



JUDICIARY OF
ENGLAND AND WALES

LORD DYSON MR
THE GLOBALISATION OF LAW
PILGRIM FATHERS LECTURE 2015
6 NOVEMBER 2015

(1) Introduction¹

1. It is a great pleasure to have been asked to give the Pilgrim Fathers Lecture, particularly in a year so rich in anniversaries. This is a most prestigious annual lecture. The previous lecturers include some of the most distinguished jurists of our time.
2. There have been so many anniversaries to choose from this year. Who can be unaware that it is the 800th anniversary of Magna Carta, a document that was the product of a local dispute between tyrannous King John and his truculent barons, and which has contributed greatly to the development of the rule of law both here and throughout the democratic world? It is also the 200th anniversary of the Plymouth Law Society whose first president was Henry Woollcombe. It must be particularly satisfying for the Society that your current President, Charles Parry, is one of his successors in the firm Woollcombe Yonge.² The importance of maintaining a strong independent legal profession locally cannot be overstated; and a profession that is strong and independent locally is all the better equipped to operate effectively on the international stage.

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

² See <<http://www.plymouthherald.co.uk/New-Plymouth-Law-Soc-president-mark-organisation/story-25897856-detail/story.html>>.

3. Plymouth is a city that embodies the idea that what happens on the local scene can have effects globally. It was their persecution for rejecting the Church of England that impelled the Pilgrim Fathers to sail from Plymouth on 16 September 1620 in search of a better life in what is now known as New England. Nearly four hundred years later, individuals from across the world still move from one place to another in search of a better life, many of them fleeing persecution. 2015 has been a particularly harrowing year for those seeking asylum in safe countries. Who cannot be moved by the daily sight on our television screens of large numbers of civilians seeking to escape from the violence to which they have been subjected in their home countries? The movement of individuals from one country to another is now governed by increasingly complex rules of domestic and international law. The globalisation of the law is a development of the 20th and 21st centuries. It is of importance to all of us. In the light of current events, I propose to start with asylum law.
4. On 28 July 1951 the United Nations adopted the Convention relating to the Status of Refugees (the Refugee Convention). The inspiration for it was, in the words of Ruud Lubbers and Anders B. Johnson, the acknowledgment by the international community of the need to *'deal with the aftermath of World War II'* and of *'the strong global commitment to ensuring that the displacement and trauma caused by the persecution and destruction of the war years would not be repeated.'*³ It is a treaty that has *'become known as the Magna Carta of international refugee law'*.⁴
5. The interpretation of the Refugee Convention falls in the first place on the domestic courts of the signatories. There are now almost 150 such parties. They have diverse judicial systems and cultures. It is inevitable that there will be differences of approach between them as to the interpretation and application of the Convention.

³ Foreword to *Refugee Protection: A Guide to International Refugee Law*
<http://www.ipu.org/pdf/publications/refugee_en.pdf>

⁴ Cited by R. Wilkinson, *Refugees* (2001) Vol. 2 (No. 123) at 2 <<http://www.unhcr.org/3b5e90ea0.html>>.

6. There are two principal ways in which the signatories can diverge from each other in their interpretation of it. The first is by their own domestic legislation. The second is by the interpretative process itself. I propose to say nothing about the first of these. But the second lies at the heart of what I want to discuss today.
7. The rules governing the interpretation of international treaties are to be found in articles 31 and 32 of the Vienna Convention on the Law of Treaties. The essential rule is contained in article 31(1) which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The alluring simplicity and obvious good sense of this are deceptive.
8. A good example of the problem is to be found in the meaning of the word “refugee” in article 1A(2) in relation to persecution by non-state agents. In the case of *Adan v Secretary of State for the Home Department* [2001] 2 WLR 143, the applicants challenged a certificate issued by the Secretary of State authorising their return to Germany or France as safe third countries where their asylum claims would be determined in accordance with the Convention. The basis of the challenge was that Germany and France failed to recognise persecution by non-state agents as qualifying for protection under the Convention, at least if the state was not itself complicit in the persecution. It was contended that the French and German interpretation of a “refugee” was wrong, so that they were not countries to which the applicants could lawfully be returned. The House of Lords decided that it had to inquire into the meaning of the Convention approached as an international instrument and to determine the “autonomous” meaning of the relevant provisions of the treaty. It had to be given an independent meaning derivable from the text of the Convention as well as the sources mentioned in articles 31 and 32 and without taking colour from the distinctive features of the legal system of any individual contracting state. As a matter of principle, there could only be one true meaning of a treaty. It was true that article 38 provides that, if there is disagreement as to the meaning of the Convention, it can be resolved by the International Court of Justice.

That court, however, had never been asked to make such a ruling and the prospect of a reference to it was remote. In practice, therefore, it was left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. And that is precisely what the House did. It explained why the French and German interpretation was wrong. France and Germany were not, therefore, safe countries where the applicants' claims would be determined in accordance with the Convention.

9. Another problem area has been the meaning of "persecuted" which is an integral part of the definition of "refugee" in article 1A(2). This has arisen in a significant number of cases. The problem is that the Convention itself does not shed any light on the meaning of "persecution", but the UNHCR Handbook does. In *Adan*, Lord Steyn pointed out that under articles 35 and 36 of the Convention (and under article II of the 1967 Protocol), the UNHCR plays a critical role in the application of the Convention. Contracting States are obliged to co-operate with the UNHCR. It is, therefore, not surprising that the UNHCR Handbook, although not binding on states, has high persuasive authority and is much relied on by domestic courts and tribunals.

10. In *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856, the House of Lords had to consider whether refugee status should be accorded to Turkish Kurds who claimed asylum in the UK on the ground that, if they were returned to Turkey, they would be liable to perform compulsory military service on pain of imprisonment if they refused. The House examined the leading international instruments to see whether they provided any support for the applicants' case. These included the UNHCR Handbook, the General Comment No 22 of the UN Human Rights Committee, the 1996 Joint Position Statement, the Charter of Fundamental Rights of the EU and the draft directive of the EU (the forerunner of the Qualifications Directive). This material did not show a clear international recognition of the right for which the applicants contended. The House then considered whether the

applicants' case found compelling support in the jurisprudence of other jurisdictions. It concluded that, although there were indications of changed thinking among a minority of members of the European Commission, there was as yet no authority to support the applicants' case. The claim was, therefore, rejected.

11. *Sepe* is an interesting example of the techniques deployed by a national court in seeking to find the true interpretation of the Convention. The starting point is the Vienna Convention, but that is only the starting point. It examines relevant international instruments to see whether they provide a clear indication of the answer to the question at issue. Having regard to the central role of the UNHCR, the Handbook is of particular importance. It also considers what leading academic writers have to say. Finally, it has regard to the decisions by courts of other jurisdictions. There is a growing corpus of case-law from a significant number of national courts on the interpretation of the Convention. In the UK, we have drawn heavily on the jurisprudence of the courts of Australia, New Zealand and Canada.

12. An interesting and difficult question is: by what criteria does a national court decide whether to adopt the views of academic writers or the decisions of other national courts? In our courts at least, a passage from a textbook or a judgment in a foreign case is often cited to reinforce a conclusion that has already been reached by independent detailed reasoning. Sometimes, however, the passage sets out reasoning which the judge considers to be so compelling that he or she simply adopts it. The willingness of judges to borrow from each other is now an accepted and, in my view, welcome fact of judicial life. There is much that we can learn from each other, and not merely in relation to the interpretation of international treaties. In recent years, the development of the common law of England has benefited hugely from decisions of courts of other common law jurisdictions.

13. But to return to the Convention, what Roger Haines said in a paper in 1995 (“International Judicial Co-operation in Asylum Laws. Suggestions for the future”) should surely be of universal application. He said that it is a question of seeking out the best of overseas refugee jurisprudence. He gave as an example the meaning of the requirement that the fear of persecution be “well-founded” and the standard of proof that an applicant must satisfy. He referred to a number of formulations of the test adopted in different jurisdictions, included “a reasonable possibility” (US Supreme Court), “a reasonable degree of likelihood ((UK House of Lords) and “a real chance” (High Court Australia). Having reviewed these alternatives, the New Zealand Court of Appeal preferred the “real chance” test because it considered that it was more readily capable of comprehension and application by sometimes harassed decision-makers.
14. Mr Haines warned (rightly in my view) that, if we are increasingly to borrow what we perceive to be the best refugee jurisprudence from other states, we must be aware of the domestic law setting and the considerations which may have influenced that state’s jurisprudence. For example, there is much in the Canadian cases law which is driven by the imperatives of the Canadian Charter of Rights and Freedoms, especially in relation to procedural fairness.
15. I would now like to examine two fairly recent and striking decisions of the UK Supreme Court which considered whether the claimants were refugees within the meaning of the Refugee Convention. I have to confess that I wrote judgments in both cases. These are *HJ (Iran) v Secretary of State for the Home Department* [2011] AC 596 and *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152. As we shall see, in both decisions the Supreme Court drew on comparative jurisprudence on the Convention.
16. Let me start with *HJ (Iran)*. This appeal concerned two cases. Both appellants were gay men. HJ was an Iranian who arrived in the UK in 2001 and claimed asylum on arrival. HT was a

Cameroonian who arrived in the UK in 2007, having travelled on a false passport. He claimed asylum on his arrest at Gatwick airport. Both appellants asserted that they had a well-founded fear that they would be persecuted if they were returned to their countries of origin. The central question in both appeals was whether the claimants were refugees within the meaning of article 1A(2) of the Convention which defines a refugee as an individual who:

‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country . . .’

17. Both asylum claims were rejected by the Secretary of State. Challenges to these refusals were rejected by our lower courts. The question for the Supreme Court was succinctly stated by Lord Rodger in these terms:

‘A gay man applies for asylum in this country. The Secretary of State is satisfied that, if he returns to his country of nationality and lives openly as a homosexual, the applicant will face a real and continuing prospect of being beaten up, or flogged, or worse. But the Secretary of State is also satisfied that, if he returns, then, because of these dangers of living openly, he will actually carry on any homosexual relationships “discreetly” and so not come to the notice of any thugs or of the authorities. Is the applicant a “refugee” for purposes of the United Nations Convention relating to the Status of Refugees 1951 (“the Convention”)? . . .’⁵

18. In other words, can a gay man, who would have a well-founded fear of persecution if he were to live openly as a gay man on return to his home country, be said to have a well-founded fear of persecution if on return he would in fact live discreetly, thereby probably escaping the attention of those who might harm him if they were aware of his sexual orientation? At first sight, it might be thought that, if the sexual orientation of the asylum seeker would not in fact come to the attention of anyone, it is impossible to see how he could be said to have a fear, let alone a well-founded fear, of persecution on the ground of his sexual orientation.

⁵ Ibid at [40].

19. But the Secretary of State did not go so far as to contend that there are no circumstances in which an asylum-seeker could have a well-founded fear of persecution if he or she were to take measures to avoid detection on return. Her case was that, if the measures that an asylum-seeker would take on return to avoid persecution were not reasonably tolerable, then that of itself would amount to persecution. But provided that the avoiding measures were reasonably tolerable, there could be no well-founded fear of persecution.
20. The Supreme Court rejected the reasonable tolerability test. It was unworkable and wrong in principle. It was based on a misunderstanding of two previous authorities, one of which was a decision of the High Court of Australia. There was no support for it in any previous jurisprudence.
21. It decided that the claimants had a well-founded fear of persecution notwithstanding the fact that they would lead discreet lives if they were returned. The language of Article 1A(2) itself did not provide the answer to the problem. But the court reached its conclusion by interpreting the Convention in a principled way having regard to its purpose and intent. The key point was that the underlying rationale of the Convention compelled the conclusion that gay men should be able to live freely and openly as gay men without fearing that they may suffer harm of the requisite intensity or duration because they are gay. The country of nationality does not meet the requisite standard of protection from persecution simply because conditions in the country are such that a gay asylum-seeker would be able to take, and would in fact take, steps to avoid persecution by concealing the fact that he is gay.
22. As Lord Rodger put it,

'The underlying rationale of the Convention is . . . that people should be able to live freely without fear that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without the fear of persecution. By allowing

*them to live openly and free from that fear, the receiving state affords them the protection which is a surrogate for the protection which their home state should have afforded them.*⁶

And as I put it in my judgment,

*‘The Convention must be construed in the light of its object and purpose, which is to protect a person who “owing to a well-founded fear of being persecuted.....”. If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he could conceal the fact he is a gay man **in order to avoid persecution** on return to his home country.’⁷*

23. The court found support for this approach in some valuable Commonwealth jurisprudence which had considered the very issue that was before the court. The High Court of Australia decision of *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473 was the subject of sustained analysis by Lord Rodger⁸ and described by him as “powerful authority”. In that case McHugh and Kirby JJ said that the fact that the applicants would act discreetly did not mean that they did not have a well-founded fear of persecution on their return. Rather, the tribunal had to ask why they would act discreetly. If it was because they would suffer serious harm if they lived openly as a homosexual couple, they would have a well-founded fear of persecution “*since it is the right to live openly without fear of persecution which the Convention exists to protect*”.

24. Asking why an asylum-seeker would act discreetly focuses the court’s attention on the reason why the individual has acted discreetly in the past, and would have to do so in the future. As McHugh and Kirby JJ explained,

*‘In many – perhaps the majority of – cases, however, the applicant has acted in the way that he or she did only because of the **threat** of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the **threat** of serious harm with its menacing implications that constitutes the persecutory conduct.’⁹*

⁶ [2011] AC 596 at [53].

⁷ Ibid. at [110].

⁸ Ibid. at [66]ff.

⁹ Cited at *ibid* [66].

25. By asking why he would act discreetly, the attention of the court is focused on what would happen to the individual if he did not act discreetly on his return. Was discretion the means by which he would hope to avoid persecution? If yes, was the fear of persecution that the individual hoped to avoid by so acting well-founded? If yes, the individual had a well-founded fear of persecution within the meaning of the Convention. This leads to a further consideration, also noted by McHugh and Kirby JJ. An individual who dissimulates may successfully avoid coming to the attention of the authorities. But he will still be in fear of persecution, fearfully waiting for a knock at the door.¹⁰ Throughout the period when is seeking to evade detection, he continues to be in fear of persecution. As Madgwick J said in *Win v Minister for Immigration and Multicultural Attains* (2001) FCA 132 at [18], to say otherwise would stand the Refugee Convention on its head and one would be driven to say: ‘*Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland would not be a refugee.*’¹¹

26. Lord Rodger noted that the reasoning of McHugh and KirbyJJ had been applied in *NABD of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs* (2005) 79 AJR 1142. This case concerned the question whether the appellant who had converted to Christianity would face persecution if he returned to Iran. It had also been applied in *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, where the appellant, a journalist from Ukraine had been subject to a campaign of harassment on account of his political views. It had been held by the lower court that he could safely return to Ukraine, not as a journalist, but as a construction worker who kept his political beliefs to himself. The High Court of Australia overturned this decision: it had focused on what steps the appellant would take to avoid persecution rather than why he would take them. As Lord Rodger explained, the decision was

¹⁰ Ibid. at [116].

¹¹ Cited ibid. at [117].

predicated on the journalist having to give up *‘the very right to express his political views without fear of persecution which the Convention was designed to protect.’*¹²

27. The Supreme Court noted that the courts in New Zealand had reached a similar conclusion on the issue, but on the basis of a somewhat different analysis. On this analysis, which is explained in the leading case of *Refugee Appeal No 74665/03* [2005] INLR 68, the emphasis is on the fact that refugee status cannot be denied to a person who on return would forfeit a fundamental human right in order to avoid persecution. As I noted in my judgment, in agreement with Lord Rodger, the attraction of this approach is that it gives due weight to the fact that the Convention must be interpreted *“in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms”*.¹³

28. It can, therefore, be seen that the Supreme Court drew heavily on Commonwealth jurisprudence in determining a difficult question of interpretation which had not previously been considered at the highest level in the UK courts. In rejecting the reasonable tolerability test which had been proposed by the Secretary of State and accepted by the Court of Appeal, I noted that this test had found no support in other jurisprudence. This was important *“in view of the implicit rejection of it in a number of other jurisdictions, including at least Australia and New Zealand”* and *“the fact that it was desirable as far as possible that there should be international consensus on the meaning of the Convention”*. Attempting to achieve international consensus is perhaps a more realistic ambition for domestic courts than striving to find the single autonomous meaning of the Convention which, as we have seen, was the goal set by the House of Lords in *Adan*.

¹² Ibid. at [71].

¹³ Ibid. at [113].

29. The question that arose in *RT (Zimbabwe)* was: is it an answer to a refugee claim by an individual who has no political views and who therefore does not support the persecutory regime in his home country to say that he would lie and simulate loyalty to that regime in order to avoid the persecutory ill-treatment to which he would otherwise be subjected?
30. RT and KM had no political views. They neither supported nor opposed the Zimbabwean regime. But anyone who was unable to demonstrate loyalty to the regime was at risk of persecution. Their case was that they had a well-founded fear that they would be persecuted, because they would lie and pretend to support the regime solely in order to avoid the persecution that they would suffer if they did not demonstrate their loyalty to the regime. In other words, this was a case analogous to *HJ (Iran)*.
31. There was no doubt that the *HJ (Iran)* principle applies to any person who does have political beliefs and who would be obliged to (and would) conceal them to avoid the persecution that he would suffer if he were to reveal them. The central question was whether the right to hold *no* political beliefs (and say so) attracts Convention protection as much as the right to hold and express political beliefs. The starting point for the analysis was the emphasis placed by the Convention on human rights. The court agreed with the important principle (a point made in the New Zealand authorities by reference to the preamble to the Convention) that human beings shall enjoy fundamental rights and freedoms without discrimination. We noted that this was reflected in European Union legislation, and that the right to freedom of thought, opinion and expression recognised in international and European human rights law protects non-believers as well as believers, and extends to the freedom *not* to hold beliefs as well as to hold them and the freedom *not* to express opinion as well as to express them.¹⁴ The

¹⁴ [2013] 1 AC 152 at [29]ff.

same principled approach had been taken in jurisprudence drawn from the United States and from South Africa.¹⁵

32. The Supreme Court referred to Justice Jackson's judgment in *West Virginia State Board of Education v Barnette*:

*'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.'*¹⁶

This celebrated statement may well have been inspired first by the Mayflower Compact, which foreshadowed the United States' Constitution, and secondly by the fundamental rights expressed in the US Bill of Rights which reflected some of the enduring values enshrined in Magna Carta.

33. The court also referred to the South African Constitutional Court decision in *Christian Education South Africa v Minister of Education*, where Sachs J said:

*'There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity.'*¹⁷

The various authorities pointed in one direction: the same as that identified in *HJ (Iran)*. As I explained:

'... the right not to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and ... the Convention too ... Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution. A focus

¹⁵ See [2013] 1 AC 152 at [37]ff.

¹⁶ (1943) 319 US 624, 642.

¹⁷ 2000 (10) BCLR 1051 at [36].

on how important the right not to hold a political or religious belief is to the applicant is wrong in principle . . .

As regards the point of principle, it is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold. One of the hallmarks of totalitarian regimes is their insistence on controlling people's thoughts as well as their behaviour. George Orwell captured the point brilliantly by his creation of the sinister "Thought Police" in his novel 1984.¹⁸

34. So *RT (Zimbabwe)* is another example of a case where our court has reached a decision heavily influenced by foreign jurisprudence. It is not at all surprising that it should do this when interpreting an international treaty. The provisions of the treaty have an autonomous and, strictly speaking, single meaning. It is undesirable that national courts of parties to the Convention should produce different interpretations of the same provisions. If there is a more or less consistent interpretation by the domestic courts of other signatory states of a provision of the Refugee Convention, then our court should be very slow to depart from it.
35. This is not a satisfactory state of affairs. The situation exposed in *Adan* was regrettable. There ought to be an international court whose decisions on questions of interpretation are binding on the signatory states. Meanwhile, it is to be hoped that courts will apply the interpretation that commands majority, if not universal, support.
36. I would like to conclude this lecture by making some observations about the globalisation of our common law. Our judges are not bound to follow the jurisprudence of the courts of other common law systems. But there is a growing interest in the extent to which the jurisprudence of other common law courts should influence the development of the common law here.
37. There is nothing new in the idea of our common law being influenced by the law of other jurisdictions. Lord Denning said that advocates ought to draw the court's attention to

¹⁸ Ibid. at [42] – [43].

relevant commonwealth authorities just as they would authorities from England and Wales.¹⁹ This was not a novel idea. Take the phrase “an Englishman’s home is his castle”. It gives expression to the long-established principle that the State cannot enter or deprive someone of his property without either consent or lawful authority. The phrase originated in a case called *Semayne’s Case* in 1604.²⁰ The ratio of the decision was that, although the King’s Sheriff could break and enter a property with valid lawful authority to do so, he had first to knock and seek consent to enter. In the course of the proceedings, Sir Edward Coke, who was Attorney-General at the time, said: ‘*the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.*’ It might be thought that Coke was relying on the famous provision in Magna Carta that no one should be disseised without due process of law. He was well versed in Magna Carta. In fact, the origin of the phrase that he used was far more ancient. The idea came from Roman law, specifically *Gaius’s Commentaries on the Twelve Tables*.²¹

38. Coke was not alone in borrowing from Roman law. Such borrowings were relatively frequent in the formative years of the common law both as regards substantive law²² and procedure.²³ Equity, the great product of the medieval period, owed much to Europe. Coke’s successor as Chief Justice, Lord Mansfield, is famous for having drawn inspiration from Roman law, from mercantile law, and from European jurists, as has been most recently demonstrated by Norman Poser in his excellent biography of Mansfield’s life and career.²⁴ These foreign influences did not come to an end with Mansfield. A more recent example is to be found in the 1984 judgment of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*.²⁵ This case concerned the question whether civil servants working at GCHQ could

¹⁹ Lord Denning MR cited in *The Supreme Court Practice 1999* (Sweet & Maxwell) (1999) Vol. 1 at 1480.

²⁰ (1604) 5 Coke Rep. 91.

²¹ J. Frank, *Civil Law Influences on the Common Law - Some Reflections on "Comparative" and "Contrastive" Law*, 104 U. Pa. L. Rev. 887 1955-1956 at 888.

²² E. Re, *The Roman Contribution to the Common Law*, 29 Fordham L. Rev. 447 (1961) at 470.

²³ Vinogradoff, *Reason and Conscience in Sixteenth-Century Jurisprudence*, (24) Law Quarterly Review (1908) 373

²⁴ N. Poser, *Lord Mansfield: Justice in the Age of Reason*, (McGill) (2013).

²⁵ [1985] AC 374.

lawfully be banned from joining a trade union. The basis of the ban was said to be national security. In the course of his judgment in the House of Lords, Lord Diplock adverted to the ‘*principle of proportionality*’. This is a concept that is well-established in our law today. But it was not so at that time. Lord Diplock presciently said that English law might adopt the principle at some time in the future. He noted that it was recognised in the administrative law of several of our fellow members of the European Economic Community.²⁶ Since then, under the influence of EU law and the European Convention on Human Rights, the principle has gradually assumed a central position in our law.

39. In 1962 in *Smith v Leech Brain & Co Ltd* Lord Parker LCJ said that “*it is important that the common law, and the development of the common law, should be homogeneous in the various sections of the Commonwealth.*”²⁷ A good example of a common law decision by a foreign court influencing our law is *Bazley v Curry* 174 DLR (4th) 45, a decision of the Canadian Supreme Court. The issue that arose here in *Lister v Hesley Hall* [2002] AC 215 was whether the owners of a boarding house were vicariously liable for the sexual abuse of its residents committed by the warden it had employed. The Court of Appeal had followed a previous English authority and held that the warden’s acts could not be regarded as an unauthorised mode of carrying out his authorised duties. His employer was, therefore, not vicariously liable for them. The previous authority was criticised in the Canadian case. The House of Lords in *Lister* agreed. Lord Steyn said that he had been “*greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in Bazley*”. He said that wherever such problems are considered in the future in the common law world these judgments will be the starting point. The new test was to ask whether the employee’s torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. This test has now taken root here. It might not have done so but for the compelling reasoning of the judgments in the Canadian decision. I should, however, say that the appropriateness of the test was the subject

²⁶ Ibid at 410, discussed in J. Laws ibid at 60 – 61.

²⁷ [1962] 2 QB 405 at 415

of argument in two recent cases in which I was involved in the Supreme Court: *Mohamud v WM Morrison Supermarket Plc* and *Cox v Ministry of Justice*. Judgment is awaited.

40. More recently in *FHR European Ventures LLP & Ors v Cedar Capital Partners LLC*, having considered decisions from, for example, Australia, Lord Neuberger noted that, while it was inevitable that the common law would develop in different ways in different common law jurisdictions, it remained ‘*highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.*’²⁸

41. We are living in an increasingly interdependent world. Jurists read each other’s judgments with ease on the internet. They meet at international conferences to discuss issues of common interest. The good sense of learning from each other and taking the best that each of us has to offer is now well appreciated. And this is not limited to influencing the development of the common law. In the field of civil procedure, we have borrowed ideas relating to the proper management of expert evidence from Australia and New Zealand. We have exported to them the principle of proportionality in the conduct of civil litigation. And influences are not limited to common law jurisdictions. Thus, for example, changes to our procedural law here have influenced reform in Norway. In the late 1990s we introduced a process whereby the court, rather than litigants, were responsible for the management of litigation. The Norwegian Dispute Act of 2005 adopted that very approach. They drew their inspiration from our reforms.

42. There are many other examples of such influences and effects. Many more than I can give this evening. What I hope I have done however is to give a flavour of just how relationship between national laws and how national jurisdictions can and have influenced each other.

(5) Conclusion

²⁸ [2014] UKSC 45 at [45].

43. More than 60 years after the Refugee Convention was signed, it continues to give rise to difficult questions of interpretation. In the absence of a final international court dedicated to giving authoritative decisions on these questions, the courts of the signatories have to do their best to resolve them. As I have shown, they learn from and influence each other. In many areas, a common understanding of the meaning of the principal provisions has been reached. It is to be hoped that in the same way a common understanding of problems not yet resolved will emerge in the future.

44. As regards the development of the common law, we have seen that our courts are open to the influence of other jurisdictions. This does not mean that we slavishly adopt or follow the decisions of those jurisdictions. We scrutinise and analyse their decisions in the light of our own experience, culture and social and economic conditions. As has been said, *'the common law's genius'* is the ability to *'(refine) principle over time'*.²⁹ We continue to do so in the light of decisions and developments from abroad, and we continue to influence those developments.

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²⁹ J. Laws, *The Common Law Constitution* (2014) at 9.