CHAPTER 15

Relations Between Top Courts and Supra-National Courts

Shimon Shetreet

The issue of the relations between national top courts, international, and supranational courts has been the center of controversy for a long time. It has been specifically debated and discussed in public discourse.1 It has also been reflected in decisions from the top national courts, such as in the decisions regarding the European Arrest Warrant2 in Germany, Poland, and the Czech Republic,3 and in the decisions regarding control orders in the United

1 See the reports on the public speeches of Lord Kerr of the U.K. Supreme Court, Lord Kerr, the Relationship between ECHR and Domestic Courts, available at http://humanrights.ie/constitution-of-ireland/lord-kerr-on-the-relationship-between-echr-and-domestic-courts/, calling for a dialogue to avoid conflict. See the statement of Lord Judge, the LCJ of England and Wales, before the U.K. House of Lords Constitution Committee, http://jurist.org/paperchase/2011/10/uk-top-judge-national-courts-not-bound-by-europe-rights-court.php, stating that U.K. Courts are not bound by the decisions of the ECtHR but should only consider ECHR decisions when deciding cases. But see the statement of Lord Phillips, the President of the UK Supreme Court that the ECtHR decisions will always control U.K. Courts as long as the Human Rights Act 1998 remains in effect. Id.

2 European Arrest Warrant (EAW) is a mechanism to establish judicial cooperation between EU members, so as a judicial order of arrest in one EU state shall be respected and implemented in another member state. This means in practical terms that extradition procedures are unnecessary. The issue arose regarding the application of this mechanism to persons who are citizens of their own state.

Kingdom. Debate over how to best resolve this issue remains, and there are vast differences in opinion about the extent to which national courts and national organs of member states must obey international and supranational courts in matters that touch basic principles underlying the legal systems of member states.

The debate is conducted from both the viewpoint of national legal systems, as well as from the opposing viewpoint of the judicial policy of the international tribunal such as the ECtHR. Lord Hoffman of the United Kingdom Supreme Court has been critical of the ECtHR, and has expressed the view that its power to interfere in a detailed manner in domestic law should be pointedly limited.

4 See the ECtHR case of A & Others v UK, and see the UK Supreme Court case Secretary of State for the Home Department v. AF & Others (2009). See particularly the opinion of Lord Hoffman:

[The judgment of the European Court of Human Rights (ECtHR) in A v. United Kingdom (Application No 3455/05), bAILl: [2009] echr 301, requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country’s defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit. It is true that Section 2(1)(a) of the Human Rights Act 1998 requires us only to “take into account” decisions of the ECtHR. As a matter of our domestic law, we could take the decision in A v United Kingdom into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so.


6 Lord Hoffmann, The Universality of Human Rights, Judicial Studies Board Annual Lecture, 2009 available at www.judiciary.gov.uk [19 March 2009 speeches]. For similar criticism see President of the Belgium Constitutional Tribunal, Marc Bossuyt, Stijn Smet, President of Belgian Constitutional Court Criticises European Court of Human Rights, 2010. It is relevant