Argentoratum raro loquetur: Strasbourg will seldom speak; thoughts on EU Accession to the European Convention on Human Rights

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Introduction

Lady Paton, Ladies and Gentlemen,

It is immense privilege for Michelle Lafferty and me to be here in Edinburgh, not just as lawyers in the Registry of the European Court of Human Rights, as Scots lawyers.

We nearly didn't make it. Having left the office in good time on Friday afternoon we managed to miss our connection at Brussels airport. I shall spare you the details of the journey after that. However, in light of the experience I was almost tempted to re-title my talk "Scotland and Europe: the view from Strasbourg… and Brussels airport…and a Holiday Inn near Brussels airport… and Amsterdam airport at a hour of the day that Michelle is clearly more familiar with than me… and, finally, Glasgow airport some on a Saturday afternoon."

However, for reasons that will apparent, I should like to retain my original title.

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It has now been nearly fifteen years since the enactment of the Human Rights Act and the Scotland Act. Among the many judicial opinions which have been handed down in Edinburgh, London and Strasbourg since the passage of those Acts, none, I think, is shorter than the late Lord Rodger's speech in *AF (No 3)*, the now famous: "*Argentoratum locutum: iudicium finitum* – Strasbourg has spoken, the case is closed".[2]

Lord Rodger, with Lord Bingham and Lord Hope, was one of the greatest judges – either here in the UK, in Strasbourg or anywhere else - ever to write on the European Convention. Time without number, their speeches provided model expositions on domestic and Strasbourg law on the Convention, at a time when both domestic courts and Strasbourg needed them most.

Many Courts – included the one I have the privilege to work for – can only admire and attempt to follow their example. Indeed, it is a testament to the brilliance of those three men that I cannot think of a single case where the Strasbourg Court has disagreed with a judgment of the House of Lords in which they formed the majority in the House of Lords. More personally, the intellectual debt which my generation of Scots and Strasbourg lawyers owe them feels at times too great to repay.

It is as a small tribute to Lord Rodger, therefore, that I have entitled my brief remarks on EU accession to the Convention: *Argentoratum raro loquetur*: Strasbourg will seldom speak.

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[2] *Secretary of State for the Home Department v. AF and another* [2009] UKHL 28 at paragraph 98.

I should immediately add two qualifications.

First, you have, I think, just heard the limits of my schoolboy Latin.

Second, Strasbourg does, at times, have rather a lot to say for itself. Sceptics would say too much to say for itself but that is perhaps another issue for another day.

What I wanted to convey with that title is that – for reasons I shall come to – the likelihood is that, just as with Scottish cases, Strasbourg will seldom be called on to adjudicate on cases which involve points of EU law. Before turning to those cases, it appears the most useful introductory contribution I can make to this panel is to say something of the current developments in Strasbourg on EU accession to the Convention.

(I) Putting the European legal house in order

After its backlog of cases, and the now perennial attempts to reform it, the greatest single issue facing the Strasbourg Court is its relationship with the European Union legal order.

It is banal, but nonetheless necessary, to begin by observing that there are currently two human rights systems in Europe: the Convention system, applied and interpreted by Strasbourg Court; and the burgeoning human rights policies and jurisprudence of the European legal order, the centrepiece of which is now undoubtedly the Charter on Fundamental Rights.

There is now broad agreement that the current relationship is inchoate and unsatisfactory. Two elements currently make that so.

The first is that the Convention is part of the European Union legal order and is applied by the institutions of that order, but without any possibility of direct recourse to the Strasbourg Court – the only body capable of giving an authoritative interpretation on the Convention – should anyone wish to challenge application or interpretation of the Convention by the institutions of the European Union.

The second is that individuals can, under Article 34 of the Convention, lodge cases with the Strasbourg Court challenging acts of EU Member States when those acts may have stemmed from the national implementation of EU law, but without any direct involvement of the European Union in the litigation of those cases before the Strasbourg Court.

For over a decade there has been almost universal consensus that accession of the EU to the Convention is the best means of resolving these two difficulties. The entry into force of the Lisbon treaty in December 2009 and Protocol No. 14 to the Convention in June 2010 gave, respectively, the EU and the Convention system the legal competences to make accession possible. That said, even allowing for the pace at which European negotiations now take place, the agreement of the modalities for accession has been slow. Indeed, had I been asked to speak on the subject of accession as recently as early spring of this year, I would have said that Strasbourg waiting for accession was a bit like Vladimir and Estragon waiting for Godot.

There is, however, recent cause for optimism. To almost universal surprise, in April 2013 a draft revised agreement on accession was agreed between the Council of Europe and the European Commission. The agreement comprises:

(i) a draft Protocol to the Convention which will make the necessary amendments to the Convention to allow for EU participation in the Convention system,

(ii) a draft declaration to be made by the EU at the time of signature of the eventual Accession treaty;

(iii) a draft rule to be added to the Rules of the Council of Europe Committee of Ministers on execution of judgments; and

(iv) a draft model of Memorandum of Understanding between the EU and its Member States, agreeing the terms on which the EU will seek leave to intervene in Strasbourg proceedings against a Member State that involve a point of EU law.

The cause for surprise that agreement was reached is that, until virtually the last moment, a number of member States – inside and outside the European Union – had reservations about the terms of EU participation in the Convention system. There were, for instance, some reservations as to whether the Strasbourg Court should have jurisdiction to review the compatibility of primary EU law with the Convention, until it was pointed out that Strasbourg had done precisely that in *Matthews v. the United Kingdom*.[3]

[3] [GC], no. 24833/94, ECHR 1999-I.

I shall not recite exhaustively the terms of the agreement which the negotiations unexpectedly produce. It suffices to say that the three important terms are:

(i) the creation of a co-respondent mechanism (by which, with the leave of the Strasbourg Court, the EU can become a co-respondent in a case when the respondent is a Contracting State and vice versa);

(ii) the institution of a procedure by which, before Strasbourg rules on a case, the CJEU to can first assess the compatibility of a provision of EU law with the Convention; and

(iii) the right of members of the European Parliament to participate in the election of judges of the Strasbourg Court by the Parliamentary Assembly of the Council of Europe, including the election of an EU judge to sit on the Court.

The first two are eminently sensible solutions. For the third, although the issue of a full-time EU judge on the Court did not generate any controversy in the negotiations, in my view, serious practical questions remain as how the selection process will work, not least because there will presumably be no shortage of candidates across Europe for the post.

Leaving this issue aside, it is clear that there is still a great deal work to be done before accession occurs. The means by which MEPs will participate in the Parliamentary Assembly still has to be agreed, as does the participation of the EU in the work of the Council of Europe's Committee of Ministers on execution of judgments of the Strasbourg Court, since there is as yet no intention of the

EU to formally join the Council of Europe. The memoranda of understanding as to when the EU will seek leave to intervene in cases against its members States still have to be agreed. It will also have to be determined which of the EU institutions will represent the Union before the Court (the Commission, it is thought). The CJEU still has to give its opinion on the revised agreement. Finally, and most importantly, since the draft Protocol to the Convention is an amending one, it requires the unanimous ratification of the 47 member States of the Council of Europe. One can only hope that the ratification process will not suffer from the undue delays experienced during the ratification of Protocol No. 14.

(II) Strasbourg will seldom speak

Have set out so many obstacles and such potential delays, I am now almost tempted to revise my original title and say *Argentoratum nunquam loquetur* – Strasbourg will never speak, at least not before I retire. That would, though, be too pessimistic, for none of the obstacles I have outlined would appear insurmountable.

What kinds of EU law cases, then, can we expect Strasbourg to decide?

I think I have had enough wine at lunch to risk a few predictions, some more certain than others.

Certainly, Strasbourg will continue to decide cases brought against individual EU member states as they apply EU law.

The majority of these cases will concern individuals or companies who seek to challenge licensing or other regulatory systems. These complaints will – as now – be made under Article 1 of Protocol No. 1 to the Convention (the right to property and possessions) and, to the extent that it applies to such proceedings, under the right to a fair trial guaranteed by Article 6 to the Convention. Few cases of this kind ever succeed in Strasbourg, not least because of the margin of appreciation afforded to States in the commercial sphere. For one, particularly rustic example of this that you may wish to consider is the Court's recent inadmissibility decision in *Lohuis*[4] upholding the Netherlands' decision to implement Directive 91/676/EEC (on nitrates from agricultural sources) by limiting the maximum number of pigs one is allowed to own on per Dutch farm. (I shall leave you to discover from the decision itself why you would want to limit the number of pigs per farm in order to reduce nitrates).

Strasbourg will also decide more cases in the field of Justice and Home Affairs.

If there is a growing weakness in EU legal co-operation in this field it is that it is based on the presumption of equal human rights protection throughout the Union. I do not think it too controversial to say that, in certain fields, that presumption is a questionable one and one which will continue to be attacked by litigants before the Strasbourg Court.

The Grand Chamber's judgment in *MSS v. Belgium and Greece*[5] on the compatibility of the return of asylum-seekers to Greece under the Dublin (II)

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[4] (dec.), 37265/10, 30 April 2013.
[5] [GC], no. 30696/09, ECHR 2011.

Regulation with Articles 3 and 13 of the Convention, showed the stark problems faced by Greece in complying with its human rights obligations to asylum-seekers. The Grand Chamber's judgment, finding a violation against Belgium for returning an Afghan asylum-seeker to Greece, underscores that EU member states are not entitled blindly to rely on that presumption of equal protection.

Staying in the field of Justice and Home Affairs, I think it is inevitable that the Strasbourg Court will be called upon to undertake a similar analysis in respect of the European Arrest Warrant. There are already cases pending on the issue of whether Article 8 can be relied upon to prevent extradition from one EU state to another, and if so, whether a different balancing exercise has to be conducted in an extradition case rather than, say, an immigration case (the issue considering by the High Court of Justiciary and Supreme Court in KAS). You will forgive me if, giving that these cases are pending, I do not say any more.[6]

As regards the presumption of equivalent human rights protection within the European Union legal order itself, a very interesting example is the recent

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[6] *K.A.S. v. the United Kingdom* ((dec.) no. 38844/12, 4 June 2013) has since been struck out, the applicant having indicated to the Court that she had struck a plea agreement with the United States' prosecuting authorities. The Court's decision is noteworthy for its observation that it should be slow to find that special circumstances exist to justified a continued examination of such a case, even one raising an issue of general importance, when it had been the subject of careful and detailed examination by the domestic courts. As the Court observed: "the applicant's case was examined by three instances, including the Supreme Court, and all three instances gave careful consideration, not just to her case, but to the general approach to be taken to Article 8 in extradition cases. Therefore, notwithstanding the general importance of the issue which was initially presented to it in this case, the Court is satisfied that there are no circumstances which would justify its continued examination of it." (paragraph 46 of the decision)

judgment in *Michaud* v. France,[7] no. 12323/11, concerning France's implementation of EU Directives concerning money laundering and, in particular, the compatibility of reporting requirements placed on lawyers in respect of their clients with Article 8.

As you will know, in *Bosphorus Airways v. Ireland*[8] the Court laid down the rule that, if equivalent protection of human rights was provided for in the European Union legal order, then the presumption would be that a State had not departed from the requirements of the Convention when it did no more than implement legal obligations flowing from its membership of the European Union.

Rather significantly, in *Michaud*, the Court found that the presumption did not apply because first, in contrast to *Bosphorus*, the case concerned Directives and not Regulations (giving France a margin of manoeuvre not available to Ireland in *Bosphorus*); and second, in *Bosphorus* the control mechanism in EU law had been brought into play by the Irish Supreme Court's request for a preliminary ruling from the Court of Justice, which the French Conseil d'Etat had not done in the instant case.

That second reason may in time prove to be controversial, not least because the Strasbourg Court has always stated that, as least as far as Article 6 of the Convention is concerned, there is no right to have case referred to the Luxembourg Court for a preliminary ruling.[9]

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[7] No. 12323/11, paragraphs 112-116, 6 December 2012.

[8] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi (Bosphorus Airways) v Ireland* 2005-VI; 42 EHRR 1-para 137 GC.

[9] *Herma v. Germany* (dec.), no. 54193/07, 8 December 2009 with further references therein.

Lastly, there is, of course, the possibility that Strasbourg will rule cases which have been litigated through the EU legal order. These are not cases which anyone – either in or outside Strasbourg – would relish the Strasbourg Court deciding. Despite occasional rumours of clashes and battles for European judicial supremacy, Strasbourg and the Luxembourg Courts have a good relationship, not least because – in the words of the President of the Court, the Luxembourg Courts have established as robust defenders of human rights. It would require something very serious to have gone wrong in the EU legal order – or for the Strasbourg Court to be particularly foolhardy – for it find that the Luxembourg Courts had misinterpreted or misapplied the Convention.

Above all, I would urge caution and a sense of perspective. The pending cases I mentioned constitute at best a baker's dozen among over 116,000 cases currently awaiting examination. Most of those 116,000 cases concern States which are not even in the EU: Turkey, Ukraine and, above all, Russia. Even when it is not deciding cases against those countries, Strasbourg is much more likely to decide cases involving the due process rights under Articles 5, 6 and 7 of the Convention as they arise from national criminal justice systems, a domain in which EU member states have, for the most part, assiduously guarded their legal sovereignty from EU involvement.

You will forgive me if I end there, not least because I am conscious of the irony of taking too much time to tell you that Strasbourg will seldom speak.

I would however wish to end with a word on Scotland and its continued participation in Europe. If Strasbourg seldom speaks on EU law, does so even more rarely in Scottish cases. That it is a tribute, not just to the conscientious

application of the Convention by the Scottish judiciary, but to the manner in which human rights have become part of the fabric of our national life. To paraphrase that great Scot and father of the Convention, Sir David Maxwell-Fyfe, that is due to tolerance, decency and kindliness which have guided Scottish society and should now guide our participation in the European institutions we have done so much to create.

It is with those words that I now give the floor to another of the great Scottish jurists to have inspired my generation: Sir David Edwards.

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