was no European consensus. It therefore held that the United Kingdom's position on the issue was within its margin of appreciation. It urged the State, however, to keep the situation under review. The applicants' complaints under Articles 12, 13 and 14 of the Convention were either considered by the Commission and Court not to give rise to a violation or to raise no further issues requiring examination.

Ahmed and others v United Kingdom[21]

The four applicants worked for various local authorities in posts which were designated politically restricted under the Housing and Local Government Act 1989. Under the Local Government Officers (Political Restrictions) Regulations 1990 such persons are unable to participate in certain political activities. As a result the applicants had to resign from or were unable to take up positions in their local political parties and could not actively support other candidates. They claimed that the Regulations were in breach of their rights to freedom of expression guaranteed

[20] (1999) 27 EHRR 163

[21] (2000) 29 EHRR 1

by Article 10 of the Convention, freedom of association under Article 11 and their right to participate in elections to be found in Article 3 of the First Protocol. The Commission, by a majority of 13 votes to 4, agreed with the applicants that the restrictions on their political activities went too wide in the pursuit of political neutrality of local government officials and were thus a violation of Article 10. They found no violation of Article 3 of Protocol 1 and considered it unnecessary to consider the complaint under Article 11. The Court, however, took a different view. It considered that the restrictions, which had been based on an official report which found actual and potential abuse of persons in the applicants' positions, did fulfil a pressing social need, namely to strengthen the political impartiality of senior local authority officials and to maintain confidence in democracy at local level. The Regulations did not pursue this aim in a disproportionate manner being restricted to activities which would, in the eyes of the electorate, call into question the applicants' impartiality. Furthermore, the necessity for the restrictions had been recently reviewed by the domestic authorities. By 6 votes to 3, therefore, the Court concluded that the facts disclosed no violation of Article 10. By the same margin, and with similar reasoning, the Court found no breach of Article 11 and agreed unanimously with the Commission that there was no breach of Article 3 of the First Protocol.

McLeod v United Kingdom[22]

The applicant was involved in acrimonious divorce proceedings in the course of which her former husband obtained a civil court order entitling him to possession of certain property in the matrimonial home which remained occupied by the applicant and her mother. Three days prior to expiry of the time limit for complying with the order, the former husband went to the matrimonial home while the applicant was at work accompanied by his brother, sister, his solicitor's clerk and two police officers. The police had attended at the request of the solicitor because they feared that there might be a breach of the peace if the ex-husband attempted to gain entry to the house. In the event the party were admitted peaceably by the applicant's mother but in circumstances which were subsequently found to amount to a trespass. The applicant's former husband and his relatives removed the property to which he was entitled while the police remained in the house or on the driveway. One of the police officers checked that only property which was on a list shown to him by the solicitor's clerk was removed. Telephoned by her mother, the applicant returned from work as the second and final van load of property was about to be driven away. She was prevented from intervening by the police who said that any dispute over what had been removed should be resolved between the party's solicitors. Although the applicant obtained damages against her former husband, his relatives and solicitor for trespass, the police were exempt from liability under the rule in *Thomas v Sawkins* [23] (preserved by section 17(6) Police and Criminal Evidence Act 1984) which provides that the police are entitled to enter private property where they reasonably fear that a breach of the peace may occur. The applicant thus complained that these circumstances amounted to a violation of her right to respect for private and family life and her home guaranteed by Article 8 of the Convention. The majority of the Commission (by 14 votes to 2) found no violation of Article 8. On the basis of the information they had received, the police had a duty to take seriously an indication that trouble may arise. The officers had acted with restraint and their presence in the applicant's home was necessary to

[22] (1999) 27 EHRR 493

[23] [1935] KB 249

prevent a breach of the peace and was within the State's margin of appreciation. The Court, on the other hand, found by a majority of 7 to 2 that there had been a violation of Article 8. Although the police's presence at the scene was in pursuit of the legitimate aim of preventing disorder or crime their entry to the applicant's home was disproportionate. The police should have taken steps to verify the information given to them by the ex-husband's party and, when they discovered that the applicant was not at home, should have remained outside the property. A complaint under Article 1 of Protocol 1 which the Commission unanimously rejected on the basis that the police had not interfered with any of the applicant's property was not pursued before the Court.

Matthews v United Kingdom[24]

Under the European Parliamentary Elections Act 1978 (which gave effect to an Act of the European Community of 1976) only residents of the United Kingdom were eligible to vote in European elections. The applicant, a British citizen resident in Gibraltar, claimed that her inability to participate in the election to the European Parliament in 1994 violated Article 3 of the First Protocol to the Convention under which Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. By a majority of 11 to 6 the Commission found that Article 3 of Protocol 1 was not applicable to the applicant's complaint because the European Parliament did not constitute a "legislature" within the meaning of the Article. The purpose of the provision was to guarantee free and fair elections at the local and national level, and not the supra-national level. The Commission left open the question as to whether the European Parliament had sufficient law-making power to be considered a "legislature" if Article 3 of the First Protocol were to have been applicable to supra-national bodies. In a significant development of jurisprudence, the Grand Chamber of the European Court held by 15 votes to 2 that not only did Article 3 of Protocol 1 apply to supra-national bodies, but also that the European Parliament had sufficient law-making and general democratic supervisory powers to qualify it as a "legislature" within the meaning of that Article. Whilst the State had a certain margin of appreciation in how it gave effect to the right to effective participation in elections, to exclude one territory of the European Union in its entirety denied the very essence of the right to the applicant and the other residents of Gibraltar. It followed that there had been a violation of Article 3 of the First Protocol. The Court found it unnecessary to consider the applicant's complaint of discrimination contrary to Article 14 of the Convention which had been rejected unanimously by the Commission.

Keenan v United Kingdom[25]

The applicant's complaint related to the circumstances surrounding her son's suicide whilst in prison. Her son had suffered from a history of mental illness and, at the time he hanged himself, was under medication on the segregation wing of the prison where he had been sent as punishment for an assault on two prison officers. The applicant invoked Articles 2, 3 and 13 of the Convention. The Commission (by 15 votes to 5) and the Court (unanimously) agreed that the State had fulfilled its positive obligation under Article 2 to secure the right to life, having in place an effective system to reduce the risk

[24] (1999) 28 EHRR 361

[25] Report of the European Commission of Human Rights of 6 June 1999; Judgment of the European Court of Human Rights of 3 April 2001.

of suicide in prisons which had been followed in this case. No such system could eliminate the risk of suicide completely and the prison authorities had taken all reasonable steps to prevent Mr Keenan's death consistent with their duty to respect his personal dignity. The Commission and Court also both unanimously found that the applicant's rights to an effective remedy guaranteed by Article 13 had been violated because the remedies available to her for legal action to establish liability for her son's death and for him to complain about his treatment were inadequate. A majority of the Court, however, also found a violation of Article 3 of the Convention in relation to the circumstances of detention of the applicant's son in the days before his suicide which the Commission had narrowly rejected by 11 votes to 9. Whereas for the Commission the absence of contemporaneous evidence to show that the applicant's son was suffering the requisite degree of distress or anxiety attributable to his detention (as opposed to his mental condition) led them to conclude that he had not been subjected to inhuman or degrading treatment or punishment, for the Court the lack of effective monitoring of his condition and the absence of informed pyschiatric input into his assessment and treatment in the days leading up to his suicide, together with the imposition of a period of segregation and additional punishment days before his anticipated date of release, were not compatible with the standard of care required for a mentally ill prisoner. By 5 votes to 2, therefore, the Court found that there had been a violation of Article 3.

Conclusion

These 14 cases represent approximately one quarter of all those judgments of the European Court of Human Rights in cases brought against the United Kingdom since McCann in which the Commission had expressed a view on the merits. Interestingly, the rate at which the old Court reversed findings of the Commission was higher (approximately one in three) than the rate at which the new Court has done so (approximately one in five).[26] This could be explained by a tendency of the new Court in its early days to be more ready to accept the opinion of the Commission where one had been given since in the majority of cases coming before it the new Court was considering both admissibility and merits for the first time.[27]

Such small samples make it difficult to draw any firm conclusions but the following general trends may be observed. There is no reason to suppose that these trends are restricted to cases concerning the United Kingdom and thus may be of more general application.

- Where the Court reversed a finding of the Commission it tended to replace an opinion that there had been a violation of the Convention with a finding that there had not. Thus, in 9 of the cases considered in this review the Court found no violation where the Commission had expressed the view that there had been a violation compared to only 5 where the position was the other way around.[28]

[26] Of the 14 judgments considered in this article 12 were decided by the old Court prior to 1 November 1999. Only the last two, Matthews and Keenan, were considered by the new Court in accordance with the provisions of Article 5(4) of Protocol 11. In the same period the new Court adopted 8 other judgments under the transitional procedure in which they agreed with the opinion expressed by the Commission.

[27] Since the abolition of the Commission the new Court has adopted more than 50 judgments in cases brought against the United Kingdom.

[28] Although not included in this review for the reasons given in footnote 7 supra, this trend is

- Many of those cases where the Court reversed a finding of a breach concerned political, moral or social issues. Thus in cases concerning the private lives of transsexuals or gypsies, the licensing of videos or restrictions on the political activities of local officials the Court has tended to be more conservative than the Commission. Put in terms of Convention jurisprudence the Court has given the State a wider margin of appreciation in these sensitive areas than the Commission was prepared to. This may have been partly due to the composition of the Court when compared with the Commission[29] or simply because of the natural tendency of a tribunal which knows it is not the court of final instance to be more interventionist.

- In other cases the Court has taken a different juridical approach to the interpretation of the Convention than the Commission did. This is most noticeable in a case such as Stubbings where the Court was not so much expressing a different view on the merits but saying that the Commission had interpreted the Convention wrongly. This also explains the basis for some of those cases in which the Court found a violation where the Commission had not, such as Robins and Matthews. In those cases the Court was developing Convention jurisprudence in ways in which the Commission might have felt were outside its authority.

- The two notable exceptions to these trends are McCann and McLeod. In both judgments the Court showed a willingness to indulge in a re-examination of the facts to come to the conclusion that there had been a violation of the Convention when the Commission were of the view that there had not been. This can be seen as not only going beyond the Court's supervisory role (which it often distinguishes from the role of an appeal court) but also as a usurpation of the Commission's function as the primary fact finder.

More generally, it may seem odd that the two bodies which were formerly charged with interpreting the Convention could so often disagree upon whether its provisions had been breached. This apparent conflict is all the more marked when the Convention is supposed to set out minimum standards to guarantee basic rights and fundamental freedoms. However, it ignores the fact that the Convention is not only a living instrument (the interpretation of which may change over time) but also a legal document the interpretation of which is bound to vary according to the composition of the tribunal and the assessment of the facts in any given case. Such a phenomenon is not unknown in the application of domestic law by national courts. Indeed, it could be said that differences of opinion are more likely

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also noticeable in cases which raised issues under several Articles of the Convention. In Benham v United Kingdom (1996) 22 EHRR 293, for example, the Commission found violations of Articles 6(3), 5(1) and 5(5); the Court only upheld the finding in respect of Article 6(3). Similarly in Chahal v United Kingdom (1997) 23 EHRR 413, both the Commission and Court found violations of Articles 5 and 13, but the Commission had also unanimously found violations of Articles 3 and 8.

[29] It is interesting to note that 9 of the judges on the new Court are former Commissioners though, of course, they are exempt from re-hearing cases in which they participated at the Commission. .

to occur with respect to the Convention given its broad provisions of general principle and relatively little case-law than with respect to national laws which are usually defined with more precision and subject to judicial scrutiny on a more regular basis.

It is noticeable also just how many decisions of the Commission and Court are reached by majority. This is especially so in the cases under consideration in this review where the Commission and Court have often disagreed amongst themselves and with each by a very narrow margin.[30] Again, this occurrence is not unusual in the domestic system where tribunals are composed of much smaller numbers. Indeed, given the size of the tribunals in Strasbourg it is perhaps more remarkable that unanimous decisions are ever reached. But it reinforces the notion that the Convention has no one meaning and seldom does a state of affairs give rise to an "obvious breach" as often used to be claimed.

Lawyers in the United Kingdom who are now familiarising themselves with the Convention and its jurisprudence pursuant to the Human Rights Act 1998 are no doubt beginning to appreciate the complexity of interpreting the Convention, if they did not already. As a body of English case law develops on the meaning of the Convention the propensity for disagreement at various levels of the judiciary will be seen to apply in respect of human rights just as it does in any other area of the law. If proof of this were needed the recent decision of the House of Lords in *Alconbury*[31] (which reversed a finding of the Divisional Court that certain provisions of the Town and Country Planning Act 1990 and related legislation were incompatible with the Convention right to a fair trial) or of the Privy Council in *Brown*[32] (which did the same to the Scottish High Court of Justiciary in respect of section 172 of the Road Traffic Act 1988 and the presumption of innocence) should suffice as examples.

As far as Strasbourg is concerned the potential for divergent views has been greatly diminished since the entry into force of Protocol 11 which abolished the European Commission of Human Rights. Thus, all applications are now only considered by the Court. If an application is declared admissible by a Committee of three judges a Chamber composed of seven judges gives a judgment on the merits. This judgment will usually be final. There is provision under Article 43 of the Convention for either party in exceptional cases to request that a case be reconsidered by a Grand Chamber composed of 17 judges.[33] However, only if a panel of five judges of the Grand Chamber consider that the case raises a serious question affecting the interpretation or application of the Convention, or raises a serious issue of general importance, will it accede to the request. So far no case considered by the panel has passed this high threshold. The purpose of the reforms

[30] In the same period the number of cases where the Commission and Court unanimously agreed with each other are relatively few. Examples are Hussain v United Kingdom (1996) 22 EHRR 1 where there was a violation of Article 5(4) and Findlay v United Kingdom (1997) 24 EHRR 221where Article 6(1) was found to have been breached.

[31] R v Secretary of State for the Environment Transport and the Regions ex parte Holding and Barnes plc [2001] UKHL 23.

[32] Margaret Anderson Brown v Procurator Fiscal (Dunfermline) and Her Majesty's Advocate General for Scotland [2001] 2 WLR 817

[33] The request must be made within 3 months from the date of the judgment of the Chamber: Article 43(1). Hence judgments do not become final until this period has elapsed or both parties have indicated that they will not request that the case be referred to the Grand Chamber or the panel of the Grand Chamber itself rejects a request to re-hear the case: Article 44(2).

brought into effect by Protocol 11 was to streamline the procedure for determining applications and in particular to reduce the time it took for an application to be resolved. But one important consequence may well be a greater consistency in jurisprudence with divergent views on whether the facts give rise to a violation being expressed by two differently constituted organs of the Convention only very rarely.

In due course cases which are now being considered by British courts under the Human Rights Act 1998 will be referred to the European Court of Human Rights. The right of individual petition to Strasbourg remains for a dissatisfied applicant (though not for a public authority[34]). Although one of the purposes of the Act was to reduce the number of times that the United Kingdom is found to have violated the Convention in Strasbourg, no one seriously believes that there will be no further findings of breach now that the Act is in force. It is inevitable that sooner or later an English court will be corrected in its interpretation of the Convention by the European Court of Human Rights. There is plenty of scope, therefore, for divergent views on the interpretation of the Convention to continue in respect of United Kingdom cases, both at the domestic and international level, notwithstanding the demise of the Commission.

[34] Or rather those who are not regarded as a "person, non-governmental organisation or group of individuals" according to the wording of Article 34 – the tests are not necessarily the same.