Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011)

1. **Do you think seeing the reasoning of UK courts in human rights cases helps the European Court of Human Rights to understand UK laws and UK courts' decision making? Does this have an impact on the likelihood of an adverse finding against the UK?**

The European system of human rights protection, built around the European Court of Human Rights ("the Court"), is based on the notions of subsidiarity and shared responsibility; i.e. that the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities. These concepts have been reinforced over the last decade during a period of political reform of the Convention system called the "Interlaken reform process"[1] (so-called after the first Inter-Governmental conference held in Interlaken, Switzerland in 2010). The UK government has been very active during this reform period stressing the importance of these concepts and the margin of appreciation, which is reflected in the Brighton Declaration (2012)[2] adopted by the 47 States Parties to the European Convention on Human Rights ("the Convention") during the UK's Chairmanship of the Committee of Ministers of the Council of Europe. The Brighton Declaration specifically affirmed the strong commitment of the States Parties to implement the Convention at the national level by:

"Enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court". (our emphasis)

Accordingly, by taking into account the case-law of the Court, the UK domestic courts are implementing the Convention at the national level, embedding it into the UK's legal system, strengthening the culture of human rights in the UK, and bringing the notion of shared responsibility to life.

Since the coming into force of the Human Rights Act 1998, the Court has been able to rely on the UK courts' specific reasoning as to compliance with the Strasbourg principles and case-law; this is because the UK domestic courts and the Court are systematically applying the same set of principles and Strasbourg case-law by reference to the same text. Domestic judgments frequently set out crucial aspects of the case including the detail of the applicable domestic law, the competing interests at play as well as any potential domestic sensitivities which may be relevant to the margin of appreciation. When the domestic decision-making is undertaken by reference to Strasbourg case-law and principles this is extremely helpful for the Court. As a matter of principle, we can probably say that having the benefit of a careful and detailed domestic engagement with the Convention principles at the national level is likely to reduce the likelihood of finding a violation against the respondent State in question, although of course the Court reserves to itself the final say on Convention-compliance ("European supervision"): see the approach exemplified in *Ndidi v. the United Kingdom* (2017).

[1] https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=

[2] https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

2. **Is there confidence in Strasbourg in the way the UK courts deal with human rights cases? Does this have an impact on the way the European Court of Human Rights approaches cases from the UK?**

Yes there is. Analysis of Strasbourg case-law by UK domestic courts and in particular its superior courts shows an in-depth understanding of the Court's case-law. This has been significantly reinforced and built up over the last twenty years since the coming into force of the Human Rights Act. When the national authorities have demonstrated in cases before the Court that they have taken their obligations to secure Convention rights seriously the Court may apply the concept of subsidiarity more robustly.

An example can be given in cases concerning private and family life (Article 8 of the Convention). In the case of *Ndidi v UK* (2017) the Court established the principle that where domestic courts have carefully examined the facts, applied the relevant human rights standards consistently with Convention and its case-law, and adequately balanced the applicant's personal interest against the more general public interest in the case, Strasbourg Court would not substitute its own assessment of the factual details and/or the balance struck for that of the competent national authorities, unless there were strong reasons to do so.

The fact that there are so few violations found against the UK would also argue in favour of the fact that the UK courts are successfully applying the Convention at the domestic level. One may see this reflected in the statistics (see below). Firstly, the number of applications brought to Strasbourg against the UK is exceptionally low (for the last four years the lowest per head of all of the 47 Member States). Secondly, the percentage of cases resulting in a judgment finding a violation is also extremely low (two cases finding a violation out of 284 cases decided against the United Kingdom in 2020). These figures indicate that potential human rights complaints are being successfully dealt with at the domestic level.

3. **Do UK court judgments assist in the development of jurisprudence that is then applied in cases involving other countries? What impact would there be on the European Court of Human Rights if the UK courts were no longer required to apply the Convention?**

The sophisticated analysis by the UK domestic courts of the case-law of the European Court of Human Rights is indeed relied upon in its judgments against other countries. Sometimes the reasoning is discussed by the judicial formation even if that is not expressly reflected or recorded in the final judgment. Sometimes, however, there is direct and express reliance on judgments of the higher courts of the UK in the judgment itself. The most recent example is the Grand Chamber case of *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, 22 October 2018. That case concerned the detention of football supporters for approximately eight hours without charge, with a view to preventing violence. The Grand Chamber relied upon the judgment of the UK Supreme Court in *R v The Commissioner of Police for the Metropolis* of 15 February 2017 (as well as the judgment of the Court of Appeal in the same case) in which the Court's case-law on Article 5 § 1 (b) was found to be inconclusive. In that case four applicants had been detained for up to five and a half hours to prevent an imminent breach of the peace during the wedding of the Duke and Duchess of Cambridge on 29 April 2011. The UK Supreme Court, having analysed the Court's case-law, and notably the divergent views expressed in the concurring opinion in *Ostendorf v Germany* concluded that the detention was lawful under Article 5 § 1 (c). The Grand Chamber of the Court, having considered in detail its own case law as well as the reasoning of the UK courts, consequently changed its own approach also to consider the issues

raised under Article 5 § 1 (c) (rather than under Article 5 § 1 (b) as the Court had done in *Ostendorf*).

4. Have there been any problematic cases where the UK courts have departed from Strasbourg jurisprudence?

In the Court's view it is here important to avoid considering this question on the basis of a mere "snapshot" of the on-going dialogue between the Court and the domestic courts. Judicial dialogue through judgments is, by definition, a process which takes time and any one snapshot is not necessarily reflective of the quality or effectiveness of that dialogue. Taking that approach, while there are examples of the UK superior courts at any particular time taking a differing approach in relation to a specific line of Strasbourg case-law, we would not necessarily categorise these as "problematic" cases. Generally differences of approach resolve themselves over time through follow-up judgments. This is an example of an on-going judicial dialogue. These examples also highlight the fact that the UK superior courts can and do take an independent view on specific case-law issues where they consider it necessary to do so. Generally, these cases are rare.

One of the best known examples is the case of *Al-Khawaja v the United Kingdom* (2011) where the Grand Chamber adjusted its position on a specific aspect of the right to a fair trial (rules on the evidence of witnesses who are absent from trial) in direct response to the UK Supreme Court's judgment in *Horncastle* (2009).

Another example of this type of judicial dialogue may be seen in the cases on whole life orders for prisoners. Firstly, there was the Strasbourg Court's judgment in the case of *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts) where the Court also found *inter alia* that the domestic law concerning the prospect of release of life prisoners in England and Wales was unclear. A specially constituted Court of Appeal which considered this judgment in *R v McLoughlin* examined the Court's conclusion. It set out how domestic law would treat applications for release and declared that it did provide offenders with a clear hope or possibility of release in exceptional circumstances (a power which, under the relevant legislation, is the Secretary of State's to exercise). In *Hutchinson v. the United Kingdom [GC], no. 57592/08, 17 January 2017* the Court found that the imposition of a 'whole life order' for murder did not violate Article 3 of the Convention.

5. In general, do you think that the 'judicial dialogue' with the UK is going well? Could it be improved?

Here we may distinguish formal judicial dialogue through judgments (see the reply to the last question) and more informal judicial dialogue through other more informal contact. As indicated above, the formal dialogue is constructive as it leads to a conversation through judgments usually resulting in the issue being resolved over time. Another example of formal judicial dialogue – though much more immediate and within the same proceedings - between the UK courts and Strasbourg is the *Charlie Gard* case, where the UK Supreme Court in its final judgment/order included two paragraphs which were specifically directed to the Court before whom an application (including for interim measures) was at that time pending.

In addition, there is also extensive informal dialogue which takes place through various means. Firstly, there are regular bilateral meetings between small groups of UK judges (from the three domestic UK jurisdictions and the Supreme Court) and judges from the Court. These are held every 18 months or so alternately in Strasbourg or in the UK. The last visit took place in

Strasbourg in February 2020 and a visit of family law judges is planned for November 2021. Secondly, the UK Judge on the Court, Tim Eicke, frequently visits the UK and engages in informal dialogue with the judiciary in England and Wales as well as in Scotland and Northern Ireland. Another forum for informal dialogue is the Superior Courts Network ("SCN"). This network was established by the Court in 2015 and currently groups 93 superior courts from 40 out of the 47 Council of Europe Member States. In 2019 four jurisdictions joined from the United Kingdom: the UK Supreme Court, the Court of Sessions and Judiciary of Scotland, the Court of Appeal of England and Wales and the Court of Appeal of Northern Ireland. The SCN gives member courts privileged access to case-law information, including updates on important cases which is sent on the day of adoption of the judgment, as well as access to *ad hoc* case-law information through their own dedicated "focal point". In return, the superior courts provide the Strasbourg Court with information on the relevant domestic law for the purposes of any comparative law analysis required in any particular case notably by the Grand Chamber (in 2020, 4 such contributions were provided, with a maximum of 10 per year).This means that when looking at the comparative legal situation on a sensitive issue raised by a case (say the rights of transgender persons), the Court can rely on the domestic courts to provide it with the current legal position in the relevant jurisdiction. This information, which frequently is a more up-to-date and more accurate statement of the relevant domestic law than that which the Court can collate through its own efforts, then provides the Court with a more solid basis on which to assess whether there is any European consensus on a particular question. Beyond this case-specific collaboration, the UK has also become very active members of the SCN through its participation in a number of the topical webinars organised by the SCN (*inter alia* to replace the normal annual meeting of national focal points in Strasbourg). In July 2020, Lord Justice Peter Jackson (Court of Appeal, England and Wales) was one of the speakers in the webinar on COVID and court functioning and this month Lord Justice Warby spoke at the webinar on hate speech and vulnerable groups.

Finally, a delegation of senior UK judges (frequently including the heads of the respective jurisdictions) come to Strasbourg each year to participate in the Court's formal Opening of the Judicial Year (at which informal meetings have been organised to enable face-to-face dialogue with members of the Court and its registry) and in past years the national judge (as well as the President or his representative) of this Court has been invited and attended the Opening of the Legal Year at Westminster Abbey as well as the Lord Chancellor's breakfast.

In conclusion, our view is that both the formal and the informal judicial dialogue is going extremely well and it is rather difficult to identify any particular area for improvement.

Statistics

Since 2017, the number of applications against the UK allocated to a judicial formation has been between 301 – 415 per year. Per 100,000 inhabitants this works out as 0.04 – 0.06 for the last four years, the lowest of all the 47 Member States.

Of the total pending cases before the Court on 1 January 2021 (62,000), 124 are pending against the United Kingdom. Russia, Turkey, Ukraine and Romania account for approximately 70% of all pending cases (see the Court's Annual Report for 2020).

The vast majority of cases lodged against the United Kingdom are found to be clearly inadmissible and are decided in a summary procedure by a Single Judge. Of the cases which are not declared inadmissible by the Single Judge, not all will result in a violation of the European Convention on Human Rights. They may be struck out or declared inadmissible at a later stage or the Court may find no violation, after consideration of the parties' arguments.

In 2020, the Court decided 284 cases lodged against the United Kingdom. It declared inadmissible or struck out 280 applications. It found a violation of the Convention in two cases. It found no violation in one case and it further struck one case out of the list in a judgment following the acceptance of the friendly settlement declaration[3].

In 2019, the Court decided 359 cases lodged against the United Kingdom. It declared inadmissible or struck out 347 applications. It found violation of the Convention in five judgments concerning 12 applications. It should be noted that in one application out of the mentioned twelve applications the Court found no violation of the Convention in relation to the first applicant and a violation in relation to the second[4].

17/02/2021

[3] *J.J. v. the United Kingdom* (striking out), no. 31127/11, 27 February 2020.

[4] *J.D. and A v. the United Kingdom,* nos. 32949/17 and 34614/17, 24 October 2019.