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Title: Good news! The Strasburg Court does not overrule UK laws after all

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Example citation: Ressel, J. (2015) Good news! The Strasburg Court does not overrule UK laws after all. *Law, Culture & Ideas Blog*. **01/02/2015**

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Version: Published version

Official URL: <https://lawcultureblog.wordpress.com/2015/02/02/good-news-the-strasburg-court-does-not-overrule-uk-laws-after-all/>

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Law, Culture & Ideas

02/02/2015 · 12:40 AM

Good News! The Strasburg Court does not overrule UK laws after all.



The forthcoming election campaign in UK may well include promises by the Conservative Party to withdraw from the European Convention on Human Rights (‘ECHR’) should the party win the next election.

The original proposals to withdraw from the Convention were launched at the Conservative Party conference in October 2014 but instantly denounced as legally illiterate and based on nothing more than a fundamentally flawed misunderstanding of human rights jurisprudence.

In short the proposals never made sense, were full of legal howlers and were not supported by any credible legal authority. Moreover the proposals disregarded the implications for the constitutional structure of United Kingdom.

It now transpires that not only are the proposals legally illiterate but there is in fact no empirical evidence to suggest that UK has been subject of especially harsh treatment by the European Court of Human Rights (‘The Strasburg Court’).

Ironically, we may need to pay homage to effect of the recently introduced Rule 47 of the Rules of the Strasburg Court in helping us to realise that the suggestion for UK to withdraw from the ECHR amounts to just a moment of legal insanity and political contempt for the notion of human autonomy and democratic self-determination.

On 29 January 2015 the Court published its Annual Report for 2014. The report included a statistical analysis on a country by country basis of the number of cases brought against it and enumerated the number of judgments where the state in question was held to have violated the rights of its citizens. UK was subject to only four adverse judgments last year in contrast to the highly ranked Russian Federation which

was held to be in breach of its Convention obligations in 129 cases closely followed by Turkey facing 101 adverse judgments. [1]

The legal justification for the Conservative Party proposal to withdraw from the Convention was the claim that the Strasbourg Court “has over time developed a ‘mission creep’” involving itself in developing and extending the scope of the Convention beyond the intentions of the original framers of the Convention.

Moreover the Conservatives claimed that the Strasbourg Court regularly goes beyond the intention of the Convention because it regularly overturns decisions of UK courts and overrules laws passed by UK Parliament [2]. It now transpires that a statistical analysis of the cases dealt with by the Court last year provides no evidence whatsoever to support this claim.

As we may recollect, the proposals were heavily criticised, most prominently by Dominic Grieve [3], *inter alia* as legally illiterate [4] sloppy and riddled with howlers which would not be made by any competent law undergraduate.

A vivid example of an obvious legal howler is a misreading of the well known case of *Vinter & Others v UK* [5]. The case was decided by the Court in 2013 and dealt with the legality of non-reviewable life sentences.

The Conservatives asserted that as a consequence of the decision in *Vinter*: “...murderers cannot be sentenced to prison for life, as to do so was contrary to Article 3 [6] of the Convention. This Article is designed to prohibit “torture” and “inhuman or degrading treatment or punishment.” For the Strasbourg Court, this entails banning whole life sentences even for the gravest crimes.”[7] This claim is simply untrue and legally wrong based on a faulty but politically motivated misreading of the case.

As Professor Alison Young explains the judgment does not in fact say that life sentences are banned or that those serving life terms must be released. What the Court decided was to ban life sentences without review. She writes that “...*what is banned is a life sentence without a review after 25 years of that sentence. If there are sound penological grounds for continued detention, the prisoner remains in detention.*”[8]

The Conservative proposal also asserted that under Section 3 of the Human Rights Act 1998 once the UK courts had construed legislation so as to be compliant with the Convention the will of Parliament was overborne. This claim is legally illiterate and plainly wrong. In fact there is nothing in the 1998 Act which stops Parliament from passing legislation reversing an incompatibility judgment (see Section 4).

Accordingly, the proposition that the Strasbourg Court’s use of the living instrument doctrine to interpret and apply the European Convention on Human Rights amounts to a ‘mission creep’, and an attack on the law making sovereignty of UK Parliament and is oppressive of UK courts amounts to nothing more than a hollow cry in the dark.

The fact is that, as Owen Bowcott reports, of all the member states of the Council of Europe, UK had the highest number of judgments confirming that it was **not** in breach of its obligations under the Convention. That is to say, that only in four out of 14 judgments was UK held to be in breach of a human right protected by the Convention.[9]

In his article Owen Bowcott publishes a number of useful tables summarising the statistical information produced by the Court.[10] The table below shows the absolute numbers and percentages of adverse judgments against individual states. We can see that the Russian Federation accounts for 14.4% of all violation judgments followed by Turkey at 11.3% and Romania at 9.7%. UK does not feature in this table as its percentage of violation judgments is well below 1%.

Violation judgements by state

Key | ● Number ● Percentage of total violation judgments



GUARDIAN GRAPHIC

SOURCE: ECHR [11]

The evidence indicates that the UK is not a country regularly found to be in breach of its Convention and as such any fear that the Government has of interference (real or perceived) in domestic law making by the European Court of Human Rights is entirely without foundation in fact.

Moreover, as it is clear that the European human rights jurisprudence is fully aligned with and sympathetic to UK human rights law, it follows that any call for a separate legal instrument such as the proposed 'British Bill of Rights', intended to operate as a metaphorical and a legal dam stemming the influx of European jurisprudence cannot be justified in law or reason.

Furthermore, it seems that the Strasbourg Court itself has taken effective administrative steps to discourage applications in the interests of efficiency, if not justice.

In his speech to the press on 29 January President of the Court, Dean Spielmann proudly described the effect of Rule 47 in actually discouraging applications to the Court. In his speech on presenting the Court's Annual Report President Spielmann, reported good progress being made in reducing the backlog of outstanding cases and expressed satisfaction that the introduction of more stringent requirements for the lodging of applications had resulted in fewer cases reaching the Court, a drop of some 3% over the year. [12]

"The lessons we can draw from 2014 are the following. First, a decrease of around 3% can be observed in the number of incoming applications.

Second, the Court implemented a policy whereby the lodging of applications is made subject to more stringent conditions. Failure to meet these conditions, set out in the new Rule 47 of the Rules of Court, will result in the applicant's complaints being rejected without being examined by a judge. I would stress that applicants whose applications are rejected under Rule 47 are fully entitled to lodge a new application, provided that it satisfies the conditions laid down.

Nevertheless, the fact of processing only those applications which are properly presented represents a considerable efficiency gain. A total of 56,250 applications were allocated to a judicial formation, a 15% reduction compared with the previous year. The Court ruled in over 86,000 cases. The number of cases disposed of by a judgment remains high: 2,388, compared with 3,661 the previous year. At the end of 2013 there were some 100,000 applications pending.

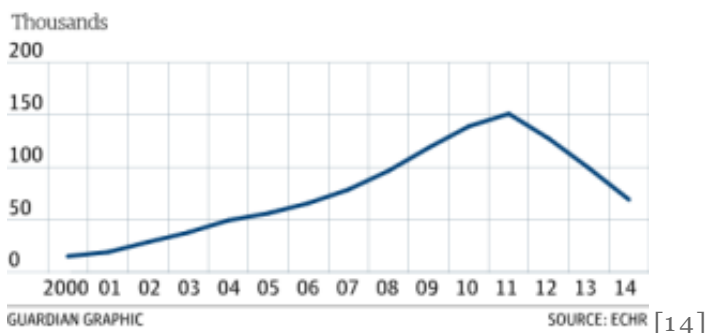
That figure was down by 30% at the end of 2014, standing at 69,900.

Half the pending applications – 35,000 – are repetitive cases. In addition, 8,300 applications (12%) will

be dealt with under the single-judge procedure” *President Dean Spielmann, Press Conference Speech 29 January 2015*. [13]

The drop in the number of pending applications is neatly illustrated in the table below published by *The Guardian*.

Applications pending before a judicial formation



Owen Bowcott has extracted the statistics for UK and writes that in 2014 of the 1,997 cases lodged against UK 98.7% meaning 1,970 actual cases “were declared inadmissible or struck out.” Further, “[o]f the 1,243 UK applications pending for judicial assessment at the end of last year, over 1,000 relate to voting rights for prisoners – the unresolved issue that has provoked a bitter stand-off between the UK parliament and the ECHR.”[15]

The figures produced by the Strasburg Court suggest that contrary to the UK Government’s assertions, the number of UK cases admitted to the Court for a hearing is actually very few. The fear of re-entry of civil jurisprudence into UK common law appears quite unfounded and in no way threatening the logical coherence of the operational closure of UK common law, manifest in notions of consistency, stability, predictability, equality and ideas of precedent and treating like cases alike.

Furthermore, the Strasburg Court itself has adopted extra-legal economic principles of economic efficiency focusing on speed of process of adjudication and disposal of cases, rather than developing a transcendent notion of juridical justice. This suggests that its allegiance is to a non-reflective positive law process, a positive interpretation of a text at the risk of a juridical closure (focusing on internal consistency and doctrinal interpretative stability) in deliberate ignorance of the ecology of human rights jurisprudence, the very environment that nourishes the essential sense of human freedom. [16]

If one were a cynic (in the modern sense) it may be possible to conclude that the UK Government does protest too much in seeking to reject the ECHR because ironically it is far too close to it.

Links and Notes:

[1] European Court of Human Rights, Annual Report 2014 (Available at http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf)

[2] J Ressel ‘Human rights, the law, common sense and the question of freedom.’ *Law, Cult. & Ideas Blog* (8 October 2014) (Available at <https://lawcultureblog.wordpress.com/>)

[3] See for instance the BBC Radio interview with Dominic Grieve, the former Attorney General, recorded on 3 October 2014. (Available at <http://www.bbc.co.uk/news/uk-29472750>)

[4] See Liberty ‘*Legally Illiterate*’ (Available at <https://www.liberty-human-rights.org.uk/news/latest->

[news/legally-illiterate](#))

[5] Available at [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664#{%22itemid%22:\[%22001-122664%22\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664#{%22itemid%22:[%22001-122664%22]})

[6] Article 3 of ECHR prohibits torture, or inhuman or degrading treatment or punishment without reservation. (Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf)

[7] Protecting Human Rights in UK (Available at <http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document>)

[8] A. Young, 'HRA Howlers: The Conservative Party and Reform of the Human Rights Act 1998' U.K. *Const. L. Blog* (7th October 2014) (Available at <http://ukconstitutionallaw.org>)

[9] Owen Bowcott, *The Guardian*, 29 January 2015 'UK broke law in fewer than 1% of European human rights cases in 2014' at <http://www.theguardian.com/law/2015/jan/29/uk-broke-law-european-human-rights-cases-2014>

[10] *Ibid.*

[11] *The Guardian*, 29 January 2015 – Guardian Graphic at: http://static.guim.co.uk/ni/1422560354198/ECHR_violation_judgement.svg

[12] President Dean Spielmann, Press Conference Speech, Strasbourg, 29 January 2015 (Available at http://www.echr.coe.int/Documents/Speech_20150129_Press_Conference_2015_ENG.pdf)

[13] *Ibid.*

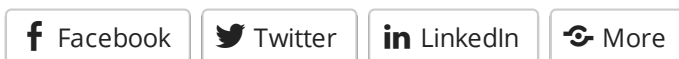
[14] *The Guardian*, 29 January 2015 – Guardian Graphic at: http://static.guim.co.uk/ni/1422560354118/ECHR_pending_judicial_revie.svg

[15] Owen Bowcott *op. cit.*

[16] Gunther Teubner 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' *The Modern Law Review* 2009 Vol 72, No 1, pp 1-23

Suggested citation: J Ressel 'Good News! The Strasbourg Court does not overrule UK laws after all.' *Law, Cult. & Ideas Blog* (1 February 2015) (Available at <https://lawcultureblog.wordpress.com/>)

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