ANNEX

Strasbourg Lecture (2012)

Strasbourg then and now – a wander down memory lane and other thoughts

MANY LECTURES could be given about the ECHR and the judgments of the Strasbourg Court. Indeed innumerable such lectures have been given and continue to be given practically on a daily basis. This lecture is unashamedly to be centred upon my own experience of the Strasbourg Court, as counsel, as an *ad hoc* UK judge sitting on the Court, and as a UK judge applying the Convention case law or, as the Strasbourg Court on occasion rules, misapplying it. The one promise, or is it rather a threat, I give you at the outset is that I shall not mention a single case in which in one capacity or another I have not personally been involved. Most lawyers' reminiscences contain a high percentage of their own cases. The last Lord Chancellor of Ireland published the first of what was expected to be a two-volume set of memoirs. After the first volume appeared there was an unaccountable delay. One of his colleagues, however, discovered the explanation. "I am told," he said, "that the compositor has run out of capital i's!"

If, which may be doubted, this lecture has anything that could properly be dignified as a theme (apart obviously from the self-indulgence of personal reminiscence) it is that in the days, now over a quarter of a century ago, when I used to appear before the

Court, invariably acting, and almost invariably losing, on behalf of the UK Government, the Strasbourg Court's rulings had a beneficial effect on our own laws and attitudes. Strasbourg was, in short, a good thing. As, however, the years have passed, and more particularly since the HRA 1998, which in effect incorporated the Convention into domestic law as from October 2000, it has become to my mind a less good thing. And that perhaps is hardly surprising. Since 2000 we, the UK's own judges, have been able, indeed obliged, to apply the Convention for ourselves. What need, therefore, for an international tribunal, clearly less well versed in our own ways, to tell us how to conduct our affairs? This was very much the theme of a lecture given some three years ago by Lord Hoffmann. It did not, I may say, receive universal acclaim.

Before I come to any personal reminiscence, let me first set the scene historically by reference to what have always seemed to me two striking illustrations of old-fashioned attitudes clearly in need of fresh thinking. First, this, from the celebrated (or do I mean notorious?) judgment of Lord Atkinson in the House of Lords in *Roberts v Hopwood* in 1925 – the one exception to my rule about mentioning no case in which I was not personally involved. A London borough council had decided to pay its workers a minimum wage of £4 per week, notwithstanding that the cost of living had fallen. The District Auditor decided that these payments were excessive (gratuities rather than wages) and he surcharged the councillors. Upholding the surcharge, Lord Atkinson in his speech castigated the councillors for failing to determine what would have been just and reasonable remuneration and instead for having

> … allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.

For the second example of rampant sexism remain, if you will, in the House of Lords, but this time move to the legislative chamber and allow some thirty-two years to elapse after the decision in *Roberts v Hopwood,* until December 1957 when the House of Lords debated what was to become the Life Peerages Act 1958. (I interpolate: the Law Lords sat in the House of Lords as the final appeal court for 133 years until 2009 when they (we) were re-created as a new Supreme Court. They were the first life peers and indeed the only life peers until the 1958 Act). Here is the somewhat startling contribution to the 1957 debate made by the then still youthful Earl Ferrers:

> Frankly, I find women in politics highly distasteful. In general, they are organising, they are pushing and they are commanding … I believe that there are certain duties and certain responsibilities which nature and custom have decreed men are more fitted to take on; and some responsibilities which nature and custom have decreed women should take on. It is generally accepted that the man should bear the major responsibility in life. It is generally accepted, for better or worse, that a man's judgment is generally more logical and less tempestuous than that of a woman. Why then should we encourage women to eat their way, like acid into metal, into positions of trust and responsibility which previously men have held? If we allow women into this House where will this emancipation end? … Will our judges, for whom we have so rich and well-deserved respect, be drawn from the serried ranks of the ladies? [I interpolate, Lady Hale would not I think be impressed!]

… and so on and so forth until this peroration:

> If it should come to pass that there was a vote upon this matter, I trust that the outcome would portray the feeling that I feel sure nine out of ten noble Lords have in their heart – namely, that we like women; we admire them; sometimes we even grow fond of them; but we do not like them here.

In those long distant times there was perhaps room, some of you at least will agree, for an international Convention to shake up conventional thinking on minority rights. Discrimination against women apart, we still had capital punishment for murder; male homosexual activity was a criminal offence, even between consenting adults in private. So too was attempted suicide; so too abortion. Discrimination in employment and housing, against foreigners, religious minorities and others, was widespread – and lawful. I could go on.

I come then to the first group of my own cases, those in which I appeared as counsel for the Government, on occasion led by a law officer but mostly not, often myself leading a young Mr Bratza, for some years now Sir Nicholas Bratza, the UK's permanent judge on the European Court of Human Rights and since last October its President. My overall record before the Court was, I think, played twelve, won one, drew one, lost ten. Actually that wasn't a bad record in those years, the late 1970s and early 1980s. Mostly the cases were about prisoners' rights, or immigrants' rights or rights of mental health patients or other disadvantaged minorities – and the plain fact is that, in those pre-HRA days, the Convention and the Strasbourg rulings striking down various of our antiquated laws embodying old-fashioned and illiberal attitudes had an altogether healthy impact on the UK's domestic life and practices.

In those days, indeed, the Government was in fact on occasion quite happy to lose its cases. Let me give you two illustrations of that. The Prison Officers Association was amongst the more militant unions, intent on a repressive prison regime and fiercely resistant to all change. The Home Office, to its credit, was keen to liberalise prison practices but quite unable to persuade the

intransigent union to agree to this. The result was a series of prison cases in Strasbourg, all of which the Government loyally contested but all of which they lost – thereby becoming able, armed as they now were with Strasbourg's adverse rulings, to force the union's hand into accepting the changes required. *Silver and others v UK* was just such a case, the principal complaint of all seven applicants being that the prison authorities exercised full control over their mail, reading both the correspondence that was sent to them and their own letters out, even letters to lawyers. In addition, Mr Silver himself had been refused two petitions to the Home Secretary asking for permission to seek legal advice. Unsurprisingly, the Court found violations both of article 6 and of article 8.

The other case I well recollect the Government were happy to lose was *Young, James and Webster v UK* (the railwaymen case). Essentially the position there was that British Rail had concluded closed shop agreements with all the relevant unions acting for the various railway employees, agreements, that is, which prevented British Rail from employing anyone but union members. Young, James and Webster had each worked on the railways for some years before these agreements were made and were all opposed to joining a trade union. Mr Webster, for example, thought the trade union movement unrepresentative and that it acted contrary to the best interests of both the workers and the country in general. In particular he found it repugnant that he was obliged to participate in strike action. Article 11 of the Convention, I need hardly remind you, provides that

> Everyone has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

It says nothing about the right *not* to join trade unions but nevertheless that is what the Court decided was implicit in article 11:

A "negative right" not to be compelled to join an association or a union.

The governing trade union law had been enacted and the railwaymen's applications to the Court had been made whilst Labour was in office, that is before 1979. The case was heard, however, in 1981 when the Conservatives under Mrs Thatcher were in power and they had very different views about closed shop legislation. Although Mr Bratza and I felt obliged to persuade the Solicitor General (Ian Percival), who was leading us, that the UK Government had no option but to fight the case – i.e. to argue that as a matter of law it was open to the UK to sanction closed shop agreements – all of us were happy to lose the case and lose it we duly did.

Amongst the other notable cases which I lost in Strasbourg I will mention just two. *Harman v UK* was the aftermath of an ill-starred prosecution of Harriet Harman (now the Deputy Leader of the Labour Party), in which I had succeeded right up to and including an appeal to the House of Lords, for contempt of court in disclosing to the press a clutch of sensitive Home Office documents that had been made available to her in her then capacity as a solicitor acting for a prisoner. (She was in fact the Legal Officer of the National Council for Civil Liberties, Liberty as it is now called.) Discovery of documents under UK law was then subject to an implied undertaking that they should be used solely for the purpose of those proceedings. Strasbourg, however, unfortunately for the Government's argument, paid more attention than the domestic courts had done to the fact that in the course of the proceedings all these documents had actually been

read out verbatim in open court by junior counsel for the claimant, Mr Stephen Sedley – later Sedley LJ. Again we lost.

The one other case amongst those I lost in Strasbourg (led by the Attorney-General, Michael Havers) perhaps worth mentioning is *Malone v UK* where the Court condemned the UK's long-standing practice of telephone tapping, authorised in those times merely by the Home Secretary's warrant with no legislative backing whatever. The result of that case was the Interception of Communications Act 1985, the first of a series of statutes, each in turn prompted by further adverse Strasbourg judgments. These legitimised and put on a clear statutory basis first phone-tapping and mail interceptions (IOCA 1985) and then successively MI5 (the Security Service Act 1989), SIS (MI6) and GCHQ (both officially recognised for the first time in the Intelligence Services Act 1995) and finally the Regulation of Investigatory Powers Act 2000, coming into effect the same day as the Human Rights Act. This effectively replaced all the earlier legislation governing the intelligence agencies and heightening the duties to which they are subject when interfering, as inevitably they must, with people's civil liberties, above all with their privacy rights. The Security Service Act 1989 was, I may say, prompted by another successful case brought to Strasbourg by Harriet Harman (who clearly by then had got a taste for it) and by Patricia Hewitt (later a colleague of hers in Mr Blair's Labour Cabinet), complaining that MI5 held files on them containing their personal details.

All this was legislation I was to become very familiar with, first as the president of tribunals established under the various statutes to adjudicate on complaints by members of the public about the actions of the various intelligence services. In prospect it sounded enthralling and I recall my excitement when asked

to preside over these tribunals. And indeed the introductions we were given to the various services were quite fascinating – obviously we had to be familiarised with their workings or we could never have dealt properly with the complaints made against them. But, perhaps predictably although not I think predicted, 99% (I speak literally) of all the complaints that we received were in fact nonsensical. Paranoia is surprisingly widespread. People used to complain that MI5 had inserted listening devices into their toasters or that their phones were malfunctioning with constant clicks on the line. One thing I learned was that tapped phones never click or malfunction; only those whose phones are tapped can guarantee an invariably clear and reliable line. Manifestly the complainants were people in whom the security services could have had no possible interest whatsoever, so it was all rather a waste of time. Later, however, I was appointed to the statutory role of Intelligence Services Commissioner and for six years I devoted four weeks a year (two of them during my judicial vacations) ensuring to the best of my ability that our intelligence officers both in the UK and around the world were operating properly devised and monitored systems and working within the proper limits of their powers, essentially the limits of necessity, reasonableness and proportionality. In all I visited some twenty-five British embassies, my accommodation varying between luxurious ambassadorial residences and a portacabin on a military base in Kosovo.

I have, I fear, digressed. Let me return to my involvement with the Strasbourg Court, next in my capacity as the *ad hoc* UK judge. I shall mention only the more high profile of the two cases in which I sat in this capacity. The applicant was the notorious spy,

George Blake, an SIS Officer from 1944 until his arrest in 1960 for disclosing secrets to the Russians. In 1961 he was sentenced to a record term of forty-two years imprisonment (a term that may or may not have been related to the rumour that his treachery had cost the lives of forty-two secret agents). In 1966, however, he was assisted in a daring escape from prison and since then has lived in Moscow. In 1989 he wrote his autobiography and that it was – or more particularly the royalties of about £100,000 that his British publishers had agreed to pay him – that prompted the UK Government to take proceedings to deny him this payment: on the principle that a self-confessed traitor should not profit from his treachery. The Government's ultimately successful claim in turn prompted Blake to complain to Strasbourg that the UK proceedings had themselves constituted a violation of his Convention rights. Sir Nicholas Bratza, having as counsel advised the UK Government at the time of publication in 1989 as to the course they should then take, was clearly unable in 2004, when the case reached the Strasbourg Court, to act as the UK judge and thus it was that I came to be appointed.

After long deliberation we rejected as plainly unarguable and thus inadmissible a variety of Blake's complaints about loss of property rights, loss of rights of free expression and various complaints of unfair court procedures. But eventually, after further deliberations, we upheld his complaint in just one particular, namely the overall length of the litigation. The regrettable fact was that the legal proceedings in the UK had taken something over nine years to reach their final conclusion in the House of Lords in July 2000. Problematic though the case had proved, by no stretch of the imagination could Mr Blake's rights be said to have been determined, as article 6 requires, "within a reasonable

time". He was awarded 5,000 euros, enough to stick in the gullet of several UK commentators but vastly less than the royalties he had been deprived of.

I come next to two cases in our own courts in which, whilst feeling it impossible to give effect to what I felt sure were the requirements of the Convention, I nevertheless, many at the time thought somewhat rashly, expressed my personal views that the merits of the claimants' cases would come to be recognised in Strasbourg.

The first of these two cases was *ex parte Smith*, more commonly known as the Gays in the Military case, in which in 1995 I sat at first instance in the Divisional Court. This was, of course, before the HRA and so before the domestic courts were entitled to give effect to Convention rights. Although, therefore, I felt obliged to reject the applicant's challenge to the UK's then policy of dismissing from the armed services anyone of homosexual orientation – anyone, that is, sexually attracted to a member of their own sex, irrespective of whether or not they actually engaged in homosexual conduct – I expressly stated that

> I for my part strongly suspect that so far as this country's international obligations are concerned, the days of this policy are numbered.

And so, of course, it proved to be. In 1999 the ECtHR in *Smith and Grady v UK* unanimously found there to have been violations of both article 8 and article 13 (the Wednesbury irrationality test proving too high a threshold for domestic courts to be able to adjudicate properly on the sensitive questions of necessity and proportionality arising under article 8(2)).

Before leaving *Smith* I cannot resist telling you of the reaction to the opening line of my judgment in the case, a line I was rather

pleased with and recall thinking at the time was really pretty acute: "Lawrence of Arabia would not be welcome in today's armed forces".

Seldom do any of one's judgments ever attract the least public attention, let alone response. Following *Smith*, however, I received over a hundred letters and of these fully half were devoted to that opening line. Not one, however, said "Goodness, what a perceptive thought." On the contrary, they were about evenly divided between those who said "How dare you traduce the memory of a great servant of the British Empire; there is not a word of reliable evidence to establish that Lawrence was a homosexual." The other half said: "Too true, Lawrence wouldn't be welcome in today's armed services; we don't want poofters like him around."

Again, I fear, too much digression. Let me come to my next case, *Anderson v Secretary of State for the Home Department*, where I was involved as a member of the Court of Appeal. The basic question at issue there was who should have the last word in deciding how long a murderer should spend in prison. As you will know, since the abolition of the death penalty in 1965 anyone convicted of murder must be sentenced to life imprisonment (or in the case of juveniles to indefinite detention at Her Majesty's pleasure) – whether guilty of mercy killing or mass murder. Whether that is a good idea is another matter, the subject of continuing public and political debate but nothing to do with my lecture today.

Anderson was really the last of a series of cases, the Strasbourg Court having already ruled with regard to Her Majesty's pleasure cases and discretionary life sentences that it is for the judges (not the Home Secretary) to decide the penal tariff – the period to be served in prison as punishment before the prisoner can even be

considered by the Parole Board for release – and for the Parole Board (not the Home Secretary) to decide (rather than merely recommend) when, following the tariff period, prisoners should be released back into the community.

Mandatory life sentence cases, however, had always been treated differently: essentially on the basis that it was the intrinsic gravity of the offence of murder, rather than the dangerousness of the individual prisoner, which justified the imposition of a whole life sentence and leaving to the mercy of the Home Secretary the question whether, and if so when, a prisoner should be released.

To cut a long story short, when *Anderson* came before the Court of Appeal in 2001, the question for us was whether we should continue to treat mandatory life sentence cases differently. We decided that, since another such case, *Stafford v United Kingdom*, was about to be heard by the Strasbourg Court, the right course would be to leave it to them to decide this highly sensitive question. It would, I suggested, have been somewhat presumptuous for us in effect to pre-empt Strasbourg's impending decision. I added, however:

> For my part, I shall be surprised if the present regime for implementing mandatory life sentences survives the Court of Human Right's re-examination of the issue in *Stafford.*

Again, my forecast proved correct. By the time the further appeal in *Anderson* came before the House of Lords, Strasbourg had already decided that tariff fixing is legally indistinguishable from the imposition of a sentence so that article 6 requires the judges to have the last word on it.

Because, however, the legislation then in place unambiguously entrusted decisions as to the length of imprisonment of mandatory

life sentence prisoners to the Secretary of State, not even section 3 of the Human Rights Act – a section which, as surely you will know, generally enables the Court to torture statutory language into compatibility with the UK's Convention obligations – could render it compatible so that the House of Lords in *Anderson* in fact made a declaration of incompatibility under section 4 of the Act. This is one of the comparatively few examples of the Court feeling driven to this unsatisfactory conclusion – unsatisfactory, of course, because it leaves the successful claimant still without his fundamental rights and also because it requires government then to legislate afresh, which they prefer not to have to do. It is, indeed, a striking fact that counsel for the Crown is usually as enthusiastic for a section 3 construction of the legislation, however strained, as counsel for the complainant – assuming, of course, that the Court is going to decide that there would otherwise be a Convention violation.

Having now preened myself on two cases where I correctly predicted what the outcome would be in Strasbourg, although feeling unable to give effect to the Convention domestically, I had better go some way to restoring the balance by confessing to having been the judge responsible for bringing an untimely end to the attempts by UK prisoners in our own courts to be allowed to vote in general elections. That was in 2001 and one of the prisoners challenging the ban was Hirst who was later to succeed in his application to the Strasbourg Court. Refusing him, and two others, leave to appeal to the Court of Appeal from decisions which went against them in the Divisional Court, I held that it was for Parliament alone either to abolish the ban on prisoners voting or else to narrow it as they thought fit. I ended my short judgment thus:

Politically I am not unsympathetic to the applicant's cause. Jurisprudentially, however, I regard it as doomed.

I was here proved wrong. Strasbourg ruled in October 2005 that the blanket ban on prisoners voting breached article 3 of the First Protocol – a broad provision by which contracting states

> … undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expressions of the opinion of the people in the choice of the legislature.

Nothing there about who could properly be disqualified from voting. But Strasbourg nonetheless held that although each state has a wide margin of appreciation in the matter, it is not all-embracing. The UK's ban was, the Court said, indiscriminate, applying automatically irrespective of the gravity of the prisoner's offence or the length of his sentence or, indeed, as to when the sentence was to end. Consider, for example, someone sentenced to seven days imprisonment for shoplifting whose short period of custody happens to coincide with an election. It is not entirely obvious why he or she should be deprived of their vote. That said, this remains a political hot potato and, as you will know, the UK Government, having conspicuously failed over the past six years to give effect to the Court's judgment in *Hirst*, later became subject to a further Strasbourg ruling, in a case called *Greens*, that the UK are in breach of Protocol 1 and had to introduce amending legislation to correct the position within six months of the *Greens* judgment becoming final, i.e. six months from April 2011 when the grand Chamber dismissed the UK Government's request for an appeal hearing in that case. This period for compliance however, was later extended because of the Grand Chamber's decision to entertain a similar case, *Scoppola v Italy (No 3)*, which was heard last November,

with the Attorney-General acting on behalf of the UK Government as Third Party Interveners. The Grand Chamber's judgment is now awaited so the situation remains to be clarified. I shall be surprised, however, if Strasbourg now sanctions Britain's blanket ban.

Again, if I may be allowed, a short digression. It used to be the case, as everyone knew, that the only adults barred from voting in general elections were convicts, lunatics and peers (in modern parlance prisoners, mental patients and members of the House of Lords). Mental patients (unless also convicted offenders) obtained the vote in 2000 – subject, theoretically, to their having the requisite mental capacity. Those peers who are members of the House of Lords, however, remain disenfranchised. Supposedly, the reason they have no vote is that, even when Parliament is prorogued, they (unlike MPs who must submit themselves for re-election if they wish to continue as legislators) remain members of a legislative body. When, however, three years ago, under the Constitutional Reform Act, the Law Lords were despatched across Parliament Square and re-created as a new Supreme Court, we lost our rights to speak and vote in the House of Lords so long as we remained full-time judges. I recall pointing out at the time that, having lost our say in Parliament, we should now have the vote restored to us at elections. I was assured that a team of lawyers would immediately be set to work to correct this legislative oversight. However, it never was corrected. You may therefore look forward one day to reading the judgment of the Strasbourg Court in the case of *Brown v UK*. I shall then add "litigant" to the various capacities in which I have been involved in the Strasbourg case law.

It is time to bring matters rather more up to date. Although, as I said at the outset, there seems to me altogether less need now

than in pre-HRA days for a supranational court to rule on the UK's observance of the Convention, I cannot pretend that all our domestic courts' rulings have found favour in Strasbourg. On the contrary, a number of House of Lords cases to which I have been party, and in which we have rejected various human rights complaints, have subsequently been decided very differently by the European Court of Human Rights. *Gillan* was one such case, a 2006 House of Lords decision on stop-and-search powers under the Terrorism Act 2000, powers which Strasbourg held in 2010 afford police officers too broad a discretion and thus risk arbitrariness in application. *S and Marper v Chief Constable of South Yorkshire Police* was another, a 2004 judgment of the House of Lords holding that the UK's policy of retaining indefinitely the DNA samples and fingerprints of all those required to provide them, irrespective of whether they were thereafter convicted or acquitted, involves no breach of article 8. Strasbourg later, in December 2008, held that this practice too violates article 8 on the basis that the powers of retention of these samples are impermissibly indiscriminate.

Here again the Government has been slow to implement the required change in the law. Last May, in *GC v Commissioner of Police of the Metropolis*, seven of us in the Supreme Court, in the light of Strasbourg's ruling in *S and Marper*, recognised that the House of Lords decision in that case could no longer stand, declared the existing guidelines for DNA retention unlawful, and gave the Government "a reasonable time" to introduce a compliant new legislative scheme. A new scheme, based on the much more restrictive rules which apply in Scotland, is now included in the Protection of Freedoms Bill, likely to be enacted soon.

A third instance of the House of Lords having to change course

on a matter of intense public and political controversy was over the control order legislation, still a political hot potato. In a group of cases in 2008 the House of Lords had decided that the control order regime as it then operated was lawful – in particular that the national interest in protecting secret sources of intelligence justified disclosing to the suspected terrorist, at least in some cases, very little indeed of the basis of the suspicion against him. That certainly was the conclusion of the majority of the Court, namely Lady Hale, Lord Carswell and myself. Lord Hoffmann was more hawkish even than we were; Lord Bingham on the other hand would have held the system unlawful. Following the Strasbourg Grand Chamber's subsequent judgment in the Belmarsh case, however, the enlarged Court of nine of us sitting in *AF(No 3) v Home Secretary* concluded (in Lord Hoffmann's case with patent reluctance if not indeed resentment) that we had no choice but to allow the appeals and remit the cases for rehearing in accordance with Strasbourg's ruling which required very substantially more disclosure to suspects than we had thought was necessary. As Lord Rodger crisply put it:

Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.

Not that any of you would have needed the translation!

I may add as a final digression that I came close to having to recuse myself from hearing the control order litigation. In January 2006 I received out of the blue a letter from the Home Office pointing out that the Terrorism Act 2005 (the legislation which substituted control orders for the Belmarsh detention orders which the House of Lords had by then condemned in the landmark case of *A*)

required the Home Secretary to consult three specified office holders before deciding annually whether to renew the control order regime. One was the Government's independent adviser on terrorist legislation, then Lord Carlile. Another was the Director-General of the SS, then Eliza Manningham-Buller. The third was the Intelligence Services Commissioner, at that time me. I replied rather testily that until this letter I had been completely unaware of being a statutory consultee, no one having previously taken the trouble to notify me of this. Nor of course had I been consulted about it in advance although, as I observed,

> … perhaps unsurprisingly given that, as I now learn, this provision was only introduced into the legislation at about 4 a.m. on that long March night last year when the Bill was passing urgently and contentiously between the two Houses.

At all events, rather presciently as it turned out, I declined to express any views on the question of renewal since

> … to do so would inevitably compromise my judicial integrity and make it impossible for me hereafter to hear any appeal such as may be brought to question the legitimacy or legality of the control order regime.

How right I was. I could never have sat on any of those cases had I previously advised government of my views on renewal.

That brings me to the final case I want to discuss this afternoon, *Al-Khawaja v UK*, one of the three cases mentioned by Lord Hoffmann in his lecture as examples of cases where Strasbourg really has no business to be interfering in our domestic affairs. The case concerned the hearsay evidence rule. Dr Al-Khawaja was a doctor charged with indecent assault on two of his patients. One of them, after making a statement to the police, committed

suicide. The judge admitted her statement in evidence but warned the jury that they had not seen the complainant or heard her cross-examined. Her story was, however, supported by strong similar fact evidence, not only from the other complainant but from two other witnesses who had had similar experiences. The jury convicted unanimously and the doctor was given a custodial sentence. The Court of Appeal said that the overall case against the appellant was very strong and they were wholly unpersuaded that the verdicts were unsafe. The Strasbourg Court, however, said that there had been a violation of the fair trial provision of article 6. In their opinion, in any case in which a conviction is based "solely or to a decisive degree" on a statement by a person whom the accused has had no opportunity to examine, the defendant has not had a fair trial.

Unlike the position in *AF(No 3)*, the control order case, however, the Strasbourg Court's decision in *Al-Khawaja* was not the last word on this particular issue. The reason for this is that, having been decided by an ordinary Chamber rather than the Grand Chamber, the UK Government then requested that the case should indeed be referred to the Grand Chamber. Knowing as they did that a group of similar cases under the title *R v Horncastle* were pending before the Supreme Court, the Grand Chamber adjourned consideration of that request until after we had heard and given judgment in *Horncastle*. Put shortly, all seven of us in *Horncastle* unanimously refused to apply the first instance Chamber's decision in *Al-Khawaja* and in effect joined with the UK Government in urging the Grand Chamber to take the case and to recognise that our own domestic legislation on the admissibility of both hearsay (and, indeed, anonymous) evidence is entirely compatible with article 6's requirement for fair trials.

The Grand Chamber heard the case in May 2010 and, having deliberated for no less than a year and a half, last December finally issued a decision which, *mirabile dictu*, accepted the UK Government's main argument. Notwithstanding the Grand Chamber's view that the deceased complainant's statements had indeed been "decisive", it concluded that there were sufficient counterbalancing factors to ensure that, viewing the fairness of the proceedings as a whole, the admission of the statement in evidence did not after all breach article 6.

This decision has gone some way in encouraging those less sceptical than Lord Hoffmann about the value of the Strasbourg Court as a supranational tribunal determining the proper application of the Convention within individual member states, to believe that there can indeed be a useful process of dialogue between Strasbourg and the national courts of the member states, not least our own Supreme Court.

This view feeds into another which has gained some currency in recent months: the view that our courts should not regard themselves as bound by the decisions of the Strasbourg Court but rather, having merely taken account of them (as section 2 of the Human Rights Act 1998 requires), should feel free to follow or reject them as we please. I took the opportunity in a judgment we gave last week in a case called *Rabone v Pennine Care NHS Foundation Trust* – all about the tragic death by suicide of a voluntary psychiatric patient negligently given home leave – to express my own views on this particular question. I commend them to you. Perhaps a good subject for another lecture would be: "Which court is truly supreme: the Supreme Court or Strasbourg?" It is not, however, the subject of today's lecture. That, you may be relieved to hear, is now concluded.