

UoP OSCOLA 5th Referencing: Essay Example

This essay aims to explore how the UK courts ‘take into account’ and interpret Strasbourg jurisprudence. The Human Rights Act 1998 (HRA) was enacted to allow UK courts to implement and give effect to the European Convention on Human Rights (ECHR). The prevailing issue here is whether the UK courts should be bound to follow Strasbourg jurisprudence or go further to enhance their human rights protection when interpreting Convention rights. Traditionally, the UK courts have strictly interpreted s 2 of the 1998 Act and treated themselves as duty-bound (the mirror principle).¹ This essay will argue that although the mirror principle has been weakened and does not operate strictly in practice, it remains the general rule with expanding exceptions. This essay will begin by critically examining the mirror principle. It will then critically discuss/examine the expanding exceptions to the mirror principle and the dialogue approach adopted between the European Court of Human Rights (ECtHR) and the UK courts.

Section 2(1)(a) of the HRA 1998 regulates the relationship between UK courts and the ECtHR, stating national courts must ‘take into account’ Strasbourg jurisprudence when they are adjudicating on convention rights. Lord Bingham’s statement in *R (on the application of Ullah) v Special Adjudicator*² that ‘the national courts must keep pace with the Strasbourg jurisprudence as it evolves: no more but certainly no less’ has led to the development of the mirror principle.³ Lord Bingham’s dictum is regarded as ‘the heart of judicial approach’ to the interpretation of s 2(1) of the HRA 1998.⁴ This dictum is further illustrated in the judgment of Lord Slynn in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*.⁵ In that case, Lord Slynn declared ‘in the absence of some special circumstances ... clear and constant jurisprudence of the ECtHR should be followed’.⁶ These two cases effectively established the UK courts’ traditional approach, confirming that UK courts should mirror the ECtHR decisions in practice.⁷

¹ HRA 1998, s 2(1)(a).

² [2004] UKHL 26, [2004] 2 AC 323.

³ *Ullah* (n 2) [20].

⁴ *Ullah* (n 2) [20].

⁵ [2001] UKHL 23, [2003] 2 AC 295.

⁶ *Alconbury* (n 5) [26].

⁷ Roger Masterman, ‘Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?’ (2004) Winter PL 725, 732.

A strict interpretation of s 2(1) of the HRA 1998 promotes legal certainty, efficiency, and predictability.⁸ Additionally, s 2 effectively allows the UK courts to pass authority for their decisions/judgements to an external source.⁹ This is a crucial benefit of the mirror principle since it prevents the UK courts from being criticised for taking an activist approach, as they are obliged to follow Strasbourg's jurisprudence.¹⁰ Although the duty imposed on UK courts when adjudicating on Convention rights 'appears weak',¹¹ UK courts have misunderstood their obligation and thus, treated themselves as bound to follow Strasbourg jurisprudence.¹² In treating themselves as duty-bound, the UK courts are constrained between 'a floor and a ceiling'.¹³ Essentially, UK courts should not go beyond the protection that the ECtHR provides, nor should they fall below Strasbourg's standards. An example of a strict application of the mirror principle is demonstrated in *Secretary of State for the Home Department v AF (No 3)*¹⁴ where Lord Rodger stated '[i]n reality, we have no choice ... Strasbourg has spoken, the case is closed'.¹⁵

Strict adherence to the mirror principle is contentious as it prevents the UK courts from expanding rights and utilising a more generous approach.¹⁶ Additionally, the mirror principle is subject to criticism as it does not appreciate the principle of subsidiarity,¹⁷ meaning the UK courts are 'better placed to evaluate local needs and conditions'.¹⁸ Through the mirror principle being applied strictly in practice, there is a risk in the UK courts adopting a 'straight jacket approach'¹⁹ and in doing so, preventing the development of their own human rights jurisprudence.²⁰

⁸ Masterman (n 7).

⁹ HRA 1998, s 2(1)(a).

¹⁰ Masterman (n 7) 725.

¹¹ Masterman (n 7) 736.

¹² Jonathan Lewis, 'The European Ceiling on Human Rights' (2007) Winter PL 720, 727.

¹³ Francesca Klug and Helen Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' (2010) 6 EHRLR 621, 624.

¹⁴ [2009] UKHL 28, [2010] 2 AC 269.

¹⁵ *AF (No 3)* (n 14) [98].

¹⁶ Nuno Ferreira, 'The Supreme Court in a Final Push to Go Beyond Strasbourg' (2015) July PL 367, 369.

¹⁷ Nicolas Bratza, 'The Relationship Between the UK Courts and Strasbourg' (2011) 5 EHRLR 505, 508.

¹⁸ Lewis (n 12) 737.

¹⁹ Paul Mahoney, 'The Relationship Between the Strasbourg Court and the National Courts' (2014) 130 LQR 568, 583.

²⁰ Ferreira (n 16) 368.