STRATEGIC ADMISSIBILITY DECISIONS IN THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract The current relationship between UK and Strasbourg is politically fraught, which presents inevitable challenges for both jurisdictions. This article will analyse how the Strasbourg Court has responded to these challenges when dealing with applications against the UK, particularly when an application is brought following determination by the UK Supreme Court. It will be argued that there is some evidence that the Strasbourg Court has recently been using the admissibility stage as a novel site for effecting strategic behaviour, in order to moderate and influence UK–Strasbourg relations. The effect of this recent inclination, and some possible justifications for it, will then be set out.

Keywords: human rights, European Court of Human Rights, UK Supreme Court, admissibility, judicial behaviour, strategic model.

I. INTRODUCTION

Speaking in April 2017, Judge Pinto de Albuquerque, judge of the European Court of Human Rights (ECtHR), declared that 'it is stating the obvious that the current relationship between the United Kingdom and the European Court on Human Rights is a strained one'.[1] This sentiment would no doubt be shared by many. The challenges that have mired the relationship between the UK government and UK courts on the one hand, and the Council of Europe and the ECtHR on the other, at least in recent times, have sometimes threatened to become overwhelming. But if the result of these challenges is a relationship between the two jurisdictions that can indeed be characterised as 'strained', how might this affect the way that the judges in UK courts and the judges in Strasbourg behave and interact with one another?

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[1] P Pinto de Albuquerque, 'Is the ECHR Facing an Existential Crisis?' (Mansfield College, Oxford, 28 April 2017) <https://www.law.ox.ac.uk/sites/files/oxlaw/pinto_opening_presentation_2017.pdf>.

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Of course, any inter-judicial relationship goes both ways. Some of the UK's more recent actions (political and judicial) towards the European Court have seemingly aimed to foster greater cooperation and a closer relationship between the two jurisdictions, whilst other actions seem more antagonistic and hostile. Such developments have been admirably chronicled elsewhere.[2] Rather than focusing on the UK, this article will instead focus on some of the more recent actions of the Council of Europe and, in particular, of the European Court of Human Rights. It will look at how the Court has responded to challenges against the UK in light of this 'strained' relationship, and what this might evidence about judicial behaviour more generally. In doing so, it will primarily focus upon a relatively novel area of the Strasbourg Court machinery: the case admissibility stage.[3] This has been relatively unexplored,[4] but nonetheless presents an innovative site for the exploration of strategic judicial behaviour. The present article will therefore explore the ways in which the Court has used this procedural stage in cases brought against the United Kingdom. Ultimately, it will be suggested that, although only a minor part of the Court's architecture, there is some evidence that the admissibility stage provides the Strasbourg Court with a potentially useful site for dealing with tricky cases from the United Kingdom, by providing a means of dissolving potential clashes between the two jurisdictions before they fully come to fruition. If this is indeed the case, questions must then be raised as to whether this sort of strategic behaviour can be justified under the Convention system.

This article will proceed as follows. After laying out the historical relationship between the UK and Strasbourg, including the more recent hostile stance towards the Court from UK actors, a brief overview of some of

[2] F Cowell, 'Understanding the Causes and Consequences of British Exceptionalism towards the European Court of Human Rights' (2019) IJHR (online) <https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1597714>; S Greer and R Slowe, 'The Conservatives' Proposals for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation?' (2015) 4 EHRLR 372; K Ziegler, E Wicks and L Hodson, *The UK and European Human Rights: A Strained Relationship?* (Bloomsbury Publishing 2015) esp. Ch 3 (Lord Kerr, 'The Relationship Between the Strasbourg Court and the National Courts – As Seen from the UK Supreme Court'); Ch 4 (E Bates, 'The UK and Strasbourg: A Strained Relationship – The Long View') and Ch 7 (R Clayton, 'Should the English Courts under the HRA Mirror the Strasbourg Case Law?').

[3] Unlike in other jurisdictions, admissibility decisions in the ECHR system are made public in much the same way their general judgments are. This makes them an ideal object of study.

[4] With some noteworthy exceptions such as J Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' (2014) 14(1) HRLR 148. Often, the admissibility stage is examined in scholarship on ECtHR standing, eg D Shelton, 'Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights' (2016) 16 HRLR 303; S Granata, 'Manifest Ill-Foundedness and Absence of a Significant Disadvantage as Criteria of Inadmissibility for the Individual Application to the Court' (2010) 20 Italian Yearbook of International Law 111; F Tulkens, 'The Link Between Manifest Ill-Foundedness and Absence of a Significant Disadvantage as Inadmissibility Criteria for Individual Applications' (2010) 20 Italian Yearbook of International Law 169; F Hampson, 'The Concept of an ''Arguable Claim'' under Article 13 of the European Convention on Human Rights' (1990) 39 ICLQ 891.

Strasbourg's recent actions involving the UK will be set out, including some ways in which it might be seen by some as 'pulling back' in light of this hostility. Following from this, a number of Strasbourg's recent admissibility decisions involving complaints against the UK government will be analysed, all of which arose for prior determination at the UK Supreme Court (UKSC). In tying these together, two questions will then be asked: is Strasbourg being unduly deferential to the United Kingdom in this respect and how is the admissibility procedure accommodating this? And if so, how, if at all, can this behaviour be explained, and/or justified?

II. RELATIONSHIP BETWEEN THE UK AND STRASBOURG

It may be useful at the outset to provide a very brief overview of the historical development of the European Convention and the evolving relationship between the United Kingdom and the European Court.[5] This relationship has always been shifting, but until recently, it has been a largely stable one. The UK was one of the founding members of the Council of Europe, ratifying the ECHR in 1951 and enshrining the right to individual petition in 1966. From that point, although rejecting the argument that the Convention created any directly enforceable rights at the domestic level[6] UK judges, in some limited ways, began to pay attention to the rights set out in the ECHR and the judgments of the Strasbourg Court when dealing with certain issues in the domestic law.[7] It was of course the passing of the Human Rights Act (HRA) in 1998 which expanded the role of domestic courts in relation to the Convention, granting the national courts a host of new powers, including the ability to strike down secondary legislation, and radically reinterpret or declare incompatible primary legislation.[8] The HRA remains in force, and human rights issues remain a frequent feature of the work of domestic courts.

As for the Strasbourg Court, after a slow start and some early reluctance to flex its muscles, the Court moved into a period of general expansion and development of its case law, especially after the abolition of the Commission and the move to a general and permanent Court in the late 1990s.[9] From here, both the number of applications the Court received and the content of

[5] For a much more incisive and in-depth history, see E Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press 2010).

[6] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL).

[7] eg as an aid to statutory interpretation: *R v Chief Immigration Officer ex p Bibi* [1976] 1 WLR 979, 984 (Denning MR).

[8] Human Rights Act 1998, section 3; section 4.

[9] ECHR Protocol 11. However, it is worth noting that significant Court judgments against the UK were handed down much earlier in the Court's timeline; the first was in 1975 (*Golder v United Kingdom* (1979–80) 1 EHRR 524, concerning prisoners' access to courts), followed by two in 1978 (*Ireland v United Kingdom* (1979–80) 2 EHRR 25, on interrogation methods employed during The Troubles; *Tyrer v United Kingdom* (1979–80) 2 EHRR 1 on corporal punishment). *Golder*, *Ireland* and *Tyrer* were all significant cases in the Court's case law, alongside other early cases against the UK, such as *Sunday Times v United Kingdom* (1979–80) 2 EHRR 245 (media freedom of expression), *Dudgeon v United Kingdom* (1982) 4 EHRR 149 (1982) (criminalisation of

the petitions it dealt with grew substantially, generating a vast corpus of case law.[10] More recently, however, the Court has seemingly hit the brakes on its expansive period and has moved instead into what Robert Spano has dubbed the 'age of subsidiarity'.[11] This involves a more restrained, deferential approach to its case law and ensuring a greater respect to national States and their policy choices. Its primary role has moved from providing substantive oversight towards ensuring a 'procedural embedding' of the Convention across the Council of Europe.[12] This era is marked by the signing of the Brighton declaration and coming into force of Protocol 15[13] which both emphasise the role of the 'subsidiarity' principle and enshrines it within the architecture of the Convention. The Court has recently demonstrated a greater reluctance to intervene directly at the national level, especially where human rights considerations have already been properly considered by an appropriate body.[14]

In theory, then, this set-up seems harmonious: as the UK has opened the door to greater involvement of the Convention (and therefore the Court responsible for its interpretation) within the domestic setting, Strasbourg has responded by showing greater sensitivity to national courts and decision-makers, and taking greater care when involving itself in domestic issues. In practice, however, the political establishment in the UK has taken a relatively hostile tone towards Strasbourg over the last two decades,[15] despite the fact that the coming into effect of the 'age of subsidiarity' was largely spearheaded by the UK itself.[16] Particular ire was directed at a number of Strasbourg's more politically controversial decisions against the United Kingdom, including those relating to prisoner voting[17] and deportation of terrorist suspects.[18] A change of government in 2010, from the Labour Party which passed the Human Rights

homosexuality), *Silver v United Kingdom* (1983) 5 EHRR 347 (prisoner communication) and *Malone v United Kingdom* (1985) 7 EHRR 14 (communications interception).

[10] See Bates (n 5).

[11] R Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) HRLR 487. For evaluation, see L Huijbers, 'The European Court of Human Rights' Procedural Approach in the Age of Subsidiarity' (2017) 6 CILJ 177; and T Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68(1) ICLQ 91.

[12] R Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) HRLR 1.

[13] N O'Meara, 'Reforming the European Court of Human Rights: The Impacts of Protocols 15 and 16 to the ECHR' in Ziegler, Wicks and Hodson (n 2).

[14] Most notably, the judiciary: see *Ndidi v United Kingdom*, Appl No 41215/14, Decision of 14 September 2017; *Big Brother Watch v United Kingdom*, Appl No 58170/13, Judgment of 13 September 2018, [111].

[15] N Bratza, 'The Relationship between UK Courts and Strasbourg' (2011) 5 EHRLR 505; Lord Lester, 'The European Court of Human Rights and the Human Rights Act: British Concerns' [2012] 17 JR 1.

[16] E Bates, 'Activism and Self-Restraint: The Margin of Appreciation's Strasbourg career… Its Coming of Age?' (2016) 36(7) HRLJ 261, 271–4.

[17] *Hirst v United Kingdom* (2006) 42 EHRR 41.

[18] *Othman v United* Kingdom (2012) 55 EHRR 1.

Act to the Conservative party which acted as chief opposition to it[19] marked an era of even greater criticism, much of it from official government ranks.[20] Repeal of the Human Rights Act, or a withdrawal from the European Convention, continues to be a possibility.[21]

Interestingly, such criticism has not been limited to that coming from politicians. Whilst it used to be the case that UK judges were generally very faithful to Strasbourg, with even the most sceptical judges towing the Strasbourg line,[22] it is now the case that at least some domestic judges seem much more comfortable with airing their animosity towards the ECtHR and its judgments. For example, Lord Sumption's now infamous 2013 lecture, The Limits of Law, is a succinct treatise on judicial restraint and featured clear call for a re-examination of the weight given to Strasbourg authorities by national decision-makers.[23] He alleged that Strasbourg had 'become the international flagbearer for judge-made fundamental law extending well beyond the text which it is charged with applying'[24] and that the Court risked becoming 'a prime instrument of social control and entitlement'.[25] This is just one example of criticism voiced by the senior judiciary in recent years.[26] It seems, despite the significant concessions made by Strasbourg based on the concerns of contracting States,[27] that the UK, at least if some of its most

[19] This does not, of course, mean that the New Labour government was universally in favour of judicial approaches to human rights: see eg 'Blunkett Rejects "Airy Fairy" Fears' *The Guardian* (12 November 2001) <https://www.theguardian.com/politics/2001/nov/12/uk.september11>.

[20] 'May: I'll Rip up Human Rights Laws That Impede New Terror Legislation' *The Guardian* (6 June 2017) <https://www.theguardian.com/politics/2017/jun/06/theresa-may-rip-up-human-rights-laws-impede-new-terror-legislation>.

[21] See eg Conservative Party, *Protecting Human Rights in the UK* (2014) and 'Theresa May to Consider Axeing Human Rights Act after Brexit, Minister Reveals' *The Independent* (18 January 2019) <https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html>.

[22] See, for example, Lord Rodger in *Cadder v HM Advocate* [2010] UKSC 43; [2010] 1 WLR 2601.

[23] Lord Sumption, 'The Limits of the Law', 27th Sultan Azlan Shah Lecture, Kuala Lumpur (20 November 2013) <https://www.supremecourt.uk/docs/speech-131120.pdf>. Many of those themes were repeated in his more recent Reith Lectures: see J Sumption *Trials of the State: Law and the Decline of Politics* (Profile Books 2019).

[24] 'The Limits of the Law', ibid 7

[25] ibid 12. There is also, remarkably, a suggestion that there is an Orwellian character to the Strasbourg enterprise at 11.

[26] As well as Lord Sumption, above, see Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416. There may be '[a] feared loss of control' re Strasbourg taking over in at least some areas: J Steele, '(Dis)owning the Convention in the Law of Tort' in J Lee (eds) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart 2011). However, Lord Dyson has pushed back against 'an impression has been created that the entire judiciary is critical of the European Court of Human Rights', saying that 'This impression has been created by a small number of lectures given by a few senior judges. They have not claimed to speak on behalf of their colleagues or, so far as I am aware, anyone else. I believe that, as one would expect, there is a wide range of judicial views on this subject' (Lord Dyson, 'Are the Judges Too Powerful?' UCL Bentham Association Presidential Address (13 March 2014) <https://www.ucl.ac.uk/laws/sites/laws/files/dyson_2014.pdf>.

[27] Although the UK is a vocal critic, it is certainly not the only one: *GIEM SRL and Others v Italy*, Appl Nos 828/06, 34163/07 and 19029/11, Judgment of 28 June 2018 [GC], Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque, [57]–[60].

influential politicians and judges are to be believed, has not been sated. Indeed, with political winds becoming more hostile to Europe more generally, its critics seem unlikely to temper their dissatisfaction. It is against this background that the following analysis of Strasbourg 'pulling away' must be considered.

III. THE STRASBOURG COURT: PULLING AWAY?

A. The UK: A Special Case?

The relationship between Strasbourg and the UK is undoubtedly shaped by how both sides understand their roles, and, importantly for the present case, how each side understands each other's roles. This relationship can be played out in the political arena: the Parliamentary Assembly and Committee of Ministers of the Council of Europe can agree to schemes involving concessions to the UK or political amendments to placate its discontent.[28] But since the majority of national criticism is aimed not at Strasbourg's political organs but the Court and its judgments, a lot of mediating power falls to those who make those judgments: the judges. They are, undoubtedly, keenly aware of the controversies involving the Court, especially in the UK. They know that the decisions they make might have political ramifications, and sometimes very significant ones. They, too, have a stake in maintaining solid relationships between the Court and the signatory States. If the Committee of Ministers can 'go easy' on the UK in the name of political compromise, can the Court do so too? Might there there be a 'strategic' aspect to its work?[29]

Interestingly, some scholars such as Helen Fenwick have argued that Strasbourg is indeed applying a particularly permissive approach to cases against the United Kingdom.[30] Her charge is that the possibility alluded to above is in fact happening in practice: greater leniency is being afforded to the UK in human rights cases and is partaking in the practice of 'exceptionalism'. For example, in certain cases, Strasbourg has been content to allow a very substantial amount of deference to the UK's view when

[28] The Committee of Ministers recently approved some very slight amendments by the UK to the blanket ban on prisoner voting which had previously been found unlawful by the Court. After 13 years of inaction and hostility to the judgment it is obvious why the Committee would be keen to approve these measures. Some have doubted whether these changes really do remedy the defects identified by the Court: E Adams, 'Prisoners Voting Rights: *Case Closed*?' UK Constitutional Law Blog (30 January 2019) available at: <https://ukconstitutionallaw.org/2019/01/30/elizabeth-adams-prisoners-voting-rights-case-closed/>.

[29] The 'strategic model' of judging has been put forth, largely by scholars working in the US context, to encompass such considerations: see L Epstein and J Knight, *The Choices Justices Make* (CQ Press 1998)

[30] H Fenwick, 'Enhanced Subsidiarity and a Dialogic Approach – Or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-Terrorism at Strasbourg Against the UK?' in Ziegler, Wicks and Hodson (n 2).

conducting its 'proportionality analysis'.[31] On a number of occasions, the UK has convinced the Court to depart from long-established case law in order to find its actions compliant with the ECHR.[32] In its case law concerning the legality of life sentences, the Court seemed to adopt a very lenient position with regard to the UK situation, but a much more stringent one in cases against other States such as Lithuania and Ukraine.[33]

These issues may be concerning, but they concern the substantive approach adopted by the Court when it is fully determining cases against the UK. There is, however, another potential site where strategic behaviour designed to moderate the UK–Strasbourg relationship might operate, and one which arises prior to full determination of the issues by a full Court: the initial admissibility stage.

B. The Admissibility Stage

The ECtHR's admissibility procedure is quite particular. Like most international courts, the Strasbourg Court utilises an initial mechanism to filter out unmeritorious cases. Any application to the Strasbourg Court must satisfy a set of admissibility criteria which include some very sensible requirements such as ensuring that any given applicant has complied with the required paperwork properly, requiring that an application is made within a certain time and mandating that any potential domestic remedies have been exhausted before lodging their application.[34] Whenever an application falls at this hurdle, it is dealt with not in a full Judgment, but in a shorter pronouncement called a 'Decision'. However, Decisions are not only used to deal with procedural issues. Perhaps more controversially,[35] a Decision may be used to deal with 'manifestly ill-founded' applications where the merits of a claim are seemingly so self-evidently hopeless that it 'does not disclose any appearance of a violation of the rights guaranteed by the Convention'.[36] These are often cases where the claim is particularly outlandish, or that the court has already decided identical or very similar cases, and there exists no realistic argument for distinguishing or departing from those previous findings. Ultimately, these filters, procedural and substantive, provide a mechanism for filtering out hopeless cases at an early stage, an especially useful tool given that Strasbourg receives such a high volume of applications

[31] That is, whether a State's chosen action, seeking to achieve a legitimate aim, was a proportionate means of doing so. Prime examples of a deferential approach to the UK include *Animal Defenders v United Kingdom* (2013) 57 EHRR 21 and *Austin v United Kingdom* (2012) 55 EHRR 14; see Fenwick (n 30) 202–4.

[32] *Ibrahim v United Kingdom* [2017] CrimLR 877.

[33] L Graham, 'Petukhov v. Ukraine No. 2: Life Sentences Incompatible with the Convention, but Only in Eastern Europe?' (Strasbourg Observers, 26 March 2019) <https://strasbourgobservers.com/2019/03/26/petukhov-v-ukraine-no-2-life-sentences-incompatible-with-the-convention-but-only-in-eastern-europe/>.

[34] ECHR art. 35.

[35] Hampson (n 4), 896.

[36] European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (31 December 2018) <echr.coe.int, https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> 59 and 61.

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each year.[37] The filtering away of even procedurally-sound cases is an eminently sensible idea, so long as the process for doing so it is used properly.

Decisions, then, at least in theory, are reserved for easy, 'cut and dry' cases. However, the Decision mechanism must be used properly, not least because this format tends to sacrifice thoroughness and transparency for expediency and utility. Decisions are designed, after all, to deal with issues that are less contentious and less important than those arising in full Judgments. As well as (typically) being shorter in length, Decisions are usually decided by fewer judges[38] and are usually less thoroughly reasoned than full Judgments.[39] These pronouncements are handed down as a single opinion, and whilst sometimes disagreements between the judges involved may be indicated, neither concurring nor dissenting opinions are permitted to be included in the published report. This means that if there is any disagreement in the deciding panel, only the majority opinions are reported; the number of judges expressing disagreement, the identity of those judges, and the extent of their disagreement are not usually made known.[40] Unlike Judgments, Decisions cannot be appealed to the Grand Chamber. Although Decisions are clearly far less robust than Judgments, this can be readily justified by the context in which they operate; there is obviously far less of a need to produce long, detailed, appealable judgments on matters which largely concern trivial formalities. They are perfectly suitable for procedural matters concerning admissibility or repetitive, low-impact, or vexatious applications.

The limitations of Decisions could raise a problem, however, if they are used in improper circumstances. In considering an application where a novel issue arises, where the Strasbourg authorities are unclear, or where there is disagreement between national and European Courts, for example, the Court should deal with such issues in a full and thorough Judgment, rather than through the comparatively insubstantial Decision route. However, through taking a look at number of more recent Decisions in which Strasbourg has found applications against the UK to be 'manifestly ill-founded', it will be suggested that Strasbourg has indeed chosen to dispose of cases through the comparatively limited Decision procedure when, at minimum, a full Judgment should have been handed down instead. Some important, potentially meritorious applications, raising real points of controversy, fell at

[37] At the end of 2012, the number of pending cases was reported at 128,100. At the end of 2018, that figure was reported as 56,350: European Court of Human Rights, 'Annual Report 2012' <https://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf> and 'Analysis of Statistics 2018' <https://www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf>.

[38] Decisions are usually decided by 1, 3 or 7 judges. Most full Judgments are determined by a panel of 7 judges, and sometimes an enlarged Grand Chamber panel of 17 judges.

[39] Gerards (n 4) 154.

[40] Although not a common occurrence, sometimes a dissenting or concurring opinion in an ECtHR judgment can prove to be influential; the dissenting view in the case of *Ostendorf v Germany* (2013) 34 BHRC 738 was later taken up by the Grand Chamber in *S v Denmark* (2019) 68 EHRR 17.

the Decision stage when a full and reasoned analysis was deserved. If this is accepted, this then raises the question of whether these improper designations were simply examples of judicial error, or if there might instead be some strategic aspect of the Court's work even in the admissibility stage. In other words, as with some of the examples above of the Court 'pulling away' in cases of controversy involving the UK, might the Decision mechanism, especially through the 'conceptual indeterminacy'[41] of the 'manifestly ill-founded' criterion, provide of some sort of 'strategic utility' to the Court when dealing with certain types of cases from a politically hostile State?

As noted above, some UK judges are beginning to join politicians in expressing more comfortably their criticism of the Strasbourg Court and its judgments. A strategic approach might also consider this; a cautious approach might be all the more important in such cases where there exists a greater potential for not just political, but also judicial conflict. The judiciary is a powerful and direct actor in determining the domestic influence of the ECHR; it is the judges, rather than the politicians, who ultimately decide whether public bodies have complied with the ECHR and whether the national laws are Convention-compatible. The UK judiciary is an important actor to keep 'on the right side'. As such, the following analysis focuses on three applications which reached Strasbourg following prior determination by the UKSC, and where the UKSC had already rejected the applicant's rights claim. Each application can be seen as a challenge both to the political actors who passed or enforced the legislation, as well as against the judicial actors endorsing its Convention-compliance.

C. Strasbourg Case Law

The three relevant cases are completely unrelated in their subject matter, and do not share an obvious theme beyond being involving a human rights claim which had previously been rejected by the UKSC. They are *Tariq v United Kingdom*,[42] concerning access to secret trials, *FJM v United Kingdom*,[43] concerning eviction from private property, and *Poshteh v United Kingdom*,[44] concerning homelessness appeals. *Tariq* was decided in April 2018, and the others in November 2018. Each will now be considered in turn.

1. Tariq v United Kingdom

The first case is *Tariq v UK*.[45] It concerned the lawfulness of employing a 'closed material procedure' in an unfair dismissal claim, under which the

[41] H Keller, A Fischer and D Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2011) 21(4) EJIL 1025, 1046.
[42] *Tariq v United Kingdom* (2018) 67 EHRR SE2.
[43] *FJM v United Kingdom* (2019) 68 EHRR SE5.
[44] *Poshteh v United Kingdom*, Appl No 78375/17, Decision of 27 November 2018.
[45] *Tariq v UK* (n 42)

applicant was mostly excluded from the court proceedings on grounds of protecting national security interests.[46] Settled case law had established that where applicants were substantially excluded from the trial proceedings, Article 6 ECHR (the right to a fair trial) imported a requirement that certain core information— at least a 'gist'[47]—about the case against them should be provided. The pertinent question in this case was whether this requirement was universal, in that it arose in all civil cases, including Tariq's, or whether 'gisting' would only be needed on certain occasions and in certain types of cases.

The Supreme Court,[48] by a majority, found that 'gisting' was not a mandatory requirement in all civil procedures and that the applicant's exclusion did not breach Article 6 on the facts. Nevertheless, the judges did not find the case an easy one; in fact, the Court formed an augmented panel of nine judges to hear the case, a practice typically reserved for the most difficult and controversial cases. Although some found the conclusion in the case to be a fairly self-evident one[49] others certainly did not.[50] One judge, Lord Kerr, even dissented, holding that the 'gist' requirement was in fact a universal feature of all civil cases, including in the case at hand, and that Tariq suffered a breach of Article 6 on the facts.[51] Nonetheless, since a majority found against him, Tariq subsequently sought redress at Strasbourg.

That Court essentially agreed with the majority of the UKSC, echoing its finding that 'gisting' was not needed in all civil procedures, and certainly not in the applicant's case. Notably, however, it seemingly did so with far less difficulty than the UKSC. It found that Tariq's case was so clear, in fact, that it could be dealt with at the admissibility stage; it declared Tariq's case to be manifestly ill-founded.

Given the issues involved, the fact that Tariq's application did not warrant a full Judgment was surprising. The issues involved were certainly contentious; at the time of appeal, the legal position in respect to gisting was far from clear. There existed a number of authorities, domestic and European, on the matter. Whilst certain cases pointed in the direction of universal application, some seemed to endorse a less absolutist stance.[52] As above, different English

[46] E Nanopoulos 'European Human Rights Law and the Normalisation of the Closed Material Procedure: Limit or Source?' (2015) 78(6) MLR 913, 916–17

[47] D Kelman, 'Closed Trials and Secret Allegations: An Analysis of the 'Gisting' Requirement' (2016) 80(4) JCrimL 264.

[48] *Tariq v Home Office* [2012] 1 AC 452; [2011] UKSC 35.

[49] Lord Brown called the claimant's submissions 'absurd': ibid, [88].

[50] Lord Dyson opined that 'much of the content of the European Convention on Human Rights is about striking balances. This is sometimes very difficult and different opinions can reasonably be held.' ibid, [161].

[51] ibid, [95]–[137].

[52] Compare *A v United Kingdom* (2009) 49 EHRR 29 with *IR v United Kingdom* (2014) 58 EHRR SE14. Y Vanderman, 'The Right to a Fair Trial in *Tariq v Home Office*: Taking Blind Shots at a Hidden Target' (2012) 17(1) JR 70, 75: 'there are just as many passages from those decisions suggesting that *A*-type disclosure ought to be available absolutely as there are passages highlighting their context specific nature'.

judges had adopted different positions on the issue,[53] something which has been considered important in other European cases.[54] The case had sparked significant academic discussion and criticism.[55] Nonetheless, Tariq had to settle for a Decision rather than a full Judgment.

Unfortunately, the Decision, which I have criticised more fully elsewhere, suffered from a number of deficiencies.[56] Many of these, undoubtedly, were exacerbated by the limitations of the Decision format. The Court did not consider the issues fully and give them the consideration they deserved. Its treatment of the existing Strasbourg case law was at times quite cursory, with cases applying in one context being applied to another without proper explanation, despite the fact that at least one of those cases was couched in explicit terms which made it clear that its conclusions applied only in the specific circumstances under which they arose.[57] The difficulties of reconciling the previous case law were not sufficiently appreciated: the potentially significant differences in the case law, some of which seemingly pointed in opposite directions, were severely downplayed. Indeed, the Court was able to sideline its own Grand Chamber authority, so heavily relied upon in the applicant's case, remarkably quickly. Many of Lord Kerr's points went unaddressed. Even if the outcome of the case could be justified, the route the Court provided to get there was deeply unsatisfying. *Tariq v UK* may have clarified the narrow substantive position raised on its facts, but little more.

The Decision format was therefore not only a surprising format for the determination of Tariq's case but also an unduly constraining one. This is troublesome for transparency and certainty, but also for the applicant himself. Tariq, it must be remembered, was facing a situation to his detriment for which, but for his Article 6 challenge, he had no remedy; despite the conflicting case law and the live issues involved, the Court ended Tariq's human rights challenge with concerning ease. The Decision, after all, could not be appealed.

2. *FJM v United Kingdom*

A second example is *FJM v UK*.[58] This was a case which involved another important issue—the applicability of the Convention to private evictions. The Supreme Court held in 2016 that the domestic regime in place in the UK at the time, essentially allowing private landlords almost complete control over

[53] In addition to Lord Kerr at the Supreme Court, both the Employment Appeal Tribunal and Court of Appeal also found for Mr Tariq: *Tariq v Home Office* [2010] ICR 223 (EAT); *Tariq v Home Office* [2010] EWCA Civ 462; [2010] ICR 1034 (Court of Appeal).

[54] eg *Beghal v United Kingdom* Appl No 4755/16, Judgment of 28 February 2019.

[55] See R Goss, 'To the Serious Detriment of the Public: Secret Evidence and Closed Material Procedures' in L Lazarus *et al*., *Reasoning Rights* (Hart 2014); J Jackson, 'Justice, Security and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?' [2013] PL 720.

[56] L Graham, 'Tariq v United Kingdom: Out with a Whimper? The Final Word on the Closed Material Procedure at the European Court of Human Rights' (2019) 25(1) EPL 43.

[57] In particular, *IR* (n 52)

[58] *FJM v United Kingdom* (n 43).

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the eviction of their tenants, did not fall foul of Article 8.[59] The applicant, challenging her eviction on human rights grounds, therefore lost her case at the Supreme Court and sought redress at Strasbourg.

As with *Tariq*, the Strasbourg Court dealt with her appeal at the Decision stage. This, too, was surprising for such an important case.[60] Like *Tariq*, the issues raised were contentious and the domestic case had sparked major academic criticism.[61] It is therefore suggested that, here, too, the Decision format was overly constraining and an inappropriate forum to tackle the issues. The *FJM* Decision suffers from three flaws in particular.

Firstly, its treatment of the issues in play was just too cursory. The questions raised involved conflicting streams of authority relating to private property disputes[62] which were not properly appreciated. The Court's treatment of these authorities has been criticised as 'deeply flawed';[63] rather than attempting to untangle and reconcile them, the Court simply said, unconvincingly, that the law had been adequately set out in a single recent case.[64] Certain authorities were either swept aside quickly or sidelined altogether, and of the cases it did mention, some were treated in a very superficial manner.[65] The Decision even seems to contain a factual error, a technical mischaracterisation of at least one of the cases cited.[66] Ultimately, besides some passages about the application of the Convention between private parties, which were, with respect, underdeveloped, FJM's case fell to be decided without the proper attention it deserved.

Secondly, the Decision lacks clarity. The Strasbourg Court's response to an appeal from the UKSC should be as clear and as detailed as possible to provide authority and guidance to that Court in the future. But there is some confusion as to exactly what the Strasbourg Court found in *FJM*; it is not obvious whether the Court found, on the one hand, that Article 8 was applicable but nevertheless not breached on the facts, or whether, on the other hand, Article 8 was totally inapplicable owing to the prohibition on horizontal effect. Whilst in this case these approaches might point to the same result, they reveal important differences in the conceptualisation of human rights in private property cases which are sure to influence the development of the law in this area. There was no room for development of such points in an admissibility decision.

[59] *McDonald v McDonald* [2016] UKSC 28; [2017] AC 273.

[60] The importance of the case was acknowledged by the Council of Europe itself, where the case was deemed important because it 'expressly acknowledged, for the first time' the law relating to private evictions: European Court of Human Rights, 'Annual Report 2018', 108 <https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf>.

[61] E Lees, 'Article 8, Proportionality and Horizontal Effect' (2017) 133 LQR 31; S Nield, 'Shutting the Door on Horizontal Effect: McDonald v McDonald' (2017) 1 Conv 60.

[62] Compare *Di Palma v United Kingdom* (1986) 10 EHRR CD149 with *Zehentner v Austria* (2015) 52 EHRR 22. See N Madge, 'Small Earthquake in Bulgaria: Not Many Dead' 19(4) JHL 61.

[63] J Boddy and L Graham, 'FJM v United Kingdom: The Taming of Article 8?' (2019) 83(2) Conv 162, 167.

[64] *Vrzic v Croatia* (2018) 66 EHRR 30

[65] Boddy and Graham (n 63) 165–8.

[66] ibid, 167, fn 60.

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The third problem is that, depending on the reading of the case, the Decision might have actually extended the Strasbourg position beyond that established through the previous case law. It has been suggested that whilst the Court purported to simply confirm its previous jurisprudence, in practice it developed the law further.[67] This is not what the Court was purporting to do in this case: Decisions are, after all, reserved for straightforward applications of existing principles. Any substantive extension to the Court's case law should surely be reserved for a full and proper Judgment; a Decision is surely an inappropriate forum for judicial development of this kind.

It is difficult to say that the Decision format was the sole reason for these shortcomings, but it is clearly the case that dealing with the case through a full Judgment would likely have encouraged a greater exploration of the relevant issues, provided more space to fully set out the Court's reasoning so as to ensure clarity, and would likely avoid the sort of errors and omissions outlined above. As with *Tariq*, however, the Decision format is important for more than just the overall outcome: it also weakens the idea that there could be any significant conflict between the UK and Strasbourg: the UK and its courts need not worry; there are (apparently) no contentious issues involved in the applicant's case; there is no need to fear any European meddling in its long-established property rights regime.[68]

3. *Poshteh v United Kingdom*

Poshteh v UK[69] is a case which attracted much less fanfare than the previous cases, both domestically and at Strasbourg. It concerned the applicability of Article 6 ECHR to certain homelessness claims. In the domestic iteration of the case, the Supreme Court, led by Lord Carnwath, found that Article 6 was totally inapplicable to the facts before it.[70] What is particularly striking, however, was that unlike in the above cases, the Supreme Court was not tasked with reconciling ambiguous, conflicting Strasbourg authority. The clear position of the Strasbourg Court was not a live issue in this case. Rather, the Supreme Court was being asked to depart from the established Strasbourg view, a submission which, quite remarkably, it accepted.[71] Furthermore, it seemed to do on some very bold grounds. The UKSC had previously established two narrow grounds in which a departure from ECtHR authority might be justified: only where it was thought that Strasbourg had misunderstood some aspect of the English law, or that its pronouncements

[67] ibid, 167–8. [68] See also *JA Pye (Oxford) v United Kingdom* (2008) 46 EHRR 45.
[69] *Poshteh v United Kingdom* (n 44)
[70] *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36; [2017] AC 624.
[71] The Supreme Court is under no direct obligation to follow the law of the Strasbourg Court: see Human Rights Act 1998, section 2. In this case, the established Strasbourg position was set out in *Ali v United Kingdom* (2015) 63 EHRR 20. The Supreme Court preferred to follow the House of Lords case of *Ali v Birmingham City Council* [2010] UKSC 8; [2010] 2 AC 39.

clashed with some fundamental feature of the English legal system.[72] Lord Carnwath, however, writing the sole judgment in *Poshteh*, seemed to go further than this, approving of a departure from Strasbourg simply because he thought that the European authorities were poorly reasoned and substantively wrong. In other words, although he viewed Strasbourg precedent as clear and authoritative, he thought that the view of the UK courts was simply better and thus chose to continue to apply it. This was a powerful, and perhaps unprecedented, stance to adopt.[73]

Poshteh is not the only case in which the UK Supreme Court had chosen to depart from the Strasbourg view. However, where this has occurred previously, for example in cases concerning hearsay evidence[74] and life sentences,[75] the Strasbourg Court has responded to the national court's rebuff with a detailed and sophisticated analysis, often at the Grand Chamber level.[76] Incidentally, in those specific instances, the European Court ultimately agreed with the national court. But, crucially, it took the national court's arguments very seriously, and most importantly, subjected the criticism it put forward to very thorough analysis, through the appropriate forum: a fully reasoned Judgment (usually at Grand Chamber level, no less). This sent the appropriate message to the UK judges: their dissidence was noted, their criticism was taken seriously, and the Strasbourg Court was prepared to engage with it.

Quite the opposite seems to have occurred in the in the Strasbourg Court's determination of *Poshteh v UK*. The case was, like *Tariq* and *FJM* before it, dealt with as a Decision. Therein, very little was made of what the Supreme Court chose to do: explicitly depart from the established law. Whilst the Court did note that it had 'carefully considered' the Supreme Court's criticism[77] it did not clarify whether that criticism was appropriate, forceful or persuasive. After setting out Carnwath's inflammatory passages, it simply moved on. It found that, on the facts, no breach of Article 6 occurred, and that was all that needed to be strictly considered. The Supreme Court offered a direct challenge to Strasbourg, but the Strasbourg judges seemed to barely acknowledge it. As with the above Decisions, the short reasoning it provided lacked rigour and clarity. What exactly the Court held was unclear: did it simply approve of the outcome, leaving the wider issues aside? Did it reach that outcome using its own approach or that of the UKSC? Did it endorse the Supreme Court's view of the issues? If so, should the old case law now be

[72] *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104.

[73] A majority of judges seemed to take a similar approach in the later case of *Hallam and Nealon v Secretary of State for Justice* [2019] UKSC 2. cf. Lord Reed's powerful endorsement of the orthodox approach in that case at [172]–[175].

[74] *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

[75] *AG Reference (No 69 of 2013)* [2014] EWCA Crim 188; [2014] 1 WLR 3964.

[76] *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23; *Vinter v United Kingdom* (2016) 63 EHRR 1; *Hutchinson v United Kingdom*, Appl No 57592/08, Judgment of 17 January 2017 [GC].

[77] *Poshteh v UK* (n 44) [36].

discarded? In any case, it is doubtful as to whether a Decision was the appropriate forum to decide any of this.

Another regretful aspect of the Strasbourg Court's choice to deal with this case at the admissibility stage is that in the course of its judgment, the Supreme Court directly requested that the Strasbourg Court deliver an authoritative judgment on the issue from the Grand Chamber.[78] Indeed, it intimated that, if such a consideration was made, it might later change its mind about taking its own path. This would have opened the possibility for useful dialogue between the two courts. In the eyes of the Strasbourg Court, however, the case did not even warrant a 'regular' first-instance judgment, never mind a Grand Chamber hearing. Not only was the application disposed of as a Decision, but it was delivered almost totally without fanfare. Incidentally, it wasn't even deemed important enough to be included in the European Court's press release at the time, which highlights any upcoming Judgments and Decisions of substance.[79] It seems like on this occasion, the disgruntled Supreme Court was able to flex its muscles without much pushback from Strasbourg. There was no dialogue, but rather a mumble of acknowledgment. The technical application of Article 6 ECHR may not be the most politically controversial ground, but perhaps the waters have now been tested in anticipation of some potential, more provocative, future disputes. On this occasion, at least, Strasbourg extinguished any potential for conflict via the back door.

4. Other cases

The above three cases are not the only applications against the UK to be dealt with as a Decision in recent times, and the majority of applications are far less objectionable than those set out above. For example, recent applications have been dealt with at this stage on grounds of non-exhaustion of domestic remedies;[80] where the application was time-barred;[81] where there has been a withdrawal of a complaint[82] or a friendly settlement between the parties;[83] where the dispute fell outside of the Court's territorial jurisdiction[84] and where established case law was deemed to be unambiguous and clearly

[78] *Poshteh v Kensington* (n 70) [37].

[79] European Court of Human Rights, 'Forthcoming Judgments and Decisions 18-20.12.18' <http://hudoc.echr.coe.int/eng-press?i=003-6280934-8187238>.

[80] *Times Newspapers Ltd and Kennedy v United Kingdom*, Appl No 64367/14, Decision of 13 November 2018; *Kiani and Gulamhussein v United Kingdom*, Appl Nos 2428/12 and 18509/13, Decision of 3 April 2018; *Khaskar v United Kingdom*, Appl No 2654/18, Decision of 3 April 2018.

[81] *McGill and Hewitt v United Kingdom*, Appl Nos 7690/18 and 9348/18, Decision of 14 May 2019.

[82] *AA and FA v United Kingdom*, Appl No 6796/16, Decision of 14 May 2019; *Sumislawska and Zajic v United Kingdom*, Appl No 14642/18, Decision of 11 September 2018.

[83] *LV v United Kingdom*, Appl No 50718/16, Decision of 14 May 2019; *FO v United Kingdom*, Appl No 56699/11, Decision of 11 September 2018.

[84] *Chong and Others v United Kingdom*, Appl No 29753/16, Decision of 11 September 2018.

applicable to the complaint raised.[85] None of these cases appear evidently problematic, and indeed show that the admissibility stage can be a useful and productive tool for identifying meritorious cases for the Court's consideration.

A case that might at first seem problematic is *Eiseman-Renyard v UK*.[86] This was an application made against the UK following the Supreme Court's finding against the applicants in the case of *Hicks*.[87] In that case, much like in *Poshteh*, the Supreme Court expressed serious criticism of the Strasbourg authorities and chose not to follow them. When the applicant made it to Strasbourg, the Court simply adopted the Supreme Court's approach in an admissibility decision. However, whilst the Decision itself did not grapple with the substance of the Supreme Court's position, unlike in *Poshteh*, it was able to rely on authority which did.[88] In the earlier case of *S v Denmark*,[89] decided after the Supreme Court made its complaints in *Hicks* but before the determination of *Eiseman-Renyard*, the Grand Chamber had undertaken a thorough review of the law, and had properly considered the Supreme Court's criticism in *Hicks* when doing so. It chose to follow the Supreme Court's path and abandon its previous position, and provided full and thorough reasons for doing so. Thus, by the time *Eiseman-Renyard* came to be decided, the Court had at its disposal ample authority to dispose of the case quickly. Regardless of how appropriate the Supreme Court's boldness might be in departing from (what was then) established case law, this departure, and the reasons underpinning it, was in effect properly considered by the Grand Chamber, which was surely the proper way to address disputes with the UK Supreme Court.

It is also important to stress that, despite its approach in the above cases, the Strasbourg Court has continued to find, in certain instances, a breach of the Convention against the UK, even when the UK Supreme Court reached the opposite conclusion. In particular, it disagreed with the UKSC in finding that the power to question an individual at the border without any requirement of suspicion breached Article 8,[90] and also disagreed with it on a matter concerning the legality of maintaining a database including the sensitive details of certain political protestors.[91] However, it could be argued that even in these judgments, some reticence has been shown; findings of a breach have tended to be on a much more 'procedural' basis, for example, that the domestic law was not sufficiently clear[92] or safeguards provided were not

[85] *Makarová v United Kingdom*, Appl No 67149/17, Decision of 12 June 2018. Arguably, *Garamukanwa v United Kingdom*, Appl No 70573/17, Decision of 14 May 2019, also fits into this category.

[86] *Eiseman-Renyard v United Kingdom* (2019) 68 EHRR SE12

[87] *R (Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9; [2017] AC 256.

[88] Making this case much closer to *Horncastle v United Kingdom* (2015) 60 EHRR 31, which, although an appeal from a domestic case which chose not to follow Strasbourg, was able to rely on the full-throttled examination of the issues in *Al-Khawaja* (n 76).

[89] *S v Denmark* (n 40).

[90] *Beghal* (n 54).

[91] *Catt v United Kingdom*, Appl No 43514/15, Judgment of 24 January 2019.

[92] *Catt*, ibid; *Beghal* (n 54).

quite tight enough.[93] But it is undisputed that there are significant ramifications for the UK following some of these cases, especially in light of contemporary debates about surveillance and data storage. It is also worth noting the recent case of *VM v UK (No 2)*.[94] In that case, the Strasbourg Court disagreed with the Supreme Court in a case involving the right to liberty,[95] finding that the applicant in that case suffered a violation of her rights under Article 5 due to being detained following a procedurally-flawed assessment, despite the fact that such flaws were not significant, and in any case would not have affected the validity or length of her detention. The Court found a substantive breach of Article 5, whereas the UKSC did not. However, it did not really disagree with the UKSC to a great extent, essentially disagreeing on the consequences of a liberty deprivation, not the existence of one. Nonetheless, the case was dealt with in a full Judgment format, the issues were considered properly, and the Strasbourg Court did explicitly diverge from the UKSC, even if it was only on a technicality.

IV. EVALUATION

In summary, it is clear that the Strasbourg Court is still willing, at least in certain cases, to disagree with the UKSC on matters concerning human rights issues. However, it remains the fact that the Court has, seemingly improperly, dealt with a number of controversial claims at the admissibility stage rather than making a full assessment in a Judgment. What, if anything, can be made of this?

At the outset, it is clear that any conspiratorial intent on behalf of Strasbourg should be dismissed. Strasbourg's ultimate conclusions—finding against a breach in all three cases—are certainly conceivable and each can be defended. For example, in *Poshteh*, the Supreme Court's reasons for departing from Strasbourg case law were not superficial: there is force in the argument that the existing authorities did exhibit poor reasoning and endorsed a position which is somewhat difficult to justify. There is no suggestion that, supposing any of the three cases mentioned above were to be dealt with in a full Judgment, the overall outcome of the case would necessarily be different.

However, in line with the 'strategic' account of judging, it is difficult to dismiss the idea that something extra-legal may have been in play. As mentioned above, the Court has faced considerable hostility from many quarters, seeking to portray it as an unsympathetic foreign body antagonistic to British culture and values. If each of these cases were taken further into lengthy, highly-publicised proceedings, and especially if they were to involve third-party interventions or appeals to the Grand Chamber, might that feed into

[93] *Beghal*, ibid. This was also the case in *Big Brother Watch* (n 14).
[94] *VM v United Kingdom (No 2)*, Appl No 62824/16, Judgment of 25 April 2019.
[95] *R (O) v Secretary of State for the Home Department* [2016] UKSC 19; [2016] 1 WLR 1717.

such a narrative and, ultimately, affect the perception of the Court? Dealing with a case as a Decision sends a message: there is no real difficulty involved in the case and Strasbourg has no grievance with the domestic courts. In cases where the Supreme Court has already determined an issue, it signals that they have got things right and they need not worry about being overruled from above. It may help to convince those sceptical of European overreach that the Court will only intervene where necessary, and that they need not worry about excessive meddling. In some circumstances, these practical benefits might be more important than aligning all the technicalities of the case law. This is especially the case if the overall outcome of a case would remain the same regardless of at which stage the case fell.

National discontent with the Strasbourg Court is growing. Working to retain the integrity of this relationship between Strasbourg and the United Kingdom has obvious benefits for both parties.[96] Avoiding an unnecessary constitutional clash in times of uncertainty and mistrust should surely be a seen as a worthwhile endeavour. In this light, would Strasbourg really want to 'rock the boat' over a case concerning the technical application of what constitutes a 'civil claim' under the Convention or a work dismissal claim? Equally, would the Court, when considering a case like *FJM*, really want to involve itself in the long-established common law doctrines regulating private law and property rights, of which national judges are, understandably, likely to be very defensive of?

It may also be beneficial for the Court to now 'pick its battles' to some extent. The most venomous backlash from the UK in recent times concerned politically controversial topics such as prisoner voting, deportation and the conduct of the armed forces. By backing down in cases involving less emotive issues, this may contribute to a more receptive environment in the event that a more provocative case should arise in the future. Indeed, given that the UKSC has recently found against human rights claims involving controversial issues such as abortion access[97] and welfare cuts,[98] bigger, more politically explosive disputes between the two jurisdictions may yet be on the horizon, and it makes sense for Strasbourg to be setting something of a cooler atmosphere in which to conduct any future disputes.[99]

[96] M Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28 EJIL 763, 783–4.

[97] *R (A) v Secretary of State for Health* [2017] UKSC41; [2017] 1 WLR 2492.

[98] *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; *The Times* (29 May 2019).

[99] In addition, lower courts have found it difficult to grapple with the Grand Chamber's judgment in *Paposhvili v Belgium* [2017] Imm. A.R. 867 concerning deporting individuals with medical conditions: see eg *Secretary of State for the Home Department v EA* [2017] UKUT 445 (IAC); [2018] Imm AR 249; *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 64; [2018] 1 WLR 2933; *MM (Malawi) v Secretary of State for the Home Department* [2018] EWCA Civ 2482; [2019] HRLR 3. An appeal to the Supreme Court was granted in the case of *AM* on 28 November 2018.

On the facts of particular cases, too, it may sometimes be beneficial for the Court to avoid certain disputes altogether. We can take the *Poshteh* litigation as an example. If the Strasbourg Court were to have taken the Supreme Court's rebuff in that case seriously and changed its position, it would perhaps have risked undermining its own authority (which, in turn, would risk undermining its legitimacy) by departing from case law which had been recently decided by its most senior Court. There is a chance, too, that proper resolution may have required an appeal to the Grand Chamber level, which would have involved expenses, effort and further delay. There are obvious reasons to avoid such a path if it is unnecessary to do so. On the other hand, if the Court were to hold fast to its previous position and explicitly disagree with the Supreme Court, this might risk generating further antagonism. Would it be certain that the UKSC would change its mind if Strasbourg were to dig its heels in? Given the Supreme Court's unwillingness in *Poshteh* to follow Strasbourg in the first place in spite of a clear Chamber judgment, it is dubious as to whether furthering this battle (again, especially when the overall result in the case at hand would make no difference) would produce any meaningful results at the national level in any case. The Supreme Court has recently shown, for example, that it is sometimes even willing to depart from Grand Chamber authority.[100] If the UKSC was willing to ignore one Strasbourg authority, why not another? Ultimately, entrenching these differences may only serve to further distance the two judicial bodies.

In addition, whilst *Tariq*, *FJM* and *Poshteh* were each relatively passive, and strongly deferential, responses to the national courts, Strasbourg Decisions need not always be vehicles for passive agreement with the UKSC, even in instances where it is facing considerable criticism. The Court can use Decisions to effect a degree of change, or make some indications as to where it might stand on certain issues.[101] *Kaiyam and Others v United Kingdom*[102] provides an interesting example, a case concerning the extent of a State's obligations concerning the rehabilitation of a prisoner in the context of Article 5. The Supreme Court, in a relatively caustic judgment, dismissed most of the human rights claims raised by the applicants, and criticised the relevant Strasbourg case law upon which they relied.[103] As with *Poshteh*, rather than following that jurisprudence, it preferred to adopt its own approach.[104] When the case reached Strasbourg, that Court handed down a Decision which broadly agreed with the UKSC, affording a relatively limited scope to the application of Article 5. Unlike in

[100] *Hallam and Nealon* (n 73).

[101] The Court's early case law concerning abortion, for example, consisted almost exclusively of admissibility decisions eg *X v Austria*, Appl No 7045/75, Decision of 10 December 1976; *WP v United Kingdom,* Appl No 8416/78, Decision of 13 May 1980; *X v Denmark,* Appl No 9974/82, Decision of 2 March 1983; *H v Norway*, Appl No 17004/90, Decision of 19 May 1992.

[102] *Kaiyam and Others v United Kingdom* (2016) 62 EHRR SE13.

[103] *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66; [2015] AC 1344.

[104] The Supreme Court declined to view the issues at hand under either art 5(1) or art 5(4) but instead as a more holistic 'ancillary' obligation under art 5 generally: ibid, [37]–[38].

Poshteh, however, the Court did not blithely accede to the UKSC's criticism. It accepted that there was a difference between the approach taken by the two courts, but proceeded to apply its own case law and its own standards to the case. Whilst it reached a similar overall conclusion as the domestic court,[105] it acknowledged the jurisprudential diversion that separated the two courts, and confirmed that the proper approach to be taken was that which was established by its own case law, and which was lambasted by the UKSC.[106] One year later, in the case of *Brown v Parole Board*[107] the UKSC departed from its position and moved back in line with Strasbourg, in part relying on the Decision in *Kaiyam v UK*.[108] Thus, although carrying less technical weight than a full Judgment might have done, in that instance a Decision helped to shape the domestic law in a positive way. In fact, in some ways, dealing with Kaiyam's case as a Decision may have been the more impactful strategic choice. Given that the UKSC was so clearly sceptical of Strasbourg's previous efforts in this area,[109] it might have been the case that a gentle nudge from Strasbourg, housed in a 'mere' Decision, was more acceptable to the UKSC than a more confrontational judgment. Might the European Court's choice to disagree through the means of a Decision rather than a Judgment be influenced, to some degree, by a desire to ensure its concerns in this case received a better domestic reception? In any case, the Court in *Kaiyam v UK* succeeded in getting the UKSC to switch course and adopt Strasbourg's position once again. Unfortunately, such small 'nudges' did not feature in *Tariq*, *FJM* or *Poshteh*, so *Kaiyam* exists as an outlier in this respect, but it nonetheless shows that resorting to Decisions need not mandate an attitude of passivity by the Strasbourg Court.

It is possible, therefore, to identify a number of benefits of a more strategic approach to admissibility questions in cases against States which may be hostile to the ECtHR. In a system in which the obligation for implementing judgments largely falls to national States, there is a real need for the Strasbourg Court to foster positive relations with contracting States to minimise (the potential for) a negative reception to the Court and its work. Using a strategic approach, unnecessary constitutional clashes can be averted, and inter-judicial relations can be improved, perhaps in order to cultivate a better environment for co-operation and dialogue in more difficult or controversial cases which may arise in the future. There are even some conceivable circumstances in which meaningful change might be more effectively realised through Decisions than full Judgments.

[105] In fact, whilst the UKSC found that only some applicants suffered a breach of art 5, the ECtHR found that art 5 was not breached on the facts at all: ibid, [81]–[83]. The court was, however, not unanimous on this point.

[106] *Kaiyam v UK* (n 102) para 72.

[107] *Brown v Parole Board for Scotland* [2017] UKSC 69; [2018] AC 1

[108] ibid, [31]–[44].

[109] The court in *Kaiyam* was, after all, departing from a full Court judgment: *James v United Kingdom* (2013) 56 EHRR 1.

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That being said, it is important to consider whether these benefits, many of which are hypothetical and 'extra-legal', can justify the 'improper' use of the admissibility procedure. In this respect, it is submitted that considerable caution is still very much warranted.

There is, at the outset, the obvious problem of fair labelling; if indeed the admissibility stage provides a forum for the tempering of political relations, perhaps it is not legitimate to do so under the guise of a purely technical and procedural stage. However, if strategic considerations in judging are to be operative at all, they must work precisely because the opportunity to effect these considerations arise not as overt political questions but indirectly, in the application of the ostensibly neutral functions of the Court. Claims about the political function of judiciaries are not new, nor is the claim that these political considerations 'seep' into neutral machinery.[110] Indeed, in a sense, it is the duplicitous labelling of the strategic site that legitimises that strategic function. Nonetheless, fair labelling issues remain, as do the potentially very weighty issues concerning legitimacy and transparency.

Perhaps the major problem with Strasbourg's approach is the most obvious one: 'strategising' admissibility decisions risks meritorious applications being dealt with in an unsatisfactory manner. There is an evident risk to applicants: the adoption of strategic behaviour might ultimately run the risk of sacrificing justice being done on the merits of individual cases, and the plight of individual applicants. Cases brought by applicants like those in *Tariq* and *FJM* certainly had merit, after all. Ultimately, the Strasbourg Court's role is to keep national courts in check and ensure that human rights are being protected across the Council of Europe.[111] There is a compelling argument that, whatever the merits of a more strategic approach, the protection of the human rights of any applicant that comes before it should always be the primary concern of any human rights judge. The European Convention is hugely important for individuals and this should not be compromised readily; as Lord Neuberger has rightly said of the UK: 'in the absence of a written constitution, it is the … Convention … which operates as a principled control mechanism on what the legislature can prescribe'.[112] This 'control mechanism' should not be compromised too readily. In addition, frequent concessions to

[110] The most obvious British exponent is JAG Griffith; see *Politics of the Judiciary* (1st edn, Fontana 1977).

[111] There is an ongoing debate concerning the proper role of the ECtHR, particularly as to whether it should focus on achieving individual justice for each applicant or adopt a more systemic standard-setting role, amenable to compromise, and perhaps, strategy: K Dzehtsiarou and A Greene, 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' [2013] PL 710; S Greer and L Wildhaber, 'Revisiting the Debate about "Consitutionalising" the European Court of Human Rights' (2012) 12 HRLRev 655. The Strasbourg judges, however, appear to generally view the Court's role as the former: S Greer and S Wylde, 'Has the European Court of Human Rights Become a "Small Claims Tribunal" and Why, If at All, Does It Matter?' (2017) 2 EHRLR 145.

[112] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, [52].

States in the name of political relations may weaken the general effectiveness of the Convention. To again borrow from Judge Pinto de Albuquerque:

> Should the Contracting Parties be free to follow the Court's case-law if, when and so far as this pleased the respective Governments or local courts, the 'achievement of greater unity' between these Parties would be an illusory goal, each of the Parties choosing at any given historical moment the extent to which they wished to take part in the 'common understating and observance of … human rights' which is at the heart of the European human rights protection system … such a system, which would enable States to qualify the binding nature of the Court's judgments, would not only seriously weaken the role of the Court in the discharge of its functions, but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order.[113]

Whatever the merits of a strategic approach, this important point should not be forgotten.

In addition, if Strasbourg underplays the points of disagreement and potential tensions between the two courts, it risks stifling the supposed hallmark of the UK–Strasbourg relationship, inter-judicial dialogue.[114] If legitimate criticism from one direction cannot be acknowledged, it cannot be properly engaged with and countered. Some of the comments by Supreme Court judges regarding Strasbourg's case law are direct and harsh.[115] A proper engagement with these comments would surely be better than ignoring or downplaying the depth of that critique. The Decision format does not allow for a proper dialogue with States, at least in the traditional sense.

Additionally, by showing a reluctance to question the UKSC, the Strasbourg Court may risk legitimising some of the more controversial and concerning trends that have started to arise in cases such as *Poshteh* and *Hicks*, where national judges feel themselves more emboldened to depart from the Convention case law. Of course, such a departure may convincingly be argued as a defensible in a given case. However, in order to preserve the integrity of the Convention system and the consistent application of human rights standards across the Council of Europe, the Court must take seriously, and be seen to take seriously, any departures, however well-reasoned, and subject them to thorough scrutiny. To do otherwise, as in the case of *Poshteh*, risks signalling an unduly passive response to contracting States. Too submissive an acceptance of the UKSC's more recent bold departures might contribute to the weakening of the authority of the Strasbourg Court as a whole.

A final, but important, point is that the European Court, especially in its 'age of subsidiarity', should be aiming to provide clarity and guidance to the national

[113] *Borg v Malta*, Appl No 37537/12, Judgment of 12 January 2016, Partially Concurring, Partially Dissenting opinion of Judge Pinto de Albuquerque, [10].

[114] Dialogue is still promulgated as an important principle by the Supreme Court: *DA* (n 98), [131] (Lord Hodge).

[115] For a particularly severe example, see *Hallam and Nealon* (n 73), [85] (Lord Wilson).

courts as to how to navigate the corpus of ECHR case law. National courts, including the Supreme Court, look to Strasbourg authority when applying the Convention domestically. The Supreme Court has been receptive of its guidance, but has sometimes complained about the 'mixed messages' sent by messy Strasbourg case law.[116] Fully reasoned, properly explained judgments aid national courts in this regard.[117] Short Decisions rarely do. As was explained above, *Tariq*, *FJM* and *Poshteh* all involved novel issues concerning the proper interpretation and application of Strasbourg authorities. Part of the reason they concerned the Supreme Court so much (and part of the reason as to why they reached that Court in the first place) was due to the (perceived) problems with what the Convention, and the Strasbourg case law, meant in practice. The UKSC clearly looked to Strasbourg for guidance, and in some cases expressed a direct plea for that Court to fix or clarify matters. And yet, Strasbourg's replies in these three Decisions proved unsatisfying in each instance, dealing with the legal position quickly, deploying unsatisfactory reasoning and downplaying the controversies which sent the case there in the first place. The domestic call for clarification was not respected. Further, the issues which arose in the above cases are not limited to the specific appeals themselves, nor are they limited to the UK context. The Convention-compliance of private evictions and secret trials, for example, are likely to be issues raised in proceedings across courts across Europe in the future. Decisions which are vaguely reasoned and unduly deferential to the UK therefore pose a risk to legal certainty and the effective application of the Convention across Europe. More definitive guidance and consistent application of principles would surely aid States and their judiciaries, and facilitate a more confident resolution of disputes at the national level. This, it should be remembered, is part of the rationale for the installation of the Decision mechanism in the first place.

In sum, whatever the merits of the strategic approach in a given instance, there are great risks involved with the adoption at the admissibility stage: for the individual applicant, for the relationship between Strasbourg and the national court in question, and for the general effectiveness of the Convention across Europe.

V. CONCLUSION

The relationship between the UK and Strasbourg is unsettled and sometimes uneasy. Many legal and political actors play a part in shaping that relationship, including the judges at both the national and European level, and the strategic use of the Decision may be one way for the Strasbourg

[116] *R (Smith) v Secretary of State for Defence* [2010] UKSC 29; [2010] 3 WLR 223, [199].
[117] For a good example see the discussion of *A* (n 52) in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2009] 3 WLR 74.

judges to indirectly influence that relationship. This article has analysed three cases which may evidence this strategic behaviour, all of which involving applicants asking Strasbourg to vindicate their rights claims after a previous rejection by the Supreme Court. It has been suggested that the 'strategising' of admissibility decisions may, at least in part, have been justified by a desire to minimise potential tensions between the UK and Strasbourg, and to pacify certain influential voices in the UK that are openly critical to the Court and its work.

Whether this behaviour can be justified is a more difficult question. Some defences have been offered; since the successful operation of the Convention system depends to a significant degree on the political will and the good faith compliance of contracting States, the strengthening of political co-operation between the two jurisdictions will, in theory, help to secure the effectiveness of the Convention system. There is at least a potential for this to be effected through a tactical use of the admissibility procedure, in that it can help to reframe potential conflicts and send non-combative messages to States. However, we should not lose sight of what the Court is really doing: it is relegating substantive, legitimate claims to a procedural question in the name of good governance. This has significant implications, not least for the applicants who bring those cases, whose claims, often raising contestable and important issues, do not receive the full and thorough assessment they deserve. Dialogue may be stifled. The clarity and thoroughness of the Court's case law may suffer. Importantly, rather than fostering cooperation, too great a resort to the Decision format in controversial cases may only serve to embolden the dissident behaviour of more hostile judiciaries. When claims raise contentious issues and present an opportunity for Strasbourg to clarify or develop its case law, we should be extremely reluctant to endorse the determination of such issues at the admissibility stage, whatever the political benefits may be. The goal of strengthening political co-operation between the UK and Strasbourg may indeed be legitimate, but it must always be seen as a competing interest alongside the Court's long-established goal of ensuring individual justice in each case it deals with. At least in the cases of *Tariq*, *FJM* and especially *Poshteh*, the Court went out of its way to avoid any potential for a jurisdictional clash, but in doing so it failed to clarify its case law, introduced confusion and, most importantly, risked creating injustice for the applicants. Herein lies the greatest potential for harm with strategic behaviour, and as such, however useful it may sometimes be, it would be wise to keep a very close eye upon it.