

**BETWEEN:-**

**THE QUEEN  
on the application of  
HILAL ABDUL-RAZZAQ ALI AL-JEDDA**

**Appellant**

**- and -**

**THE SECRETARY OF STATE FOR DEFENCE**

**Respondent**

**- and -**

**JUSTICE**

**Intervener**

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**SUBMISSIONS ON BEHALF OF THE INTERVENER**

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**A. INTRODUCTION**

1. JUSTICE is a human rights and law reform organisation. It is the British section of the International Commission of Jurists. On 13<sup>th</sup> December 2005 Laws LJ ordered that “1) permission be granted to Justice to intervene by written submissions only, limited to 25 pages. 2) Justice may only address the courts via Counsel at the hearing to the extent that they are invited to do so.”
2. The focus of the present intervention is whether domestic law and, in particular, the enjoyment of “Convention rights” under the Human Rights Act 1998 (“HRA”), is capable of being displaced by an unincorporated

international instrument (assuming for the sake of argument that any such displacement would be effective as a matter of international law). This issue arises in the present case as follows.

3. The Secretary of State for Defence (“SSD”) contends that the Appellant cannot rely on Article 5 of the European Convention on Human Rights (“ECHR”) because *“he is not entitled to rely on a Convention right contained in Schedule 1 to the HRA which is not, as a matter of international law, applicable to the relevant territory in question: see the decision of the House of Lords in R (Quark Fishing Limited) v Secretary of State for the Foreign and Commonwealth Office”* (§13, SSD Skeleton Argument). There are two parts to this submission: (a) that the effect of United Nations Security Council Resolution 1546 (“UNSCR 1546”) is, as a matter of international law, to displace the application of Article 5 of the ECHR and (b) that this displacement is recognised and given effect in domestic law by the HRA. The present intervention focuses on this, last, issue (“the domestic effect of the displacement”).
  
4. The SSD also contends that even if Article 5, ECHR, applied to the Appellant’s detention the HRA does not since it is *“a domestic statute, and its jurisdictional scope should be read and understood accordingly”* (§14, SSD Skeleton Argument). It is noted that this submission is contrary to the recent Court of Appeal judgment in *R (Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609. Following that judgment, the Appellant’s detention (by British armed forces at a detention centre in Iraq) falls within the jurisdictional scope of the HRA. In *Al-Skeini* the SSD conceded that one of the appellants, Baha Mousa, came within the United Kingdom’s jurisdiction, under Article 1, ECHR: “when a citizen of Iraq was in the actual custody of British soldiers in a military detention centre in Iraq during the period of military occupation he was within the jurisdiction of the UK within the meaning of Article 1 of the

ECHR” (§6, *R(Al-Skeini) v SSD*). However, as in the present case, the SSD disputed that this meant that there was also jurisdiction under the HRA - on the basis that the HRA did not have extra-territorial effect (§§37-44, *R(Al-Skeini) v SSD*). The Court of Appeal rejected this argument (§§144-149 (Brooke LJ), 188 (Sedley LJ), 210 (Richards J)).

## **B. SUMMARY OF THE INTERVENER’S SUBMISSIONS**

5. On the domestic effect of the displacement, the Divisional Court appears to have accepted, in large part at least, the SSD’s submissions. Accordingly, for reasons of expediency, the present submissions are framed by reference to the SSD’s submissions in this appeal rather than by reference to the Divisional Court judgment. Thus, the SSD construes “Convention rights” in the HRA on the basis that it *“takes account of the scope (i.e. application or non-application) of those rights as they exist as a matter of international law and, hence, as they would be understood by the Strasbourg court in any particular case.”* (§114, SSD Skeleton Argument). However, since the SSD seeks to argue that UNSCR 1546, adopted on 8<sup>th</sup> June 2004, displaces the application of “Convention rights” a fuller description of the SSD’s construction would be that “Convention rights” in the HRA must take account of those rights as they exist as a matter of international law from time to time and, hence, as they would be understood by the Strasbourg court in any particular case.
6. It is submitted that this construction is unsustainable. “Convention rights” must no doubt take account of the interpretation and application of those rights as they exist as a matter of international law and as they would be understood by the Strasbourg court but the question of their existence is to be ascertained by reference to the United Kingdom’s international obligations at the time when the HRA came into effect, unless the HRA is subsequently

amended or there is a derogation/reservation under sections 14 and 15 which reflects the UK's changing obligations. That marks the extent to which Parliament gave effect to the United Kingdom's international obligations under the ECHR in the HRA. A summary of the propositions upon which this submission rests is as follows:

- 6.1. A key principle regarding the use of international law in domestic courts is that unincorporated international instruments have no direct effect in domestic law. This principle applies irrespective of the international law status of the unincorporated international instrument in question.
- 6.2. Where an international instrument is given effect or incorporated into domestic law by a statute, that statute determines the extent to which and the manner whereby the international instrument is applicable in domestic law.
- 6.3. It is a matter of statutory construction whether, as the SSD submits, the HRA and, in particular, the definition of "Convention rights", permits the incorporation of international instruments into domestic law where those instruments curtail or abrogate the United Kingdom's international law obligations under the ECHR.
- 6.4. The HRA must be construed by reference to the principle of legality. This is since the effect of the SSD's construction would be to displace the principle of no direct effect, a long standing principle of constitutional law, and to potentially displace the application of fundamental human rights. Accordingly, it must be asked whether the SSD's construction is evident from clear and express words in the HRA or as a matter of necessary implication.

- 6.5. There are no clear and express words in the HRA which compel such a conclusion. This appears to be conceded by the SSD.
- 6.6. Nor is the SSD's construction supported as a matter of necessary implication. The sections of the HRA upon which the SSD relies merely illustrate the uncontroversial notions that the interpretation of "Convention rights", once engaged, and the question of who may benefit from their protection are to bear the same meaning as they would be given by the European Court of Human Rights ("ECtHR"). They do not bear on the question of whether those Convention rights have been engaged (or disengaged) in the first place.
- 6.7. "Convention rights" in the HRA means those ECHR rights listed in Schedule 1; the rights by which the UK was bound as a matter of international law at the date the HRA came into effect. This is evident from the definition of the "the Convention" in section 21(1). It is also supported by sections 1(4), 1(6), 14 and 15 which show that Parliament distinguished between the United Kingdom's international law obligations under the ECHR and "Convention rights" under the HRA and that, where it deemed appropriate, it provided for the translation of the United Kingdom's changing international law obligations into domestic law.
- 6.8. The intervener's construction is not inconsistent with the House of Lords judgment in *Quark Fishing*.

### C. THE CONSTITUTIONAL CONTEXT

7. The SSD's Skeleton Argument states that the Appellant's submissions "*to the effect that the Court is being invited to conclude that a domestic statute has been varied by an unincorporated provision of international law, completely miss the point*" (§109). It is true that much of the domestic effect of the displacement issue turns upon the proper construction of the HRA. However, this exercise in construction should not to be undertaken in a vacuum. Rather, it is to be seen against the full backcloth of legal and constitutional principles regarding the use of international law in English courts.
8. The touchstone of the role of international instruments in domestic law is *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 ("the *Tin Council* case"). For present purposes the most relevant part of Lord Oliver's speech is that which relates to the principle that international treaties have no direct effect in domestic law ("the principle of no direct effect"):

*"[T]he Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they may enjoy in domestic law without the intervention of Parliament. So far as individuals are concerned [an unincorporated treaty] is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because as a source of rights and obligations it is irrelevant."* (at 500B-D) (underlining added)

9. This aspect of the *Tin Council* case was recently restated by Lord Bingham in *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976: "*It is true ... that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts*" (at [13]).

10. The principle of no direct effect is part of the bedrock of the British constitution:

*“The domestic constitution is based upon the separation of powers. In domestic law, the courts are obliged to give effect to the law as enacted by Parliament. This obligation is entirely unaffected by international law.”* (R v Lyons [2002] UKHL 44 [2003] 1 AC 976 per Lord Hoffmann at [40])

11. A self-evident purpose of the principle of no direct effect is to protect individuals against the risk of executive abuse of the prerogative power, for example to protect the domestic law rights of individuals from being eroded by executive conduct. The principle therefore applies regardless of whether the binding nature of an international instrument in international law arises from a unilateral act of the United Kingdom executive (e.g. the ratification of a treaty) or from a multilateral act (e.g. a UN Security Council Resolution). This is illustrated by, for example, section 1(1) of the United Nations Act 1946 which provides,

*“If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty-five (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations calls upon His Majesty’s Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.”*<sup>1</sup>

The SSD puts mis-placed emphasis upon this distinction. For example:

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<sup>1</sup> Article 41 of the UN Charter provides, *“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*

*“Derogations are unilateral acts of, in this case, the United Kingdom Government. For obvious reasons, Parliament has chosen, in the HRA, to submit them to a degree of Parliamentary supervision by requiring an Order in Council. By contrast, the effect of a decision of the Security Council under Article 103 of the UN Charter is a matter of general international law, of immediate binding force and equally applicable to all States and (in this case) determining the effect of the ECHR on a particular point.”* (§115, SSD Skeleton Argument)

12. An obvious corollary of the principle of no direct effect is that international instruments may be made part of domestic law where they are incorporated into or given effect in domestic law by legislation. The axis upon which the status of the international instrument turns is the domestic statute: it will dictate the extent to which and the manner whereby the international instrument will be relevant to and given effect in domestic law (as noted by the Divisional Court, §§35-36). One illustration of this is the domestic recognition of the distinction between rights under the ECHR and rights under the HRA. As Lord Nicholls stated in *Re McKerr* [2004] UKHL 12 [2004] 1 WLR 807:

*“These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country’s law because the Convention does not form part of this country’s law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the 1998 Act. ... They are part of this country’s law. The extent of these rights, created as they were by the 1998 Act, depends upon the proper interpretation of that Act.”* (at [25])

#### **D. THE PRINCIPLE OF LEGALITY**

13. The SSD’s construction of “Convention rights” in the HRA (i.e. that it must take account of those rights as they exist as a matter of international law from time to time and, hence, as they would be understood by the Strasbourg court in any particular case) brings with it remarkable ramifications (as noted by

the Divisional Court, see §34). Two have particular relevance in the present context. First, the SSD's construction would involve a radical departure from the principle of no direct effect. This is since it would give direct domestic effect to international instruments, concluded by the executive without Parliamentary approval, and altering the United Kingdom's pre-existing international law obligations under the ECHR. Secondly, it would enable the amendment, curtailment or abrogation of fundamental human rights by act of the executive alone.

14. Because of these consequences the principle of legality must be applied when construing the HRA to see whether it bears the construction contended for by the SSD. The principle of legality was explained by Lord Steyn, quoting from *Cross, Statutory Interpretation* (3<sup>rd</sup> edition, pp 165-166), in *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539:

*“Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules ... Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. Examples are the principles that discretionary powers conferred in apparently absolute terms must be exercised reasonably, and that administrative tribunals and other such bodies must act in accordance with the principles of natural justice. One function of the word “presumption” in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles .... These principles apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as “presumptions of general application.” ... These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by statutory text.”* (at 588B-E)

15. The principle of legality was more recently described by Lord Hoffmann in the context of the HRA in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115:

*“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”* (at 131E-G)

16. It follows that in order for the SSD to succeed in demonstrating that his construction of “Convention rights” is correct he must show:

16.1. That there exist in the HRA clear and express words providing for the displacement, by unincorporated international instruments, of the principle of no direct effect and/or the application of the Convention rights set out in Schedule 1 of the HRA, OR

16.2. That the displacement, by unincorporated international instruments, of the principle of no direct effect and/or the application of the Convention rights set out in Schedule 1 of the HRA follows as a matter of necessary implication from the words in the HRA. A “necessary implication” is,

*“one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic*

*not interpretation.” (R (Morgan Grenfell) v Special Commissioner of Income Tax [2002] UKHL 21 [2003] 1 AC 563 per Lord Hobhouse at [45])*

17. It is submitted that there are no clear and express words in the HRA providing for the displacement. The SSD appears to accept this: *“The Appellant contends that the HRA could only be regarded as applying (or not applying) in this manner if there was a specific provision within the HRA to this effect. In fact the Secretary of State’s argument is made good by reference to various key provisions within the HRA, which demonstrate the clear interdependence of the “Convention rights” under the HRA and the application of rights under the ECHR”* (§110, SSD’s Skeleton Argument). Thus, the SSD must show that his construction is supported as a matter of necessary implication. That is the exacting standard to be applied, as required by the principle of legality, when construing the HRA - and not simply whether the SSD’s case can be “made good” by reference to provisions of the HRA showing the interdependence between HRA and ECHR rights.

#### **E. HRA: NECESSARY IMPLICATION?**

18. It is submitted, further, that the SSD’s construction is not supported as a matter of necessary implication by the HRA. It is not good enough for the SSD to simply show the interdependence<sup>2</sup> of rights under the HRA and the ECHR (§110, SSD’s Skeleton Argument). That fails to distinguish between the different levels on which those rights may be interdependent.

19. In determining the United Kingdom’s responsibility under the ECHR the following basic questions must be addressed:

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<sup>2</sup> It is clear from the SSD’s use of the word “interdependence” in relation to “Convention rights” under the HRA and ECHR rights that he means that these sets of rights are coextensive. That is the sense in which “interdependence” is used here.

- (a) **Incidence/Existence:** Is the UK bound, as a matter of international law, to provide the right which is alleged to have been violated, i.e. has the United Kingdom ratified/acceded to that part of the ECHR? This is the gateway to the following questions because if the UK has no obligation as a matter of international law for the particular Convention right upon which the claimant seeks to rely there will be no case to answer.
- (b) **Place:** Does the UK have jurisdiction over the place where the right is alleged to have been violated?
- (c) **Victim:** Does the claimant have standing under the Convention, i.e. is s/he a "victim"?
- (d) **Interpretation/Application:** Can the claimant show that his right has been violated, on the basis upon which that right has been interpreted and applied?

20. Whether or not "Convention rights" in the HRA necessarily implies interdependence with ECHR rights on all, none or some of these levels is a matter of construction. In order to succeed on his case, the SSD needs to show that the HRA addresses (a) – incidence/existence of rights - in the manner contended for, i.e. that "Convention rights" must take account of those rights as they exist as a matter of international law from time to time and, hence, as they would be understood by the Strasbourg court in any particular case.

21. The provisions of the HRA (including all the provisions relied upon by the SSD) contemplate interdependence between "Convention rights" under the HRA and ECHR rights insofar as (b)-(d) are concerned. They do not address (a). Nor can it be concluded that from the interdependence between "Convention rights" under the HRA and the ECHR regarding (b)-(d) it follows, as a matter of necessary implication, that there is such

interdependence regarding (a). Section 21(1) is the only express provision in the HRA relating to (a). Apart from that, it is the enactment of the HRA itself which relates to (a). In enacting the HRA and including within its ambit the protection of the “Convention rights” in Schedule 1, Parliament gave domestic effect to the United Kingdom’s international law obligations under the ECHR as they then were. Furthermore, the case for necessary implication regarding (a) collapses in the face of HRA provisions which envisage that subsequent changes to the United Kingdom’s international law obligations under the ECHR would be “domesticated” by amendment to the HRA (eg. section 1(4)) or designated derogations/reservations under sections 14 and 15.

***(a) HRA contemplates interdependence between “Convention rights” under the HRA and ECHR rights regarding (b)-(d)***

22. The HRA provisions relied upon by the SSD show that Parliament intended there to be interdependence between “Convention rights” under the HRA and ECHR rights regarding (c) and (d). There is, of course, nothing either extraordinary or controversial about that. Once the provisions of an international instrument are incorporated or given effect in domestic law then they should be given the autonomous meaning which they bear as part of the international instrument. Domestic case law is littered with examples illustrating this basic principle, for example in relation to the Geneva Convention on the Status of Refugees: *R v Secretary of State for the Home Department ex parte Adan* [2001] 2 AC 477;<sup>3</sup> the Hague Convention on the Civil

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<sup>3</sup> “[T]he inquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law.” And “[T]he Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 1 and 32 [of the Vienna Convention on the Law of Treaties] and without taking colour from the distinctive

Aspects of International Child Abduction: *In re H (Minors) (Abduction: Acquiescence)* [1998] AC 72,<sup>4</sup> and the ECHR: *N v Secretary of State for the Home Department* [2005] UKHL 31 [2005] 2 WLR 1124.<sup>5</sup>

23. The SSD relies upon HRA, sections 1(1), 21(1), 2(1) and 7(7). He also relies upon case law relating to the interpretation of “public authority” for the purposes of section 6. These will be addressed in turn.

24. Sections 1(1) and 21(1): Section 1(1) defines “Convention rights” by reference to the ECHR and section 21(1) defines the “the Convention” as “*the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4<sup>th</sup> November 1950 as it has effect for the time being in relation to the United Kingdom.*” The SSD relies upon these sections at §§110 and 114 in his Skeleton Argument. This definition of the ECHR does not assist the SSD’s case.

25. The key words in the definition for present purposes are “United Kingdom” and “for the time being.” The SSD’s interpretation of “Convention rights” proceeds upon the basis that “United Kingdom” it means the United Kingdom as a state in international law terms rather than as a geographical entity (i.e. “Great Britain and Northern Ireland”, section 5 and Schedule 1 of the Interpretation Act 1978). It is noted that this interpretation is flatly

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*features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty.”* Lord Steyn at 515G-516A and 516G respectively.

<sup>4</sup> “*An international Convention expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning under the laws of all contracting states.*” Lord Browne-Wilkinson at 87F.

<sup>5</sup> “*There is ample room, where the Convention allows, for the application of [humanitarian principles]. They may also be used to enlarge the scope of the Convention beyond its express terms. It is, of course, to be seen as a living instrument. But an enlargement of its scope in its application to one contracting state is an enlargement for them all. The question must always be whether the enlargement is one which the contracting states would have accepted and agreed to be bound by.*” Lord Hope at [21].

inconsistent with the SSD's position in *R (Al-Skeini) v SSD* (for the Court of Appeal's rejection of the SSD's interpretation in *Al-Skeini* see §§ 32, 37-47, 184-188 of the judgment). In relation to "for the time being": the Collins Concise Dictionary defines this phrase as "for the moment, temporarily". Accordingly, section 21(1) refers to the incidence/existence of the "Convention rights" in Schedule 1 as they bound the United Kingdom at the time the HRA was enacted. Thus, the HRA defines which rights are protected in domestic law; those Convention rights in Schedule 1 by which the United Kingdom was, on 2 October 2000 (when the HRA came into force), bound as a matter of international law. This does not mean that "Convention rights" under the HRA has an autonomous meaning separate from ECHR rights. The interpretation/application of "Convention rights" moves with the interpretation/application of ECHR rights by the ECtHR.

26. "For the time being" in section 21(1) does not support the SSD's construction of "Convention rights" (that it must take account of those rights as they exist as a matter of international law from time to time and, hence, as they would be understood by the Strasbourg court in any particular case). Had Parliament wished to confer this meaning on the definition of the ECHR in section 21(1), it could have drawn upon the sort of language it used in section 2(1) of the European Communities Act 1972. This provides:

*"All such rights, powers, liabilities, obligations and restrictions from time to time created by or arising under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies"*. (underlining added)

27. The Collins Concise Dictionary defines “from time to time” as “at intervals, occasionally”. Section 2(1) of the European Communities Act 1972 provides an important precedent whereby the incorporation of an international treaty into domestic law is effected so that domestic law automatically mirrors any changes to the international treaty effected on the international plane. The domestic incorporation has a direct, ongoing and dynamic nature. Had that been the Parliamentary intention in relation to the HRA then Parliament could have drawn upon section 2(1) of the 1972 Act in a similar or adapted form for section 21(1). It chose not to. Indeed, it chose express wording to reflect the opposite intention.

28. Section 2(1): Section 2(1) requires domestic courts determining a question which has arisen in connection with a Convention right to take into account judgments, decisions, declarations or advisory opinions of the ECtHR where relevant to the proceedings in which that question has arisen. The SSD contends that this obligation “*would apply equally in respect of a decision to the effect that the ECHR either (a) does not apply at all; or (b) that it is subject to the overriding effect of some other rule of international law which provided a defence to a claim that it had been violated.*” (§110, SSD Skeleton Argument). The only reasoning offered in support of this assertion is “*where, as a matter of legal analysis, the Strasbourg court would not apply Article 5 in a given context, it would be very odd to conclude that that the English Courts must nonetheless apply it.*” To the contrary, there is nothing “odd” about this at all, for the following reasons.

29. First, the obligation imposed upon domestic courts by section 2(1) is to follow the clear and constant jurisprudence of the ECtHR. This relates to the way in which the ECtHR interprets and then applies Convention rights, as is clear

from Lord Bingham's speech in *R (Ullah) v Special Adjudicator* [2004] UKHL 26 [2004] 2 AC 323:

*"While such [ECtHR] case law is not strictly binding it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court.... This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of Strasbourg case law ... the duty of the national court is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less."* (at [20])

30. It is submitted that, of the different levels in which "Convention rights" under the HRA and ECHR rights may be interdependent, the section 2(1) obligation relates to (d) – the interpretation/application of rights – and not to (a) – the incidence/existence of rights. The fact that it relates to (d) does not, as a matter of necessary implication, mean that it also relates to (a) (see further below, §§35-36). Thus it adds nothing to the SSD's case.

31. Secondly, and alternatively, it is submitted that even if the section 2(1) obligation relates to all levels (a) - (d) it vests in domestic courts a discretion as to whether or not to follow Strasbourg jurisprudence, i.e. ECtHR case law is not binding on domestic courts. As the Divisional Court noted, this reflects the fact that a margin of appreciation is accorded by the Strasbourg court to domestic courts (§41). However, it also reflects the fact that domestic courts apply the HRA whereas the ECtHR applies the ECHR (see above, §12). This is an important distinction, as pointed out by Lord Hoffmann in *Re McKerr* [2004] UKHL 12 [2004] 1 WLR 807: *"In the Court of Appeal [in R (Khan) v Secretary of State for Health] ... Brooke LJ, giving the judgment of the court ... said ... "we do not believe the court at Strasbourg would look at the matter in this way." I daresay it would not. But that is because the court would be concerned with the*

*international obligations of the United Kingdom and not with the extent to which the 1998 Act was retrospective” (at [64]).*

32. Thus, where there are “special circumstances” and/or “strong reasons” (see Lord Bingham in *Ullah*, above §29) domestic courts need not follow ECtHR case law. In the event that the ECtHR found that UNSCR 1546 did displace the operation of Article 5, ECHR, this is not a judgment which would need to be followed in domestic courts under section 2(1). The “special circumstance”/“strong reason” justifying this course of action would be that following the ECtHR judgment would displace the principle of no direct effect and the application of fundamental human rights. As Lord Hoffmann noted in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions* [2001] UKHL 23 [2003] 2 AC 295, “*The House is not bound by the decisions of the [ECtHR] and, if I thought that the Divisional Court was right to hold that they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed*” (at [76]). Thus, if the displacement of the principle of no direct effect/the application of fundamental human rights is not sanctioned by the clear and express words of the HRA nor by necessary implication from the HRA then it certainly cannot be sanctioned through the back door by the duty to follow ECtHR case law.

33. Section 7(7): Section 7(7) of the HRA defines “victim” for the purpose of the HRA as being the same as “victim” under Article 34, ECHR. The SSD’s Skeleton Argument states “*Thus, in relation to a key provision of the HRA ... the approach that would be taken by the Strasbourg court is stated to be the template for the Court under the HRA.*” (§113). Section 7(7) relates to (c). It does not relate to (a). The fact that it relates to (c) does not, as a matter of necessary implication, mean that it also relates to (a) (see further below, §§35-36).

34. Section 6 and “Public Authority”: The SSD relies on case law where domestic courts have followed Strasbourg authority in defining “public authority” under section 6, HRA (§§111, SSD’s Skeleton Argument). Again, as with section 2(1) this relates to (d) and not (a). It does not further the SSD’s construction of “Convention rights” under the HRA. Once again, the fact that it relates to (d) does not, as a matter of necessary implication, mean that it also relates to (a) (see further below, §§35-36).

*(b) HRA contemplates domestication of post-enactment changes to UK’s international law obligations under the ECHR by HRA amendment / ss 14 and 15*

35. It is clear from sections 2(1) and 7(7) and from domestic case law regarding “public authority” under section 6 that the HRA contemplates that the interpretation of “Convention rights”, once engaged, and the question of who may benefit from their protection are to be determined coextensively with ECtHR case law. The SSD’s reliance on these provisions proves this much - but no more. These provisions do not by themselves support the construction that “Convention rights” must take into account the United Kingdom’s international law obligations under the ECHR from time to time. Nor can it be said that because these provisions contemplate interdependence between “Convention rights” under the HRA and ECHR rights in relation to (c) and (d), there is then a necessary implication that there must also be such interdependence in relation to (a). This is for the reasons set out above (§§18-21) but also because there are other provisions in the HRA which show that Parliament distinguished between the United Kingdom’s international law obligations and “Convention rights” under the HRA and that, where it deemed appropriate, it provided for the translation of the United Kingdom’s

changing international law obligations into domestic law. If the SSD's construction of "Convention rights" were correct then these provisions would be otiose.

36. The relevant provisions are as follows:

36.1. Sections 1(4) and (6): Section 1(4) enables the Secretary of State to make amendments to the HRA (by order) where appropriate "*to reflect the effect, in relation to the United Kingdom, of a protocol*". Section 1(6) provides that such an amendment may not be made so as to come into force before the protocol concerned is in force in relation to the United Kingdom. Of course, section 21(1) does not define the Convention to include its protocols. Thus, it might be said these provisions are of no import in the present context. However, they are significant because they illustrate Parliamentary recognition of the facts that the United Kingdom's obligations on the international plane could be altered where it ratified a protocol to the ECHR; that these obligations might need to be reflected in domestic law; that there should be a mechanism for reflecting the requisite changes in domestic law and that the enforcement of international law obligations and domestic law should be synchronised. Sections 1(4) and (6) therefore embody an approach to the distinction between international law obligations and domestic law which is consistent throughout the HRA.

36.2. Sections 14 and 15: Perhaps the most vivid illustration of Parliamentary intention to preserve the distinction between international law obligations and domestic law are sections 14 and 15. They enable derogations and reservations made by the United Kingdom on the international plane to be given effect, by way of an

order, as a matter of domestic law. In relation to these provisions the Divisional Court stated that they “*tell one nothing as to the circumstances in which it will be necessary to [derogate].*” (§62) That is true. However, it is the common principle underlying these provisions (as well as sections 1(4) and (6)) which is important – i.e. that where there is a change in the United Kingdom’s international law obligations (whether effected unilaterally or multilaterally, e.g. the UN Security Council Resolution) then it must be translated into domestic law before it can affect the rights under the HRA.

## F. QUARK FISHING

37. The intervener’s construction of “Convention rights” is not inconsistent with the House of Lords judgment in *Quark Fishing*. In that case, the Appellate Committee held that there could be no claim under the HRA where the United Kingdom was not bound, as a matter of international law, to provide the Convention right (article 1 of the First Protocol) in question.
38. It is submitted that – on this issue - that is as far as that judgment goes. This can be seen, in particular, by Lord Hope’s speech at §87 where he construes the definition of the First Protocol in the HRA and applies to it, by implication, the following words from section 21(1), “*as it has effect for the time being in relation to the United Kingdom.*” (see further above, §§24-27) There is nothing in *Quark Fishing* which goes as far as the SSD contends in §§13 and 108 of his Skeleton Argument, i.e. that “Convention rights” means that the incidence/existence of the United Kingdom’s international law obligations under the ECHR are to be assessed as they exist from time to time rather than at the time the HRA was enacted.

## G. CONCLUSION

39. It is submitted that it is evident from the foregoing that there is no necessary implication from the HRA that “Convention rights” bears the meaning contended for by the SSD. Rather, as set out in §6 above, it is submitted that the incidence/existence of “Convention rights” under the HRA must be ascertained by reference to the United Kingdom’s international obligations at the time when the HRA was enacted (unless the HRA is subsequently amended or there is a derogation/reservation under sections 14 and 15 which reflects its changing obligations).

40. Finally, it should be noted that:

40.1. The HRA clearly provides mechanisms by which developments in the United Kingdom’s international law obligations can be fed through into domestic law (see above, §36). Notwithstanding these pre-existing mechanisms there is nothing, as a matter of principle, to prevent other amendments being sought and made to the HRA to reflect evolving international law obligations. These are the ways in which the Government may seek to translate its exercise of the royal prerogative, in the conduct of foreign relations and the making of treaties, into domestic law. This is not about form prevailing over substance. Here, the observation of proper form is essential is maintaining one of the bastions of the British constitution: the separation of powers.

40.2. The construction contended for by the SSD is unattractive because it is inherently inconsistent with a basic tenet of legal policy: that law should be certain and predictable. If “Convention rights” in the HRA

were to be defined as the SSD submits, this would inject instability into the notion of “Convention rights”. Constant research would have to be undertaken into the status of the United Kingdom’s international law obligations under the ECHR whenever one sought to enforce the protection of such rights. Pragmatism (viz., such changes would be infrequent and unusual) provides no answer to this objection from principle: because of the possibility of such change the uncertainty and unpredictability would exist and the research would have to be undertaken.

**SHAHEED FATIMA**  
**9<sup>th</sup> January 2006**

Blackstone Chambers  
Temple, EC4Y 9BW