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Thematic Analysis: Human Rights and the 2010/11 U.K. Supreme Court

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THEMATIC ANALYSIS

Human Rights

Karinne Coombes and Fiona Roughley

I. Introduction

The efforts of the UK Supreme Court in the field of human rights during its first year reflected and informed a broader debate in society generally as to whether decisions of the European Court of Human Rights (hereafter "EurCtHR") in Strasbourg are appropriate for the domestic context. As the government mooted in Whitehall the merits of substituting the Human Rights Act 1998 (hereafter "HRA") with an autochthonous "British Bill of Rights", the newly-formed Supreme Court in the old Middlesex Guildhall struggled to articulate a framework for why, when and how the rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms (hereafter "ECHR"), as incorporated into UK law by the HRA, might not mean for the British what Strasbourg says they mean for Europe.

In *Manchester City Council* v. *Pinnock*[1] the Supreme Court proposed a formula for dealing with relevant Strasbourg decisions:

> This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law... Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.[2]

The formula is useful for explaining why the Court treated relevant Strasbourg jurisprudence differently during the term. However, as helpful as the formula is for *retrospectively* categorising outcomes, it may prove unworkable as a prospective guide. In particular, it is difficult to see how the legislature, let alone a public authority for whom it is "unlawful ... to act in a way which is incompatible with a Convention right",[3] will be able to determine when an aspect of domestic law can properly be labelled "fundamental". However, as this review illustrates, it is only in exceptional cases that the Supreme Court supports the rejection of unambiguously direct guidance from Strasbourg.[4] Yet it is the concept of "exceptionality" that is the rub. To adopt a phrase used by Lady Hale in argument in *Pinnock,* "exceptionality is an outcome and not a guide".[5]

II. "Follow that line"

Decisions of the Supreme Court during its first year demonstrated that British courts must not

1 [2010] UKSC 45, [2010] 3 WLR 1441. A subsequent decision by the Court on 9 February 2011 in relation to the same matter addressed only consequential orders and costs matters and has no bearing on the present discussion: *Manchester City Council* v. *Pinnock* [2010] UKSC 6.

2 [2010] 3 WLR 1441, at [48], references omitted.

3 HRA, s.6(1).

4 See Part IV below.

5 [2010] 3 WLR 1441, at [51].

only take into account Strasbourg jurisprudence, which they are required to do by the HRA,[6] but they must also treat this jurisprudence as carrying significant weight and having, in many cases, a decisive effect.

Although the decision in *R (A Child)* v. *Secretary of State for the Home Department*[7] was politically controversial,[8] the judgment exhibited a standard application of "follow that line" judicial reasoning. At issue were statutory provisions requiring all persons sentenced to 30 months' imprisonment or more for a sexual offence to notify the police of where they were living and their travel abroad. With no possibility of review, the requirements operated indefinitely. The claimants were two convicted sex offenders who were subject to the notification regime. The issue before the Court was one of proportionality:[9] whether the inability to seek review of the notification requirements rendered them a disproportionate means of pursuing a legitimate aim.[10] The Divisional Court of the Queen's Bench held that they were disproportionate and issued declarations of incompatibility. The Court of Appeal subsequently upheld those declarations.[11]

The Supreme Court dismissed the appeals. After reviewing the relevant Strasbourg jurisprudence, Lord Phillips[12] concluded that, because none of the Strasbourg cases directly concerned lifetime notification requirements for sex offenders, they could not be considered "authority, binding or otherwise". Yet the Strasbourg reasoning proved decisive. In those cases, the possibility of review of notification requirements or retention of personal information arrangements connected with criminal procedures was considered "highly material" to the question of proportionality.[13] Consequently, the Supreme Court upheld the declarations of incompatibility applying to the present applicants because "the notification requirements constitute a disproportionate interference with article 8 rights because they make no provision for individual review".[14]

In *Pinnock*, substantial domestic authority was in direct conflict with directives from Strasbourg. The issue was whether article 8 of the ECHR requires a court, which is being requested by a local authority to order that a person be dispossessed of his home, to determine the proportionality of the possession order notwithstanding that the right of occupation has, under domestic law, come to an end. In contrast to three House of Lords decisions,[15] a line of Strasbourg cases[16] had "well established"[17] an affirmative answer to this question. Furthermore, Strasbourg jurisprudence

6 HRA, s.2(1).

7 [2010] UKSC 17, [2010] 2 WLR 992.

8 See, for example, Alan Travis, "David Cameron condemns supreme court ruling on sex offenders", *The Guardian* (16 February 2011). Available at <http://www.guardian.co.uk/society/2011/feb/16/david-cameron-condemns-court-sex-offenders> (last accessed on 31 July 2011).

9 *R (A Child)* v. *Secretary of State for the Home Department* [2010] 2 WLR 992 (It was common ground that: (i) the notification requirements interfered with the claimants' article 8 ECHR rights guaranteeing respect for private and family lives, homes and correspondence; (ii) the interference was in accordance with the law; and (iii) the notification requirements pursued the legitimate aims of "the prevention of crime and the protection of the rights and freedoms of others" at [4]).

10 *Ibid.*, at [41].

11 *R. (JF (by his litigation friend OF) and Thompson)* v. *Secretary of State for the Home Department* [2009] EWCA Civ 792, [2010] 1 WLR 76.

12 Lady Hale and Lord Clarke agreed with Lord Phillips. Lord Hope (at [59]) and Lord Rodger (at [61]) also agreed with the reasons of Lord Phillips but did so subject to additional comments, none of which are relevant to the role of Strasbourg jurisprudence in the Court's decision.

13 *R. (A Child)* v. *Secretary of State for the Home Department* [2010] 2 WLR 992 at [34].

14 *Ibid.*, at [57].

15 *Harrow London Borough Council* v. *Qazi* [2003] UKHL 43, [2004] 1 A.C. 983; *Kay* v. *Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 A.C. 465; *Doherty* v. *Birmingham City Council* [2008] UKHL 57, [2009] 1 A.C. 367.

16 Many of the Strasbourg cases concerned the UK directly: *Connors* v. *United Kingdom* (2004) 40 EHRR 198; *McCann* v. *United Kingdom* (2008) 47 EHRR 913; *Kay* v. *United Kingdom* (Application no. 37341/06), 21 September 2010 (although this case was decided after oral argument in the Supreme Court in *Pinnock* had concluded).

17 *Manchester City Council* v. *Pinnock* [2010] 3 WLR 1441, at [45].

also established that where there is a procedure for judicial review of a possession order, a "judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (*i.e*, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate for resolving sensitive factual issues".[18]

The Supreme Court followed the Strasbourg Court and, in doing so, articulated its "formula" for when Strasbourg jurisprudence should be applied, notwithstanding substantial domestic authority to the contrary.[19] As discussed above, the formula leaves much unresolved. However, applying it to the facts, the Court concluded that, since there was "no question of the jurisprudence of the EurCtHR failing to take into account some principle or cutting across our domestic substantive or procedural law in some fundamental way", the Strasbourg decisions should be followed. Consequently, the Court held that, "to be compatible with article 8, where a court is asked to make an order for possession of a person's home at the suit of a local authority, the [UK] court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact".[20] The Court also decided that, "wherever possible, the traditional review powers of the court should be expanded so as to permit it to carry out that exercise".[21]

The simplicity of expression masks the significant expansion of the content of traditional judicial review that it represents. For dispossession cases, the powers of the review court (absent express statutory provisions to the contrary) now extend to "reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view".[22] Although the Court stressed that ordinarily this right of review will have no practical utility where a local authority is entitled to possession as a matter of domestic law,[23] the more significant implications of the decision relate to judicial review generally. "Proportionality" is a requirement of a number of articles of the ECHR,[24] and processes of traditional judicial review are not limited in availability, nor peculiar in content, to the possession order context.

III. Strasbourg sets the limits

During its first year, the Supreme Court considered a number of claims that advocated expanded interpretations of the substantive provisions of specific human rights and the scope of the application of the HRA. In these instances, the Court adopted a cautious approach, broadly indicating that it will not go beyond Strasbourg jurisprudence.[25]

In *Secretary of Defence* v. *Smith*[26] the Court considered, *inter alia*, the extraterritorial application of human rights obligations. The central question was whether Private Smith, a British soldier who died of hyperthermia while on a British military base in Iraq, was subject to UK jurisdiction within the meaning of article 1 of the ECHR so as to benefit from the HRA while abroad.[27] Al-

18 *Ibid.*, at [45].

19 *Ibid.*, at [48].

20 *Ibid.*, at [49].

21 *Ibid.*, at [73].

22 *Ibid.*, at [74].

23 *Ibid.*, at [54].

24 For example, articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of assembly and association).

25 This may be in contrast to jurisdictions that do not have an external court fulfilling a supervisory role over the domestic court. See, for example, *Olga Tellis* v. *Bombay Municipal Corporation* AIR (1987) SC 180, where the Indian Supreme Court held that the right to life includes a right to livelihood.

26 [2010] UKSC 29, [2011] 1 A.C. 1.

27 In particular, it was argued that, insofar as the HRA requires a state to act in conformity with the Convention, the UK was required to perform an inquest into Private Smith's death that satisfied the procedural requirements of Article 2 of the

though the appellant, the Secretary of State for Defence, and the respondent, the mother of the deceased, agreed that Private Smith was within the jurisdiction of the UK, they disagreed on the nature of that jurisdiction. The Secretary of State argued that jurisdiction under the ECHR was primarily territorial, such that British soldiers would only be under UK jurisdiction while on a British base. In contrast, counsel for Mrs Smith drew a parallel with state agents, such as diplomats and consular officials, who remain subject to the jurisdiction of the state when exercising state powers outside the territory of the state.[28] Therefore, they argued, the HRA applied because Private Smith was a member of the armed forces and his death occurred while he was on active service on behalf of the UK.

Overturning the unanimous decision of the Court of Appeal, the majority of the Supreme Court[29] held that jurisdiction under the ECHR is primarily territorial and could only be broadly interpreted in exceptional circumstances. Since no claim could succeed under the HRA "unless there has been a breach of a Convention right of a person *within the jurisdiction* of the United Kingdom that should have been secured pursuant to article 1",[30] the Court considered whether, pursuant to article 1 of the ECHR, British troops operating on foreign soil fall within UK jurisdiction. Examining EurCtHR decisions in *Bankovic* v. *Belgium*[31] and subsequently,[32] Lord Collins concluded[33] that, "article 1 reflects the territorial notion of jurisdiction, and that other bases of jurisdiction are exceptional and require special justification".[34] Since Mrs Smith's claim did not fall within the classes of cases previously recognised by Strasbourg as warranting extraterritorial application of the Convention,[35] and the majority could find no "basis in [Strasbourg's] case law, or in principle, for the proposition that the jurisdiction which states undoubtedly have over their armed forces abroad both in national law and international law means that they are within their jurisdiction for the purposes of article 1", British troops on active service overseas would only be within UK jurisdiction for the purposes of article 1 when on a British military base.[36]

Smith highlights the unwillingness of the Supreme Court to go beyond Strasbourg jurisprudence. The reasoning of Lord Phillips,[37] representative of the majority, endorsed the view of Lord Brown in *Al-Skeini* v. *Secretary of State for Defence*,[38] namely that article 1 should not be interpreted as "reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach".[39] Since the claim that armed forces fall under the jurisdiction of the state by virtue of their personal status was novel, and in the words of Lord Phillips, no Strasbourg jurisprudence "clearly demonstrate[d] that the contention [of Mrs Smith was] correct".[40] Thus, the Court of Appeal erred

Convention.

28 *Ibid.*, at [33].

29 Lady Hale, Lord Mance and Lord Kerr dissented on the issue of jurisdiction.

30 *R. (Secretary of State)* v. *Smith* [2011] 1 A.C. 1 at [5], emphasis in original. Article 1 of the ECHR provides that, "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

31 *Bankovic and others* v. *Belgium and others*, no. 52207/99, 12 December 2001.

32 *Öcalan* v. *Turkey* (2003) 37 EHRR 238; (2005) 41 EHRR 985 (Grand Chamber); *Issa* v *Turkey* (2004) 41 EHRR 567; *Markovic* v. *Italy* (2006) 44 EHRR 1045 (Grand Chamber); *Al-Saadoon and Mufdhi* v. *United Kingdom* (Admissibility) (2009) 49 EHRR SE 95; *Medvedyev* v. *France* 29 March 2010.

33 Lords Roger and Walker agreed.

34 *R. (Secretary of State)* v. *Smith* [2011] 1 A.C. 1 at [305].

35 *Ibid.* (Namely, (i) territorial jurisdiction by a state over the territory of another contracting state; (ii) extensions of territorial jurisdiction by analogy; and (iii) common sense extensions of the notion of jurisdiction to fit cases which plainly should be within the scope of the Convention).

36 *R. (Secretary of State)* v. *Smith* [2011] 1 A.C. 1 at [307].

37 Lord Hope and Lord Brown agreed.

38 [2008] A.C. 153.

39 *R. (Secretary of State)* v. *Smith* [2011] 1 A.C. 1 at [60] per Lord Phillips.

40 *Ibid.*

in finding that Private Smith was under the jurisdiction of the UK within the meaning of article 1 when operating outside the British base in Basra, Iraq.[41] Underscoring this deference to Strasbourg, Lord Phillips commented that, "[t]he proper tribunal to resolve this issue is the Strasbourg court itself, and it will have the opportunity to do so when it considers *Al-Skeini*".[42]

Obiter remarks in *R. (A)* v. *Croydon London Borough Council*; *R. (M)* v. *Lambeth London Borough Council*[43] also confirm the unwillingness of the Court to go beyond Strasbourg jurisprudence when determining the scope of Convention rights. The claimants in this case were asylum seekers who were separately denied accommodation available to children *(i.e.*, persons under 18 years of age) pursuant to section 20(1) of the Children Act 1989 because local authorities concluded that the claimants were over 18 years old. Yet an assessment by independent doctors concluded that they were aged 15 and 17 years respectively. On this basis, the claimants sought judicial review of the decisions regarding their ages and entitlement to accommodation. The lower courts held that decisions under s.20(1) of the Children Act were not reviewable. The Supreme Court allowed the appeals, holding that the determination of age was a question of fact that may be subject to judicial review.[44] Although *obiter*, the Court touched upon whether the right to accommodation is a civil right protected by the ECHR, such that an exercise of local authority powers under section 20(1) of the Act would engage article 6(1) of the ECHR. Lady Hale[45] noted that, "no Strasbourg case had yet gone so far" as to recognise that a legislative right to be provided with accommodation amounted to a civil right, despite the fact that this was assumed, but not decided, in a prior House of Lords decision.[46] Highlighting the unwillingness of the Court to go beyond Strasbourg, Lady Hale stated that, "I would be most reluctant to accept, unless driven by Strasbourg authority to do so, that article 6 requires the judicialisation of claims to welfare services of this kind."[47]

IV. Strasbourg will not always be followed

At the far end of the spectrum of how the Supreme Court addressed decisions of the EurCtHR in its first term is *R.* v. *Horncastle*,[48] as the Court declined to follow Strasbourg jurisprudence on the basis that English law adequately protected the Convention right at issue and the rule laid down by Strasbourg did not take into account existing domestic processes and was therefore not suitable for domestic implementation.

The central question in *Horncastle* was whether the appellants' right to a fair trial guaranteed by article 6 of the ECHR was breached because their convictions were based solely, or to a decisive extent, on the statements of absent witnesses who could not be cross-examined.[49] Existing

41 *Ibid.*

42 *Ibid.*

43 [2009] UKSC 8, [2009] 1 WLR 2557.

44 *Ibid.*, at [32-33].

45 Lords Scott, Walker, and Neumerger agreed. Lord Hope went further than the other justices, concluding that "it can now be asserted with reasonable confidence" that the duty to provide accommodation to children in need "does not give rise to a 'civil right' within the meaning of article 6(1) of the Convention", at *Ibid.*, [65]).

46 *R. (A)* v. *Croydon London Borough Council*; *R. (M)* v. *Lambeth London Borough Council* [2009] 1 WLR 2557 at [39], citing *Runa Begum* v. *Tower Hamlets London Borough Council)* [2003] 2 A.C. 430 (where the House of Lords assumed, without deciding, that a claim to be provided with suitable accommodation under the homelessness provisions of Part VII of the Housing Act 1996 was a civil right).

47 *R. (A)* v. *Croydon London Borough Council*; *R. (M)* v. *Lambeth London Borough Council* [2009] 1 WLR 2557 at [44]. Lady Hale ultimately concluded that, even if the right to accommodation existed as a civil right, the procedures in place were sufficient to meet the requirements of article 6(1) of the Convention, at [45].

48 [2009] UKSC 14, [2010] 2 A.C. 373.

49 At issue were articles 6(1), which provides that, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded

Strasbourg jurisprudence – including the Chamber decision in *Al-Khawaja and Tahery* v. *The UK*[50] concerning the very same domestic legislation – determined that article 6 would be violated when convictions are based solely, or to a decisive extent, on hearsay evidence.[51] In *Horncastle*, the appellants challenged convictions for which hearsay evidence was admitted[52] pursuant to the Criminal Justice Act 2003, which contained certain safeguards but lacked the exclusionary rule established by Strasbourg. A unanimous Supreme Court dismissed the appeal, holding that although the HRA requires domestic courts to take Strasbourg jurisprudence into account,[53] there may be rare instances in which they could refuse to follow its lead.[54]

Providing extensive reasons, the Court held that the Strasbourg Court's sole or decisive rule was unnecessary and not suitable for English criminal law because the legislative safeguards established "in the interests of justice"[55] by Parliament "strike the right balance" between fair trials and the interests of victims and society for criminals to "not be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason."[56] The Court expressed particular concern with the fact that, although Strasbourg had recognised the need for exceptions to the strict application of article 6(3)(d),[57] it had introduced – and reaffirmed – the sole or decisive rule without fully explaining the underlying principle[58] and, given that most of its cases concerned procedures from civil law jurisdictions,[59] Strasbourg did not fully consider whether the rule was justified in the English common law context nor whether English law adequately protected article 6 rights.[60] The

from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice" and 6(3)(d): "Everyone charged with a criminal offence has the following minimum rights: .... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

50 *Al-Khawaja and Tahery* v. *The United Kingdom*, nos. 26766/05 and 22228/06, 20 January 2009.

51 *Lucà* v. *Italy*, no. 33354/96 ("where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6", at [40]); aff'd in *Visser* v. *the Netherlands*, no. 26668/95, 14 February 2002; *P.S.* v. *Germany*, no. 33900/96, 20 December 2001; *Krasniki* v. *the Czech Republic*, no. 51277/99, 28 February 2006. See also *Doorson* v. *the Netherlands*, 26 March 1996 ("Even when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements", at [76]).

52 For the defendants Horncastle and Blackmore, a witness had died after giving a statement to police, which was read into evidence; for the defendants Marquis and Graham, the evidence of a witness who was too afraid to testify was read into evidence; and for Carter, evidence that was the product of business records of a corporation was admitted.

53 HRA, s.2(1)(a): "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights".

54 *R.* v. *Horncastle* [2010] 2 A.C. 373 ("There will... be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course.... This is such a case", at [11]).

55 *Ibid.*, at [14].

56 *Ibid.*, at [108].

57 *Ibid.*, at [73].

58 *Ibid.*, at [80 and 86]. See also *ibid.* ("The sole or decisive rule has been introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions", at [14]).

59 *Ibid.* ("The jurisprudence of the Strasbourg court in relation to article 6(3)(d) has developed largely in cases relating to civil law rather than common law jurisdictions and this is particularly true of the sole or decisive rule", at [107]).

60 *Ibid.* ("as I have shown that [Strasbourg] case law appears to have developed without full consideration of the safeguards against an unfair trial that exist under the common law procedure. Nor, I suspect, can the Strasbourg court have given detailed consideration to the English law of admissibility of evidence, and the changes made to that law, after consideration

Court ultimately held that the sole or decisive rule was inappropriate because it would "create severe practical difficulties"[61] and the Criminal Justice Act 2003, properly construed, adequately protected article 6 rights.[62]

In *Al-Khawaja*, the EurCtHR held that hearsay evidence submitted under the Criminal Justice Act 2003 breached article 6.[63] The Supreme Court's lengthy justification in *Horncastle* for refusing to follow *Al-Khawaja* is arguably indicative of how seriously the Court takes Strasbourg jurisprudence, and the extent to which it considers departure from Strasbourg "exceptional". However, references to the possibility of sparking a "valuable dialogue" with the EurCtHR[64] suggest that the Supreme Court was none too subtly insisting that, even if Strasbourg has given its opinion once, the judicial conversation on the ECHR between UK courts and Strasbourg does not only travel downwards and westwards. The Grand Chamber has now heard arguments in *Al-Khawaja*. The value of the "dialogue" and its implication for English law remain to be determined.

V. Conclusion

Recent human rights cases illustrate that the Supreme Court takes seriously its obligation to engage with Strasbourg jurisprudence. However, an important question remains: what criteria should English courts use to determine when to follow or disregard applicable ECHR rulings? *Pinnock* and *Horncastle* both involved domestic and EurCtHR authority that were inconsistent with each other, but their outcomes were mirror images. In both cases, the Court gave a list of relevant considerations (*e.g.*, whether an aspect of English law is "fundamental" or whether English law was "adequate" despite the assessment of the EurCtHR), but these considerations arguably provide little guidance for future cases where domestic authority conflicts with that of the EurCtHR. In contrast, the guidance from *Smith* and *Croydon*, is clear: there are firm limits to the Court's willingness to entertain novel human rights claims. Whatever the Court may do in the future when its own authority conflicts with that of the Strasbourg Court, it is unlikely to go beyond the rights as recognised by Strasbourg.

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by the Law Commission, intended to ensure that English law [namely, the Criminal Justice Act 2003] complies with the requirements of article 6(1) (3)(d)", at [107]).

61 *Ibid.*, at [14].

62 *Ibid.*, at [108].

63 *Ibid.*, at [107].

64 *Ibid.* ("This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court", at [11]). See also note 2 above (The Supreme Court in *Pinnock* wanted to retain the ability of having a "constructive dialogue" with the EurCtHR).