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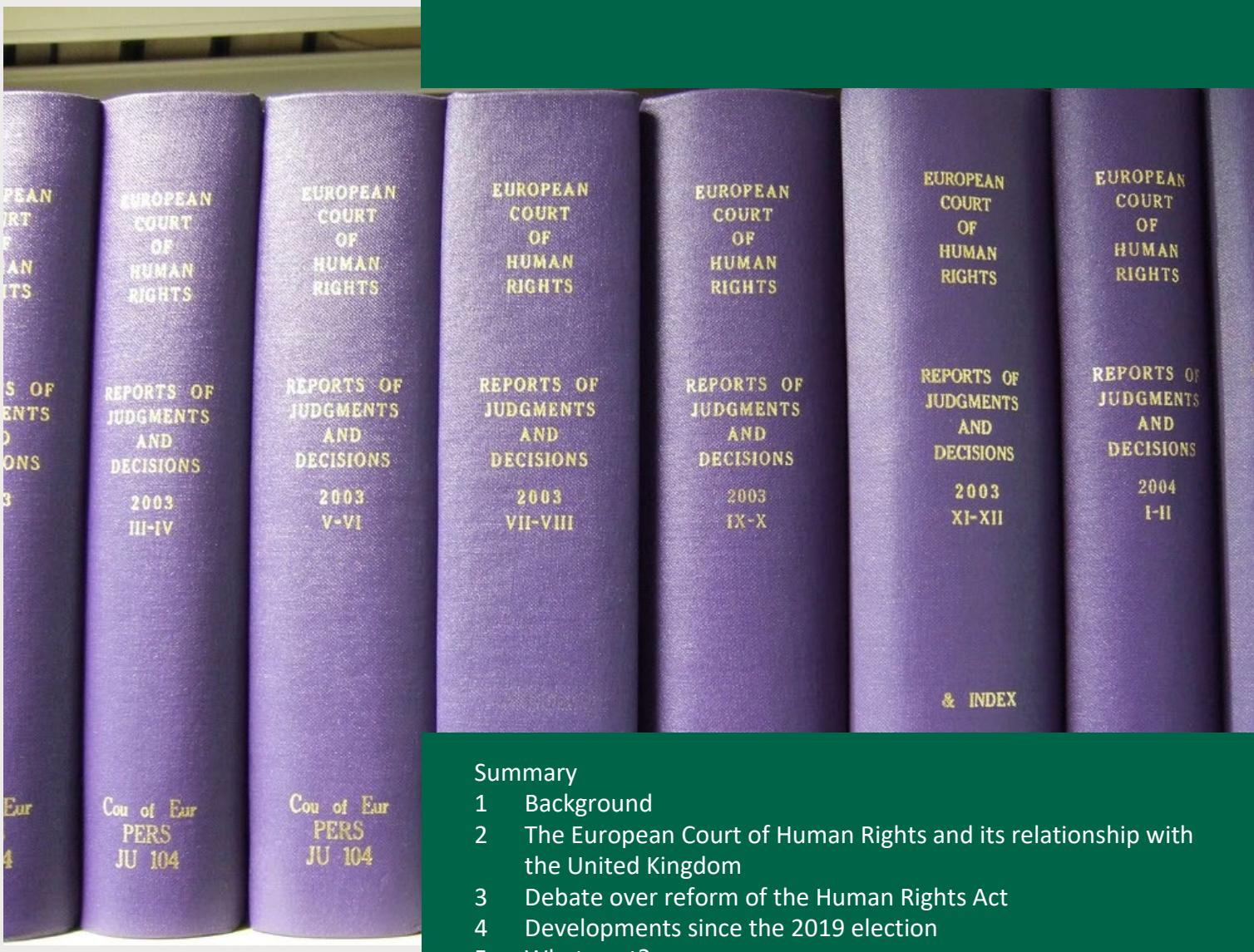
The European Convention on Human Rights and the Human Rights Act 1998



Summary

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Summary

The UK is a member of the European Convention on Human Rights and has implemented it in domestic law through the Human Rights Act 1998.

What are the Convention rights?

The European Convention on Human Rights guarantees certain rights considered to be so important that they are fundamental to democracy and the rule of law. These include the right to life, liberty, fair trials, and freedom of speech and assembly.

By signing up to the Convention the UK has accepted treaty obligations in international law to secure these rights for everyone in its jurisdiction, and to abide by final judgments of the European Court of Human Rights. The European Court of Human Rights is an international court based in Strasbourg, France, made up of judges from each of the 46 member states.

What does the Human Rights Act do?

The Human Rights Act aimed to 'bring rights home' by allowing people in the UK to bring claims in the UK courts rather than having to take cases to the European Court of Human Rights in Strasbourg.

This means that people in the UK can rely on the Convention rights in order to challenge acts of public bodies in court. And it means public bodies must act in a way that is compatible with the UK's obligation to secure the Convention rights for people in its jurisdiction.

The Human Rights Act also requires the courts to interpret legislation in a way that is compatible with Convention rights so far as possible. If a court is unable to, it can issue a 'declaration of incompatibility'. This has no effect on the ongoing validity of the legislation; it is not possible for the courts to overturn legislation. But it alerts the Government to the incompatibility and provides a mechanism for this to be resolved by a remedial order, which amends the legislation to remove the incompatibility without the need for primary legislation.

Debate about reform

There has been a longstanding debate about whether to retain the Human Rights Act or to repeal or replace it, and it has faced sustained political opposition from some.

One reason for this is that it has tended to be associated with high-profile cases involving individuals or groups considered to be undeserving, such as terrorist suspects and prisoners.

There are also concerns that it has brought judges into the sphere of political decision making and upset the constitutional balance between parliament and the courts.

The Conservative Party has on several occasions, both in Government and in opposition, announced plans to replace it with a Bill of Rights. During the current Parliament the Government introduced a Bill of Rights Bill. It would have retained the same set of substantive rights and membership of the European Convention, but by amending some of the provisions of the Human Rights Act it aimed to recalibrate the way the courts, Parliament and public bodies approach the protection of rights. It would also have changed the emphasis placed on certain rights, with the intention of better reflecting a "quintessential UK" approach. It received widespread criticism for its approach.

Following changes of Prime Minster and Justice Secretary, the Bill was ultimately abandoned by the Government before receiving its second reading.

The future of human rights protection

Although this latest plan for reform of the Human Rights Act was abandoned, the Government has brought forward other legislation that would limit its application in relation to specific areas of decision making. These include decisions about the removal of asylum seekers to third countries, the release of prisoners, and the investigation of service personnel for wrongdoing.

By doing so, this legislation diverges from the notion that human rights are universal and apply to everyone regardless of conduct or status.

It also increases the likelihood that the European Court of Human Rights will find the UK to be in violation of its human rights obligations in the future.

If the Court did find that the UK had violated the Convention, the UK would be obliged under international law to comply with the judgment, take action to rectify the incompatibility with the European Convention on Human Rights and provide any victims with a remedy. If it no longer wishes to

comply with these treaty obligations, the UK will have to confront the possible consequences of withdrawal.

The European Convention is referred to in the Belfast/ Good Friday Agreement, the Trade and Cooperation Agreement with the EU, and the devolution settlements with Wales, Scotland and Northern Ireland.

Departure could thus have implications for the peace agreement in Northern Ireland; ongoing cooperation in criminal justice procedures with the EU; and relationships with the devolved nations.

Moreover, many of these obligations are also found in UN human rights treaties, or even in customary international law. This means the UK could still be bound by these obligations even if it were to withdraw from this treaty.

1 Background

1.1 The European Convention on Human Rights

The European Convention on Human Rights (ECHR) came into force on 3 September 1953. When the Council of Europe adopted the Convention, it marked the first step in implementing the UN's Universal Declaration of Human Rights of 1948.

By ratifying the Convention, member states accept international legal obligations to guarantee certain civil and political rights to people within their jurisdictions. These rights are set out in a series of Articles of (and Protocols to) the Convention. They include the right to life; the right to be free from torture and inhuman and degrading treatment; the right to liberty; and the right to freedom of expression, among others.[1]

The European Court of Human Rights (ECtHR) is an international court, based in Strasbourg, France. It rules on applications from individuals or states that allege violations of the civil and political rights set out in the ECHR. The ECtHR was established in 1959 by the member states of the Council of Europe, to ensure they were observing the obligations they had committed to. It seeks to ensure that the 46 member states who ratified it are complying with the Convention.

The UK ratified the Convention in 1951 and in 1965 declared it would accept the jurisdiction of the ECtHR in relation to individual complaints.

1.2 The Human Rights Act 1998

The UK takes a 'dualist' approach to international law. This means that international law only becomes part of domestic law when expressly incorporated. The Human Rights Act 1998 (the HRA) effectively incorporated the ECHR into UK law.

The Act was intended to 'bring rights home'[2] and does so in part by allowing human rights claims to be brought in UK courts, as well as, for example,

1 European Convention on Human Rights
2 Rights brought home: the Human Rights Bill, Cm3782, 1997

through a culture shift in the approach taken by requiring public authorities to embed human rights into their policy making and operational actions.

The central provisions of the Act, which came fully into force on 1 October 2000, are as follows:

- Section 2 ensures that the courts "must take into account" the judgments and decisions of the ECtHR that are relevant to their proceedings.
- Sections 3 and 4 require legislation to be interpreted compatibly with Convention rights "so far as it is possible to do so" and allow courts to make a "declaration of incompatibility" if a compatible interpretation is impossible, when dealing with primary legislation. [3]
- Section 6 requires public authorities to act compatibly with Convention rights. This applies to all bodies carrying out "functions of a public nature", including central government and the courts. However, section 6 does not apply to the House of Commons and the House of Lords "or a person exercising functions in connection with proceedings in Parliament" in recognition of Parliament's role in the constitution.
- Sections 7 and 8 give people the right to bring proceedings and get remedies in UK courts, rather than having to go to the ECtHR in Strasbourg to have their rights enforced.
- Section 10 allows for Parliament to address findings of incompatibility with Convention rights through remedial orders.
- Section 14 allows for the UK to temporarily derogate from parts of the Convention in times of emergency, in accordance with Article 15.
- Section 19 requires the minister in charge of a Bill to make a statement before second reading to say the Bill is compatible with the Convention rights, or that they are unable to make such a statement, but the Government wishes Parliament to proceed with the Bill nonetheless.[4]

Schedule 1 to the HRA contains the substantive ECHR rights, including:

- Article 2: right to life
- Article 3: prohibition of torture
- Article 4: prohibition of slavery and forced labour

[3] This also applies to secondary legislation if the parent legislation makes a compatible reading impossible.

[4] The HRA thus explicitly envisages Parliament legislating incompatibly with the Convention, in recognition of the importance of parliamentary sovereignty

- Article 5: right to liberty and security
- Article 6: right to a fair trial
- Article 7: no punishment without law
- Article 8: right to respect for private and family life
- Article 9: right to freedom of thought, conscience and religion
- Article 10: freedom of expression
- Article 11: freedom of assembly and association
- Article 12: right to marry
- Article 14: prohibition of discrimination

Articles 2, 3, 4(1) and 7 are absolute rights, meaning that the state cannot depart from its obligations even in times of emergency.

The others are 'limited' or 'qualified' rights, meaning that it may be possible to derogate from their application in times of emergency, or to restrict them in order to protect the rights of others or the public interest. Any interference with qualified rights must nonetheless be necessary and proportionate in pursuit of a legitimate purpose, and prescribed by law. Legitimate purposes recognised by the Convention depend on the right concerned and include the prevention of crime, the protection of public health or the economic wellbeing of society.

As well as preventing states from doing things that conflict with human rights protections, some Convention rights may also place positive obligations on the state, for example to protect life, and to investigate suspicious deaths.

The position prior to the HRA

Before the HRA came into force, the UK was already bound by the ECHR as a matter of international law. This meant the Convention had the following effects in UK domestic law:

- The ECHR affected the interpretation of domestic legislation, but only where there was ambiguity (it was assumed in cases of ambiguity that Parliament intended to legislate compatibly with the UK's international human rights obligations). [5]
- Where judges were exercising discretion, they would take account of the Convention.

[5] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

- It informed the development of the common law (which is law made by judicial interpretation and precedent) where it was uncertain or incomplete. [6]

An individual in the UK could enforce their ECHR rights, but only by taking a case to the ECtHR directly. Taking a case to the ECtHR in Strasbourg was time-consuming and expensive. The white paper that preceded the Human Rights Bill noted:

> For individuals and for those advising them, the road to Strasbourg is long and hard. Even when they get there, the Convention enforcement machinery is subject to long delays. [7]

It added that, at that time, it took an average of five years to exhaust all domestic remedies and cost an average of £30,000.

The white paper argued that the HRA could improve this situation. Apart from reducing delay and costs to UK courts, it said it would allow British judges to contribute more to the development of European human rights law:

> the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe. [8]

The UK's obligations as a party to the ECHR

As noted above, in the UK's dualist system the HRA incorporates the ECHR into domestic law. However, regardless of the position in domestic law the UK is bound by the ECHR under international law as long as it chooses to remain a party to it.

In particular, the following articles would have implications for how the UK chooses to implement the ECHR at a domestic level:

- Article 1 provides that the parties to the Convention "secure to everyone within their jurisdiction the rights and freedoms" contained in the Convention. [9]

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6 See for example Lord Bingham in *R v Lyons* [2003] AC 976 [13]. See also written evidence to the Joint Committee on Human Rights from Dr Jacques Hartmann (Reader in Law at University of Dundee); Mr Samuel White (Postdoctoral Research Assistant at University of Dundee) (HRA0016) at paragraph 3.

7 Home Office, Rights brought home: the Human Rights Bill, Cm 3782, October 1997, para 1.14

8 Home Office, Rights brought home: the Human Rights Bill, Cm 3782, October 1997, para 1.14

9 European Convention on Human Rights, Article 1

- Article 13 requires the UK to provide an "effective remedy" (a legal outcome to a complaint, such as damages) before a "national authority" for any person whose rights have been violated.[10] Since the HRA came into force, anyone can access an effective remedy for a breach of ECHR rights in the UK. This has been principally through section 7, which entitles "a person who claims that a public authority has acted (or proposes to act) in a way which" is incompatible with an ECHR right, to bring proceedings in the appropriate court or tribunal, or to rely on the ECHR rights in any other legal proceedings.[11]

- Article 34 provides for individual applications to the court, and requires that parties to the Convention undertake not to hinder the effective exercise of the right.

- Article 46 requires that parties to the Convention abide by the final judgment of the ECtHR in any case to which they are parties. The Council of Europe's Committee of Ministers supervises the "execution" of judgments of the ECtHR, meaning whether states take satisfactory steps to resolve any incompatibility identified.[12]

10 Article 13 is not included in the rights contained in Schedule 1 of the HRA because the HRA itself is considered to provide a remedy in human rights claims.

11 Before the HRA, enforcement in the UK was more piece-meal and relied on discreet context-specific mechanisms for those seeking an effective remedy, such as relying on police investigations for compliance with Article 2 (right to life) procedural obligations. Some pre-HRA mechanisms met the requirements of Article 13 that people whose human rights had been violated should have an effective remedy. Other mechanisms were either not available or were insufficient, for example if they lacked independence or if they lacked the power to make legally binding decisions.

12 The Government publishes an annual report for the Joint Committee on Human Rights on how it has responded to ECtHR judgments and declarations of incompatibility in the UK courts. For the most recent report see Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2022-2023, Ministry of Justice, 2023

2 The European Court of Human Rights and its relationship with the United Kingdom

2.1 The European Court of Human Rights

As noted above, the European Court of Human Rights (ECtHR) is an international court and a body of the Council of Europe (CoE). It rules on cases concerning alleged human rights violations by the treaty's signatories, who are the 46 member states of the Council of Europe.[13] Cases can be brought by any of the 800 million inhabitants or non-governmental organisations within CoE states (individual applications) as well as by other CoE member states.

The ECtHR is distinct from the Court of Justice of the European Union (sometimes called the European Court of Justice).

Judges

The ECtHR has 46 judges – one from each member state.[14] They are elected for a term of nine years by the CoE's Parliamentary Assembly,[15] from a list of three candidates nominated by each state.[16]

The Convention requires that judges are of a "high moral character" and that they are independent and impartial, including from their nominating state.[17] Judges must also "possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."[18] This means candidates must be judges with sufficient experience on senior domestic courts, or academics, legal professionals or other persons such as

13 There were 47 member States until Russia was expelled in 2022. Council of Europe – European Committee on Legal Co-operation, "Exclusion of the Russian Federation from the Council of Europe and suspension of all relations with Belarus", 17 March 2022

14 European Court of Human Rights, Composition of the Court, (updated 3 July 2023)

15 The Parliamentary Assembly of the Council of Europe (PACE) is made up of members of national parliaments. The UK Parliament sends 18 delegates to PACE: Parliamentary Assembly of the Council of Europe, National Delegations: United Kingdom, (accessed 1 August 2023)

16 This process is set out in art 22 ECHR

17 Art 21 ECHR

18 As above.

diplomats with enough relevant experience.[19] The quality and independence of judges is an ongoing matter of concern for some states, including the UK, [20] and has been the subject of negotiations and reform (see section 2.3 on reform for more details).

Since 2016, the judge elected in respect of the UK has been barrister Tim Eicke KC. His term ends in 2025.

Structure

The 46 judges are divided into five administrative sections. Within each section, the judges usually hear cases in groups of seven "chambers" or three "committees". The chamber may relinquish particularly important cases to the Grand Chamber, which is made up of 17 judges including the President of the Court. Following a judgment from a chamber, the parties may also request that the Grand Chamber re-examine the case (although such requests are not necessarily granted).[21]

Cases can also be examined by a single judge in certain circumstances, such as an application for interim measures (see section 2.2 below on substantive judgments) or if an application is clearly inadmissible and does not require further examination.[22]

2.2 The life of a case before the European Court of Human Rights

There are four stages in the life of an ECtHR case: (1) national level proceedings; (2) a decision on admissibility; (3) a substantive judgment on the merits of the case; and, (4) the supervision of the "execution" (that is, the implementation) of the judgment.[23]

Stage 1: National-level proceedings

A person bringing a claim to the ECtHR must first take it through the domestic courts, as far as is possible.[24] In the UK, a person or organisation can do this through challenging a decision of a public authority that they

19 The Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights A Short Guide on the Panel's Role and the Minimum Qualifications Required of a Candidate October 2020, pp 8-10

20 HC Dec 19 January 2022, cc472-780

21 Composition of the ECHR - Grand Chamber (coe.int)

22 See article 27 of the Convention as amended by Protocol no. 14. It now permits single judges to declare cases inadmissible Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention (13 May 2004) art 7

23 The life of an application (coe.int)

24 Art 34

claim has violated their Convention rights through bringing a judicial review case.[25]

Stage 2: Admissibility

Admissibility criteria

The first decision the court makes about a case is whether it is admissible, that is, whether it can and will later consider the case's substantive issues.

Judges make this determination using specific criteria set out in the Convention[26] for all cases where the applications have been made properly.[27]

Firstly, the court must have jurisdiction. This means that:

1. the case must be based on the ECHR and concern a right guaranteed by the ECHR;[28]

2. the applicant, either a person or non-governmental organisation, must allege that they are a victim of a violation by a state that has signed the Convention and consequently have suffered a significant disadvantage;[29] and

3. the alleged Convention violation must have taken place after the Convention entered into force for the relevant state.[30]

There are also territorial criteria that must be satisfied. Article 1 of the Convention requires that member states secure the Convention rights to everyone within their jurisdiction. There is an ongoing debate as to how the court has interpreted this requirement and in particular how states should apply the Convention outside their territory where they have been engaged in armed conflict. See section 4.1 for further discussion.

Secondly, the case must be procedurally admissible. The applicant must have "exhausted domestic remedies," which means they must have raised the arguments in domestic courts and taken the case as far as possible via

25 Section 6 of the Human Rights Act requires public authorities to act compatibly with Convention rights. Human Rights Act 1998, s. 6

26 These are set out in articles 34 and 35 of the European Convention on Human Rights and have been clarified through ECtHR case law. A guide to admissibility can be found here.

27 The technical requirements for the contents of an individual application are set out in Rule 47 of the Rules of Court. This is assessed administratively by the Registry of the ECtHR.

28 Arts 32 and 35(2)(b)

29 Arts 34 and 35((3)b)

30 It is a well-established principle of international law that treaties do not apply retroactively.

domestic mechanisms,[31] and have brought the claim within four months of the final domestic decision.[32]

Thirdly, there are high-threshold substantive criteria. The claim cannot be manifestly unfounded or an abuse of the right of bringing an individual application and the applicant must have suffered a significant disadvantage.[33]

Admissibility statistics

Most cases do not make it past the admissibility stage. For example, in 2023, the court received about 49,000 applications.[34] It administratively dismissed 10,600 for not being made properly.[35] Of the 38,300 that went to judges to decide on the admissibility, 31,300 (82%) were declared inadmissible or struck out.[36]

Judges dealt with 201 applications concerning the UK in 2023, of which 172 (86%)were found inadmissible or struck out. [37] This includes those declared inadmissible or struck out by a single judge, a panel of three judges (a committee) or seven judges (a chamber).

As shown in the chart below, the UK was among the states with the highest proportion of cases deemed to be inadmissible, based on aggregated data for the years 2020 to 2023.

31 Art 35(1)

32 Protocol no. 15 reduced the time limit from six to four months in 2021. Council of Europe, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (24 June 2013) art 4 amending art 35 ECHR

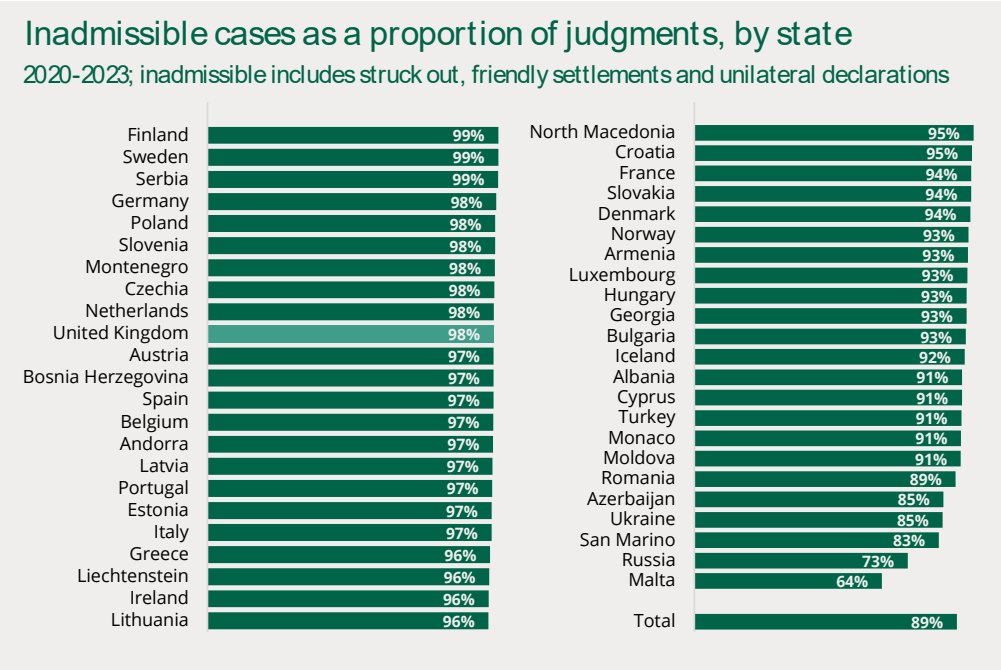
33 Art 35(3)

34 There were 10,600 applications dismissed administratively and 38,300 that went to judicial formations. European Court of Human Rights, Analysis of Statistics 2023 (January 2024) p 3

35 The administrative requirements for applications are set out in rule 47 of the Rules of Court "Contents of an Individual Application": European Court of Human Rights, Rules of Court (23 June 2023) rule 47. European Court of Human Rights, Analysis of Statistics 2023 (January 2024) p 3.

36 See above. The court may strike out cases that are admissible if they are resolved without proceeding further either through a "friendly settlement" or a unilateral declaration from the state.

37 European Court of Human Rights, Analysis of Statistics 2023 (January 2024), table 14



Source: European Court of Human Rights, Analysis of Statistics 2023 [PDF] and 2022 [PDF]
Notes: The proportion shown is the number of inadmissible cases decided by judgment (including inadmissibility decisions by single judge, committee, or chamber, and cases in which a friendly settlement or unilateral declaration was reached) out of the total number of judicial decisions which also includes judgments. Cases deemed inadmissible in the pre-court phase (administrative decisions) are not included.

Stage 3: Substantive judgment (merits)

At this third stage, the court decides whether the state in question has violated the Convention. To do this it asks first whether the state has interfered with a Convention right or freedom and second whether that interference was justified (although this only applies to certain rights).[38]

In the first instance, one of the court's chambers examines the merits of a case. A judgment becomes final after three months, unless it is handed down from the Grand Chamber, in which case it is final immediately.[39]

How the court assesses the merits of a case

The court decides its cases guided by two main principles: effectiveness and subsidiarity:

- **Effectiveness** means that the Convention rights are not just protected in theory but also they are "practical and effective" safeguards.[40]

38 As noted above, some rights such as the Article 3 prohibition on torture are absolute which means that interference is never justified.

39 Art 44 ECHR

40 *Soering v. the United Kingdom*, ECtHR 7 July 1989, 14038/88, para 87

- **Subsidiarity** means that states have the primary duty to secure Convention rights,[41] and the court merely has the secondary and supervisory role of checking whether states are doing this properly.[42]

The principle of subsidiarity means that the court generally considers that it is for states to decide how to safeguard Convention rights within their country, within limits. This is called the "**margin of appreciation**" doctrine.[43] The amount of leeway the court gives a state depends on three main factors:

- the consensus across CoE states on the approach to the issue
- whether the state is better placed than the court to assess the limitation of a right and
- the importance of the right in question

Member states, including the UK, have taken steps over time to reform the Convention to encourage the Court to give more leeway to member states.[44]

Moreover, the court's approach to rights changes over time: it considers the Convention to be a "**living instrument**" which can be interpreted dynamically in the light of present-day conditions unforeseen by the original drafters.[45] This approach is viewed by some as being potentially controversial.

Remedies

If the court finds that the state in question has violated the Convention, a State may need to take measures to remedy the violation. This can include the payment of just satisfaction (damages), taking individual measures (to place that individual in the situation they would have been but for that violation), or taking general measures (for example to address a systemic or structural violation of rights affecting a number of individuals). The Court normally leaves it to the State to determine how to address the individual or general measures that may be required, although it may "indicate" what action that state must take to remedy the situation. However, the payment of damages to the applicant(s) is ordered by the Court.

41 Art 1 ECHR

42 See e.g. "Belgian Linguists case" Case "relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium", ECtHR 23 July 1968, 1474/62, para. I.B. 10; ; *Handyside v. the United Kingdom*, ECtHR 7 December 1976, 5493/72, paras 48-50

43 See above

44 See for example Protocol no.15 which inserted the principle of subsidiarity and the margin of appreciation doctrine into the Convention's preamble. Council of Europe, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (24 June 2013) art 1 amending Preamble ECHR. The UK pushed for this through the Brighton Conference and subsequent Brighton Declaration: European Court of Human Rights, High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration (20 April 2012). See section 2.3 below for more detail.

45 *Tyrer v United Kingdom*, ECtHR 25 April 1978, 5856/72, para 31; *Marckx v Belgium*, ECtHR 13 June 1979, 6833/74, para 41

There are two types of just satisfaction: pecuniary and non-pecuniary. The purpose of pecuniary just satisfaction is to put the applicant in the financial position that they would have been in, had it not been for the violation of the Convention.[46] Non-pecuniary just satisfaction compensates applicants for non-financial harm they may have suffered, such as mental or physical suffering. The court can also instruct the state to pay the legal costs of bringing the case to the applicant.

UK statistics

The UK has a substantially better success rate before the court than the average state. Between 1959 and 2023, it won 26% of cases compared with the average 8% of other states.[47]

Outcomes of UK cases
1959 to 2023

	United Kingdom		All states	
	Number	%	Number	%
Total judgments, *of which,*	570		26,798	
Judgments finding at least one violation	330	58%	22,667	85%
Judgments finding no violation	148	26%	2,177	8%
Struck out/ friendly settlements	69	12%	1,160	4%
Other judgments	23	4%	785	3%

Source: European Court of Human Rights, Violations by Article and State 1959 to 2022 [PDF] and Violations by Article and by State 2023 [PDF]

Its success rate has improved over time. Between 2013 and 2022 a violation was found in 49% of cases against the UK, as compared with 74% on average.

46 Art 41 ECHR. European Court of Human Rights, Practice Directions: Just Satisfaction Claims (3 June 2022)

47 European Court of Human Rights, Violations by Article and State (PDF), accessed 15 August 2023

Outcome of judgments, by member state, 2014 to 2023

By Council of Europe state which was the subject of the application

State	Number of applications dealt with in total	Per 10,000 population in the member state	Judgments*		
			Total judgments	Where at least one violation was found	Violation judgments as a proportion of all judgments
Türkiye	91,617	11	1,001	903	90%
Russia	79,556	6	2,906	1,951	67%
Ukraine	52,871	12	950	917	97%
Romania	41,845	21	1,018	661	65%
Hungary	21,866	22	369	344	93%
Poland	21,708	6	280	191	68%
Italy	20,285	3	267	231	87%
Serbia	19,711	28	216	135	63%
France	8,558	1	191	114	60%
Bosnia and Herzegovina	8,462	24	82	78	95%
Croatia	7,986	19	263	208	79%
Republic of Moldova	7,605	21	432	264	61%
Bulgaria	7,261	10	313	280	89%
Greece	6,623	6	323	288	89%
Germany	6,279	1	113	43	38%
Spain	5,883	1	117	69	59%
Azerbaijan	4,168	4	252	244	97%
Netherlands	4,087	2	65	29	45%
Lithuania	3,941	14	163	97	60%
Belgium	3,790	3	118	79	67%
Slovak Republic	3,786	7	155	119	77%
United Kingdom	3,732	1	71	33	46%
Czech Republic	3,445	3	40	16	40%
North Macedonia	3,366	16	110	86	78%
Slovenia	3,341	16	103	71	69%
Switzerland	2,784	3	128	51	40%
Latvia	2,684	14	87	67	77%
Montenegro	2,402	39	88	56	64%
Portugal	2,398	2	129	91	71%
Austria	2,369	3	73	47	64%
Armenia	2,305	8	144	136	94%
Sweden	1,811	2	29	8	28%
Finland	1,517	3	29	14	48%
Estonia	1,477	11	34	23	68%
Georgia	1,131	3	107	86	80%
Norway	1,046	2	51	26	51%
Albania	1,027	4	63	58	92%
Denmark	624	1	26	11	42%
Cyprus	427	5	31	27	87%
Ireland	324	1	12	7	58%
Malta	318	7	122	78	64%
Luxembourg	301	5	11	5	45%
Iceland	251	7	25	17	68%
San Marino	143	43	21	10	48%
Liechtenstein	83	22	4	3	75%
Monaco	67	18	5	3	60%
Andorra	64	9	4	1	25%
Total	467,325	6	11,141	8,276	74%

* Excludes the majority of cases decided by the court which are decisions of inadmissibility.

Source: European Court of Human Rights, Annual reports 2014 to 2023

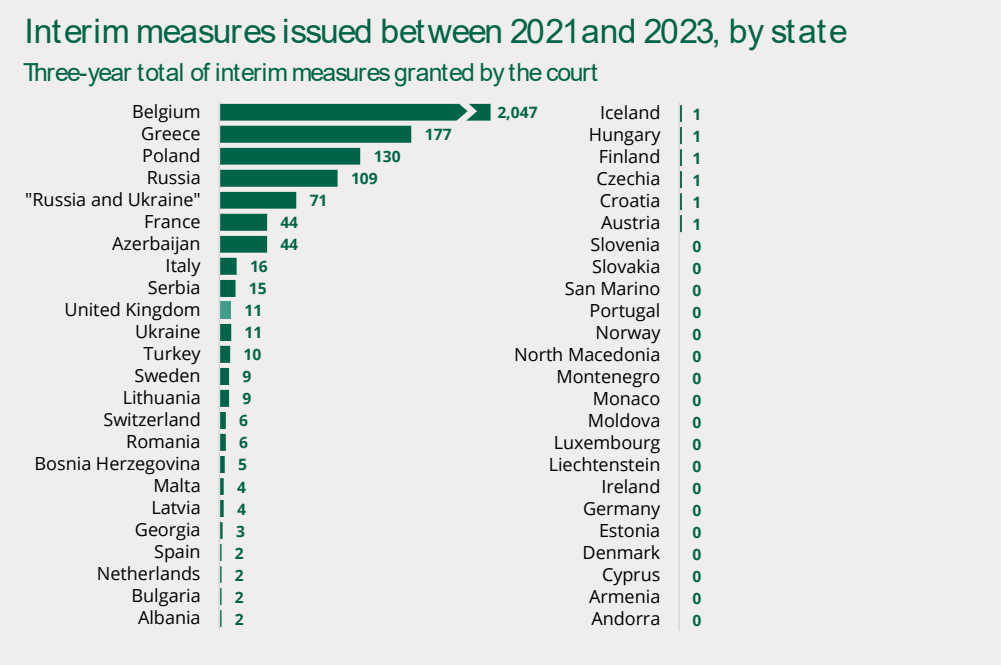
Interim Measures

On occasion, the court makes urgent orders called "interim measures" before issuing a full judgment if it considers the applicant faces an exceptional and imminent risk of irreparable harm.[48]

Most interim measures concern applicants' fear for their lives (Article 2) or ill-treatment (Article 3) and prevent the applicant being expelled or extradited for the duration of the proceedings before the court.[49]

A failure to comply with interim measures is usually a violation of article 34 of the ECHR, under which states must not prevent applicants bringing claims to the Court.

As shown in the chart below, 11 interim measures were granted against the UK between 2021 and 2023. Some states received considerably more (Belgium was a notable outlier, receiving 2,047 interim measures) and around half of member states received one or no grants of interim measures against them.



Source: European Court of Human Rights, Rule 39 requests listed by respondent State processed by the Court in 2021, 2022 and 2023 [PDF]. Notes: Many more interim measures were granted against Belgium than any other state, due to a large number of immigration-related interim measures in 2023 (1,297 requests) and in 2022 (748 requests). "Russia and Ukraine" is listed in the statistics, which may indicate applications against the two states or where jurisdiction is unclear.

48 The court has authority to do this under rule 39 of the Rules of Court. (The Court's European Court of Human Rights, Rules of Court (23 June 2023), rule 39). See European Court of Human Rights, Factsheet – Interim Measures (December 2022).

49 European Court of Human Rights, Factsheet – Interim Measures (December 2022), p 1

Stage 4: Judgment execution

The court's judgments are binding on states under international law: Article 46 of the Convention requires states to "execute" or implement final judgments of the court.[50] Another Council of Europe body, the Committee of Ministers which is made up of member states' foreign ministers, is responsible for supervising the execution of judgments. [51] The Committee of Ministers meets quarterly to oversee this process. The UK is usually represented by diplomats but sometimes ministers attend too. The Committee of Ministers is assisted by its Secretariat, the Department for the Execution of Judgments, and closes a case when it considers that a state has abided by a judgment.[52]

The Committee of Ministers may refer a case back to the court if it considers that a state is refusing to abide by a final judgment. It has only ever done this twice, in relation to Azerbaijan and Türkiye, in both cases concerning political prisoners.

The presidency of the Committee of Ministers is held on a rotating basis.[53]

Enhanced, standard supervision

To implement a judgment, a state must address both the situation of the applicant and any structural reasons that that enabled the violation against the applicant to occur. These are called "individual" and "general" measures.

Individual measures may include a financial penalty that is imposed by the court ("just satisfaction") or taking action to rectify the applicant's situation, such as granting a person leave to remain in the country. General measures could include repealing or passing new legislation, implementing new non-legislative policy or training public sector employees to be aware of the judgment.

The Committee of Ministers groups cases against a given state which require similar implementation measures and supervises them together. The first case in a group is the "leading" case and the others are "repetitive" cases.

There is two-track system for supervising judgments. The Committee of Ministers supervises most cases under the "standard procedure" but exceptional cases receive extra scrutiny under the "enhanced procedure".[54]

50 Article 46 European Convention on Human Rights (coe.int)

51 Council of Europe, Committee of Ministers (accessed 19 January 2024)

52 Again see art 46 ECHR. The CoE Department for Executions maintains a database tracking the supervision of cases: Department for the Execution of Judgments of the ECHR, HUDOC EXEC (accessed 19 January 2024)

53 Committee of Ministers, Chairmanship (accessed 19 January 2024)

54 This system was brought in as a result of the first high level conference on the reform of the Court: Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan – Modalities for a Twin-track Supervision System (6 September 2010) para 1

These include cases that require urgent action, raise structural or complex problems or are between states.[55]

States can also resolve cases through the friendly settlement process at any stage prior to the court issuing a judgment.[56] The Committee of Ministers also supervises the execution of the terms of these agreements.

At the end of 2022, the Committee of Ministers was supervising 1,299 leading cases and 6,112 cases overall.[57] 49% of these cases had been pending for more than five years.[58] In contrast, 30% of the UK cases had been pending for more than five years.[59]

98% of all cases against the UK have been closed by the Committee of Ministers.[60] As of February 2024, there are currently 12 UK cases open before the Committee of Ministers, made up of eight groups concerning similar issues, which are summarised in the table below.[61]

Table 1

Cases	Issue	Violations	Final judgment date[62]
COVENTRY v. the United Kingdom	Excessive and arbitrary burden on unsuccessful uninsured defendants in conditional fee arrangement litigation due to recoverability of success fees and insurance premiums.	Unfair balance between the parties in legal proceedings (art 6)	06/03/2023

55 See above, para 8

56 This process is under art 39 ECHR

57 Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 16th Annual Report of the Committee of Ministers 2022 (March 2023) p 86

58 See above, p 110

59 See above, p 111

60 Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, Country Factsheets: United Kingdom (accessed 19 January 2024)

61 European Court of Human Rights, HUDOC database, search filtered by date, language, country and violations , accessed 5 February 2043. See also the Ministry of Justice annual report to the Joint Committee on Human Rights, Responding to human rights judgments, November 2023, CP958, which details measures being taken by the UK to implement these judgments

62 The final judgment date is either (1) the date that the Grand Chamber hands down a judgment, (2) the date the Grand Chamber rejects a request for referral, (3) the date that parties declare they will not request a referral to the Grand Chamber or (4) three months after the Chamber hands down the judgment, if the parties do not request a Grand Chamber referral. See art 44 ECHR.

		Excessive burden placed on defendants(art 1, protocol 1)	
S.W. v. the United Kingdom	Failure to afford the applicant opportunity of meeting allegation of professional misconduct during trial and to prevent the wide dissemination of adverse findings on the same.	Privacy (art 8) and effective remedy (art 13).	22/09/2021
V.C.L. AND A.N. v. the United Kingdom	Failure to take adequate operational measures to protect two potential victims of child trafficking from prosecution.	Prohibition of slavery and forced labour (art 4) and unfair criminal proceedings (art 6).	05/07/2021
BIG BROTHER WATCH AND OTHERS v. the United Kingdom	Proportionality and safeguards of legislation governing the bulk interception of communications regime and the regime for obtaining communications data from service providers.	Privacy (art 8) and freedom of expression (art 10).	25/05/2021
CATT v. the United Kingdom	Retention of peaceful campaigner's data on police database.	Privacy (art 8).	24/04/2019
MCKERR v. the United Kingdom (Tied with FINUCANE, KELLEY AND OTHERS, McCAUGHEY and	Deaths at hands of or in collusion with security forces in Northern Ireland in the 1980s and 1990s and the failure to conduct article 2 compliant investigations.	Right to life (art 2).	04/08/2001

SHANAGHAN as well as other closed cases)			
S. AND MARPER v. the United Kingdom (Tied with GAUGHRAN)	Unjustified interference with the applicants' right to respect for their private life due to the retention for an indefinite period of DNA profiles taken in connection with their arrest for offences for which they were not convicted.	Privacy (art 8).	04/12/2008

Source: European Court of Human Rights, HUDOC database, search filtered by date, language, country and violations , accessed 5 February 2024

2.3 The Government's internal processes relating to the European Court of Human Rights

Once the European Court of Human Rights publishes a final judgment, its implementation is overseen within the Council of Europe by the Committee of Ministers assisted by the Department for Executions.[63] The Committee of Ministers will close a case once it considers that the state has implemented the judgment.

For each case, states must submit an 'action plan' to the Committee of Ministers outlining how they intend to execute (or implement) the judgment and can thereafter submit further communications on progress and plans. Once a state considers that it has implemented a judgment it submits an 'action report'.

Individual UK Government departments are responsible for responding to judgments within their policy areas, including writing the action plans and reports. The process is coordinated by the Ministry of Justice Human Rights Policy Division. The Foreign, Commonwealth and Development Office communicate with the Council of Europe through its delegation (UKDel) that coordinates with the Department for Execution and Committee of Ministers.

[63] Article 46 ECHR

2.4 Reform of the European Court of Human Rights

Throughout the lifetime of the ECtHR, states have worked together to reform it to adjust to both internal and external pressures. Reform efforts have been ongoing since the early 2010 through a series of high-level conferences and reform measures called the "Interlaken Process". The UK Government has been an active participant in ECtHR reform.[64]

Reform efforts have addressed the court's backlog of cases, judicial appointments and rebalancing the relationship between member states and the court through emphasising principles such as the margin of appreciation and subsidiarity. These changes have largely been done through states agreeing "protocols" that amend the European Convention on Human Rights, which governs the operation of the court.

Establishing a single, full-time court

Protocol 11, agreed in 1994, established a single permanent court replacing a previous two-tier system under which the court only sat part time.[65] The full-time court began sitting in 1998.[66]

The purpose of the reform was to improve the efficiency and decrease length of time of the process to adapt to the increasing number of applications and influx of new members from post-Soviet Eastern Europe.[67]

Dealing with the backlog

The court's workload has been an ongoing problem from its establishment in 1998.[68] In 2004, states parties addressed the backlog of cases through Protocol 14, which made several changes including:

- making it easier administratively to dismiss clearly inadmissible cases by allowing a single judge to decide alone[69]

64 See for example: Ministry of Justice, European Convention on Human Rights Protocol Comes into Force (1 August 2021)

65 There was also the Commission, which placed a greater emphasis on negotiated solutions.

66 Council of Europe, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery established Thereby (11 May 1994)

67 See above. Preamble.

68 Lord Woolf, Review of the Working Methods of the European Court of Human Rights (December 2005)

69 Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the Control System of the Convention (14 May 2004) arts 6-7 amending arts 26 and 27 of the Convention

- changing the admissibility criteria to require that applicants had faced significant disadvantage[70]
- enabling a three-judge panel to decide on the merits of a case[71]
- establishing that the court would support parties in coming to a settlement, including early on in the process.[72]

Since 2010 member states have made further efforts to manage the court's workload through the Interlaken Process.

Rebalancing the relationship between member states and the court

States undertook an intensified effort to reform the court through a series of special conferences and related declarations between 2010 and 2018 (referred to as the 'Interlaken process' after the location of the first conference).[73]

These conferences focused on both operational and political concerns. Operational concerns related to the ongoing issues of the court's caseload, poor implementation of judgments and the quality and independence of judges. Political concerns related to ensuring that the court maintained its legitimacy and authority through member states playing the primary role in upholding the Convention, with the court's role being subsidiary.

The political concerns were driven by the UK and Denmark through their chairmanships of the Committee of Ministers and the conferences they hosted in Brighton in 2012 and Copenhagen in 2018.[74]

Protocol 15: Margin of Appreciation and Subsidiarity

The 2012 Brighton Declaration, signed by all 47 states, reaffirmed the "fundamental principle of subsidiarity" and encouraged the court to "give great prominence" to the principles of subsidiarity and the margin of appreciation.[75]

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70 See above. Art 12 amending art 35(3) of the ECHR

71 See above. Art 6 amending art 26 of the Convention

72 See above. Art 15 amending art 39

73 These conferences were in Interlaken (Switzerland) in 2010, Izmir (Turkey) in 2011, Brighton (UK) in 2012, Oslo (Norway) in 2014, Brussels (Belgium) in 2015 and Copenhagen (Denmark) in 2018 and were hosted by the nations chairing the Committee of Ministers.

74 Ministers Deputies, Priorities of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe (7 November 2011 – 14 May 2012) (27 October 2011) pp 1-2; Ministers' Deputies, Priorities of the Danish Chairmanship of the Committee of Ministers of the Council of Europe (15 November 2017-May 2018) (13 November 2017) p 3

75 European Court of Human Rights, High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration (20 April 2012) paras 3, 12(a)

It also directed that these principles be included in the Convention.[76] As a result, states amended the preamble to read:

> High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[77]

The court has increasingly referenced the principles of subsidiarity and the margin of appreciation in recent years.[78] There has been academic debate on whether this means that the court has become more deferential in its judgments towards states.[79] Recent quantitative analysis indicates that the court's use of this language does not mean that it is deferring more to states, and that the increase in references to the principles started before the Interlaken reform process.[80]

Appointment of judges

Concerns about the quality and independence of judges, including from UK stakeholders and commentators,[81] have led to reform efforts. The 2010 Interlaken Declaration, signed by heads of state and government, affirmed the importance of the independence and impartiality of judges and the need to ensure confidence in the selection process, possibly through improving the quality and transparency of national and European selection procedures.[82]

The Committee of Ministers consequently established an advisory panel to vet the quality and qualifications of potential judicial candidates on the papers before the candidates are interviewed by the Judges Committee of

76 European Court of Human Rights, High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration (20 April 2012) para 12(b)

77 Protocol 15 reduced the time limit from six to four months in 2021. Council of Europe, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (24 June 2013) art 1 amending the preamble of the ECHR

78 Madsen Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?" (2018) 9 Human Rights Law Review 119 at 220 [View earlier open access version here.]

79 Lize R Glas, "From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?" 20 Human Rights Law Review

80 Molbæk Steensig, H., "Subsidiarity Does not Win Cases: A Mixed Methods Study of the Relationship between Margin of Appreciation Language and Deference at the European Court of Human Rights" (2022) 36 Leiden Journal of International Law

81 Ministers Deputies, Priorities of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe (7 November 2011 – 14 May 2012) (27 October 2011) pp 1-2; See also John Howell MP, leader of the UK Delegation to the Parliamentary Assembly of the Council of Europe HC Deb 19 January 2022, c472

82 High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration (19 February 2010) para 8

the Parliamentary Assembly and the candidates are then put to the Parliamentary Assembly for election.[83]

Currently, government officials from member states, including representatives of the UK Ministry of Justice,[84] reporting to the Committee of Ministers, are undertaking a review of the appointment processes.[85] Their report will cover the selection of judges and how to safeguard both the court and judges' independence and impartiality and ensure the quality of judges.[86]

Interim measures

The UK Government has recently been critical of the process for granting interim measures and has questioned its legal basis.

The Prime Minister Rishi Sunak raised the issue of interim measures with the President of the ECtHR, Siofra O'Leary, at a Council of Europe summit in Iceland in May 2023.[87]

The ECtHR said that Siofra O'Leary had held a number of bilateral meetings, clarifying that the court had been reflecting on procedures for dealing with interim measures since November 2022. She stressed that this was unrelated to any individual case or the position of any member state, and that it was part of the court's regular reviews of its working methods.[88]

Parliamentary Under-Secretary of State Lord Bellamy subsequently explained that in the Government's view interim measures raise five legal questions:

- what is the legal basis?
- what is the procedure for exercising the power?

83 Council of Europe: Directorate of Legal Advice and Public International Law, The Advisory Panel (accessed 1 January 2024)

84 See CDDH minutes, for example: Steering Committee for Human Rights (CDDH): Committee of Experts on the System of the European Convention on Human Rights: Drafting Group on Issues relating to Judges of the European Court of Human Rights, Meeting Report – 1st Meeting (Hybrid Format) (28-30 September 2022) p 7

85 These officials are part of the Steering Committee for Human Rights ("CDDH"). The CDDH is a body made up of government officials from member states including those from the Ministry of Justice that reports to the Committee of Ministers. See Council of Europe: Steering Committee for Human Rights (CDDH), Home (accessed 19 January 2024)

86 Council of Europe: Human Rights Intergovernmental Cooperation, Issues relating to Judges of the ECHR (accessed 19 January 2024); Steering Committee for Human Rights (CDDH): Committee of Experts on the System of the European Convention on Human Rights: Drafting Group on Issues relating to Judges of the European Court of Human Rights, Meeting Report – 1st Meeting (Hybrid Format) (28-30 September 2022) p 2

87 Press Release, PM meets with President of the European Court of Human Rights: 16 May 2023, Prime Minister's Office, 16 May 2023

88 European Court of Human Rights, Press Release, ECHR 149 (2023), 17 May 2023

- what is the competence of the single judge?
- what is the effect in domestic law of an order?
- what constitutes a breach of interim measures?[89]

He said that ministers, including the Prime Minister, had had constructive discussions with the ECtHR about reform and that "the court's regular internal review of procedures began to look at the interim measures procedures in November 2022".[90]

In November 2023 the ECtHR issued a press release announcing that several decisions had been adopted for consultation with member states clarifying and codifying its existing practice relating to interim measures.[91]

It set out the longstanding legal basis for interim measures. Namely, that a failure to comply with them undermines the effectiveness of the right of individual application under Article 34 and the state's undertaking in Article 1 to protect the rights and freedoms in the Convention.

The proposals for reform of the interim measures process, which are subject to consultation before being finalised, included:

- disclosing of the identity of the judges who render the decisions on interim measure requests
- maintaining the practice of providing reasons for indicating interim measures on an ad hoc basis and issuing press statements where the circumstances of the cases so require
- issuing formal judicial decisions to be sent to the parties
- maintaining the practice of adjourning the examination of the request for interim measures where the court has insufficient information and requesting more information from the parties, as long as the situation is not extremely urgent.

89 HL Deb 6 June 2023, c1242. Section 55 of the Illegal Migration Act 2023 sets out how interim measures of the ECtHR affect the duty to make arrangements for the removal of a person from the UK under that Act. The minister may decide that the duty does not apply in relation to a person with respect to whom the ECtHR has indicated interim measures. In making this determination, the minister can give consideration to the procedure that was followed by the ECtHR, including whether the UK Government was given an opportunity to present observations, and the form of the decision to indicate the interim measure.

90 As above

91 Changes to the procedure for interim measures (Rule 39 of the Rules of Court), Press Release, ECHR 308(2023), 13 November 2023

3 Debate over reform of the Human Rights Act

The Human Rights Act 1998 (HRA) had not long been in force before debate began as to whether it should be reformed or retained. However, to date it has proved resilient in the face of considerable opposition.

3.1 Position of the main political parties on the UK's human rights framework

The current Government's position is to remain a member of the ECHR. However it has introduced various legislative measures which would impact on the way it is applied in the UK by disapplying or overriding parts of the HRA in certain contexts (discussed further below at section 5). The opposition parties remain supportive of the HRA and the ECHR.

Timeline of discussions about a 'British Bill of Rights'

Initial proposals of a British Bill of Rights, 2006 to 2009

As Leader of the Opposition, David Cameron proposed a modern British Bill of Rights in 2006. He argued that there should be a:

> … a new solution that protects liberties in this country that is home-grown and sensitive to Britain's legal inheritance that enables people to feel they have ownership of their rights and one which at the same time enables a British Home Secretary to strike a common-sense balance between civil liberties and the protection of public security. [92]

The July 2007 Governance of Britain Green Paper, published shortly after Gordon Brown became Prime Minister of the last Labour Government, set out proposals for constitutional reform. The green paper proposed a British Bill of Rights and Duties which "could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others". This would build on the HRA "but make explicit the way in which a democratic society's rights have to be balanced by obligations". [93]

[92] David Cameron, Balancing freedom and security – A modern British Bill of Rights, 26 June 2006
[93] Ministry of Justice, The Governance of Britain, Cm 7170, July 2007, para 210

These proposals did not progress further.

In 2009, prior to his election as an MP, Dominic Raab wrote a book setting out his views on what had gone wrong with human rights. He was critical of the then Government's response to the threat from terrorism, including measures such as ID cards and lengthy pre-charge detention. However, he also identified the expansion of rights by the courts as the cause of "compensation culture" and of undermining social responsibility.[94]

He advocated the introduction of a British Bill of Rights, suggesting it would enable the courts to resist the direction of "judicial legislation" from the ECtHR in Strasbourg.[95]

Commission on a Bill of Rights, 2010–2015

Debate continued in the 2010–15 Parliament, through the deadlocked Commission on a Bill of Rights, which produced a divided report, reflecting disagreement on the issue between the coalition partners.[96]

The majority agreed that there was a case in principle for replacing the HRA with a Bill of Rights, but that it should not offer less protection than the HRA.[97]

Two members of the Commission, Baroness Helena Kennedy and Phillipe Sands KC, did not agree with this central conclusion, suggesting that the majority had "failed to identify or declare any shortcomings in the Human Rights Act or its application by the courts".[98]

Party manifestos, 2015

At the 2014 Conservative Party Conference, David Cameron recommitted the party to a Bill of Rights. He said:

> When that charter [the European Convention on Human Rights] was written, in the aftermath of the Second World War, it set out the basic rights we should respect. But since then, interpretations of that charter have led to a whole lot of things that are frankly wrong. Rulings to stop us deporting suspected terrorists. The suggestion that you've got to apply the human rights convention even on the battle-fields of Helmand. And now – they want to give prisoners the vote. I'm sorry, I just don't agree. Our Parliament – the British Parliament – decided they shouldn't have that right.[99]

94 Raab, D. The Assault on Liberty: What went wrong with rights, 2009, 4th Estate

95 As above, chapter 7

96 A UK Bill of Rights? The Choice before us, 2012. The members of the Commission were Professor Sir David Edward QC, Lord Faulks of Donnington QC, Jonathan Fisher QC, Martin Howe QC, Baroness Kennedy of the Shaws QC, Lord Lester of Herne Hill QC, Professor Phillipe Sands QC, and Anthony Speaight QC

97 As above, Overview, para 84

98 As above, Overview, para 88(ii)

99 David Cameron speech to Conservative Party conference 2014

In October 2014, the Conservative Party published a paper which proposed to repeal the HRA and replace it with a British Bill of Rights. The European Court of Human Rights (ECtHR) would "no longer [be] able to order a change in UK law" and would become "an advisory body only".[100] The Conservative Party's 2015 manifesto gave a clear commitment to repealing the Human Rights Act, promising to "scrap the HRA and curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain".[101]

By contrast, Labour's manifesto had promised that the party would "stand up for" individual rights and protect the HRA.[102] The Liberal Democrat and SNP manifestos also promised to retain the HRA.

In the 2015 Queen's Speech, the Government said it would replace the HRA with a British Bill of Rights.[103]

The issue receded from the political agenda following the 2016 referendum on the UK's membership of the EU and the ensuing process of withdrawal.

3.2 Wider debate about reform of the HRA

In parallel to the political debate, there has been an ongoing debate among legal practitioners, non-governmental organisations, academics, the judiciary and wider civil society, which has tended towards polarisation.

Opposition to the HRA

Critics of the HRA have focused principally on the idea that it has led judges illegitimately into the arena of political decision making, and on the use of the HRA by groups seen in some sense as undeserving (such as terrorist suspects or foreign national offenders).[104]

The role of the ECtHR, which is sometimes inaccurately characterised as a 'foreign court',[105] has provoked questions about sovereignty. And there are also philosophical objections to the notion of fundamental rights, protected from majoritarian decision making, as anti-democratic.

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100 Protection human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws (PDF), 2014

101 Conservative manifesto 2015, page 58

102 'Britain can be better', Labour manifesto 2015, available at labourlist.org

103 Queen's Speech 2015

104 For example, Folly of human rights luvvies: As actors fight plans to axe Human Rights Act, how thousands of foreign convicts use it to stay in Britain, Daily Mail, 27 May 2015

105 As noted above, the ECtHR is an international court made up of judges from the member states, including the UK

Policy Exchange's Judicial Power Project

Policy Exchange, through the Judicial Power Project (JPP), has been a long-standing and vocal critic, arguing that the HRA should be reformed or repealed.[106]

The JPP has suggested that three mistakes are commonly made in defence of the HRA. The first is to confuse the merits of the HRA with the question of whether the law should respect, promote and secure human rights. The second is the assumption that, prior to the enactment of the HRA, there is no protection for human rights in the UK. The third is to think that the HRA was the main way in which rights are now secured in the UK.[107]

The JPP says that the UK has a long and enviable record of securing rights prior to the HRA, and those arrangements were preferable, given that the HRA has, in the view of the JPP, compromised important constitutional principles.[108]

The JPP is critical of the domestic courts' approach to considering case law of the European Court of Human Rights (ECtHR). It suggested judges had used the HRA to "impose obligations on Government and Parliament which go well beyond" ECtHR standards. It suggested this was a "misuse of the structure of the HRA", which had led judges to "intervene gratuitously in political controversy … to advance their own views".[109]

Many of these arguments were reiterated in the JPP's submission to the Government's Independent Human Rights Act Review (see section 4 below for further detail).[110] Focusing on the ECtHR's living-instrument approach, it suggested that the terms of the Convention were developed over time, as the court "developed its own understanding about justice and governance". This brought judges into areas of social justice, which had previously been regarded as matters of democratic political responsibility, and had resulted in a "constitutional balance, or imbalance" on which Parliament is entitled to make fresh judgment, according to the JPP.

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106 Policy Exchange is a think tank which aims to promote new policy ideas. The JPP considers the scope of judicial power within the British constitution. It does so based on the proposition that there is a problem of judicial overreach that needs to be addressed. It has said: "The ongoing expansion of judicial power increasingly corrodes the rule of law and effective, democratic government. The Project seeks to address this problem – to restore balance to the constitution – by recalling and making clear the good sense of separating judicial and political authority."

107 Written evidence from Policy Exchange's Judicial Power Project (HRA0033), 20 years of the Human Rights Act Inquiry, Joint Committee on Human Rights, 2018

108 Written evidence from Policy Exchange's Judicial Power Project (HRA0033), 20 years of the Human Rights Act Inquiry, Joint Committee on Human Rights, 2018

109 As above

110 Ekins, R. & Larkin, J. QC, Submission to the Independent Human Rights Act Review, 3 March 2021, available at https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses

Lord Sumption's Reith lectures

Lord Sumption, former Justice of the Supreme Court, has been another vocal critic of human rights law, in particular since his retirement. Delivering the BBC's Reith lectures in 2019, he identified a number of philosophical and practical objections.[111]

He stated that rights are a creation of law, which is ultimately a matter of political choice. Therefore, the suggestion that they are inherent in our humanity reflects a personal judgment that "some rights ought to exist because they are so fundamental to our values, and so widely accepted, as to be above legitimate political debate". This, he suggested, only works if the rights in question are truly fundamental and generally accepted, otherwise a political process is necessary to resolve disagreement.

He describes the ECHR as a "dynamic treaty" – one which does not just say what domestic law should be, but which provides a supranational mechanism for future development. This, he suggests, should appeal particularly to those who believe that fundamental rights should exist independently of democratic choice, because it creates a source of law independent of political choices.

According to Lord Sumption, the ECHR was not originally intended to be a dynamic treaty, but has become one as a result of the ECtHR's living-instrument doctrine. This has "added" rights to our law which are "contentious and very far from fundamental", he suggests.[112]

Support for the HRA

Many stakeholders and experts have sought to refute these arguments and to put forward a positive case for the HRA.

The benefits of incorporating the HRA into domestic law are said to include allowing people to enforce their rights in the domestic courts, which have a better understanding of the domestic context, and to access immediate remedies.[113] It also imposes positive duties on public bodies, and effects wider changes in policy in relation to human rights.[114]

Another noted positive has been the influence of British courts on the case law of the ECtHR. This has affected the interpretation of Convention rights for all member states and helped to ensure that the UK is able to maintain a

111 The Reith Lectures 2019: Law and the decline of politics, lecture 3: Human Rights and Wrongs, available at bbc.co.uk

112 The ECtHR is not able to add rights to the Convention but under the treaty it has exclusive competence in interpreting them.

113 See for example evidence from Age UK and Coram Children's Legal Centre, Joint Select Committee on Human Rights, Twenty years of the Human Rights Act: Extracts from the evidence, 2018

114 See for example evidence from Just Fair and the British Institute for Human Rights, Joint Select Committee on Human Rights, Twenty years of the Human Rights Act: Extracts from the evidence, 2018, part 8

distinct contribution on important issues far more than it would have been able to otherwise.[115]

The argument that sections 3 and 4 have expanded judicial power at Parliament's expense have also been rejected. Supporters of the HRA say that these sections are in themselves expressions of Parliament's will, and that Parliament retains the ability to reverse a decision under section 3 or ignore a section 4 declaration.[116]

Members of the judiciary have rejected the suggestion that the HRA has drawn the courts into political decision making, distinguishing the necessity of sometimes making decisions with political consequences.[117]

Baroness Hale, former President of the Supreme Court, has noted that while there are good reasons why Parliament is better placed to address difficult and controversial issues than the courts, the courts have no choice but to decide the case before them on the evidence before them.[118]

115 See for example evidence from Professor Merris Amos and the Bingham Centre for the Rule of Law, Joint Select Committee on Human Rights, Twenty years of the Human Rights Act: Extracts from the evidence, 2018

116 See for example evidence from Liberty and the Human Rights Consortium, Joint Select Committee on Human Rights, Twenty years of the Human Rights Act: Extracts from the evidence, 2018, part 6

117 Lord Dyson, JCHR Oral evidence session, 12 October 2020, Q3

118 Hale, B., 'My rights, your wrongs: Nigel Biggar's flawed attack on 'human rights fundamentalism'', Prospect, 22 January 2021

4 Developments since the 2019 election

4.1 The Independent Human Rights Act Review

The Government launched an Independent Human Rights Act Review (IHRAR) in December 2020 during Robert Buckland's tenure as Justice Secretary. This was the first step towards fulfilling a manifesto commitment to "update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government".[119]

The terms of reference set out three issues for the review to consider:

- The relationship between the domestic courts and the European Court of Human Rights (ECtHR). This includes how the duty to 'take into account' of ECtHR case law has been applied in practice, and whether dialogue between our domestic courts and the ECtHR works effectively and if there is room for improvement.
- The impact of the Human Rights Act (HRA) on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy.
- The implications of the way in which the HRA applies outside the territory of the UK and whether there is a case for change.[120]

The review was mainly focused on the operation of the HRA and not the substantive Convention rights or the question of whether the UK should remain signatory to the Convention. It proceeded on the basis that the UK would remain signatory to the Convention.

Outcome of the review

The findings of the review were finalised and submitted to the Government in Autumn 2021. They were published on the same day as the Government's HRA consultation in December 2021.[121]

119 Conservative manifesto 2019, p48

120 Ministry of Justice, Government launches independent review of the Human Rights Act, 7 December 2020

121 All responses to the review's call for evidence were uploaded to the IHRAR website. The panel also held a number of online Roundtables, the minutes of which are set out in Annex VIII of the report. The Independent Human Rights Act Review, CP586, December 2021

According to the report, "the vast majority of submissions … spoke strongly in support of the HRA". However, it also noted persistent hostility in some quarters, "suggesting much needs to be done to dispel negative perceptions … and increase a sense of public ownership".[122] The review did not find that extensive reform of the HRA was necessary.

The review panel's conclusions and recommendations included the following:

- There should be a strong focus on civil, constitutional education on the HRA and rights more generally.
- Section 2 should be amended to clarify the priority of rights protection by making UK legislation, common law and other case law the first port of call, before ECtHR case law is taken into account.[123]
- Section 3 should be amended only to clarify the order of priority of interpretation. There should be no change to the balance between sections 3 and 4. Although concern about section 3 is understandable, as it raises the risk of the courts reaching an interpretation that differs from the apparent view of Parliament, there is little evidence of a problem in the way it operates, with the most controversial case being 20 years old. A database of section 3 judgments and an enhanced role for the JCHR in scrutinising them would improve understanding of the operation of section 3 and might help to dispel concerns.[124]
- Where secondary legislation has been found to be incompatible, there should be a power to suspend, or make prospective only, an order quashing that legislation.[125] This would provide the Government with an appropriate period of time within which to consider how to rectify the defect. There should also be a database of judgments where secondary legislation has been disapplied or quashed, to enhance Government and parliamentary scrutiny, and dispel concerns.[126]
- The current position on the HRA's extraterritorial application is unsatisfactory. It should be addressed via a "national conversation", together with Governmental discussions in the Council of Europe, and judicial dialogue between the UK courts and the ECtHR.[127]
- Section 10 should be amended to clarify that remedial orders cannot be used to amend the HRA itself. As a matter of principle, the HRA ought

122 Executive summary, para 14
123 As above, para 20
124 Paras 42-54
125 As now provided for in judicial review proceedings generally by the Judicial Review and Courts Act 2022 which provides that an order that quashes secondary legislation in judicial review proceedings could be suspended for a period of time, or could be limited in its retrospective effect, in order to allow the Government time to resolve the problem.
126 Paras 64-66
127 Para 77

only to be capable of amendment by an Act of Parliament, reflecting its constitutional status and the need to take account of devolution issues.

- The JCHR should revisit its 2001 principles, which were devised to guide Government and Parliament's approach to the remedial order process, to consider if they need to be updated or expanded. [128]

Government consultation: A Modern Bill of Rights

The Government did not formally respond to IHRAR.

On 14 December 2021, during Dominic Raab's first tenure as Justice Secretary, the Government published a consultation on its plans to reform the HRA – Human Rights Act Reform: A Modern Bill of Rights (PDF).

The consultation contained questions and draft clauses for consideration.

The foreword described the consultation as marking "the next step in the development of the UK's tradition of upholding human rights", and stated it was informed by the work of IHRAR. [129]

It noted the Government's ongoing commitment to the ECHR and "the UK's tradition of human rights leadership abroad", but also the need for a system that strikes "the proper balance of rights and responsibilities, individual liberty and the public interest, rigorous judicial interpretation, and respect for the authority of law makers". [130]

It stated that the Government intended to replace the HRA with "a modern Bill of Rights … which reinforces our freedoms under the rule of law, but also provides a clearer demarcation of the separation of powers between the courts and Parliament". [131]

The case for reform

The consultation set out the Government's case for reforming the HRA, stating that it has seen:

- the growth of a 'rights culture' that has displaced due focus on personal responsibility and the public interest;
- the creation of legal uncertainty, confusion and risk aversion for those delivering public services on the frontline;
- public protection put at risk by the exponential expansion of rights; and

128 Paras 86-91
129 Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, page 3
130 As above
131 As above

- public policy priorities and decisions affecting public expenditure shift from Parliament to the courts, creating a democratic deficit.[132]

Expansion of rights: The 'living instrument' doctrine

In support of this contention, the consultation cited several cases as examples of problems arising because of the 'living instrument' doctrine (that the Convention must be interpreted in the light of present-day conditions), including:

- *Abu Qatada*[133] – in which the ECtHR found for the first time that the Article 6 right to a fair trial could be asserted to defeat a deportation order, where a person faced prosecution based on evidence obtained by torture. This was in contrast to the judgment of the House of Lords.[134] The consultation paper stated that although "the facts were specific to the particular case, the ruling opened up the case law to further incremental judicial expansions in the use of Article 6 to frustrate deportation orders, well beyond the terms of the Convention, or previous case law from Strasbourg".[135]

- *Hirst* – in which the ECtHR found that the right to vote (guaranteed by the obligation on States to hold free elections under Article 3 of Protocol 1 to the Convention) applied in principle to all people, including prisoners. The UK's general, automatic and indiscriminate ban on all convicted prisoners in custody was incompatible with this right.[136]

- *Hatton* - in which the ECtHR found that the Article 8 right to a private and family life could be used where an individual was directly and seriously affected by noise or other pollution, although there is no explicit ECHR right to a clean and quiet environment.[137]

According to the consultation paper, these decisions extended the power of the ECtHR without democratic accountability:

> Far from merely applying the Convention, these judicial extensions of human rights have enabled the Strasbourg Court to prescribe domestic principles and

132 Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, Chapter 3 summary, page 28

133 *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1

134 *RB (Algeria) (FC) and another v Secretary of State for the Home Department and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110. However, it is worth noting that the House of Lords accepted in principle that Article 6 could be used to resist a deportation order.

135 The issue in the case was that the claimant's Article 6 rights would be undermined by the use of evidence at his criminal trial in Jordan obtained through the use of torture. The Government ultimately obtained reassurances from Jordan that this would not happen and he was deported.

136 *Hirst v UK (No 2)*, App no. 74025/01 (2005)

137 *Hatton v UK*, App no. 36022/97 (2003)

> rules in a wide range of social policy areas, without any meaningful democratic mandate or accountability. [138]

The influence of the ECtHR: Section 2

The consultation stated that section 2 of the HRA, which says that UK courts must take account of relevant judgments of the ECtHR, has led the courts to conclude that Parliament had

> … instructed them to keep up with, and match, the Strasbourg Court's case law, rather than apply the Convention rights in a UK context, and within the margin of appreciation that the Convention allows. [139]

It suggested that although "the courts have retreated a little from this maximalist position", section 2 continues to give rise to legal uncertainty and contributes to an over-reliance on ECtHR case law. This comes at the expense of case law tailored to the UK's tradition of liberty and rights. [140]

Statutory interpretation: Section 3

The paper stated that the requirement in section 3 of the HRA, that the courts read legislation compatibly with Convention rights if possible, has caused a "significant constitutional shift in the balance between Parliament, the executive and the judiciary" which had led to the judicial amendment of legislation. [141] The result, the paper argued, has been the courts displacing Parliament in determining questions of public policy.

Consequences of systemic issues

The consultation suggested that these systemic problems have manifested themselves in various ways, which the Government's proposals sought to address, namely:

- The "increasing reliance on human rights claims" has led to rights being decoupled from responsibilities and the wider public interest, in conflict with the UK tradition of liberty. Many claims under the HRA have been brought by people who have shown "a flagrant disregard for the rights of others", such as foreign national offenders and other convicted prisoners. Dealing with unmeritorious claims from these people requires spending public money and therefore undermines public confidence in the HRA. [142]

- The application of the HRA by the courts has led to the imposition of 'positive obligations' on public bodies. An example given is the obligation to protect the Article 2 right to life of those in the custody of

138 Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, para 109
139 Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, para 114
140 As above, para 114
141 As above, para 117
142 As above, paras 124-131

the state. The consultation said judicial interpretation of the scope of certain rights has led to legal uncertainty as to the extent of public bodies' positive obligations, which sometimes leads them to take a cautious approach, for fear of legal challenges.[143]

- The courts have developed principles which have implications for how some public authorities carry out their duties. This may add to the cost and complexity of operations carried out by public authorities responsible for public protection, such as the police and the armed forces, and constrain their ability to determine the allocation of resources based on professional judgement and priorities.[144]

- The expansion of fundamental rights beyond their irreducible core has led the courts to determine questions of public policy, such as those relating to social welfare. This involves balancing competing considerations and the allocation of finite public funds. Such decisions should be taken at a political level, by those accountable to taxpayers. The recognition of 'positive obligations' on public authorities by the courts has contributed to the courts becoming involved in questions of public policy, resulting in additional burdens in the delivery of public services. Such decisions being taken by the courts rather than Parliament has created a "democratic deficit" and blurred the boundaries between the legislature and the judiciary.[145]

The consultation received 12,873 responses from members of the public, academics, think-tanks, legal professionals and law firms, non-governmental organisations and charities. A response to the consultation was published in July 2022.[146] Among other things it found that:

- a majority of respondents were opposed to reform of section 2[147]
- a majority of respondents were opposed to reform of section 3[148]
- a majority of respondents believed that no changes were required to the framework imposing positive obligations on public authorities[149]
- a majority of respondents believed that there was no case for removing the requirement to make section 19 statements to accompany a Bill[150]

143 Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, paras 132-140
144 As above, paras 141-150
145 As above, paras 151-176
146 Human Rights Act Reform: A Modern Bill of Rights, Consultation Response, 12 July 2022, Ministry of Justice
147 Chapter 1
148 Chapter 3
149 Chapter 2
150 Chapter 3

4.2 The Bill of Rights Bill

The Bill of Rights Bill was introduced in the House of Commons on 22 June 2022. Second reading was provisionally scheduled for September but did not take place.

Alex Chalk announced in June 2023 that it would be withdrawn, following his appointment as Justice Secretary.

The Bill of Rights Bill assumed that the UK would remain a member of the Convention, and defined rights by reference to the same set of articles.[151]

Its aim, reflecting the concerns articulated by the consultation, was to recalibrate the relationship between government, Parliament and the courts in the context of the enforcement of those rights, and to alter the emphasis placed on certain rights.

The role of the courts

Interpretation of Convention rights

The Bill would have removed the section 2 requirement for the courts to "take into account" decisions of the ECtHR which are relevant to the proceedings in question. Instead, it asserted that the UK Supreme Court is the ultimate judicial authority on questions to do with Convention rights in domestic law.

Courts would have been permitted to adopt an interpretation of a right that diverges from ECtHR jurisprudence, and prevented from adopting an interpretation that expanded on the protection it provides, unless there was "no reasonable doubt" that the ECtHR would also adopt that interpretation.

"Respecting the will of Parliament"

The Government took the view that the HRA does not provide sufficient clarity as to how the courts should determine whether the infringement of a qualified right is necessary and proportionate.[152] This has resulted in inconsistency and uncertainty, according to the proposal, and has "impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest". [153]

The Bill would therefore have required the courts to make certain assumptions about Parliament's intentions when determining questions of compatibility in legislation which involve deciding whether it strikes an

151 For a detailed explanation of each clause see the explanatory notes and the JCHR's Legislative Scrutiny Report: Bill of Rights Bill, 25 January 2023

152 See section 1.2 above

153 Explanatory notes, para 289

appropriate balance between different policy aims, rights, or rights of different persons.

It would have required the courts to assume that Parliament had decided that the legislation struck the right balance, and to "give the greatest possible weight" to the principle that in a parliamentary democracy, such decisions are properly made by Parliament.[154]

Interpretation of legislation: Repeal of section 3 of the HRA

Section 3 of the HRA would have been repealed without replacement, meaning that the courts would no longer be obliged to find Convention-compliant interpretations of legislation, where possible.

This would address the Government's concern, outlined above, that section 3 "compels the court to expand the interpretive duty beyond what is appropriate for an unelected body".[155] The Government believed that a duty to interpret legislation which was less expansive would provide "greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues".[156]

The role of Parliament: Statements of compatibility

As described above, section 19 of the HRA currently requires the relevant minister to make a statement of compatibility with the ECHR (or a statement that they are unable to do so) in relation to new legislation in advance of second reading.

The Bill would have repealed this requirement without replacing it.

The consultation paper suggested that:

> There is a debate as to whether section 19 strikes the right constitutional balance between Government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies – in particular, whether the test set out in section 19 is the appropriate test, and if not, how might it be improved.[157]

The Government concluded that reform was needed because of the "stigma" attached to making a section 19(1)(b) statement, which effectively acts as a veto.[158]

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154 According to the explanatory notes this clause was "about respecting the will of Parliament"

155 Explanatory notes, para 235

156 Explanatory notes to the Bill of Rights Bill, para 236

157 Human Rights Act Reform: A Modern Bill of Rights, para 86

158 As above, paras 88-89

Public authorities: Limiting positive obligations

The Bill would have prevented the courts from adopting a post-commencement (of the Bill of Rights Act) interpretation of a Convention right that would require a public authority to comply with a positive obligation. A positive obligation was defined as an obligation to do any act.[159]

When considering whether to apply an existing interpretation of a Convention right that would require compliance with a positive obligation, it would have required the courts to "give great weight to the need to avoid" certain consequences, such as having an impact on the ability of the public authority or any other public authority to perform its functions.

According to the explanatory notes this non-exhaustive list was intended to guide courts to consider "the wider implications of their decision (rather than just the need to do justice in the particular case)".[160]

Procedure: new permission stage

The Bill would have introduced a new permission stage for bringing a claim, meaning that it would not be possible to bring a civil law claim under the Bill without first seeking the permission of the court.

The court would be able to grant permission only if it considered that the person is or would be a victim and that they had or would suffer a significant disadvantage.

According to the consultation paper, this was one of a number of proposals aimed at restoring "a sharper focus on fundamental rights, including by ensuring unmeritorious cases are filtered earlier".[161]

Remedies

The Bill also sought to limit the availability of remedies, such as compensation, for successful claimants.

These proposals reflected the Government's belief that the courts should seek to protect the wider public interest as well as individuals' rights when awarding compensation, by considering the impact of the award on the public authority's ability to discharge its duties.

The Government believed that the new human rights framework "should reflect the importance of responsibilities" notwithstanding the fact that "everyone holds human rights whether or not they undertake their

159 Clause 5(7)

160 Explanatory notes to the Bill of Rights Bill, para 61

161 Human Rights Act Reform: A Modern Bill of Rights, para 218

responsibilities, particularly the absolute rights in the Convention such as the prohibition on torture".[162]

Under the proposals put forward, courts would be able to hear about the lawfulness of the claimant's conduct in the circumstances surrounding the claim, but could also consider relevant past conduct.

Balancing rights

Several clauses sought to alter the weight given to the protection of specific rights, or the way in which rights apply in specific circumstances or in relation to certain categories of claimant.

Freedom of expression

The Bill would have required the courts to give "great weight" to the importance of freedom of speech when determining a relevant question. This reflected the Government's belief that the ECtHR has given insufficient emphasis to the importance of free speech, particularly when balancing it against other rights, such as the Article 8 right to privacy.

Jury trial

The Bill would have recognised "that the ways in which the [Article 6] right to a fair trial is capable of being secured include … legislation under which a person is tried by jury" in the UK, according to the explanatory notes.[163]

Rights of convicted offenders

The Bill also sought to prescribe how the courts would in the future consider potential breaches of Convention rights in cases concerning individuals subject to custodial sentences following conviction for an offence.

The courts would have been required to give the "greatest possible weight to the importance of reducing the risk to the public from persons who have committed offences" when determining if a Convention right had been breached.[164]

The requirement would have applied in particular to decisions about whether someone should be released from custody, and whether they should be placed in a particular part of a prison.[165]

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162 Human Rights Act Reform: A Modern Bill of Rights, para 302

163 Explanatory notes, paras 95-96. Given that the clause would merely recognise the status quo, it is not clear that it would have had any legal effect.

164 Clause 8(2)

165 It would have applied to claims relating to all the Convention rights apart from: Article 2 (right to life); Article 3 (prohibition of torture); Article 4(1) (prohibition of slavery); Article 7 (no punishment without law)

Deportation: Right to private and family life (Article 8)

The consultation suggested that public confidence in the human rights framework is damaged when foreign criminal and terrorism suspects can evade deportation "because their human rights are given greater weight than the safety and security of the public". [166]

Building on existing legislation, the Bill would have prescribed how the courts would balance Article 8 rights to a private and family life against other interests when considering the compatibility of any legislative provision concerning deportation with Article 8.

It stated that a provision may not be found incompatible with Article 8 unless it would require a public authority to act in a way that would cause a qualifying member of a person's family harm "that is so extreme that [it] would override the otherwise paramount public interest" in deporting that person.[167]

Deportation: Right to a fair trial (Article 6)

The Bill also sought to prescribe how the courts should deal with deportation cases where deportation is opposed on the basis that it would be incompatible with the subject's right to a fair trial under Article 6 ECHR.

It stated that the court must dismiss the appeal unless the deportation would result in a breach of Article 6 "so fundamental as to amount to a nullification of that right".

Extra territorial application

The Bill included a provision to prevent claims being brought under the Bill of Rights in relation to anything done outside the British Islands in the course of an overseas military operation.[168]

It would also have prevented a human rights claim or reliance on Convention rights in the context of inquiries or other investigations into acts related to overseas military operations. The explanatory notes stated that this was intended to limit the investigative obligations under Articles 2 and 3 to conduct effective investigations into death and serious harm which arises in the course of an overseas military operation.[169]

This clause would only have come into force if the Secretary of State was satisfied that doing so was consistent with the UK's obligations under the Convention. The explanatory notes suggest that in order for the Secretary of State to be satisfied, further legislation providing for alternative remedies

166 Para 292
167 Clause 8(3)
168 Clause 14(1)
169 Explanatory notes, para 126

may be required, or the revision of extraterritorial jurisdiction under the Convention itself.[170]

Interim measures of the European Court of Human Rights

The Bill would have required the UK courts to ignore interim measures issued by the ECtHR when determining the rights and obligations of a public authority or any other person under domestic law.[171]

It would also have required the courts to ignore interim measures when considering whether to grant any relief which might affect the exercise of Convention rights.[172]

4.3 Reaction to the Bill of Rights Bill

The Government characterised the Bill of Rights Bill as a moderate compromise, which retained the overall scheme of the HRA and incorporated the same substantive rights, whilst restoring the UK's constitutional balance and emphasising traditional liberties.

Introducing the Bill, then Justice Secretary Dominic Raab described it as "the next chapter in the evolution and strengthening of our human rights framework". He explained that the key objective of the Bill was to "reinforce quintessential UK rights such as freedom of speech, the liberty that guards all others".[173]

He stated that reforms to sections 2 and 3 of the HRA would address issues of judicial overreach from the ECtHR and that: "We will be crystal clear when it comes to the laws of the land … it is Parliament that has the last word."[174]

It was welcomed by a number of Conservative MPs, including Peter Bone, Sir Bill Cash and Sir Robert Buckland, on the basis that it would fulfil the manifesto commitment to reform the HRA and ensure that Parliament and the UK courts would have the last word.[175] Other Conservative MPs welcomed Dominic Raab's suggestion that the Bill would make it easier to deport foreign national offenders and those arriving in the country illegally, noting in particular the recent use of interim measures to prevent the departure of a flight to Rwanda. A number questioned whether withdrawal from the ECHR might be preferable.[176]

170 As above, para 129
171 Clause 24(1)
172 Clause 24(2)-(3)
173 HC Deb 22 June 2022, c 845
174 As above, c 846
175 As above, c 851-4
176 As above

Some newspapers welcomed the measures to strengthen free speech, including against a "regrettable tendency" to shut it down in order to protect privacy.[177]

However, support for the Bill was not widespread, even from those who might be presumed to be sympathetic to its underlying aims.

Professor Richard Ekins of the Judicial Power Project said that the Bill had addressed some real problems with the HRA, and to that extent was to be welcomed. [178] However, he subsequently suggested that it would have risked giving domestic judges more discretion to interpret Convention rights in a way that went beyond the ECtHR.[179]

He also noted that it would have given the Conservative Party ownership of human rights litigation, unlike the HRA (which was introduced by a Labour Government, as noted above).[180]

He suggested that the better course of action had always been to repeal the HRA without replacing it, or to sharply amend it with a view to eventual repeal. This would restore the pre-HRA constitutional position, in which human rights are protected by ordinary statute and common law, with "Parliament trusted to change the law when appropriate".[181]

Lord Sumption told Parliament's Joint Committee on Human Rights (JCHR) that he broadly welcomed the Bill's objectives but that it was trying to "square a circle that cannot be squared" by retaining membership of the ECHR "while doing a number of things that are plainly incompatible with it".[182]

He went on to describe it as "singularly badly drafted", continuing:

> … it uses expressions such as "weight", "great weight", and "the greatest possible weight" and "with no reasonable doubt", which, frankly, do not belong to the language of legal analysis at all and which the courts will find it very difficult to grapple with.[183]

Sir Robert Buckland, having welcomed the Bill's introduction, subsequently described it as a "cure in search of a problem".[184]

Dominic Raab told the JCHR that despite the lack of support for many of the Bill's proposals in the consultation responses, it had "widespread public support" for bringing "common sense into the system". The explanation for

177 The Times view on the bill of rights: Rights and Wrongs, The Times, 23 June 2022
178 Ekins, R. The Limits of Judicial Power, Policy Exchange 2022, p 14, writing at the time when the Bill had officially been "paused".
179 Ekins, R. & Casey, C., The trouble with the Human Rights Act, 9 November 2023, The Spectator
180 Ekins, R. & Casey, C., The trouble with the Human Rights Act, 9 November 2023, The Spectator
181 As above
182 Joint Committee on Human Rights, Oral evidence session, 7 September 2022. Q9
183 As above, Q10
184 Rozenberg, J. 'A cure in search of a problem', A Lawyer Writes, 1 July 2022

the disparity was that consultations tend to hear from "the sector, NGOs, those who support very elastic interpretations of human rights", he suggested.[185]

The JCHR suggested that this was "dismissive of a large volume of evidence from experts and citizens alike who engaged in good faith with the Government's consultation process".[186]

Other criticisms of the Bill included that it would:

- Reduce the protection of rights by diminishing the level and form of domestic protection and thus limit their practical effectiveness; [187]
- Result in an increase in successful cases against the UK in the ECtHR, with potential implications for the UK's compliance with international law if it was reluctant to implement judgments;[188]
- Create legal uncertainty, resulting in costly litigation with little obvious benefit;[189]
- Constrain the ability of the courts to develop the law and diminish the UK's influence on ECtHR case law;[190]
- Reduce parliamentary oversight of human rights;[191]
- Have a negative impact on devolution arrangements and the Belfast/Good Friday Agreement.[192]

185 Joint Committee on Human Rights, Oral evidence session, 14 December 2022, Q20

186 Legislative Scrutiny: Bill of Rights Bill, Joint Committee on Human Rights, HC 611, HL Paper 132, 25 January 2023, para 12

187 For example, M Elliot, The UK's (new) Bill of Rights, publiclawforeveryone.com, 22 June 2022; Green, DA, The proposed Bill of Rights is a pointless distraction, *Prospect*, 27 June 2022; Stevens, A. & Marsons, L., Raab's new bill weakens rights remedies, 2022, Law Society Gazette

188 For example, Lock, D., Three ways the Bill of Rights Bill undermines UK sovereignty, UK Constitutional Law Blog, 2022; Moxham, L., The UK's new "Bill of Rights" and the implementation of ECtHR judgments, 2022, starsbourgobservers.com

189 For example, Lord Dyson, Human Rights Act Reform: a Dangerous or Welcome Change?, JUSTICE lecture delivered at the University of Leeds, 16 November 2022

190 For example, Masterman, R., The Convention Rights in the Human Rights Act and under a Bill of Rights: Domestic, European or Both?, 2022, UK Constitutional Law Blog

191 For example, Lock, D., Three ways the Bill of Rights Bill undermines UK sovereignty, UK Constitutional Law Blog, 2022

192 For example, Murray, C., The Good Friday Agreement: Misunderstandings in Ministerial accounts of the Bill of Rights, 2022, constitutionallawmatters.org

Scrutiny by the Joint Committee on Human Rights

Inquiry into the Independent Human Rights Act Review

In January 2021 the JCHR launched its own inquiry into the Independent Human Rights Act Review (IHRAR; see section 4.1), seeking views to inform its response to the review itself and its outcome.

The committee's report concluded that the positive impact of the HRA should be welcomed and protected, and that amending it could constitute a risk to the UK's constitutional settlement and to the enforcement of human rights.[193] The then Chair, Harriet Harman, said that as a result of these findings there was "absolutely no justification for any changes along the lines mooted".[194]

Inquiry into the Government consultation on a modern bill of rights

The JCHR conducted a further inquiry into the proposals contained in the Government's consultation on a modern bill of rights and reported in April 2022.[195]

It again concluded that the case had not been made for reform of the HRA in the manner proposed in the consultation. It also expressed concern that the proposals ran counter to three central principles of human rights law:

- Human rights are universal, applying to everyone
- Human rights are fundamental and require special protection within the domestic and international legal order
- Human rights must be able to stand the test of time[196]

Report on the Bill of Rights Bill

The JCHR's report on the Bill of Rights Bill, published in January 2023, concluded that the Government should not proceed with the Bill in its current form.[197] As well as providing detailed analysis of the clauses and recommending that many of them should be removed or significantly amended, the committee identified some overarching problems with the Bill:

193 The Government's Independent Review of the Human Rights Act, 8 July 2021, HC89, Joint Committee on Human Rights

194 As above

195 Human Rights Act Reform, Joint Committee on Human Rights, 13 April 2022, HC1033, HL Paper 191,

196 As above, page 4

197 Legislative Scrutiny: Bill of Rights Bill, Joint Committee on Human Rights, 25 January 2023, HC 611, HL Paper 132, para 339

- Several of the clauses would undermine the principal of universality – that human rights apply to everyone and are not dependent on what people have done in their lives.[198]
- It would weaken human rights protection, either by limiting the power of the courts to assess Convention compliance, or by making it harder to bring a human rights claim.[199]
- The Government's rhetoric about what the Bill would achieve, "strengthening" the protection of rights, "restoring common sense", and providing "legal certainty", did not reflect the reality of how many clauses would operate in practice.[200]
- The Government had failed to provide evidence of a lack of public trust in the HRA, or to undertake a process that would instil public confidence in the Bill of Rights.[201]
- There was an overwhelming lack of support for the Bill, which did not reflect the IHRAR report, the responses to the Government's own consultation, the written evidence received by the JCHR, or numerous public statements by legal experts.[202]

198 As above, paras 319-320
199 As above, para 322
200 As above, para 327
201 As above, para 332
202 As above, paras 337-338

5 What next?

5.1 Measures taken forward in other legislation

Although the Bill of Rights Bill was withdrawn, measures have appeared in other legislation which would resurrect some of its provisions or otherwise further the same policy objectives.[203]

Safety of Rwanda (Asylum and Immigration) Bill

The Safety of Rwanda (Asylum and Immigration) Bill 2023-24 was introduced on 7 December. It contains provisions which would disapply parts of the Human Rights Act (HRA), and which would affect the way the UK responds to interim measures of the European Court of Human Rights (ECtHR).[204]

The Home Secretary made a section 19(1)(b) statement, indicating that he is not satisfied that the Bill would withstand a legal challenge based on compatibility with the European Convention on Human Rights (ECHR).[205]

The Bill would require the courts and other decision makers to conclusively treat Rwanda as a safe country, meaning that the courts would not be able to consider a review of a decision to remove a person to Rwanda brought on the basis that Rwanda is not safe. This provision would apply notwithstanding the HRA and any other provision in domestic law or interpretation of international law.[206]

Section 2 of the HRA, which requires UK courts to take account of the case law of the ECtHR, would be disapplied for the purpose of determining

[203] In addition to the measures discussed below, which have a direct bearing on the HRA and ECHR, the Government tabled amendments to the Economic Crime and Corporate Transparency Bill aimed at dealing with so called 'SLAPP claims': strategic litigation against public participation. These are claims brought to prevent publication of information, typically on the basis of defamation, where the claimant seeks to use the threat of expensive litigation to conceal allegations of wrongdoing. The amendments aimed to provide defendants with greater protection when faced with SLAPPs relating to economic crime, thereby supporting freedom of expression: Government Factsheet on the amendments.

[204] For further details see Library briefings: Safety of Rwanda (Asylum and Immigration) Bill 2023-24 (PDF), 8 December 2023 & Safety of Rwanda Bill: legal commentary (PDF), 12 January 2024

[205] Dominic Raab described the test of whether to issue a s19(a) statement (indicating that the minister believes that a bill is compatible with the ECHR) as whether it is more likely than not that the Bill would withstand legal challenge on convention grounds: "effectively a 51% test" (PDF): Oral evidence to the JCHR, 14 December 2022, Q34

[206] Clause 2(5)

whether Rwanda is a safe country for a person to be removed to in respect of a decision taken under the Immigration Acts.[207]

So, where the question of whether Rwanda is a safe country arises in the context of Convention rights[208] in any such proceedings, courts and tribunals would not be required to take account of any relevant ECtHR case law. They would not however be prevented from doing so.

It would also disapply section 3 of the HRA in relation to the entire Bill. This would mean that when the courts are interpreting the legislation there is no requirement to attempt to find a Convention-compliant reading of it.[209]

And, it would disapply sections 6 to 9 of the HRA, which require public bodies to act compatibly with rights and enable individuals to bring claims, in relation to certain specific decisions:

- A decision to conclusively treat Rwanda as a safe country under clause 2(1) of the Bill
- A decision as to whether to grant interim relief, such as an injunction preventing removal, in a challenge to removal based on particular individual circumstances
- A decision as to whether the person would face a real risk of serious and irreversible harm[210] in a challenge to removal to Rwanda based on particular individual circumstances.[211]

As a result, decision makers involved in these decisions (immigration officers, the Secretary of State, courts and tribunals) would not be obliged to act compatibly with Convention rights when making the decision. Further, the subject of the decision would not be able to bring a claim in the domestic courts that their human rights had been violated as a result of the decision or receive a remedy on that basis.

Clause 5 of the Safety of Rwanda Bill would provide that where interim measures are indicated (issued) in proceedings concerning the removal of a person to Rwanda , a minister can decide whether to comply with them. Courts and tribunals would be instructed to ignore interim measures when considering an application or appeal relating to such proceedings.[212]

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207 These are defined by section 61 of the UK Borders Act 2007

208 These are the rights set out in Schedule 1 of the HRA

209 Clause 3(4)

210 Taken under section 42(2) of the Illegal Migration Act 2023

211 Taken under sections 44(6)(a) and 45(3) of the 2023 Act. In an appeal under section 45(3), the risk must also be "obvious".

212 The JCHR noted in the context of a similar provision in the Bill of Rights Bill that although interim measures are not strictly binding on the courts as a matter of domestic law, the fact that they bind the state as a matter of international law is "plainly a relevant matter that the court should take into account when deciding whether it should grant relief": Joint Committee on Human Rights Legislative Scrutiny: Bill of Rights Bill, 25 January 2023, HC 611, HL Paper 132, para 243.

Illegal Migration Act 2023

The Illegal Migration Act 2023 also contains a number of provisions which would disapply or override parts of the HRA, as well as an instruction to the courts to ignore interim measures of the ECtHR in certain circumstances.

Firstly, section 1(5) disapplies section 3 of the HRA, removing the courts' obligation to interpret the Illegal Migration Act compatibly with the ECHR so far as possible. Instead, there is an obligation to read and give effect to the Act in accordance with its purpose of preventing and deterring unlawful migration, so far as possible.[213]

Secondly, section 5 provides that the duty or power to remove people under the Act applies regardless of whether the person makes a claim that to do so would be unlawful under section 6 of the HRA, thereby removing the duty not to act contrary to the ECHR.

Further, section 55 provides that the minister can decide that the duty to make arrangements for removal in section 2 does not apply to a person with respect to whom interim measures have been indicated by the ECtHR. In doing so they are permitted (but not required) to consider various factors, including whether the UK Government was given the opportunity to make representations in the case, and the form of the decision to indicate interim measures.[214]

If the minister decides to ignore the interim measure, immigration officers, the Upper Tribunal and the courts would also be required to do so when exercising functions or considering applications or appeals under the Illegal Migration Act.[215]

As well as disapplying or overriding provisions of the HRA, the Illegal Migration Act also contains provisions which might be incompatible with Convention rights.[216] As with the Safety of Rwanda Bill, when it was introduced, the Government issued a section 19(1)(b) statement.

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213 Section 1(3)

214 These reflect the UK Government's concerns about interim measures discussed above at 2.3

215 There has been some debate as to whether this would conflict with the obligation imposed by the Civil Service Code to comply with the law. Following the introduction of the Rwanda Bill, a letter from the Cabinet Office to the Home Office was issued confirming that if the Bill was passed, guidance would be given to civil servants indicating that they would be obliged to implement a minister's decision as to whether or not to comply with interim measures.

216 The JCHR identified potential breaches of Articles 3, 4, 5, 6 and 8 of the ECHR: Legislative Scrutiny: Illegal Migration Bill, Joint Committee on Human Rights (PDF), 11 June 2023, HC 1241, HL Paper 208. For further analysis see Library Briefing papers Illegal Migration Bill 2022-23 (PDF), 2023; Illegal Migration Bill: Progress of the Bill (PDF), 2023; Illegal Migration Bill: Lords stages and amendments (PDF), 2023.

Victims and Prisoners Bill

The Victims and Prisoners Bill would also disapply section 3 HRA for the purposes of interpreting various pieces of sentencing legislation. [217]

It would amend three pieces of legislation[218] to introduce new clauses stating that section 3 HRA does not apply in relation to the statutory provisions (and any subordinate legislation) governing:

- the release of prisoners subject to life sentences
- the release, licensing, supervision and recall of fixed-term prisoners
- a power to alter release test provisions by order.

The explanatory notes state that the amendments "span the full legislative framework … relating to release, licences, supervision, and recall of indeterminate and determinate sentenced offenders".[219]

The purpose of the provisions is to avoid the courts adopting a "strained section 3 interpretation, which ultimately disregards the policy intentions of the release regime" if new or existing release measures are subsequently found to be incompatible with the ECHR.[220]

Northern Ireland Troubles Act 2023 and Overseas Operations Act 2021

The Overseas Operations (Service Personnel and Veterans) Act 2021 pre-dated the Bill of Rights Bill, but was in part an initial attempt to limit the extraterritorial application of the ECHR, and the positive obligations on authorities to carry out investigations arising under articles 2 and 3 (the right to life and the prohibition of torture).

It created a presumption against the prosecution of current or former service personnel for alleged historical offences committed overseas.[221] It also limited the courts' discretion to extend the limitation period for civil

217 Clauses 42 to 44 of the Bill as introduced (HC 58/4). Clause numbers may have changed in subsequent versions.

218 Crime (Sentences) Act 1997 ; the Criminal Justice Act 2003; and the Legal Aid, Sentencing and Punishment of Offenders Act 2012

219 Explanatory notes to the Victims and Prisoners Bill 2022-23, para 422

220 As above, para 423. As noted above, section 3 does not currently allow the courts to adopt an interpretation that runs counter to the thrust of the legislation in question. For further analysis see Library Briefing Paper the Victims and Prisoners Bill (PDF), 2023; Victims and Prisoners Bill: Progress of the Bill (PDF), 2023

221 With the exception of allegations of sexual offences, torture, crimes against humanity, genocide, and war crimes.

claims and human rights claims arising from overseas operations, and created an absolute limit of six years for such claims.[222]

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 is also aimed in part at limiting legal action against veterans with respect to Troubles-related allegations.[223] It created a conditional immunity scheme, providing immunity from prosecution for Troubles-related offences for individuals that cooperate with a newly established Independent Commission for Reconciliation and Information Recovery. It will prevent other investigations and legal proceedings relating to Troubles-related conduct from proceeding.[224]

The ECtHR has previously found that granting amnesties is incompatible with state obligations to provide mechanisms for effective investigation under articles 2 and 3 of the ECHR.[225]

5.2 Impact on the UK's human rights framework

Concerns have been raised about the potential impact of these provisions on human rights and the rule of law. Many of them echo criticism of the Bill of Rights Bill.

Critics have raised the same issues with respect to the disapplication of section 3 of the HRA in the specific contexts identified in the Safety of Rwanda Bill, the Illegal Migration Act, and the Victims and Prisoners Bill as with repeal of section 3 proposed by the Bill of Rights Bill. Namely, that it is likely to lead to more declarations of incompatibility arising from legal claims, and unless the Government chooses to take measures to address those incompatibilities, to more adverse judgments against the UK from the ECtHR.[226]

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222 For further analysis see Library briefing Overseas Operations (Service Personnel and Veterans) Bill 2019-21

223 When Alex Chalk confirmed that the Bill of Rights Bill would not be taken forward he identified relevant measures being taken forward elsewhere, including that this legislation would address vexatious claims against veterans and the armed forces: HC Deb 27 June 2023, c145

224 For further analysis see Library briefing Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022-2023

225 A requirement for the Commissioner for Investigations to comply with the obligations imposed by the HRA was added as a safeguard during the Bill's passage to address concerns on this point: section 13(1).

226 For example, the JCHR said of the Victims and Prisoners Bill "We also consider that disapplying section 3 HRA is likely to result in more legislation being declared incompatible and more successful cases being brought before the European Court of Human Rights in Strasbourg": Letter from Chair of the Joint Committee on Human Rights to Alex Chalk, 3 October 2023. Policy Exchange argue that because the possibility of obtaining a declaration of incompatibility remains under the Safety of Rwanda Bill, it will be very difficult to maintain the policy in the face of such a

Likewise, any expectation to ignore interim measures of the ECtHR, or limit the ability of individuals to bring human rights claims in the UK courts, gives rise to a risk of an increase in the ECtHR finding against the UK.[227]

Differential application of the HRA to certain groups by these pieces of legislation also runs counter to the principle that human rights are universal.[228] The JCHR suggest that it gives rise to concerns about the prohibition on discrimination under Article 14.[229]

> Those affected by [the IMA] and the subordinate legislation made under it will arguably receive different treatment, because for them public authorities will be permitted to read and give effect to legislation in a way that is incompatible with human rights. Furthermore, while others faced with a legislative provision that violates their rights could argue that the courts should give a new Convention-compatible reading to that legislation under section 3 HRA, those affected by this Bill would not have that option available them. This could result in them being unable to remedy the violation of their rights.[230]

The approach of legislating to selectively apply the HRA also undermines the principles that human rights are fundamental and require special protection in the domestic legal order, and that they must be able to stand the test of time (as noted by the JCHR: see above at 5.3).

decision: Safety of Rwanda (asylum and Migration) Bill: A Policy Exchange Briefing Paper, December 2023. Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2022-2023 (PDF), Ministry of Justice, November 2023, CP 958, Annex A sets out how the Government has responded to all declarations of incompatibility to date: generally by introducing primary or secondary legislation, or a remedial order under section 10 of the HRA. The JCHR note that even when the Government chooses to respond to declarations of incompatibility by amending the legislation in question, this is a usually a long and drawn-out process, during which the incompatible legislation remains in law and continues to infringe rights: Legislative Scrutiny: Illegal Migration Bill, Joint Committee on Human Rights (PDF), 11 June 2023, HC 1241, HL Paper 208, para 85.

227 The JCHR recommended that the clause in the IMA be removed on the basis that it "permits deliberate breaches of our obligation to comply with interim measures": Legislative Scrutiny: Illegal Migration Bill, Joint Committee on Human Rights (PDF), 11 June 2023, HC 1241, HL Paper 208, para 133.

228 For example, The Illegal Migration Bill: Constitutional Implications, Bonavero Institute, 22 May 2023, para 69

229 Article 14 prohibits unjustified discrimination in the enjoyment of Convention rights on grounds including race and national origin, as well as other status, which may include immigration status.

230 Legislative Scrutiny: Illegal Migration Bill, Joint Committee on Human Rights, para 89. A similar point was made by the JCHR regarding the Victims and Prisoners Bill. In a letter to the Lord Chancellor it said "By disapplying it in respect of a particular cohort the Government also risks undermining the fundamental principle that human rights are universal.": Letter from Chair of the Joint Committee on Human Rights to Alex Chalk, 3 October 2023

How might the UK respond to an adverse ruling from the ECtHR?

In the event of an adverse ruling by the ECtHR, it would then be for the UK to decide how to respond, in accordance with the process set out in section 2 of this briefing.

As noted, the UK currently has a relatively good record of responding to ECtHR judgments, meaning it has few cases pending against it.[231]

However, language surrounding the Bill of Rights Bill, the Illegal Migration Act and the Rwanda Bill suggests an assumption that some members of the Government might like the UK on occasion to ignore ECtHR judgments that it disagrees with. The consultation paper preceding the Bill of Rights Bill talked of a "democratic shield to defend the dualist system in the UK by making clear that Parliament, in the exercise of the legislative function, has the last word on how to respond to adverse rulings".[232]

Introducing the Bill, Dominic Raab gave the example of prisoner voting as an occasion where the Government had refused to comply.[233]

It is unclear how the Council of Europe's Committee of Ministers (which oversees the implementation of ECtHR judgments; see section 2.2 above) would respond if the UK were to openly defy the ECtHR. It would contrast with the approach taken to finding a solution to the question of prisoner voting, which involved engaging in ongoing dialogue, and has been characterised as 'minimal compliance'.[234]

There are few precedents for a position of open defiance. Prior to its expulsion from the Council of Europe, Russia passed a law which sought to redefine its approach to the implementation of ECtHR judgments, following a judgment of the Russian Constitutional Court. The court held that when an ECtHR judgment contradicted constitutional values, the constitution should prevail, and the judgment should not be enforced. A law was passed

231 See Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2022-2023 (PDF), Ministry of Justice, November 2023, CP 958, which notes that the number of pending cases against the UK is lower than other States with a similar population size (page 10). Table 2 of Annex B puts the UK in joint 27th place out of 46 member states.

232 Human Rights Act Reform: A Modern Bill of Rights, para 316

233 This is a reference to the case of *Hirst (No 2)* [2005] ECHR 681, in which the ECtHR held that the blanket ban on prisoners voting violated Article 3 of Protocol 1 of the ECHR. This led to a long running political debate about the ECtHR and parliamentary sovereignty. Non-legislative changes were eventually made to the rules concerning prisoner voting. They were of limited scope but the Council of Europe agreed that they were an acceptable compromise and the case was closed in 2018: Council of Europe, Committee of Ministers 1324th meeting, 7 September 2018. For further details see Library Briefing paper Prisoners' voting rights (PDF), 9 August 2023

234 Von Staden, A., Pushing the envelope: Minimalist Compliance in the UK Prisoner Voting Rights Cases, 2018, ECHR Blog: where states choose to eventually comply but make a rational calculation aimed at minimising any political or material cost and retaining some decision-making authority.

subsequently providing for a review mechanism to determine whether an ECtHR judgment could be enforced.[235]

The European Commission for Democracy Through Law (a Council of Europe advisory body known as the Venice Commission) said that the law was incompatible with Russia's obligations under international law, stating:

> Whatever model of relations between the domestic and the international system is chosen, a State is bound under Article 26 of the Vienna Convention on the Law on Treaties to respect ratified international agreements and pursuant to Article 27 of the Vienna Convention it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the European Convention on Human Rights. The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court; thus, it is the duty of all State bodies to find appropriate solutions for reconciling those provisions of the treaty with the Constitution (for instance through interpretation or even the modification of the Constitution). [236]

In February 2023, the Polish Government informed the ECtHR that it would not comply with interim measures issued in a case concerning the transfer of judges to alternative posts against their will. This was based in part on a decision by the Polish Constitutional Court, which questioned the authority of the ECtHR to assess the compliance of laws concerning the judiciary, saying it was incompatible with the constitution.[237]

It has also been reported that on 15 November 2023 France ignored an order not to deport an individual to Uzbekistan.[238] Following this, on 7 December 2023, the French Conseil d'état (the most senior administrative court in France) ruled that the right of access to an effective remedy by a court was a fundamental freedom, protected by the French Constitution and by Articles 6 and 13 of the ECHR. Interim measures indicated by the ECHR are designed to ensure the effectiveness of that right of access to an effective remedy by a court. Therefore, deporting an individual in violation of an interim measure was a "serious and manifestly illegal violation of a fundamental freedom".[239]

This judgment of the Conseil d'état effectively means that it is illegal for any French civil servant or Minister to deport a person contrary to a Rule 39 indication by the ECHR and effectively means that the French Minister of the Interior cannot try to same approach again.

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235 Malksoo, L., Russia's Constitutional Court defies the European Court of Human Rights, European Constitutional Law Review, 2016, 12(2).

236 Opinion No. 832/2015, 15 March 2016

237 Non-compliance with interim measures in Polish judiciary cases (PDF), Press Release ECHR 053, 16 February 2023; Ref No. K 7/12

238 Tettenborn, A., If France can ignore the ECHR, why can't we?, The Spectator, 5 December 2023

239 French court orders return of deported Uzbek national in rebuke to interior minister, Le Monde, 13 December 2023

Hungary has taken a different approach, appearing to be compliant, while using friendly settlements and unilateral declarations,[240] possibly to avoid cases concluding with adverse findings.[241]

Article 46(4) of the ECHR allows the Committee of Ministers to refer to the ECtHR questions as to whether a state has fulfilled its obligation under Article 46(1) to abide by the final judgment of the court. It would then be for the Committee of Ministers to determine what measures should be taken if a violation is found.[242] There have so far only been two Article 46(4) judgments – one relating to the continued detention of a political prisoner in Azerbaijan and the other relating to the continued detention of a political prisoner in Turkey.[243]

While there are a variety of approaches to compliance, including delay and negotiation, it is probable that open defiance of the ECtHR would not be compatible with ongoing membership of the ECHR.[244]

The ECHR and British foreign policy

It has been argued that adherence to the ECHR and ECtHR judgments is an important motor for spreading British values.[245] Implementation of judgments of the ECtHR has led to significant improvements for rule of law and human rights in Europe, including helping to foster judicial

[240] A unilateral declaration is a mechanism for having a case struck out if the applicant refuses to accept a reasonable proposal from the respondent during the friendly settlement stage: Unilateral declarations: policy and practice, European Court of Human Rights, July 2023

[241] Kos, U.A., Controlling the narrative: Hungary's post-2010 strategies of non-compliance before the European Court of Human Rights, European Constitutional Law Review 2023, 19(2); Fikfak, V., The UK's defiance of the European Court of Human Rights, The Constitution Unit, 1 June 2023

[242] Article 46(5)

[243] *Ilgar Mammadov v Azerbaijan*; and *Osman Kavala v Türkiye*.

[244] Eg Lock, D., Three ways the Bill of Rights Bill Undermines UK Sovereignty, UK Constitutional Law Blog, 27 June 2022, suggests that "If the UK is persistently in breach of its treaty obligations, the Council of Europe would presumably have no choice but to exclude the UK as it did Russia, or risk undermining the integrity of human rights protections across Europe."

[245] The UK Government funds a Council of Europe project to help with ECHR implementation in various Eastern European countries: HELP implementing the ECHR in Eastern Partnership Countries

independence,[246] freedom of expression,[247] and freedom of assembly.[248] One example of particular relevance are the judgments in favour of the "Hyde Park" organisation in Moldova. Created to protect free speech and freedom of assembly, the group was named after the well-known location in London, where there is a long tradition of speech being allowed in favour of any subject. "Hyde Park" was routinely banned from holding peaceful assemblies in Chişinău, the capital of Moldova. Following victories for the organisation at the ECtHR, the Moldovan authorities conducted reforms to enshrine protections for freedom of assembly, which continue to be in place.[249]

Reforms like this are facilitated by general adherence to ECtHR judgments in Europe. The UK's strong record in the implementation of ECtHR judgments helps to ensure other European states also implement ECtHR judgments. Conversely, rhetoric in the United Kingdom which challenges the validity of ECtHR judgments and/or threatens to withdraw from the ECHR, provides political support to governments with autocratic tendencies which would seek to challenge the values of adherence to the rule of law and human rights. For example, the Ukrainian authorities under Victor Yanukovych – which were ousted in the 2014 Maidan "Revolution of Dignity" – questioned the need to implement an ECtHR judgment relating to the independence of the judiciary, in part by pointing to political discourse in the United Kingdom concerning the UK's possible withdrawal from the ECHR.[250]

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246 For example, see a summary of the follow-up to the judgment of the European Court of Human Rights in the case of Oleksandr Volkov v. Ukraine (21722/11), 9 January 2013: Reinstatement of judge said to be the victim of political corruption. The case highlighted how a Ukrainian Supreme Court judge had been unfairly removed from office, undermining judicial independence. Following the judgment of the European Court of Human Rights, Mr Volkov was reinstated, and the Ukrainian government has also carried out substantial legislative and institutional reforms in order to improve the independence and impartiality of the judiciary.

247 For example, following the end of the communist era, draconian defamation laws stayed in place in many countries in Eastern Europe, which made it very difficult for journalists to publish critical stories about people in power. Journalists could be subjected to enormous fines and prison sentences for publishing allegations of fraud or corruption in the public interest. Following judgments of the European Court of Human Rights, improved free speech protections were introduced in Georgia (Greater protections for free speech after journalist sued for reporting on alleged political corruption), Romania (Reforms to protect free speech after journalist given prison sentence), Montenegro (Justice for magazine editor ordered to pay huge damages – and new rules to protect free speech), Serbia (Reforms made after pensioner given unreasonable punishments), Slovenia (Magazine made to pay damages for criticising politician's homophobic behaviour), and Ukraine (Legal attack on a newspaper highlights the need for free speech reforms).

248 For example, reforms to protect the right to free assembly have been introduced after judgments of the European Court of Human Rights concerning Armenia (An unreasonable ban on a peaceful demonstration leads to reforms to protect free assembly), Moldova (Free speech group helps strengthen the right to public protest), Poland (Better protections for peaceful demonstrations after protest was banned), and Ukraine (Arrest of human rights campaigner during his anti-corruption protest sparks freedom of assembly reforms).

249 Free speech group helps strengthen the right to public protest - Impact of the European Convention on Human Rights, 2009, coe.int

250 Leach, P., & Donald, A., Hostility to the European Court and the risks of contagion, 2013, UK Human Rights Blog

5.3 Could the UK withdraw from the ECHR?

The Government's policy is to remain a member of the ECHR.[251]

However, there have for some time been suggestions that the UK should withdraw, including from the former Home Secretary Suella Braverman, and former Supreme Court Justice Lord Sumption.[252] The issue has gained particular salience in the context of legal challenges to the Government's policies aimed at reducing illegal migration.[253]

It has been noted that if the UK were to withdraw it would join Russia and Belarus as the only European countries outside of the ECHR.[254]

Withdrawal from the ECHR is permitted under Article 58, by giving a notification with six months' notice to the Secretary General of the Council of Europe.

A notification would not release the member state from its obligations with respect to any act done before it became effective.

Whether or not to take this step would be a political decision for the UK Government. However, it would have to consider the necessary steps to give effect to such a decision as a matter of domestic law, and to the legal and political consequences.

Another question would be what would happen to the HRA. It could be repealed, with or without replacement, or amended. But any of these options would require parliamentary approval, and as noted above, it is unclear whether a majority of MPs would vote to do so. It could also be left

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251 During his statement announcing the publication of the Safety of Rwanda Bill, the Home Secretary said "We have no intention of leaving the ECHR" in response to a question on the impact of withdrawal: HC Deb 6 December 2023, c444. In May 2023, the Prime Minister signed the Reykjavik Declaration, which stated: "We reaffirm our deep and abiding commitment to the European Convention on Human Rights and the European Court of Human Rights as the ultimate guarantors of human rights across our continent, alongside our domestic democratic and judicial systems. We reaffirm our primary obligation under the Convention to secure to everyone within our jurisdiction the rights and freedoms defined in the Convention in accordance with the principle of subsidiarity, as well as our unconditional obligation to abide by the final judgments of the European Court of Human Rights in any case to which we are parties."

252 "Suella Braverman restates wish for UK to leave European court of human rights", The Guardian, 28 August 2023; Sumption, J., "Judgment call: the case for leaving the ECHR", The Spectator, 30 September 2023

253 The Supreme Court's decision in *AAA v SSHD* [2023] UKSC 42 made clear that while the Government's policy of deporting asylum seekers to Rwanda was incompatible with the ECHR/ HRA, it was also incompatible with several other international legal agreements given effect by domestic legislation.

254 Kosovo is also not yet a member but its application to join is currently being considered. The JCHR described withdrawal from the ECHR as "a deplorable and regressive step, which would see the UK become an outlier in Europe alongside Russia and Belarus": Legislative Scrutiny: Bill of Rights Bill, Joint Committee on Human Rights, HC 611, HL Paper 132, 25 January 2023, para 32

in place, decoupled from the ECHR. This would be likely to create some legal uncertainty as to how the courts would interpret the HRA in this scenario, in particular the meaning of 'Convention rights'.

Would it require legislation to leave the ECHR?

It is not certain whether leaving the ECHR would require legislation and parliamentary approval; it would depend on whether leaving without legislation (using prerogative powers) would alter or frustrate existing legislation.

Foreign affairs prerogative

Legal powers used under the royal prerogative do not require parliamentary authority.[255]

Prerogative powers relating to territory and diplomacy have long formed the basis for the conduct of British foreign policy, together with certain statutory powers. They include the power to make and ratify treaties.[256]

A decision to withdraw from a treaty such as the ECHR would therefore arguably come within the foreign affairs prerogative and thus could be taken by the Government without the need for parliamentary approval.

However, through case law the courts have developed a principle that the foreign affairs prerogative cannot be used to alter domestic law, frustrate the purpose of any statute, suspend its operation, or remove statutory rights.[257]

If ECHR withdrawal would have this effect, then the prerogative power could not be used.

The question would therefore depend on the courts' interpretation of the HRA in the absence of ECHR membership, and whether withdrawal would have the effect of frustrating its purpose. [258]

Would leaving the ECHR frustrate or alter domestic law?

It is not clear whether leaving the ECHR would frustrate or alter domestic law; there are legal arguments both for and against this conclusion.

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255 Historically these powers would have been exercised by a monarch directly but, over time, the majority have been abolished, delegated to ministers or replaced by statute. See, for example, The Cabinet Manual: A guide to laws, conventions and rules on the operation of government, UK Government, October 2011, p2.

256 For further detail on prerogative powers, see the Library's Briefing Paper: The royal prerogative and ministerial advice, 24 October 2023

257 As applied in *R (on application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

258 A similar issue might also arise with respect to other statutes which reference Convention rights, such as the Northern Ireland Act 1998 and the Scotland Act 1998

In *Miller*,[259] the Supreme Court held that the Government could not use the foreign affairs prerogative to commence the process of the UK's withdrawal from the EU under Article 50 of the Treaty on the Functioning of the European Union. This was because the effect of the UK's withdrawal from the EU would be to profoundly change domestic law and remove domestic law rights. It would also frustrate the purpose of the European Communities Act 1972, which was to give effect to the UK's membership of the EU.[260]

Having lost the case, the Government introduced a short Bill to seek parliamentary approval for triggering Article 50.[261]

While this case is relevant to the question of whether prerogative powers could be used to withdraw from the ECHR, it is not clear whether the relationship between the ECHR and the HRA on one hand, and EU law and the European Communities Act on the other, are sufficiently similar to be directly comparable.[262]

The question centres particularly on the status of 'Convention rights', and whether they are dependent on the definition of 'the Convention' in the HRA, or whether they have an independent status in domestic law.

Unlike the European Communities Act, which acted as a conduit to convey EU law into domestic law, the HRA sets out the Convention rights in domestic legislation (in Schedule 1 of the HRA). This would suggest that the HRA could remain unaffected if the prerogative were used to withdraw from the ECHR.

However, in the HRA, Convention rights are defined by reference to the Convention, which in turn is defined as "the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe on 4th November 1950 as it has effect for the time being in relation to the United Kingdom".

So, it may be that withdrawal would frustrate the purpose of the HRA, because the definition of Convention rights is dependent on the definition of the Convention, and so could not be done on the basis of prerogative powers.

259 *R (on application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

260 The Government argued that the European Communities Act was "ambulatory", meaning that it gave effect to whatever the international obligations of the UK under the EU treaties were at any given time, rather than incorporating the EU treaties directly into UK law [74]. The majority of the Supreme Court disagreed with the Government on this point [114] but there were dissenting judgments, from Lord Reed [187], with whom Lord Carnwath and Lord Hughes agreed.

261 The European Union (Notification of Withdrawal) Act 2017

262 See for example Williams, J., Miller and the Human Rights Act 1998: can the Government withdraw the UK from the ECHR by the royal prerogative?, Public Sector Blog, practicallaw.com, 2017;

It has been argued that the answer to this would depend on the courts' view of the purpose of the HRA.[263] Was it to provide UK citizens with the same protection of rights in domestic law as they would have had at the ECtHR? Or, to provide for the domestic protection of rights based on the Convention, but with their interpretation decided by the UK courts?

Both arguments can be supported by different provisions of the HRA and by the case law.[264]

However, recent case law tends to support the former view, that the purpose of the HRA was to give effect in domestic law to an international instrument. For example, the Supreme Court held that "the Human Rights Act was intended to give effect in domestic law to an international instrument, the Convention, which could only be authoritatively interpreted by the Strasbourg court".[265] In another case it said of the HRA:

> The Act therefore defines the Convention rights to which it gives effect in domestic law as the rights which are enforceable against the United Kingdom under international law. It follows that the rights given effect in domestic law have the same content as those which are given effect under international law, although they are enforceable before domestic courts rather than the European court, and against public authorities rather than the United Kingdom as a state.[266]

This interpretation would make it more likely that withdrawal from the ECHR would frustrate the purpose of the HRA, and thus require legislation.

What would it mean for the devolution settlements?

The HRA's provisions apply to all domestic legislation, including that made by the devolved legislatures or institutions. So, for example, section 6 of the HRA could be relied upon to challenge an Act of the Scottish Parliament, or regulations made by the Scottish ministers under a UK Act of Parliament.

Separately, the individual devolution statutes each impose restrictions on the devolved legislatures and authorities. They can neither legislate nor act in a way that is incompatible with Convention rights. Provisions of devolved

263 Phillipson, P., & Young, A., Would use of the prerogative to denounce the ECHR 'frustrate' the Human Rights Act? Lessons from Miller, Public Law, 2017, Nov Supp, 150-175

264 As above, citing, for example, Lord Hoffman: "What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention.": *McKerr* [2004] 1 WLR 807 at [65]. This may be contrasted with, for example, Lord Hope: "Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation": *Ambrose v Harris* [2011] UKSC 43 at [19].

265 *R (on the application of AB) (Appellant) v Secretary of State for Justice (Respondent)* [2021] UKSC 28

266 *R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent)* [2021] UKSC 56 at [87]

Acts will be read "as narrowly as required" to ensure that they are within competence, if such a reading is possible. This is a slightly different test from section 3 of the HRA's requirement that legislation be read "so far as possible" in compliance with Convention Rights, but in practice will mostly yield the same result.

This has meant, for example, that Acts of the Scottish Parliament have been deemed to be "not law" so far as they have been incompatible with Convention rights.[267]

The devolved legislatures' definition of "Convention rights" depends on, and operates by direct reference to, that in the HRA.[268]

Although the conduct of international relations is a reserved matter, withdrawal from the Convention (or amending its domestic implementation) would thus have an impact on the scope of devolved competence (the matters on which the devolved legislatures have competence to legislate).

Implications for the Belfast/Good Friday Agreement

In the 1998 Belfast/Good Friday Agreement between the UK and Ireland, the UK Government committed to incorporating the ECHR into Northern Ireland law. This included Northern Ireland having direct access to the courts and to remedies for breaches of the Convention, and the power for the courts to overrule Assembly legislation on the grounds of inconsistency.[269] The HRA currently fulfils this part of the agreement in Northern Ireland.

The ECHR is also listed in Strand One of the agreement (which provides for the democratic institutions in Northern Ireland) as one of the safeguards to

> … ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected…[270]

As Article 1 of the ECHR requires that member states "secure to everyone within their jurisdiction the rights and freedoms" set out in the

[267] See for example *Christian Institute v Lord Advocate* [2016] UKSC 51.

[268] See section 126 Scotland Act 1998, section 98 Northern Ireland Act 1998 and section 158 Government of Wales Act 2006.

[269] The Belfast Agreement 1998, Rights, Safeguards and Equality of Opportunity

[270] As above, Strand One, para 5

Convention,[271] it would not seem possible for the UK to withdraw and continue to fulfil the commitments made in the Good Friday Agreement.[272]

Further, as noted above in section 2, Article 41 of the Convention provides for the possibility of seeking just satisfaction from the ECtHR. So, it would not be sufficient simply to attempt to give effect in substance to the other Articles of the Convention.

What would it mean for the Trade and Cooperation Agreement with the EU?

Part Three of the Trade and Cooperation Agreement with the EU (the 'TCA') governs law enforcement and judicial cooperation in criminal matters between the EU and the UK. This includes matters such as extradition; the exchange of information; and the transfer of prisoners.

Respect for international human rights standards, including the ECHR, forms the basis for cooperation under this Part, with Article 524 stating:

> The cooperation provided for by this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in … the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.

The TCA further provides for an expedited procedure for termination of Part Three in the event that the UK or any member state denounces the ECHR,[273] and for a party to suspend it (or aspects of it) in the event of "serious and systematic deficiencies within one Party as regards the protection of fundamental rights or the principles of the rule of law".[274]

Thus, the TCA does not envisage the automatic termination of law enforcement and judicial cooperation in the event that the UK left the ECHR,

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271 Article 56 of the Convention permits States to declare that the Convention shall apply to "to all or any of the territories for whose international relations it is responsible", however this provision concerns the extension of jurisdiction beyond the state (see eg *Bui Van Thanh and Others v the UK*, Commission decision, 1990) and therefore could not apply in the case of Northern Ireland.

272 As Lord Chancellor, Dominic Raab told the Justice Committee that he could "see the immediate downsides" to withdrawal from the ECHR because it is "written into the Belfast Agreement": Justice Committee oral evidence, 22 November 2022, Q102. See also for example Horne, A., Why can't we just leave the European Convention on Human Rights? , The Spectator, 10 August 2023, which suggests that denouncing the ECHR would lead to the UK breaching the terms of the GFA. Also Murray, C., The Good Friday Agreement: Misunderstanding in Ministerial accounts of the Bill of Rights, 2022, Constitutional Law Matters; Green, D.A., How the Good Friday Agreement means the United Kingdom government cannot leave the ECHR (without breaching the Good Friday Agreement), 2022, Law and Policy Blog.

273 Article 692, which provides for a nine month notice period for termination, unless it is triggered by one of the parties denouncing the ECHR, in which case it takes effect on the same date as the denunciation becomes effective, or fifteen days later if then notification of termination is made after that date.

274 Article 693

and it would be a political question for the EU as to whether or not to invoke these provisions. However, during the negotiations on the agreement, the EU attached significance to the role of the ECHR in underpinning cooperation in matters such as extradition, fair trials, and the treatment of detainees.[275]

[275] For further details see Library Briefing The UK-EU Trade and Cooperation Agreement: governance and dispute settlement (PDF), 2021; Brexit trade treaty 'could be terminated' if UK quits ECHR over small boat crossings, The Guardian, 8 March 2023

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