
ADVICE TO THE LEADER
OF THE CONSERVATIVE PARTY
RE ECHR

TABLE OF CONTENTS

PART I: INTRODUCTION

1. This document constitutes my advice to the Leader and the Shadow Cabinet on the ECHR issues set out by the Leader in her speech at the Royal United Services Institute.[1] I have been assisted by a team of barristers, solicitors and academics[2] but I am especially grateful to Andrew Dinsmore who has assisted me throughout.[3] Helen Grant OBE MP, the shadow Solicitor General, has reviewed and considered this document and I am grateful to her for co-signing this advice with me. However, ultimately this document contains my advice as Shadow Attorney General, and I alone am responsible for it.

2. This document is neither a policy paper nor a report. It is a legal analysis of the European Convention on Human Rights ("**ECHR**") and Human Rights Act 1998 ("**HRA**") as measured against a series of tests, with a view to enabling you, as Leader, together with the Shadow Cabinet, to decide whether Conservative Party policy should be that the UK remain a signatory to, or should withdraw from, the ECHR.

3. Those tests are:

   3.1. **The Sovereign Borders Test**, which considers the ECHR limitations placed on Government in the context of immigration (**Part I**).

   3.2. **The Veterans Test**, which considers the role that the ECHR plays in claims against veterans both overseas and in the context of Northern Ireland legacy cases (**Part II**).

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1 Speech by Rt Hon Kemi Badenoch MP (6 June 2025, Royal United Services Institute) (https://www.rusi.org/news-and-comment/rusi-news/uk-leader-opposition-speaks-international-law-rusi).

2 Including Dr Robert Craig, Senior Lecturer in Law, University of Bristol; Rhys Davies (Barrister, Temple Garden Chambers); Alexander Horne (Barrister and Visiting Professor of Law at Durham University); Harry Gillow (Barrister, Monckton Chambers), and Prof. Richard Ekins KC (Hon) and Conor Casey of Policy Exchange, and others. Ultimately, however, this document contains my advice.

3 Barrister, Twenty Essex.

3.3. **The Fairness Test**, which considers the role that the ECHR plays in the allocation of social housing and benefits (**Part III**).

3.4. **The Justice Test**, which considers the ECHR's (i) requirements of proportionality in banning protests, and (ii) constraints in setting minimum mandatory prison sentences (**Part IV**).

3.5. **The Prosperity Test**, which considers whether the ECHR is a significant constraint on infrastructure projects (**Part V**).

4. **Parts VI to VIII** of the advice consider the specific legal issues that arise in relation to the Belfast (Good Friday) Agreement ("**BGFA**"), the UK-EU Trade and Cooperation Agreement ("**TCA**") and the Windsor Framework Agreement. While these will no doubt raise political issues, and will require careful consideration, they do not constitute legal barriers to leaving the ECHR.

5. **Parts IX and X** set out the alternatives to the current position, ranging from amending the HRA to replacing the ECHR, and the mechanics and practical implications of withdrawing from the ECHR.

6. As noted in more detail in the conclusion, the ECHR places significant legal constraints on the Government's ability to address immigration, veterans and protest issues and, currently, places some legal constraints on social housing, benefits and infrastructure projects (with the potential for climate-change litigation being the most significant risk of further interference).

7. If it is sought to remove these constraints, the simple answer is to leave the ECHR, which the UK could do legally pursuant to Article 58. It could then legislate freely on any of the issues raised in this paper, without being tied to the expansive interpretation of human rights that has been developed by the European Court of Human Rights ("**ECtHR**"). As set out later in this advice, leaving the ECHR would pose the question of what changes, if any, need to be

made to the domestic law of the UK in consequence—and in particular, whether to amend, repeal, or replace the HRA.

8. If the UK is to remain a signatory to the ECHR, attempts could be made to address the difficulties in immigration, veterans and protests through specific legislation. However, any legislation that sought to provide meaningful mitigations or solutions to these problems would face significant and potentially debilitating litigation (including in the UK) and would likely be held incompatible with the ECHR (as with the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 which is going to the UK Supreme Court ("**UKSC**") in October 2025). (It is worth remembering that successive governments have so far attempted to 'tread the line' of compliance with the ECHR in legislating on these issues, largely unsuccessfully—especially on immigration and borders policy.)

9. If the UK remained in the ECHR, significant amendments would also be required to the HRA to address the raft of recent decisions that have constrained successive Governments' ability to address significant practical issues in these areas and has led to the dramatic expansion of human rights litigation. This, too, would face significant, and likely debilitating, levels of litigation in the UK and in Strasbourg.

10. Legislation does not have to be contingent on judicial approval, but it is likely that the courts would hold any meaningful legislative reform to be incompatible with Convention rights means that any durable legislative solution would be the result of multiple clarifying amendments, with much of the important detail needing to be placed in the body of primary legislation to shield it from judicial review. It goes without saying that, politically, holding the line on a policy that is said to be "in breach of Convention rights" on multiple fronts would be very difficult to sustain indefinitely.

11. Before turning to the detail, I should make two points clear.

12. First, this advice focuses on the ECHR alone. But the legal constraints on government action in the areas under consideration do not only arise from the ECHR. Leaving the ECHR therefore will not necessarily, in and of itself, remove those constraints. To put the point another way, leaving the ECHR is not a silver bullet: while it is undoubtedly correct that the ECHR is a significant constraint on Government action, it is not the only legal constraint.[4] A powerful case can be made that many of the problems identified in the tests cannot be dealt with adequately unless the UK withdraws from the ECHR: on this approach, leaving the ECHR is a gateway condition for solving these problems. However, the fact that the ECHR is not the only legal constraint means that any decision to leave the ECHR must be taken in the knowledge that other areas of legal constraint need to be considered also.

13. Second, this advice considers the current position. As set out in more detail below, there are moves by a number of states to reform the ECHR[5] and, in particular, the approach of the ECtHR. It is beyond the scope of this advice to opine on the likely success of those moves, which is not a legal question in any event. Obviously, if there were significant reform of the ECHR, or of the jurisprudence or approach of the ECtHR, this advice should be reconsidered.

4 A point demonstrated most clearly recently by the decision of the UKSC in the Rwanda litigation, *R (AAA) v Secretary of State for the Home Department* [2023] UKSC 42.

5 Albeit the UK is not, currently, one of those states, because it was not asked to join that group.

PART I: THE SOVEREIGN BORDERS TEST

The Issues

14. This section considers whether we can regain control of our borders so Parliament—not domestic or international courts—decides who comes here and who stays. In particular:

    14.1. Are there any UK constitutional barriers to this policy?

    14.2. How does the ECHR restrict the UK's ability to operate a stringent borders policy?

    14.3. What is the effect of other international instruments like the 1951 Refugee Convention and its 1967 Protocol ("**Refugee Convention**")?

    14.4. Could this policy be achieved by repealing or amending the HRA or derogating from the ECHR?

15. This section of my advice is quite lengthy but (i) is of critical importance, and (ii) contains a lot of important material on the operation of the ECHR, the HRA and the UK constitution, which is of relevance to the advice generally.

EXECUTIVE SUMMARY

16. ECHR membership clearly places significant practical limits on the UK's ability to maintain control of its borders. The ECHR and the HRA place major restrictions on individual decision-making at every level (civil servants, judges, and ministers), and in policy and legislative design. This is not a 'bug' of the ECHR and the HRA; it is a feature.

17. Outside the ECHR—like Australia—the UK would be free to adopt more robust policies in this area and still maintain compliance with other

international law instruments to which the UK is a signatory, principally the Refugee Convention and the Torture Convention.[6]

ANALYSIS

Sub-question 1: Are there any constitutional or judicial barriers to this policy?

18. In short, no. Parliament retains the power to pass whatever legislation it wishes, regardless of whether doing so would place the UK a state in breach of international law.[7] Courts are obliged to give effect to that legislation and civil servants are required to obey it.[8] Absent incorporation into UK legislation, the basic position is that international law obligations, including international treaties, have no effect on the domestic law of the UK (with exceptions for some propositions of customary international law which are incorporated through the common law).[9] It follows that no minister or civil servant is subject to a domestic legal obligation to comply with international law—and in particular no minister or civil servant could refuse to follow a domestic legal obligation (especially a statutory obligation) on this basis.[10]

19. UK judges have no inherent ability to 'strike down' legislation that may be in breach of international law. UK courts can sometimes refer to international law, especially to construe legislation that incorporates international obligations,[11] and may seek to interpret common law authorities to reflect international law where possible.[12] It is a principle of statutory interpretation that the courts will

6 The United Nations Convention Against Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the "**Torture Convention**").
7 *R v Lyons* [2003] 1 AC 976 [28] per Lord Hoffmann.
8 *R (FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin).
9 ibid [17]; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500.
10 See Richard Ekins, Sir Stephen Laws, Conor Casey, 'Government Lawyers, the Civil Service Code, and the Rule of Law' (Policy Exchange, December 2023) (https://policyexchange.org.uk/wp-content/uploads/Government-Lawyers-the-Civil-Service-Code-and-the-Rule-of-Law.pdf).
11 ibid.
12 *R v Lyons* [2003] 1 AC 976 [27].

seek to interpret legislation in a manner consistent with the UK's international law obligations, based on a presumption of Parliament's intent.[13] However, this "*must yield to contrary parliamentary intent*".[14] In other words, provided Parliament's intentions are clear, the courts have no authority to ignore Parliament's clear intention in order to interpret legislation compatibly with the UK's international obligations. It is up to Parliament to decide how, whether, and on what terms to give domestic legal effect to international obligations, including any judicial role in considering whether some public act would place the UK in breach of those obligations. Parliament can require any such judicial role to proceed on the basis of certain factual premises or within certain limitations. For example, Parliament's response to the UKSC judgment in *R (on the application of AAA and others) v Secretary of State for the Home Department* (2023) ("*AAA*")[15] was to pass the Safety of Rwanda (Asylum and Immigration) Act 2024, which required courts to assess ECHR/HRA compliance on the factual premise that Rwanda was a safe country (seeking to override the effect of the UKSC judgment in *AAA*). Similarly, legislation can require the courts not to consider certain international obligations.[16]

20. Legislation sometimes expressly requires UK judges to consider international law. Most obviously, under section 2 of the HRA, courts must "*take into account*" judgments of the ECtHR on the Convention rights which are set out in Schedule 1 to the Act. This has been interpreted by the courts as requiring them to interpret Convention rights so as to provide protection in domestic law that is "*no more, but certainly no less*" than the protection provided by the ECtHR.[17] The

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13 ibid.

14 *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] 2 AC 471 [201]; *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 748b-c.

15 *R (AAA) v Secretary of State for the Home Department* [2023] UKSC 42.

16 See e.g. s 55(6) of the Illegal Migration Act 2023.

17 *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 ("*Ullah*") [20]; see also e.g. *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559 [85], [90], [108]. It has, however, gone further in recent years with the UK courts stating that their task is to predict what Strasbourg is likely to hold: *R (AB) v Secretary of State for Justice* [2021] UKSC 28, [2022] AC 487 [54]-[59].

net result of the case law on this point is that there is "*general alignment between the interpretation of Convention rights at the domestic and the international levels, whether or not the European court would apply the margin of appreciation doctrine*".[18]

21. Multiple sections of the HRA impose further obligations on public officials and the courts. Section 3 requires the courts to interpret statutes "*as far as possible*" to be compatible with human rights obligations. Section 4 permits the courts to issue a "*declaration of incompatibility*" if they cannot interpret statutes in a way that is compatible with those same obligations. Section 6 makes it unlawful for a public authority to act incompatibly with a "*Convention right*" which for these purposes is a right set out in Schedule 1 of the HRA in the same terms as the substantive rights in the ECHR (principally Articles 2-12 and 14, and relevant Protocols). Section 10, along with Schedule 2, provides a power to ministers to bring statutes into line with the decision of the courts using a controversial power known colloquially as a Henry VIII clause that allows ministers to rewrite primary legislation.

22. Section 3 of the HRA allows the courts to depart from the plain ordinary construction of the legislation, and the intention reasonably to be attributed to Parliament, in the interests of ensuring a compatible construction.[19] While UK courts sometimes assert the importance of maintaining the distinction between interpreting legislation, and effectively legislating themselves,[20] this is an elusive distinction in practice and is hard to reconcile with the claims made in some cases.[21] The courts have no principled way for making this distinction and there is a standing risk that legislation will be rewritten by the courts per

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18 *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 [107] per Lord Reed; this effectively corrected some previous dicta (including *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd and others intervening)* [2014] UKSC 38; and *In re G (Adoption: Unmarried Couples)* [2008] UKHL 38; [2009] AC 173) which had appeared to row back from *Ullah*.

19 *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [29]-[30].

20 *McDonald v McDonald and another* [2017] 1 All ER 961 [69].

21 See e.g. *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

section 3. Whether the risk will manifest in any particular case is difficult to predict, which is part of the problem with section 3.

23. It is therefore clear that Parliament could pass stringent borders legislation, even if this was in breach of the UK's international obligations, and civil servants and courts would be bound, respectively, to carry it out and enforce it. There would inevitably be litigation attempting to hamstring such a policy by inviting courts to interpret legislation restrictively per the UK's international obligations. Unless explicitly excluded from doing so, courts would be likely to strain to interpret any such legislation, or powers contained within it, in a manner compliant with the UK's international obligations (whether under treaty, or in customary international law), or if that could not be done, to interpret the 'offending' provisions as restrictively as possible.

Sub-question 2: How does the ECHR restrict the UK's ability to operate a stringent borders policy?

24. For the purposes of this section, a 'stringent' policy would be one that, for example, seeks to achieve the following outcomes, at scale:

24.1. illegal arrivals are detained and rapidly removed;

24.2. asylum claims from new arrivals or overstayers are rendered inadmissible[22] and subject to removal; and

24.3. foreign national offenders are subject to deportation.

25. Whilst 'deportation' is often used as an umbrella term, technically 'deportation' means removing those who have committed criminal offences, whereas 'removal' refers to removing those without valid immigration status. There are

[22] It is likely that there would be a different policy for those rare instances where individuals are *directly* fleeing harm, as opposed to arriving in the UK from a third, safe, country.

differences between the legal arguments used by those subject to either removal or deportation, but they share many features—and by far, the most significant barrier to removal at present is the ECHR. There will necessarily be overlap in the case law referred to—for instance, an asylum seeker arriving in the UK in a small boat claiming they will be tortured in their native country and that they should therefore be granted asylum, may rely on the same case law as a convicted criminal resisting deportation to their home state.

26. The starting point is that as a general principle: (i) a state is entitled to control the entry of foreign citizens and their residence in its territory;[23] and (ii) in pursuance of their task of maintaining public order, under the ECHR, Contracting Parties have the power to expel foreign citizens convicted of criminal offences.[24] Accordingly, the UK has established various pieces of legislation for deporting foreign criminals, or removing illegal migrants and overstayers.[25] In practice, none of these allows for widespread, speedy deportation or removal, because of the need for individualised judicial assessments of proportionality required by ECtHR case law (which is significant in hampering effective policy, blocking mechanistic points-based, let alone blanket category-based, decisions),[26] as well as further blocks that can

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23 See in particular *Abdulaziz, Cabales and Balkandali v United Kingdom* (9214/80; 9473/81; 9474/81, ECtHR) [67], and *Boujlifa v France* (21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI).

24 *Üner v the Netherlands* (46410/99, ECtHR) [68] ("*Üner v the Netherlands*").

25 For example, under the UK Borders Act 2007 s 32(2), (5) the Secretary of State for the Home Department *must* make a deportation order if an individual who is a foreign criminal is convicted for an offence and sentenced to imprisonment for at least 12 months. Additionally, an individual who is over 17 and convicted of an imprisonable offence *may* be deported if a court recommends it (Immigration Act 1971 s 3(6)). Courts take into account a variety of factors in making this decision, including the severity of the crime: *R v Nazari* [1980] 3 All ER 880.

26 See e.g. *MA v Denmark* (6697/18, ECtHR); *KB (Art 8: points-based proportionality assessment)* [2022] UKUT 00161 (IAC).

be raised. A person cannot be detained, nor be sent away, if that will breach their Convention rights.[27]

27. The ECHR can be used in broadly four ways to delay or prevent deportation and removal:

27.1. **(1) A substantive challenge to the primary decision to remove/deport:** A straightforward challenge on the basis that deportation or removal would breach the individual's Convention rights.[28] Usually, the decision is resisted on the basis of:

27.1.1. non-refoulement or "no return to ill-treatment", whether direct or indirect (drawing on Article 2, right to life; and Article 3, freedom from torture or degrading punishment);

27.1.2. inadequate healthcare in the destination country (an extension of Article 3); or

27.1.3. infringement of family and private life (Article 8).

27.2. **(2) Raise a fresh process or new evidence to delay or avoid removal:** For those whose asylum claims are pending, the ECHR acts as a block to a deportation or removal decision being made, on the basis that until an individual has had their asylum application determined, they cannot be deported (as not granting a genuine asylum application could breach the applicant's Convention rights). As of the end of March 2025 there were 78,745 asylum applications waiting for an initial decision, and there were 50,976 open asylum appeals before the First Tier Tribunal Immigration and Asylum Chamber (a significant increase on the 33,227 at the end of

[27] See *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; *U (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110; *Othman v Secretary of State for the Home Department* [2009] 4 All ER 1045.

[28] ibid.

June 2024, that is just before the July 2024 election).[29] This delay gives many foreign criminals and individuals subject to removal a route to remain in the UK for years whilst their asylum applications are processed (and also allows them more time to build further links to the UK and/or a family/private life which can be pointed to in legal submissions) and if initially rejected, appealed, or through fresh claims if their circumstances have materially changed.[30] Similarly, raising a claim of modern slavery can delay removal, because it triggers another ECHR ground for resisting removal, namely Article 4 (protection from slavery), as well as imposing duties and timelines contained in the Modern Slavery Act 2015[31] — this is further discussed below. It is not uncommon for applicants to raise further claims, or adduce new evidence, at late stages, to maximise delays. This is sometimes known as "stacking" claims.

27.3. **(3) Challenge process, conditions, or secondary decisions:** A challenge to the process itself, or secondary decisions made within it (including age-verification or any medical assessments), the conditions of

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29 According to official statistics: Home Office, 'How many cases are in the UK asylum system?' (updated 25 June 2025) (https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-march-2025/how-many-cases-are-in-the-uk-asylum-system).

30 See Immigration Rules, Part 12, [353], with the key question being whether there is a realistic prospect that an immigration tribunal, with the old and any new evidence, could conclude that a further appeal against the refusal of a protection or human rights claim should be allowed: *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 [7] per Buxton LJ. There is a low bar, simply "*more than a fanciful prospect*" that a different decision might be reached: *R (AK (Sri Lanka)) v Secretary of State for the Home Department* [2009] EWCA Civ 447 [34]. New evidence can also be introduced close to the date of a tribunal hearing, at the judge's discretion (with reasons), but can also result in an adjournment: *Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal* (1 November 2024) [7.13]-[7.14] (https://www.judiciary.uk/wp-content/uploads/2024/10/Practice-Direction-F-tT-IAC-01.11.24.pdf). See generally: Shu Shin Luh and Connor Johnston, *Migrant Support Handbook* (Legal Action Group, 2023) [3.42]-[3.43].

31 Article 4 has been construed in the light of ECAT by the ECtHR. Where an individual claims that they are or have been a victim of modern slavery, provided this is "*not inherently implausible*", an investigative duty arises: *CN v United Kingdom* (2013) 56 EHRR 24 [72]. The state is then prohibited from removing that individual, and may have further positive duties under Article 4 to remedy the harm done, which may have to take the form of a grant of leave to remain: *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC).

accommodation or detention, and conditions of transportation (for example, whether restrained in transit). Such challenges may be structural (challenging the whole regime) or in individual cases (for example, raising special circumstances like age, or physical or mental vulnerability, to avoid detention or raise special accommodation needs, which if not met lead to release). Many of these challenges rely on a mixture of Convention rights, and other legislation on conditions or process. For example, an individual might challenge their detention based on conditions or adequacy (either under Article 3, or more likely under the Immigration and Asylum Act 1999);[32] the lack of privacy or support given vulnerabilities (Article 8);[33] on the basis of Article 5 (deprivation of liberty) given the length of detention, or the fact that other non-detained options were possible (for example where the individual is at low risk of absconding or is co-operating with the process).[34] Detention is only justified under Article 5 of the ECHR for a reasonable period where there is a prospect of removal,[35] and would not be justified if detention is merely for the purpose of deterrence (unless this was the stated legislative intent of the detention) where there is no prospect of removal in a reasonable timeframe.[36]

27.4. **(4) Rule 39 Orders:** These are 'interim measures' which amount to purported orders issued by a single judge of the ECtHR that direct a Contracting Party to do or refrain from certain actions—most commonly not to remove a non-citizen from the country in enforcement of

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32 This Act is an example of how many ECHR requirements have been grafted directly into the immigration rules and the immigration legislation (which refer to Convention rights)—which makes the issues associated with ECHR membership more 'embedded' and difficult to deal with.

33 See e.g. *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin), [2003] HLR 27 [33].

34 See e.g. *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 and *A (Somalia)* [2007] EWCA Civ 804.

35 See e.g. *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245.

36 See e.g. *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888.

immigration law ("**a Rule 39 Order**"). They have no basis in the ECHR text and are the creation of the ECtHR. This is a technique that can be used directly to frustrate enforcing the UK's borders and was used with dramatic effect in 2022 to derail the Rwanda scheme—and hung over efforts thereafter. While Rule 39 Orders had been issued against the UK before that date, they rose in prominence in 2022, and are now clearly part of the armoury of claimant lawyers who will readily use them to delay or block removal, securing what is effectively an emergency injunction from the ECtHR, without necessarily requiring argument from both sides.[37] This results in what ECtHR sees as a mandatory order to prevent or delay removal, a recent example being injunctions to stop the planes leaving for Rwanda.

28. The focus of this advice is on the **first** and the **fourth** category of challenges, because these are the sorts of challenges which bring the ECHR into sharpest focus. The other two types of challenges raise a mixture of ECHR/HRA and other legislative grounds, although more often than not this 'other' legislation has been designed to implement the ECHR and its growing jurisprudence. All four categories have significantly expanded owing to the ECtHR's "living instrument" doctrine, a trend which is likely to continue. This can be summarised as the lowering, over time, of the threshold for breaches of the ECHR—meaning that more and more individuals have been able to resist removal or deportation on the basis of the ECHR.[38]

29. For completeness, it is worth noting that the ECHR places significant restrictions on other "novel" border policies. It is likely, for example, that

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37 This remains the case even in light of the quite marginal reforms signalled by the ECtHR in November 2023: see n 91.

38 On which, see John Finnis and Simon Murray, 'Immigration, Strasbourg, and Judicial Overreach' (Policy Exchange, 2021) ("**Finnis and Murray**") (https://policyexchange.org.uk/wp-content/uploads/2022/10/Immigration-Strasbourg-and-Judicial-Overreach.pdf).

maritime turnarounds or push-backs would face significant challenges under ECHR Articles 2 and 3, given the risks involved.[39] Even the Government's recent "one-in-one-out" agreement with France contains an ECHR carve-out (which appears to include Rule 39 Orders),[40] meaning that a person cannot be sent back to France if they have an HRA/ECHR claim pending (which would include an age assessment where relevant), or are the subject of an "*injunction or court order*" of any court.[41] This, it seems, was considered necessary in order for the agreement to be consistent with the ECHR.

30. The remainder of this sub-section goes through the different articles of the ECHR, explaining how it operates as a block on anything approaching a stringent borders regime.

Non-refoulement: ECHR Articles 2 and 3

31. The ECtHR's expansion of non-refoulement obligations (well beyond what is contained in the Refugee Convention or the Torture Convention)[42] has a significant effect on the state's ability to effect removals and deportations. It has emphasised the risks to those being deported, and consciously ignored risks to 'host' populations; it has required courts to consider possible risks of ill-treatment quite far down the chain of events after removal; and it has progressively lowered what might qualify as "ill-treatment". This has widened the range of cases that are susceptible to a refoulement argument. The net effect

39 See e.g. *Safi v Greece* (5418/15, 7 July 2022, ECtHR); *Alkhatib v Greece* (3566/16, 16 April 2024, ECtHR).

40 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic on the Prevention of Dangerous Journeys (London 29 July and Paris 30 July 2025; France No 2, 2025) Article 4.

41 It has recently been reported that migrants were removed from the first flights under this agreement because of 'last-minute legal challenges' and 'outstanding human rights claims': 'First 'one in, one out' deportation flight takes off without migrants' (The Times, 15 September 2025) (https://www.thetimes.com/article/e7b5ec86-2e03-4b6c-b0d3-b408b029659f?shareToken =86a6457dd5dcefba8d81d5b0285e2519).

42 See e.g. Richard Ekins, 'Chapter 2 - The State's Right to Exclude Asylum-Seekers and (Some) Refugees': David Miller and Christine Straehle (eds), *The Political Philosophy of Refuge* (CUP, 2019).

of these and other developments in ECtHR jurisprudence is that it is much easier to resist attempts at removal under the ECHR than it would be to claim refugee status under the Refugee Convention or resist deportation under the Torture Convention (discussed later). This is the most significant legal difference between applying for refugee status under the Refugee Convention via the UN Refugee Agency in- or near-country of origin (with a proportion of these being allocated to the UK),[43] and making the journey to the UK.

32. Articles 2 (right to life) and 3 (freedom from torture or inhuman or degrading treatment) of the ECHR are commonly addressed together by the ECtHR since they raise similar considerations. These have been interpreted as imposing obligations not to return or deport persons to territories where their life might be at risk or they might be subject to a substantial risk of inhuman or degrading treatment in the recipient country;[44] including the risk they might be subject to the death penalty.[45] It applies both to illegal migrants and to foreign criminals. In order to establish whether substantial grounds exist, the ECtHR focuses on the foreseeable consequences of the applicant's removal to the country of destination, in light of the general situation there and their personal circumstances.[46] It is notable that the ECtHR has determined that any Article 2 or Article 3 risks to the population of the would-be removing state (for example, in the case of dangerous criminals) is irrelevant[47] (unlike the Refugee

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43 Between 2010 and December 2024, the UK resettled over 35,000 individuals through UNHCR resettlement schemes (the UK Resettlement Scheme, Community Sponsorship Scheme, Mandate Scheme and ACRS Pathway 2). The UNHCR data does not include (for example) ARAP, ARR or ACRS Pathway 1 and 3. See Home Office, 'How many people come to the UK via safe and legal (humanitarian) routes?' (21 August 2025) (https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-june-2025/how-many-people-come-to-the-uk-via-safe-and-legal-humanitarian-routes).

44 See e.g. *Soering v United Kingdom* (1989) 1 EHRR 439; *Chahal v United Kingdom* (1997) 23 EHRR 413; *FG v Sweden* (43611/11, ECtHR) [110]-[111].

45 *Al-Saadoon and Mufdhi v the United Kingdom* (61498/08, ECtHR) [123], [140]-[143].

46 See e.g. *FG v Sweden* (43611/11, ECtHR) [110]-[127], *JK and Others v Sweden* (59166/12, ECtHR) [77]-[105] and *Khasanov and Rakhmanov v Russia* (28492/15 and 49975/15, ECtHR) [93]-[116].

47 *Saadi v Italy* (37201/06, 28 February 2008, ECtHR) ("*Saadi v Italy*").

Convention's provisions on refoulement, which explicitly removes the right to non-refoulement from individuals who are a danger to the 'host' country).[48] Oddly, the 'absolute' nature of Article 3 protections are entirely one-sided, only recognising risks to the foreign criminal on deportation, but not those to the population of the would-be removing state.

33. Led by Strasbourg case law, UK courts are able to take a generous view of the evidence (or lack of it). It is for the applicant to adduce this evidence,[49] although the ECtHR has found that it can be necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents, as asylum seekers are less likely to have satisfactory documentation. However, when information is presented which gives strong reasons to question their case, they must provide a satisfactory explanation.[50] There are also instances of cases where despite the documentation provided being of poor quality and/or failing to address key factors, breaches of Article 2/3 have nevertheless been found by the ECtHR.[51] The ECtHR will have regard to whether there is a general situation of violence existing in the destination country;[52] alongside the applicant's personal characteristics.[53]

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48 Refugee Convention, Article 33(2).

49 *FG v Sweden* (43611/11, ECtHR) [113].

50 *N v Sweden* (23505/09, ECtHR), *Hakizimana v Sweden* (37913/05, ECtHR); *Collins and Akaziebie v Sweden* (23944/05, ECtHR).

51 *N v Sweden* [59], [62]

52 In rare cases this may be the only consideration. This would only be appropriate in the most extreme cases, where there is a real risk of ill-treatment simply by virtue of the individual concerned being exposed to such violence on returning to the country in question: *Khasanov and Rakhmanov v Russia* [96].

53 *Sufi and Elmi v United Kingdom* (8319/07 and 11449/07, ECtHR) [216], [218]-[219] held that "*Therefore, following NA v United Kingdom, the sole question for the Court to consider in an expulsion case is whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention.* ***If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two.*** *However, it is clear that not every situation of general violence will give rise to such a risk. On the contrary, the Court has made it clear that a general situation of violence would only be of sufficient intensity to create such a risk 'in the most extreme cases' where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return…*" (emphasis added).

34. As was demonstrated in 2023 by the UKSC judgment concerning the Rwanda Scheme in *AAA*, the ECHR protections against refoulement can have a substantial impact on UK immigration policy (the following proceeds on the basis of the analysis in *AAA* as the most recent detailed and comprehensive discussion of the relevant principles in the context of UK law). In particular, any attempt to return a person to a territory where there is a real risk that that person will suffer inhuman or degrading treatment or die will be contrary to the ECHR[54] (and, by implication, a public authority that took action to return to such a territory in those circumstances would be acting contrary to section 6 of the HRA, absent direct authorisation to do so in primary legislation).

35. Moreover, as is clear from *AAA*, that principle applies not only in situations where the person would be at threat of treatment contrary to Articles 2 or 3 of the ECHR in the territory to which they were directly sent from the UK, but also in circumstances where even absent the direct risk of such treatment in the first territory, there is a risk that that person will be sent from that first territory to another territory where they might be subject to such treatment. Thus, the primary issue with the Rwanda scheme was the UKSC's scepticism that Rwanda had adequate safeguards to prevent refoulement of individuals sent there from the UK, given Rwanda's historic record in operating a voluntary returns scheme with Israel.[55]

36. In circumstances, therefore, where the Government wished to send individuals to a third country, per *AAA*, for this to be lawful under the ECHR, it would be necessary to avoid a risk of those individuals being expelled or returned from

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54 On the 'real risk' threshold, see the cases included in the following ECtHR official guides: 'Guide on Article 3 of the European Convention on Human Rights: Prohibition of torture' (28 February 2025) (https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_eng), and 'Guide on the case-law of the European Convention on Human Rights' (28 February 2025) (https://ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng), including, for example, *Sufi and Elmi v United Kingdom* (8319/07 and 11449/07, ECtHR).

55 *R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42 ("***AAA***") [95]-[105].

that third country to a territory where they could be subject to treatment contrary to Articles 2 or 3 of the ECHR. If the UK were to seek to deport those individuals prior to determining their asylum status (in circumstances where the UK did not intend itself subsequently to assess their asylum status), it would need first to establish the adequacy of the procedures in place in the third country.[56] The situation would be different were the UK to send individuals to that third country either after determining their applications for asylum or with the intention of determining their applications in relation to the UK (via an offshore processing agreement). However, even in those circumstances the UK would still need to establish what safeguards there were to prevent refoulement in the third country.

37. Another significant case was *Hirsi Jamaa v Italy*, which involved the Italian government's interdiction at sea, and the return of migrants to Libya.[57] That case held that "*Art. 3 is violated whenever any exercise of state A's jurisdiction intentionally prevents a would-be immigrant from gaining entry to state A and thereby has the effect – however contrary to state A's intentions and despite its bona fide precautionary measures – that he is exposed to some real risk of inhuman treatment, if not by state B (the receiving state, or the state from which he set out to gain entry to A), then by a subsequent receiving state C or D… or by persons within state C or D for whose criminal conduct no state authorities anywhere had even indirect responsibility or culpability*".[58] In other words, Article 3 prevents both direct and indirect refoulement, whether an individual is subject to ill-treatment by the receiving state, subsequent states they may or may not be sent to, or other individuals of those states.

38. As will be appreciated, the ECtHR's unjustified expansion of the non-refoulement principle (well beyond the use of that term in the Refugee

56 *AAA* [44].
57 *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 (27765/09) 23 February 2012 (GC).
58 ibid; summarised by Finnis and Murray, 51-52.

Convention and the Torture Convention) presents a very substantial challenge when dealing with arrivals via small boats, many of whose home countries are territories where either there is a real risk of treatment contrary to Articles 2 or 3 of the ECHR by virtue of the unstable situation in those countries, or where individual applicants may have a good chance of demonstrating that they would be at risk on account of the political situation and their own characteristics.

39. The non-refoulement principle, as it has developed under the ECHR, also presents a substantial challenge to the deportation of foreign offenders. Where there is a real risk of treatment contrary to Articles 2 or 3 of the ECHR, this will be prohibited under the ECHR. The protection against refoulement in cases where a person might be subject to treatment contrary to Article 3 of the ECHR is absolute, and there is no provision for balancing the reasons for expulsion against the risk of ill-treatment.[59] A real risk of ill-treatment contrary to Article 3 of the ECHR will, therefore, prevent deportation of an individual no matter what the reason for their expulsion, such as the nature of any crime for which they have been convicted or the risk to the 'host' population of the deporting state.[60]

40. This is made all the more challenging for the Government when one considers the significantly expanded definitions given to both the positive and negative obligations under Articles 2 and 3 where, for example, a slap by a police officer or the use of handcuffs could be sufficient to breach Article 3.[61]

59 *Saadi v Italy* (2009) 49 EHRR 30 [125] and [138].
60 ibid; Finnis and Murray, 49-50.
61 See e.g. *Bouyid v Belgium* (23380/09, 28 September 2015, ECtHR).

Inadequate healthcare: ECHR Article 3

41. In recent years there has been a significant expansion in the right of applicants to resist removal on the basis that their Article 3 rights would be breached due to medical conditions and treatment options in the recipient country (irrespective of whether the individual travelled to the UK when already seriously ill).[62] While the threshold may on the face of it appear to be very high,[63] the practical effect is quite significant. The 2020 UKSC decision in *AM (Zimbabwe)*, which followed the legal test in an earlier ECtHR decision,[64] has the effect that "*States wishing to remove someone must now prove that the medical facilities actually available to the deportee in his or her home country would eliminate any real risk that his or her lifespan would be significantly shortened by removal from NHS facilities to that country*".[65] Given the relative quality of medical care in the UK as compared to most of the 'developing world', it is clear that a whole range of conditions, both mental and physical, could lead to an argument that there is a 'real risk' that an individual's life would be 'significantly shortened'. It is likely that, given the expansive judgment in *Hirsi Jamaa v Italy*, the widened duties on medical care will apply not only to removals and deportations, but also to refusals to admit entry.[66]

Infringement of family and private life: ECHR Article 8

42. Article 8 is what is known as a 'qualified' right; on the basis of the text of the Article, states can, therefore, interfere with an individual's Article 8 rights if it

62 *D v United Kingdom* (30240/96, ECtHR) [49].

63 *AM (Zimbabwe)* [2020] UKSC 17 ("*AM (Zimbabwe)*") held that the Article 3 the medical threshold in the ECtHR case of *Paposhvili v Belgium* (41738/10) will be engaged only in *"exceptional cases"*. As stated at [183], this must be read as referring to "*situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy*".

64 *Paposhvili v Belgium* (41738/10, 13 December 2016, ECtHR).

65 Finnis and Murray, 77 (emphasis added).

66 ibid.

"is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

43. Accordingly, whether there has been a breach of Article 8 requires first establishing whether the right is 'engaged', and if so, which aspect of it (in the immigration and asylum context generally, though not exclusively, the right to family life); and, second, whether there has been interference with the right in question, and if so, whether that interference can be justified. "*Family life*" under Article 8 is a '*unitary*' right, so once it has been established that '*family life*' exists, it is necessary to examine the individual interests of every person sharing that family life from their own perspective, on the basis that danger to any individual's interests is interference with '*family life*' as a whole ().[67] In addition, when deporting criminals, the ECtHR applies the criteria in *Üner v The Netherlands* at [57], which include (*inter alia*), "*the nature and seriousness of the offence committed by the applicant, the length of the applicant's stay in the country from which he or she is to be expelled and the time elapsed since the offence was committed and the applicant's conduct during that period*".

44. The ECtHR is often deferential to Contracting Parties on these issues. The ECtHR has repeatedly declared that when a foreign citizen's presence in the territory of the respondent state was from the outset precarious, unlawful or based on breaches of immigration law, their removal or deportation will likely breach Article 8 only "*in exceptional circumstances*".[68] However, as Lady Hale has observed, the "*severity*" of this wording is only "*apparent*", and is often

[67] *Secretary of State for the Home Department v Abbas* [2017] EWCA Civ 1393; [2018] 2 All E.R. 156; *KF and others (entry clearance, relatives of refugees) Syria* [2019] UKUT 413

[68] *Butt v Norway*, 2012, and *Alleleh and Others v Norway*, 2022, § 90) as per *Jeunesse v The Netherlands* (12738/10, ECtHR) [108]

undercut by the actual decision on the facts.[69] A medley of cases have made it clear that the ECtHR, and UK courts bound to follow it, readily recognises Article 8 claims in cases where an individual has arrived illegally or overstayed.[70]

45. For example, courts have given an extremely broad interpretation to the scope of the concept of "*family life*" to include relationships between siblings (including adult siblings);[71] aunts or uncles and nephews or nieces;[72] and grandparents and grandchildren;[73] while close relationships short of "*family life*" are generally considered to fall within the scope of "*private life*" (which is also protected under Article 8).[74] The problematic effect of this in practice is that it provides first-tier judges with a broad margin within which "*family life*" can be found to exist, and a similarly broad margin of discretion for finding whether there has been an interference with such right and whether that interference can be justified (particularly given that the treatment of family members outside the UK can be taken into consideration when establishing whether there has been interference with the right to family life).[75] As those first-tier assessments will be inherently fact-sensitive and often contain matters of judicial discretion, they will in many cases be very difficult to successfully challenge on appeal absent obvious error on the part of the first-tier judge.

46. For deportations, much of the case law has been incorporated into Immigration Rules, in order to increase predictability and reduce litigation. The circumstances in which Article 8 can be relied upon by those who may be

69 *AM (Zimbabwe)* [2020] UKSC 17 at [19].
70 See, for example, *ZH (Tanzania) v Home Secretary* [2011] UKSC 4.
71 *Boughanemi v France* (1996) 2 EHRR 228.
72 *Boyle v United Kingdom* (1995) 19 EHRR 179.
73 *Marckx v Belgium* (1979-80) 2 EHRR 330.
74 *Znamenskaya v Russia* (2007) 44 EHRR 15; on the distinction between private and family life, see *Macdonald's Immigration Law & Practice* (10th edn, 2021) [7.85]-[7.89].
75 See *IA and others v Secretary of State for the Home Department* (unreported, 2025).

deported in UK law is set out in the Immigration Rules at paragraphs 13.2.1-6. Individuals will be allowed to stay if:

46.1. The person has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child and the effect of deportation on the partner or child would be unduly harsh.

46.2. The person has been lawfully resident in the UK for most of their life, they are socially and culturally integrated in the UK, and there would be very significant obstacles to their integration in the country of return.

46.3. For those who have been sentenced to more than four years in prison, "*very compelling circumstances*" will need to be shown in order to rely on Article 8.

47. Again, these rules accord quite a broad interpretation to Article 8, but this will have been driven by previous judgments against the Home Office, and its desire to manage litigation risk in future cases. It is highly likely that any toughening of these rules would lead to a significant uptick in litigation and successful appeals.

48. A further difficulty in this area is that many of these decisions are not reported, making accountability difficult, and often these only come to light on appeal to the Upper Tribunal ("**UT**") (to take one example, the notorious 'chicken nuggets' case, *Secretary of State for the Home Department v Klevis Disha*[76] (2025) UI-2024-004546, in which an argument by the respondent that his son could not go to Albania as he "*will not eat the type of chicken nuggets that are available abroad*" was roundly *rejected* by the UT as a reason why the respondent should remain). There are other examples:

[76] *Secretary of State for the Home Department v Klevis Disha* (2025) UI-2024-004546.

48.1. *Secretary of State for the Home Department v Gichuhi*:[77] The UT overturned a decision by the First Tier Tribunal ("**FTT**") that a Kenyan national could stay in the UK based on his relationship with his daughter, despite also finding their relationship had broken down.

48.2. *Secretary of State for the Home Department v Amina Aaif & Miraal Zahid*:[78] The UT overturned a decision by the FTT that a claimant could remain in the UK despite a finding that his family could reunite in Pakistan and that he had not lost ties there.

48.3. *Arshad v Secretary of State for the Home Department*:[79] At [122] the Court of Appeal criticised the FTT for treating "*the consequences of* [the appellant's] *overstaying as mitigating factors*".

49. Similarly to the case law set out above, there may be some issue with rulings made by UK immigration judges not being strictly consistent with the underlying principles set out in the Strasbourg jurisprudence.[80] Some recent examples serve to illustrate this issue:[81]

49.1. In *AA v Secretary of State for the Home Department*,[82] a deportation decision was overturned for an individual sentenced to two years and four months imprisonment as the UT judge found that the FTT had not taken into account "*the difficulties in availability of and access to mental health facilities in Pakistan for* [the appellant's] *children, further*

77 *Secretary of State for the Home Department v Gichuhi* (2025) UI-2025-000650.

78 *Secretary of State for the Home Department v Amina Aaif & Miraal Zahid (a minor)* (2024) UI-2024-000031

79 *Arshad v Secretary of State for the Home Department* [2025] EWCA Civ 355

80 This seems to have been a problem for a number of years: per *NA (Pakistan)* [2016] EWCA Civ 662 at [40] – "*Mr Tam submits that tribunal judges are sometimes losing sight of the principles discussed above. On the basis of the material which we have seen in the present group of appeals, that does appear to be the case.*"

81 Separately, it may also be worth considering that poor decision-making has been exacerbated here by over-reliance on poor quality expert reports in these cases, which itself could be better regulated.

82 *AA v Secretary of State for the Home Department* (2025) Case No: UI-2023-005193 & UI-2023-005526.

compounded by social stigma and taboo surrounding mental ill-health in Pakistan".[83] [28].

49.2. In *Secretary of State for the Home Department v CC*[84] in which the FTT blocked the deportation of convicted sex offender and current drug dealer based on a psychiatric report stating he was no longer at risk of offending. In this case he had been recently sentenced to six years imprisonment for drug related offences.

49.3. In *CE v Secretary of State for the Home Department*[85] (2023) PA/01112/2020 the FTT (before it was overturned) suggested a serial child rapist should not be deported on the basis of an expert report which minimised his offending behaviour.

50. The two sets of cases noted above illustrate two important points (i) that there may well be low-quality decision-making going on in the initial stages, much of which is never corrected; and (ii) some UK case law is imposing restrictions that appear to go beyond what the ECtHR case law nominally requires, which is a hazard that arises from the individuated nature of judicial assessment.

Rule 39 Orders

51. During the attempted implementation of the Rwanda scheme in 2022, there was some controversy over the use of Rule 39 of the Rules of Court of the ECtHR. This provides for 'interim measures' which can be used to block, for instance, a deportation flight. There is no basis for Rule 39 Orders in the ECHR itself. As such, they are an invention of the ECtHR and a good example of its

83 *Ibid* [28].
84 *Secretary of State for the Home Department v CC* (2025) UI-2024-005955.
85 *CE v Secretary of State for the Home Department* (2023) PA/01112/2020.

expansionism. In June 2022, a Rule 39 Order prevented the first flight from taking asylum seekers to Rwanda.[86]

52. The issuing of a Rule 39 Order in relation to *NSK* was widely seen as lowering the threshold for making such orders. It had not been expected—including, it seems, by government lawyers— because up to that point interim measures issued against the UK were rare. The ECtHR's own jurisprudence had previously made it clear that Rule 39 Orders should only be used "*where there is a real and imminent risk of serious and irreparable harm*";[87] for instance, a Rule 39 Order was used to secure the evacuation of Alexei Navalny to Germany after he was poisoned. The ECtHR's last-minute intervention was surprising partly because the question of interim relief had been extensively considered in the domestic courts in reasoned judgments, including by the UKSC.

53. In *MK and Others v Poland*, the ECtHR stated that: "*The Court issues* [interim measures]… *only in exceptional cases and on the basis of a rigorous examination of all the relevant circumstances. In most such cases, the applicants face a genuine threat to life and limb, with the ensuing real risk of grave, irreversible harm, in breach of the core provisions of the Convention…Any laxity on this question would unacceptably weaken the protection of the core rights in the Convention and would not be compatible with its values and spirit (see Soering v. the United Kingdom, 7 July 1989, § 88, Series A no. 161; Mamatkulov and Askarov, cited above, §§ 100 and 125; and Amirov, cited above, § 67).*"[88]

54. The introduction (or invention) of 'binding' interim measures in 2005[89] led to an increase in applications to the ECtHR in immigration or asylum cases,

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86 Press statement in relation to *NSK v United Kingdom* (28774/22, 14 June 2022, ECtHR).

87 Key Theme – Summary returns of migrants and/or asylum seekers ("*push-backs*") and related case scenarios (28 February 2025) (https://ks.echr.coe.int/documents/d/echr-ks/summary-returns-of-migrants-and-or-asylum-seekers-push-backs-and-related-case-scenarios).

88 *MK and Others v Poland* (40503/17, 42902/17 and 43643/17, ECtHR) [231].

89 *Mamatkulov and Askarov v Turkey* (46827/99 and 46951/99, ECtHR).

precisely because it was obvious to claimant lawyers across Europe that this was another way of preventing or delaying removal. It is hard to predict quite how widely UK litigants may seek to use Rule 39 Orders in future, but the incentive to do so is obvious. It may be that applications for Rule 39 Orders are less likely to be made on Article 8 grounds, with applicants relying more heavily on Articles 2 or 3 as warranting the ECtHR's urgent intervention. However, there seems to be a significant 'grey area' of factors that the ECtHR could take into account which are not immediately related to Articles 2 or 3, at least based on the brief explanation given in the press-statement on the Rule 39 Order against the UK in June 2022. There, a single ECtHR judge considered a number of factors without clearly explaining precisely how these affected Convention rights or led to imminent risk of serious and irreparable harm. Moreover, this as-yet unknown ECtHR judge made his or her decision without hearing argument from the UK, and with comparatively little evidence or examination, making its previous commitment to issue interim measures in "*exceptional cases*" after "*rigorous examination*" ring rather hollow. Given the range of factors that were adduced, the inability to provide counter-evidence or argument as of right (even after the recent procedural reforms),[90] and the vague connection between these factors and potentially infringed Convention rights, it is highly likely that Rule 39 Orders will be widely used in cases of deportation or removal. These so-called 'interim measures'—which on any sensible reading of the ECHR could only be advisory—are purportedly binding orders that pose an enormous practical risk to any policy, especially one that attempts to remove illegal entrants quickly and at scale.

55. In November 2023, the ECtHR released a press statement, reaffirming its position that interim orders were only for use in exceptional cases, and announcing minor changes to the issuing of interim measures including

[90] See n 91.

disclosing the identity of the judges who render the decisions and issuing formal judicial decisions to be sent to the parties.[91] However, nothing in that statement signalled that it was drawing back from its substantive approach in June 2022 in relation to the *NSK* case (at least as far as can be ascertained from the only written justification that was provided, in a short press release), or that it would not grant such measures in similar cases in future. To repeat the observation of Lady Hale, the "*exceptional*" nature of Rule 39 Orders may only be "*apparent*".[92]

56. It is of note that in 2023, for the first time, the French government ignored a Rule 39 Order in an immigration matter.[93] However, it was subsequently ordered to reverse the deportation in question by the Conseil d'État, which confirmed that the French government had violated international law.[94] France's compliance with Rule 39 measures was reviewed in the Council of Europe's Committee of Ministers, which decided to take no further steps because of the recent Conseil d'État decision.[95] The delayed reaction of the French courts seems to have been due to the intense secrecy surrounding the deportation. This approach may be possible in some circumstances but is difficult to imagine with a high-profile national policy applied to many people. While there are significant doubts as to the juridical validity of Rule 39 Orders (because they were not explicitly provided for in the ECHR itself, and in fact were actively excluded by Contracting Parties in the negotiations leading to the

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91 Changes to the procedure for interim measures (Rule 39 of the Rules of Court), ECHR 308 (2023) 13 November 2023; ECtHR Practice Direction: Requests for interim measures (Rule 39 of the Rules of Court) (revised 28 March 2024) (https://www.echr.coe.int/documents/d/echr/pd_interim_measures_eng).

92 See n 69.

93 As reported in Le Monde and The Spectator.

94 As reported in Le Monde; see also Conseil d'État, Juge des référés, 07/12/2023, 489817.

95 The Committee of Ministers considered several related cases, including *MA v France*, see its examination in September 2025.

ECHR),[96] there is no obvious way of removing them from the Rules of the Court, nor of overturning the strong line of Strasbourg case law that has repeatedly endorsed their binding effect. That means that a policy of ignoring Rule 39 Orders, even if supported by legislation, would still be seen as a breach of international law by the ECtHR, and could play into domestic litigation in unexpected ways.

Sub-question 3: What is the effect of other international instruments?

57. While this advice is directed primarily at the effects of the ECHR on immigration policy, there are a number of other international conventions that have an important effect in this sphere, in particular the Refugee Convention, the Torture Convention, the United Nations Convention Against Torture of 1984 ("**UNCAT**"), the United Nations International Covenant on Civil and Political Rights of 1966 ("**ICCPR**"), and the European Convention Against Trafficking ("**ECAT**").

The Refugee Convention

58. Unlike the ECHR and the ECtHR, the Refugee Convention has no body or institution that is empowered as the authoritative interpreter of its meaning. UK courts including the House of Lords and UKSC have interpreted some provisions of the Refugee Convention where they have been incorporated into domestic law, for example by paragraph 345B of the Immigration Rules which provides that "*the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention*".

59. There is UK case law on the interpretation of domestic law obligations that refer directly to, or incorporate obligations and principles found in international

[96] See Richard Ekins, 'Rule 39 and the Rule of Law' (Policy Exchange, 2023) (https://policyexchange.org.uk/wp-content/uploads/Rule-39-and-the-Rule-of-Law.pdf).

law.[97] However, it would be open to Parliament to remove references to these international law provisions or principles from domestic legislation and the Immigration Rules, just as it would be open for Parliament to exclude references to previous case law that interpreted these obligations (although that would not prevent past decisions considering the meaning and interpretation of a provision of international law from being cited in academic discussion or in international courts or other bodies considering the interpretation of that provision).

60. Under Article 33(1) of the Refugee Convention, no contracting state may "*expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*" Domestic courts have consistently interpreted this provision as prohibiting not only the direct return of refugees to a country where they fear persecution, but also indirect return via a third country.[98]

61. The protections granted by Article 33(1) of the Refugee Convention, under Article 33(2), "*may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.*"

62. Article 3(1) of UNCAT imposes a similar obligation not to expel or return a person to another state whether there are substantial grounds for believing that person would be in danger of being subject to torture. The ICCPR contains obligations that are in many respects equivalent to those in the ECHR; in particular for present purposes Articles 6 and 7 impose obligations comparable

97 See paragraph Part I:19.

98 *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514, 532.

to those contained in Articles 2 and 3 of the ECHR. The obligation under Article 2 of the ICCPR requiring state parties to respect and ensure ICCPR rights to those in their territory has been interpreted by the United Nations Human Rights Committee ("**UNHCR**") as prohibiting the expulsion or return of a person to a territory where there are substantial grounds for believing that there is a risk of irreparable harm as a result, such as under Articles 6 or 7 or the ICCPR (General Comment 31 (2004), para. 12).

63. In addition, the UKSC in *AAA* at [25]-[26] suggested (*obiter*) that the non-refoulement obligation may also be imposed as a matter of customary international law. If indeed the obligation does arise under customary international law, then that obligation would continue to apply to the UK as a matter of international law even in the absence of the UK's membership of any of the above treaties. While any such development would not form a free-standing cause of action, it could potentially have an effect in statutory interpretation or in the development of case law; however, this could be expressly excluded as a matter of domestic law.

64. Given (as detailed above) the UK's dualist system, whereby international law is binding on the UK at international level but does not create direct effect or directly enforceable rights at the level of domestic law absent implementation in legislation, the above instruments (including, of course, the ECHR itself) do not have direct effect in UK domestic law absent implementation in domestic legislation.

65. In the case of the ECHR, that implementation takes the form of the HRA. The provisions of the Refugee Convention are not given direct effect in UK law, but section 2 of the Asylum and Immigration Appeals Act 1993 provides that "*[n]othing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the* [Refugee] *Convention.*" The

ICCPR and UNCAT are not directly implemented in UK legislation (save to the extent that in practice the relevant provisions are reflected in the contents of Articles 2 and 3 of the ECHR and thereby given effect by the HRA), but the prohibition against torture is given broad effect by UK domestic statute (as, for example, in section 134 of the Criminal Justice Act 1988 and has been recognised as a fundamental principle of the common law).[99]

66. In large part, the relevant provisions of the ECHR (in particular Articles 2 and 3) have been interpreted by the ECtHR as imposing equivalent protections to those in the other instruments detailed above. It is clear, however, that the ECtHR has taken a more expansionist approach: for example, it has gradually expanded the scope of refoulement; and at the same time, through cases like *Saadi v Italy* (discussed above), effectively removed the exceptions that were designed to protect host populations from dangerous criminals. It is important to note that these provisions impose separate obligations at an international law level to those contained in the ECHR itself, and that withdrawal from the ECHR would not, therefore, free the UK of these other international obligations.

The European Convention Against Trafficking

67. The prohibition of slavery and forced labour is contained in Article 4 of the ECHR. Further, in December 2008, the UK ratified ECAT, with effect, as a matter of international law, from 1 April 2009.[100] The key articles are Article 10 (identification of victims) and Article 26 (non-punishment provisions) which are reflected in s 45 of the Modern Slavery Act 2015, providing a defence to a

99 See e.g. *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221.

100 It has not yet been embodied in UK legislation, although the Government's position is that the UK's domestic law complies with ECAT.

criminal action which applies where there is a nexus between trafficking and the crime committed.[101]

68. There are two significant cases for present purposes:

68.1. *VCL and AN v United Kingdom*:[102] The UK was found to be in breach of Article 4 (slavery) and Article 6(1) (fair trial) of the ECHR in the case of two individuals who were alleged to be victims of modern slavery but were charged and found guilty of drug-related offences. Although, importantly, the ECtHR noted that while prosecution of victims of trafficking is not prohibited (this has been emphasised in *R v S(G)*),[103] such a decision should only be made following an assessment made by qualified personnel (particularly in cases concerning children) and any prosecutorial decision will have to take such a decision into account and, although not bound by it, a prosecutor would have to clearly set out why they were proceeding with a prosecution. In other words, the ECtHR has significantly expanded Article 4, suggesting that it imposes positive duties to prevent slavery, and onerous and time-consuming duties of investigation and potential punishment of wrong-doers analogous to those it has created for Articles 2 and 3; along with imposing barriers to the prosecution of persons who claim to have been trafficked.[104] Such an interpretation raises the 'blocking power' of any claim to forced labour or servitude, whether recent or historic. It may also be noted that the investigative duty will be triggered simply by the recollections of the victim, with any substantiating evidence difficult to come by, and in many cases held overseas. These investigations—which forestall conviction and

101 See *R v AFU* [2023] EWCA Crim 23 at [105].
102 *VCL & AN v United Kingdom* (77587/12 and 74603/12, ECtHR)
103 *R v S(G)* [2018] EWCA Crim 1824; [2018] 4 WLR 167 [76(i)].
104 Richard Ekins and John Larkin QC, 'Human Rights Law Reform' (Policy Exchange, 2021) [8]-[9] (https://policyexchange.org.uk/publication/human-rights-law-reform/).

deportation— can therefore take a very long time, or may never be completed. It is easy to see the moral hazard here.

68.2. *R v AFU*:[105] The Court of Appeal found that this defence can apply even when the defendant has entered an unequivocal guilty plea despite legal advice at the time on the availability of a defence, based on the defendant's instructions. This judgment confirmed that where the defendant is a victim of modern slavery, the usual principle of finality does not apply in guilty plea cases. Again, the incentive to 'stack' processes here is obvious.

69. It should be clear from the above that if an individual can rely on modern slavery legislation (incorporating elements of ECAT and the ECHR) to avoid becoming a 'foreign criminal' in the first place, the Government's options in removing them from the country are restricted.

70. As noted above, claims of modern slavery (including historic claims) are frequently raised to resist removal, often at late stages. Indeed, the recent 'one in, one out' injunction preventing the removal of an illegal migrant by plane to France demonstrates the powerful role that ECAT and the Modern Slavery Act can play in this area.

71. It is notable, too, that Australia (widely regarded as a success in tackling illegal migration) is not subject to ECAT nor the Modern Slavery Act which, as above, represent a significant block on the UK's ability to operate a stringent borders regime. Importantly, Australia remains a signatory to the Refugee Convention.

72. Finally, as between ECAT and the Refugee Convention, ECAT sets the threshold as "*reasonable grounds to believe that the person has been victim of trafficking in human beings*" under Article 10(2), whereas under the Refugee Convention the standard is that "*well-founded fear*" of persecution under Article

105 *R v AFU* [2023] EWCA Crim 23.

1(2). This has the potential for domestic courts to diverge on the tests in relation each.

Conclusion on sub-question 3

73. Unlike the ECHR, neither the Refugee Convention nor the ECAT has a standing, authoritative interpretive court.[106] The effect of this is twofold. First, the ability of an individual to challenge an action that they allege is in breach of one of those international instruments is limited, save where those instruments have been directly incorporated into domestic law. Second, where there is no body capable of providing a definitive conclusion on the interpretation of an instrument, the UK will be in a better position to argue that its actions and policies are compatible with the instrument in question, provided it has *bona fide* opinion as to the meaning of the instrument (see Article 31). This, in part, explains how the Australian Government maintains that its border policy is compliant with international law: while it is signed up to the Refugee Convention, it is not a member of the ECHR. As a result, its position cannot be authoritatively second-guessed in any competent international court.[107] It is clear, then, that a stringent regime could be pursued outside of the ECHR, while remaining within the Refugee Convention. For completeness, therefore, while I consider it would be prudent to consider withdrawal from ECAT and, at least, significantly amend the Modern Slavery Act 2015, I do not consider it necessary at this time to leave the Refugee Convention to be able to achieve your policy goals on immigration (although it would be necessary to remove or limit the reference to those instruments in domestic UK legislation).

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106 The ICCPR does have an interpretative body in the form of the UN Human Rights Committee, but the UK is not a signatory to the optional protocol to the ICCPR that would give that Committee jurisdiction to hear complaints from individuals.

107 See Home Affairs Committee, 'Written evidence submitted by the Australian Government' (CHA0060, December 2020) (https://committees.parliament.uk/writtenevidence/18368/pdf/); see also Finnis and Murray at fnn 102-103.

73.1. First, the ECHR is significantly broader than the Refugee Convention on non-refoulment, and includes more bases to resist deportation (e.g. Article 8 regarding family life).

73.2. Secondly, the determination of whether the requirements under those instruments have been fulfilled are primarily a matter for the executive or for Parliament, as opposed to the UK courts who play a much more significant role under the HRA.

73.3. Thirdly, there is no equivalent of the ECtHR such that the UK courts or Parliament would remain the sovereign authority on interpretation, without any rival international judicial body, and no binding external interpretations that the UK could not predict or control.

73.4. Fourthly, it is entirely a matter for Parliament to legislate in domestic law, in contradistinction to the HRA which requires a statement of compatibility.

73.5. Fifthly, and specifically on the issue of illegal migration, the protections against deportation (and indeed all of the rights under the Refugee Convention) do not apply to those in the UK illegally, nor prior to the determination that an individual is, in fact, a refugee.[108] Further, and as noted above, such issues are within the UK Parliament's determination, without the risk of a supranational body issuing a binding judgment against the UK. Indeed, Australia has managed to pursue a stringent borders policy while maintaining its position that it is compliant with the Refugee Convention.

[108] See *R (on the application of ST (Eritrea)) (FC) v Secretary of State for the Home Department* [2012] UKSC 12, [32]-[40]; *Blakesley v Secretary of State for Work and Pensions* [2025] 1 WLR 3150. The only limited exception to this is refoulement under Article 33.

73.6. It is to be noted, however, that remaining a member of the Refugee Convention will necessarily add some level of complexity to the borders regime adopted that might otherwise be avoided (including its impact on internal analysis and justifications, both of policy and individual decisions); and there is the possibility that the Refugee Convention may be used by litigants in ways that are unexpected, requiring further legislation (for example, it is possible that courts in the UK may approach this issue differently from those in Australia).

74. Similarly, in my view it is not necessary to leave the Torture Convention at this time.

75. The Torture Convention is less of an issue than the Refugee Convention because its main focus is on preventing states from committing torture. Whilst there is an asylum aspect in Article 3, which prevents refoulment, it is narrower than the Refugee Convention in that there must be "*substantial grounds*" (which is a higher threshold than real fear of persecution under the Refugee Convention) of "*torture*" (which is narrower than the persecution under the Refugee Convention) that must be directly or indirectly caused by a public official (which is again narrower than the Refugee Convention where the persecution need not necessarily emanate from the state).

76. There is also, significantly, no equivalent to the ECtHR which might adopt an ever-expanding definition of torture (as has occurred in Article 3 of the ECHR). Rather, it is a matter for the UK how it interprets and applies the Torture Convention.

77. As a result, the Torture Convention should not prevent you from achieving your policy goals in the five key tests.

78. I say "at this time" in this context because it may be that campaigners successfully invite the courts – wrongly, in my opinion – to use the provisions of those instruments inappropriately to interfere in immigration control. For the reasons above, this would be significantly harder than under the ECHR but I cannot say that it is impossible. This is, therefore, an area that should be kept under review.

Sub-question 4: Could this policy be achieved by repealing or amending the HRA or derogating from the ECHR?

Repealing or amending the HRA

79. It is, in principle, possible for Parliament to pass any legislation it wishes to: international law has no direct effect in the UK, and were Parliament to legislate contrary to the UK's international law obligations, it would be perfectly free to do so as a matter of the UK's constitutional arrangements.

80. As such, Parliament could repeal the HRA and legislate contrary to the ECHR, were it (and, in practice, the Government) prepared to weather criticism for the UK being in breach of its international law obligations (and, in principle, the consequences at an international level, which would largely depend on the reactions of other countries). It should be remembered, too, that significant portions of UK immigration legislation have embedded ECHR compatibility tests and other ECtHR case law, which would all require amendment.

81. In the context of immigration, the Safety of Rwanda (Asylum and Immigration) Act 2024 ("**Rwanda Act**") was an attempt to strengthen the UK's border legislation short of exiting the ECHR. In section 3 of the Rwanda Act, Parliament specifically disapplied sections 2, 3 and 6-9 of the HRA. The

consequence of this disapplication[109] would have been in effect to revert to the pre-HRA legal landscape for the purposes of that Act. This would have meant that if an applicant believed that their treatment failed to comply with the ECHR, they could bring a claim to the ECtHR, following the decision of the UK in 1966 to grant the right of individual application to that court. If the UK ignored any judgment or order[110] against it from the ECtHR, it would be in breach of the ECHR; but in the past the UK has so acted for a period, for example over the matter of prisoner voting.

82. The disapplication of these provisions of the HRA raised the barrier to litigation, since it would have forced applicants to make their claim in a forum (the ECtHR) that generally requires more preparation than domestic litigation, and is notoriously overwhelmed with applications with a long backlog of cases. However, the inefficiency of the ECtHR may well have invited further delays in the Rwanda scheme's operation, with the possibility that Rule 39 Orders could have been issued pending substantive resolution in the ECtHR (with Rule 39 applications made relatively cheaply and with comparatively little preparation). The approach of selectively disapplying the HRA would only work, of course, if the UK were willing to take a firm line on Rule 39 Orders. In addition to the HRA carve-outs, the Rwanda Act reduced the scope for challenges to removal. However, it did not remove these completely, and still contained many avenues to challenge removal domestically, as well as procedural delays given the need for individualised assessments and special circumstances—which is why the Government was able to maintain that the legislation was in line with international law. The various compromises made

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109 On the effects of disapplication more generally, see Richard Ekins, 'The Limits of Judicial Power' (Policy Exchange, 2022) (https://policyexchange.org.uk/wp-content/uploads/2022/10/The-Limits-of-Judicial-Power.pdf).

110 At least insofar as this refers to a Rule 39 Order: the UK would certainly be at risk of being held to be in breach of Article 34 if it did not comply with a Rule 39 Order.

in the design of the legislation may therefore have reduced the efficacy of its operation in practice.

83. In light of the calling of the General Election, there was no time for the Rwanda Act to operate at scale. However, because it was held up as compliant with the ECHR, domestic courts may have had a basis for interpreting it in line with the ECHR even with the carve-out of section 3 of the HRA (this would have been justified as an orthodox carrying out of Parliament's intent—it would have been a much harder argument if the Government had presented the Bill as unequivocally non-compliant).[111] It is possible that domestic courts would have strained the interpretation of its provisions, thereby expanding delays or exceptions to removal, to ensure compliance with the ECHR—and this would have been further complicated by Rule 39 Orders. A more significant risk would have been a challenge on the basis of section 4 of the HRA, seeking a declaration of incompatibility (which the legislation did not disapply), which could have been politically and practically challenging.

84. Amending the HRA, or crafting new rules to clarify particular Articles, is another option. There have been calls to rewrite the approach to Article 8 (family and private life), through primary or secondary legislation, in reaction to a number of domestic immigration tribunal cases which have attracted critical comment (in which Article 8 appears to be the right most commonly relied upon). The Labour Government has acknowledged this as an issue, with the Home Secretary announcing in March 2025 a review of how Article 8 is being interpreted and applied by UK judges. It is unclear what the precise scope of that review is or when it will report.

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111 Notably, the Government issued a section 19(1)(b) statement, but was at pains to stress that this "*does not mean that the Bill is incompatible with the European Convention on Human Rights*": Safety of Rwanda (Asylum and Immigration) Bill: Government Response to the Committee's Second Report, 19 March 2024 (https://publications.parliament.uk/pa/jt5804/jtselect/jtrights/647/report.html).

85. It is true that because Article 8 is a 'qualified right', the ECtHR can take into account the so-called 'margin of appreciation' given the national context.[112] However, this margin is severely undercut by the nature of the evaluative exercise required to assess proportionality under Article 8, which excludes any "*hard-edged or bright-line rule to be applied to the generality of cases*".[113] Clearly, any attempt to recalibrate the UK's approach to Article 8 will have to give ample opportunity for individual assessments, and allow for special circumstances (which runs contrary to what would be required in a streamlined – and stringent – regime). As discussed above, the broad scope given to Article 8 rights in the ECtHR case law allows the FTT relatively wide latitude in finding that Article 8 has been engaged and in assessing the proportionality of any interference; such fact-specific assessments can be difficult to overturn on appeal, which means that many of the same problems will likely arise even with amended rules.

86. Moreover, as noted above, the Immigration Rules are drafted in a broad manner, meaning that the Home Office may not seek to deport or remove as widely as it could in cases where Article 8 is *prima facie* engaged. This also means that the more finely-balanced cases (for example those involving significant relationships, difficulties with integrating into the UK, and comparatively less serious offending) do not come before the courts. Even with fresh primary legislation or tightened immigration rules, if the Government sought removals on a more widespread basis, it is unclear whether the ECtHR would be so deferential. Certainly, the more restrictively any legislation seeks to draw the Article 8 criteria, the more likely it is that the ECtHR's deference

112 See *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 [39].

113 *MM (Lebanon) v Home Secretary* [2017] UKSC 10 [66], quoting Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] AC 1159 [12]; see also *Smith and Grady v UK* (2000) 29 EHRR 493 [132]-[139].

will run out (attempts to restrictively clarify Articles 2 and 3 would be given even less deference by the ECtHR).

Derogating from the ECHR

87. I have noted that there have been calls for the UK to derogate from the ECHR as a means of resolving the issues. Contracting Parties can, under Article 15, derogate from ECHR obligations "[i]*n time of war or other public emergency threatening the life of the nation … to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law*". The meaning of "*public emergency threatening the life of the nation*" is "*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed*"[114] This can also encompass a part of the state only.[115]

88. Contracting Parties do have a margin of appreciation as to when such a public emergency exists, but this is not limitless and is subject to the strict supervision of the ECtHR, as well as challenge in domestic courts.[116] Whilst in theory, for example, the government could state that the UK was derogating from Article 8, there remains the risk that, in practice, either (i) a successful challenge would be brought to the ECtHR, or possibly (ii) the domestic courts would hold that the derogation was invalid. As a result, any such derogation may be the source of more litigation without any clear prospects of addressing the key issues.

89. Further, and importantly, it is not possible to derogate from Articles 2 or 3 of the ECHR. As such, the significant problems that have been caused by the ever-expanding scope of both Articles cannot be solved by derogation.

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114 *Lawless v Ireland (no 3)* (332/57) [28].

115 *Ireland v United Kingdom* (5310/71) [205].

116 See, for example, the domestic stages of the Belmarsh prison case, which culminated in *A (FC) and others v Secretary of State for the Home Department* [2004] UKHL 56.

90. Accordingly, reliance on derogation is unlikely to be either a stable or complete solution to the issues faced in the context of immigration and asylum, even assuming that the UK could somehow successfully argue that the current illegal immigration situation represents a 'public emergency', as defined. One must also bear in mind the high threshold of its previous use in cases under a more conservative ECtHR (for example, repeated 'temporary' derogations in relation to Northern Ireland or the EOKA insurgency in Cyprus).

Conclusion

91. While a number of the more high profile and controversial decisions in this area have been the result of an over-extensive or misplaced interpretation of individual ECHR rights by the FTT (and have, therefore, often been overturned on appeal), the expansive jurisprudence of the ECtHR itself has the effect that certain rights (in particular, but not exclusively, those in Articles 2, 3 and 8) have been interpreted in a manner that would prevent the UK taking full control of its immigration system without running the risk of breaching those rights in individual cases (particularly to the extent that any kind of non-individualised assessment of asylum or deportation decisions was adopted).

92. In practice, the ECHR places significant restrictions on the ability of any government and Parliament to operate the UK's immigration policies without running a risk of breaching the ECHR and being subjected to Rule 39 Orders (as was the case with the Rwanda scheme). ECHR membership places significant practical limits on the UK's ability to maintain control of its borders, both for reasons of mandated process and substance (in the sense that even where applicants lose in the end, the process costs may frustrate effective immigration enforcement more generally). Whether the constraints that the ECHR and its jurisprudence places on the design and operation of immigration

and asylum policy are acceptable is, however, necessarily a political, not a legal question.

93. The method, and consequences, of withdrawing from the ECHR is addressed below. The key point for present purposes is that the other international instruments in this area do not grant directly-enforceable rights to individuals against the UK, and do not generally have standing interpretative courts or other bodies that are binding on the parties. As such, the UK would not encounter many of the issues it has faced through its membership of the ECHR, if it only remained a member of those instruments.[117] It is beyond the scope of this advice, which is focused on the ECHR, to address each of those instruments in detail.

94. Lastly, it bears mentioning that even with a 'stringent' borders regime, it is probable that its design would be premised on voluntary departures, or sending illegal migrants to their home countries only if those countries (or a part of them) were safe; or otherwise to a safe third country. In addition to being able to remove and deport at scale, the UK would have a much greater ability to determine for itself what destinations were safe, without that being questioned by ever-expanding ECtHR jurisprudence.

[117] The Australian example mentioned above is instructive, although it should be noted that Australia is a member of the Refugee Convention, but not of the ECAT.

PART II: THE VETERANS TEST

95. This section considers: Can we stop our veterans being endlessly pursued by vexatious legal attacks and ensure our military can fight a future war without one hand tied behind their backs? There are three sub-questions:

95.1. How have the courts extended the jurisdiction of the ECHR and expansive interpretations of the right to life to cover combat abroad and legacy cases in Northern Ireland?

95.2. How does this ECHR-generated 'lawfare' supplant the laws of armed conflict, and what is the impact on morale and operational effectiveness?

95.3. How can this be fixed? Does it require derogation from or withdrawal from the ECHR?

EXECUTIVE SUMMARY

96. The ECHR is a major obstacle to doing justice to veterans who served in Northern Ireland, and to protecting current personnel from being subject to unfair process in future. This is partly due to the expanded jurisdiction of the ECHR, through ECtHR case law, and partly due to developments of the interpretation of Articles 2 and 3. It is clear that: (i) despite never having been intended to cover overseas military operations,[118] the ECHR now displaces the law of armed conflict in relation to military operations, including those abroad, which cannot easily be addressed without withdrawal; and (ii) the ECHR exposes veterans, especially those who served in Northern Ireland, to inquests and prosecutions which are difficult adequately to address without ECHR withdrawal.

[118] Either because overseas military conflicts were originally not within the jurisdiction of the ECHR (i.e. it did not apply extra-territorially), or because there would be a derogation in relation to conflicts within the territory of the Contracting Party.

97. At the outset, it bears mentioning that the ECHR is only one legal instrument that applies to the military. For example, the famous 'Marine A' case concerned the first prosecution for murder under section 42 of the Armed Forces Act 2006 of a soldier serving overseas.[119] Other sources of applicable law are noted below. While there are certainly many other legal constraints on the armed forces, this advice is confined specifically to the ECHR. That is because (as in the 'Sovereign Borders' section) owing to its standing and binding court, the ECHR places the most pressing and practical limitations on crafting and operating a legal regime for the conduct of the armed forces.

98. The terms 'endlessly pursued' and 'vexatious' in the question imply that the claims brought against servicemen and women are without merit.[120] No one could, or should, seriously suggest that the Armed Forces should be prospectively[121] immune from the law, not least because of the obvious moral hazard that this would create.[122] However, while the Armed Forces must obviously be subject to the law, this need not necessarily involve individuals outside the Armed Forces having authority to pursue personnel for conduct

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119 *R v Blackman* [2017] EWCA Crim 190. He shot a wounded, unarmed enemy combatant on 15 September 2011 stating "*Obviously this doesn't go anywhere fellas. I've just broke the Geneva Convention*". He was convicted of murder by a Court Martial panel of seven judges in November 2013 which was reduced to manslaughter on the grounds of diminished responsibility in 2017 by the Court Martial Appeal Court (having been taken up by the Criminal Cases Review Commission).

120 In civil courts, it would be those claims that are liable to be struck out/reverse summary judgment on the basis that there is no real prospect of success.

121 The role of *retrospective* immunity is considered below, particularly in the context of legacy cases in Northern Ireland.

122 An ongoing case relating to the alleged murder of woman in Kenya in 2012 highlights the obvious difficulties in blanket immunity. A Kenyan inquiry has since concluded that she was killed by an unknown British soldier while 'off duty': Yousra Elbagir 'Agnes Wanjiru: Renewed hope for justice for family of Kenyan mother allegedly murdered by British soldier' (Sky News, 24 July 2024) (https://news.sky.com/story/agnes-wanjiru-renewed-hope-for-justice-for-family-of-kenyan-mother-allegedly-murdered-by-british-soldier-13184001). A Kenyan High Court has recently issued an arrest warrant for a British national in relation to these events: Akisa Wandera, 'Kenya issues arrest warrant for British national over young mother's murder' (BBC Africa, 16 September 2025) (https://www.bbc.co.uk/news/articles/cwywng4jp08o). Wholesale immunity would be inappropriate in such cases, although there is clearly a distinction between criminal behaviour while 'off duty' and actions taken in the course of an active military operation.

'on duty' (for example, this could be managed entirely through military tribunals with high-threshold political and judicial oversight). That, of course, was the prevailing model in this country for much of the 20th century.

99. So long as it is open to the general public to instigate such claims, there will always be some risk that individuals may bring vexatious (that is, meritless) litigation against Armed Forces personnel. Such claims may exploit the mere fact that a relevant legal instrument applies, even where there is no genuine basis for the allegation, potentially burdening individuals with unfounded proceedings which necessarily take time to dispose of, as well as causing anxiety in the meantime.

100. However, legal and political controversy does not stem solely from vexatious claims. In some cases, claims brought under the ECHR may be legally valid but are still viewed by parts of the public as unfair or inappropriate – particularly where they relate to conduct in complex operational environments. The challenge for the Government, therefore, is how to address both abusive litigation and public concern about certain legitimate claims, whether through reform within the ECHR framework or by pursuing alternative legal or policy mechanisms.

101. The application of the ECHR expanded substantially when it was held to apply extraterritorially in the seminal case of *Al-Skeini v United Kingdom*.[123] It expanded further in *Smith and Others v Ministry of Defence*[124] which held that the UK also owes duties to its own soldiers. As a result, the UK is under ECHR obligations to anyone in relation to whom the UK exercises force in any overseas area over which it has effective control.

123 *Al-Skeini v United Kingdom* (55721/07, 2011, ECtHR).
124 *Smith and others v Ministry of Defence* [2013] UKSC 41.

102. This could interfere with the UK's military capabilities overseas, especially given the ever-expanding nature of Articles 2 and 3 of the ECHR which (now) include potential breaches (i) for failing to investigate allegedly unlawful killings; (ii) fatalities during training; (iii) where an individual is slapped once whilst held in custody; (iv) where handcuffs are used to detain an individual; and (v) for the length of time enemy combatants may be detained. To make matters worse, UK courts have granted damages where such breaches are found.

103. Taken together, one can readily imagine significant difficulties in relation to the training and retention of troops, along with significant constraints in fighting future wars. The full operational and morale impact requires further analysis beyond the scope of this advice, which focuses on the law.

104. The use of 'lawfare' against veterans is one facet of the problems that the ECHR causes in that it has led to years of enquiries, inquests and, ultimately, prosecution of veterans, particularly in the context of the Troubles in Northern Ireland. There are two recent acts of Parliament that have sought to address the vexatious pursuit of veterans: (i) Overseas Operations (Service Personnel and Veterans) Act 2021 ("**2021 Act**"); and (ii) Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("**2023 Act**").[125]

105. The 2021 Act introduced a presumption against prosecution for overseas events that happened more than five years ago. It has not, yet, been challenged in the courts.

106. The 2023 Act granted, *inter alia*, a conditional immunity to all combatants of the Troubles. The Northern Irish Court of Appeal held it to be incompatible with the ECHR and the Victims Directive. Further, it held that the 2023 Act could be

125 This section does not consider Dominic Raab's Bill of Rights 2022.

disapplied pursuant to Article 2 of the Windsor Framework Agreement owing to the breach of the Victims Directive (albeit it held that a breach of the ECHR would not be sufficient).[126] The Court did not overturn the declarations of incompatibility granted by the Northern Irish High Court.[127] This case is going to the UKSC in October 2025.[128] If the Northern Irish Court of Appeal judgment stands, the Secretary of State for Northen Ireland ("**SOSNI**") is going to repeal the conditional immunities pursuant to s 10 of the HRA. This will allow continued harassment of veterans through criminal prosecutions.

ANALYSIS

Sub-question 1. How have the courts extended the jurisdiction of the ECHR and expansive interpretations of the right to life to cover combat abroad and legacy cases in Northern Ireland?

107. This section provides an overview of the expansion of (i) the extraterritorial application of the ECHR to the armed forced operating outside of the UK; (ii) the expanded construction of Articles 2, 3 and 5 of the ECHR which are particularly relevant in the military context; and (iii) the English court's willingness to award damages for breach of the ECHR. These topics have been extensively covered by several Policy Exchange papers to which I draw your attention, such that this section is deliberately brief.[129]

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126 The Northern Irish Court of Appeal differed from the Northern Irish High Court which had held that both the ECHR and the Victims Directive could be relied on to justify disapplication under Article 2 of the Windsor Framework Agreement.

127 As explained in detail below, this was because the arguments on compatibility were dropped between the hearing and the judgment owing to the change of Government in the 2024 General Election. As a result, there was no real argument before the Northern Irish Court of Appeal that the 2023 Act was compatible with the ECHR and the appeal point was effectively dropped. It is therefore unsurprising that the declarations of incompatibility were upheld.

128 Andrew Dinsmore and I are instructed by the Northern Ireland Veterans Movement. We have obtained permission to intervene in the UKSC to argue that the 2023 Act is compatible with the ECHR and the Victims' Directive because it is clear that the Secretary of State for Northern Ireland is not going to make that argument.

129 See (i) Richard Ekins, Patrick Hennessey and Julie Marionneau, 'Protecting Those Who Serve' (Policy Exchange, 2019) (https://policyexchange.org.uk/wp-content/uploads/2019/06/Protecting-Those-

Extraterritoriality

108. In *Soering v United Kingdom*[130] and *Banković v Belgium*[131] the ECtHR held that the ECHR was primarily territorial and could only be applied extraterritorially in exceptional cases, with one example being where the presence of UK troops is consented to by the other state (e.g. a foreign embassy).

109. The seminal expansionist case is *Al-Skeini v United Kingdom*[132] which concerned the death of five Iraqi civilians in Basra (as well as an Iraqi civilian, Mr Mousa, who died in British army custody in Basra). The House of Lords held that the ECHR did not apply in the cases of the five Iraqi civilians who were allegedly killed by British forces, but remitted the question of whether Article 2 conferred the right to a public inquiry in the circumstances of Mr Mousa's case to the Divisional Court.[133]

110. The ECtHR, however, held that the ECHR applied in all six cases because "*the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations…*".[134] Thus, it concluded that the ECHR applies to any area over which the UK has effective control.

111. In *Smith and Others v Ministry of Defence*, the UKSC reasoned from *Al-Skeini* that the jurisdiction of the UK extends to securing the protection of Article 2 to members of the armed forces when they are serving outside of its territory,

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Who-Serve.pdf); (ii) Thomas Tugendhat and Laura Croft, 'The Fog of Law An introduction to the legal erosion of British fighting power' (Policy Exchange, 2013) (https://policyexchange.org.uk/wp-content/uploads/2017/12/the-fog-of-law.pdf); (iii) Richard Ekins, Jonathan Morgan and Tom Tugendhat, 'Clearing the Fog of Law' (Policy Exchange, 2015) (https://policyexchange.org.uk/wp-content/uploads/2017/12/clearing-the-fog-of-law.pdf).

130 *Soering v United Kingdom* [1989] 11 EHRR 439.

131 *Banković v Belgium* (52207/99, 2001, ECtHR).

132 *Al-Skeini v United Kingdom* (55721/07, 2011, ECtHR).

133 *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26.

134 *Al-Skeini v United Kingdom* (55721/07, 2011, ECtHR) [149].

noting that "*to the extent that a state's extra-territorial jurisdiction over local inhabitants exists because of the authority and control that is exercised over them, this is because of the authority and control that state has over its own armed forces*".[135] As a result, the ECHR applies to anyone in relation to whom the UK exercises authority and control.

Article 2 of the ECHR

112. In *McCann v United Kingdom*[136] Article 2 was expanded from the substantive obligation not to unlawfully kill, and to protect life, to include positive investigative obligations (known as the 'procedural requirement'). This was taken further in *Brecknell v United Kingdom* in being held to apply to historical deaths stating that where there is a "*plausible, or credible, allegation*" then "*the authorities are under an obligation to take further investigative measures*".[137]

113. This was construed by the House of Lords in *Re McKerr* not to apply to events prior to the effective date of the HRA (that is, October 2000).[138] However, in *Šilih v Slovenia* the ECtHR held that the obligation did apply for ten years prior to commencement.[139] The House of Lords in *Re McCaughey* preferred *Šilih v Slovenia* and overruled *Re McKerr*, noting that this investigative obligation is a fresh obligation arising today.[140] *McCaughey* was followed in *Re Finucane*[141]

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135 *Smith and others v Ministry of Defence* [2013] UKSC 41 [52]. *Smith* also eroded the common law concept of 'combat immunity', which previously operated to exclude the British armed forces' civil liability for negligence in combat situations, so that no duty of care could be owed by one soldier to another on the battlefield, nor could safe conditions of work be required from the Ministry of Defence under such circumstances: *Mulcahy v Ministry of Defence* [1996] 2 WLR 474, 488 (H). This also extended to the planning and preparation for such combat situations: *Multiple Claimants v The Ministry of Defence* [2003] EWHC 1134 (QB) [16.1(b)(3)(b)]. The UKSC held, in relation to the "Challenger II" claims (which were about alleged failures in training and the provision of technology and equipment), that combat immunity did not extend from actual or imminent armed conflict to failures at earlier stages in the preparation process, thus narrowing its scope.

136 *McCann v United Kingdom* (18984/91, 1995, ECtHR).

137 *Brecknell v United Kingdom* (32457/04, 2007, ECtHR) [70]-[71].

138 *Re McKerr* [2004] UKHL 12.

139 *Šilih v Slovenia* (71463/01, 2009, ECtHR).

140 *Re McCaughey* [2011] UKSC 20 [61]-[63].

141 *Re Finucane* [2019] HRLR 7 [108]-[111].

although there were indications that it is not an inflexible rule and that a multi-factorial approach is appropriate when assessing the requirement of Article 2.[142] Such investigations have been the source of significant 'lawfare' against soldiers and the UK as a state, leading to substantial numbers of coroners' inquests and prosecutions (discussed further below).[143]

114. The expansion of this procedural obligation casts doubt over the early prisoner release scheme under the BGFA: (i) *Enukidzeand Girgvliani v Georgia* held that lenient sentencing for unlawful killings could be a breach of the procedural requirements of Article 2;[144] and (ii) pertinent to the Northern Ireland context, *Makuchyan and Minasyan v Azerbaijan and Hungary* held that it could be a breach of Article 2 if those convicted of unlawful killings could hold public office (which could potentially apply to some high-profile Northern Irish politicians).[145]

115. As to the expansion of the substantive obligation:

115.1. *Dimaksyan v Armenia* concerned the death of the applicant's 18-year-old son, who was accidentally shot by a fellow serviceman while on watch duty during compulsory military service. The ECtHR found a violation of Article 2 both substantively—due to the state's failure to ensure safe conditions, including proper supervision of weapons and adequate emergency medical assistance—and procedurally, given the ineffective investigation into the death.[146]

115.2. *Hovhannisyan and Karapetyan v Armenia* concerned the death of the applicants' sons, who were conscripts killed during compulsory military

142 In *Re McQuillam* the UKSC attempted to limit the retrospective effect of the HRA: [2021] UKSC 55.
143 Indeed, the procedural requirement underpinned the *Al-Skeini* decision.
144 *Enukidzeand Girgvliani v Georgia* (2011, ECtHR) [269], [275].
145 *Makuchyan and Minasyan v Azerbaijan and Hungary* (2020, ECtHR) [171]-[172].
146 *Dimaksyan v Armenia* (29906/14, 2023, ECtHR) [96].

service by a fellow serviceman with a known criminal record. The ECtHR found a violation of Article 2 both substantively – due to the authorities' failure to assess and manage the known risks posed by the shooter, maintain discipline, and take preventive measures despite warning signs—and procedurally, due to a number of serious investigative shortcomings, including unanswered questions about the circumstances of the shooting and the failure to follow up on key witness testimony and relevant evidence.[147]

Article 3 of the ECHR

116. The procedural obligation also applies to Article 3[148] with the same issues arising. As to the expansion of the substantive obligation:[149]

116.1. *Bouyid v Belgium* went beyond severe physical harm to include any unjustified physical force by state agents against individuals in their custody. It thus abandoned the 'minimum level of severity' requirement to hold that "*any recourse to physical force which has not been made strictly necessary by the person's conduct*" is in principle a violation of Article 3.[150] On the facts of that case, two brothers were detained by the police and allegedly slapped (once) in the face. The ECtHR held that this was not inhuman treatment or torture, but found a breach of Article 3 on the basis that it was degrading treatment.[151]

147 *Hovhannisyan and Karapetyan v Armenia* (67351/13, 2023, ECtHR) [117]-[148].

148 *Assenov v Bulgaria* [1998] 28 EHRR 652 [102].

149 Whilst these cases are mainly taken from the civilian context, one could readily see how they might be applied in the military context (for example, where force is used during interrogation training for special forces or where handcuffs are used to detain an enemy combatant).

150 *Bouyid v Belgium* (23380/09, 2015, ECtHR).

151 *See* also: *Zakharov and Varzhabetyan v Russia* (35880/14 and 75926/17, 2020, ECtHR); *Roth v Germany* (22130/18, 2020, ECtHR); *Navalnyy and Gunko v Russia* (46632/20, 2020, ECtHR); *Ilievi and Ganchevi v Bulgaria* (3350/19 and 3351/19, 2021, ECtHR); *İşik v Türkiye* (22484/24, 2024, ECtHR); *Kasım Özdemir and Mehmet Özdemir v Türkiye* (12345/24 and 12346/24, 2024, ECtHR).

116.2. In *Pranjić-M-Lukić v Bosnia and Herzegovina*, the ECtHR held that the use of handcuffs was not strictly necessitated by the applicant's conduct (who was being taken to a psychiatrist by force as he had failed to appear voluntarily), and that this diminished his human dignity and was in itself degrading in breach of Article 3.[152]

116.3. In *AP v Slovakia*, the ECtHR held that a slap in the face during an arrest met the Article 3 severity threshold after first assessing whether the physical force used was "*strictly necessary*".[153] Considering the applicant's vulnerability as a minor and the professionalism expected of the officers, the ECtHR concluded that even if the applicant had spat at, or attempted to punch, the officers, the use of force was not strictly necessary and would have been a breach of Article 3.

116.4. In *Filippovy v Russia*, the applicants' son, a member of the Russian military, died by suicide following mental and physical bullying by his fellow soldiers. *Inter alia,* the ECtHR held that the psychological aspects of the bullying were sufficiently serious, in their own right, to amount to treatment falling within the scope of Article 3.[154]

Article 5 of the ECHR

117. The seminal case is *Al-Jedda v United Kingdom,* which concerned the indefinite detention of a terrorist suspect in Basra.[155] The House of Lords found that UN Security Council Resolution 1546 had authorised British forces to use internment where necessary for imperative security reasons and that this superseded Article 5 of the ECHR.[156] This was, however, effectively overturned

152 *Pranjić-M-Lukić v Bosnia and Herzegovina* (4938/16, 2020, ECtHR) [82].
153 *AP v Slovakia* (10465/17, 2020, ECtHR) [59]-[63].
154 *Filippovy v Russia* (19355/09, 2022, ECtHR) [99].
155 *Al-Jedda v United Kingdom* (27021/08, 2011, ECtHR).
156 *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58.

by the ECtHR in *Al-Jedda v United Kingdom*.[157] This has significant implications as regards future operational decision-making in relation to the retention of prisoners of war by British forces.

Damages Claims

118. The Courts award damages following breaches of the ECHR for actions overseas.[158]

Conclusion

119. It is clear from the above that the ECHR seriously interferes with military operations and the training of the UK armed forces, and the lives of veterans, given (i) the application of the ECHR extraterritorially; (ii) the ever-expanding and therefore unpredictable interpretation given to the key articles of the ECHR; and (iii) the availability of an award of damages for breach. As noted below, to understand the full extent of this impact in practice requires a thorough empirical analysis based on interviews with current service personnel and veterans.

Sub-question 2: How does this ECHR-generated 'lawfare' supplant the laws of armed conflict, and what is the impact on morale and operational effectiveness?

120. As noted in the preliminary points above, the 'law of armed conflict' ("**LOAC**") or International Humanitarian Law ("**IHL**")[159] comprises: (i) the Geneva Convention; (ii) the Hague Convention No. IV (1907); and (iii) the St Petersburg Declaration. Further, the Armed Forces Act 2006 is not necessarily regarded as part of the LOAC but is also relevant to the legal pursuit of veterans.

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157 *Al-Jedda v United Kingdom* (27021/08, 2011, ECtHR) [96]-[110].

158 *Alseran v Ministry of Defence* [2019] QB 1251.

159 A practical guide from the Red Cross drafted for soldiers is here: International Committee of the Red Cross, 'The Law of Armed Conflict: Basic Knowledge' (June 2002) (https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/law1_final.pdf).

121. It is clear that there has been significant 'mission creep' of the ECHR as it has begun to supplant LOAC or IHL—and this has been thrown into sharpest relief in the UK, because unlike most European countries the UK carried out a long-running military operation for many decades on home soil (that is, Operation Banner in Northern Ireland).

122. The impact on morale and operational effectiveness of 'lawfare' is not a legal question but rather a practical one. It is therefore beyond the scope of this legal advice.[160] To answer that question requires an empirical study consisting of a substantial number of interviews to the extent to which lawfare is an issue in practice.[161] With that said, one can readily imagine that 'lawfare' (as explained above) could have an impact on morale, training, recruitment and operational effectiveness.

123. One particular example of 'lawfare' that is clear from the case law (currently limited to Northern Ireland) is coroners' inquests. In short, they involve a law officer (barrister or solicitor) appointed by the Lord Chancellor to investigating an individuals' cause of death. In doing so, they can seek postmortems, obtain witness statements and hold an inquest:

123.1. They are not limited to the Troubles and cover a myriad of investigative purposes (for example whether a death was a suicide or murder).

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160 One can, of course, readily see that vexatious claims may lead to a drop in recruitment akin to the (reported) drop in recruitment of armed police officers following the Chris Kaba case: Ed Holt, 'Metropolitan Police receives just six applications in latest armed officer recruitment drive as hundreds quit after cop charged with murder of Chris Kaba' (Daily Mail, 25 February 2024) (https://www.dailymail.co.uk/news/article-13122815/Metropolitan-Police-receives-just-six-applications-latest-armed-officer-recruitment-drive-hundreds-quit-cop-charged-murder-Chris-Kaba.html).

161 Whilst not an ECHR case, the case of 'Marine A' is a good example where the media may have suggested vexation where that charge is hard to sustain. As noted above, that claim proceeded through the Court Martial system and the defendant was ultimately convicted for manslaughter after he adduced evidence of adjustment disorder. It would be difficult to argue that this prosecution was vexatious given the clear video footage of the killing along with the defendant's contemporaneous commentary. Nevertheless, the media presented this as an example of such vexation.

However, in recent years, there has been an increasing use of coroners' inquests to pursue veterans (which was not their original purpose).[162]

123.2. In the Northern Ireland context, the legislation is the Coroners Act (Northern Ireland) 1959 where the Attorney General has a discretion to hold an inquest under s 13. As I understand the position, the vast majority of incidents had an inquest at the time and the issue is that the Attorney General for Northern Ireland ("**AGNI**") has a discretion under s 14 to hold a further inquest where it is "*advisable*" to do so.[163] In practice, I understand that further inquests are regularly ordered under this provision which has led to a proliferation thereof.[164]

123.3. A recent example related to the killing of four (alleged) IRA members at Clonoe on 16 February 1992. In February 2025, a coroner concluded that the use of lethal force by the armed forces was not justified. It was found that the soldiers did not have an honest belief that lethal force was necessary in order to prevent loss of life and the use of such force by the soldiers was, in the circumstances they believed them to be, not reasonable. It was further found that the operation was not planned and controlled in a way to minimise to the greatest extent possible the need

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162 Indeed, the Legacy Inquest Unit was established in February 2019 specifically to support the Presiding Coroner dealing with legacy inquests: 'Statement of Mr Justice Humphreys, Presiding Coroner Re Outstanding Legacy Inquests' (17 November 2023) (https://www.judiciaryni.uk/files/judiciaryni/media-files/Legacy%20Inquest%20Statement%20-%20Presiding%20Coroner%20Mr%20Justice%20Humphreys%20-%2017%20Nov%2023.pdf). The intention was to hear all legacy inquests within a five year timeframe. This has been taken over by the ICRIR with Enhanced Inquisitorial Proceedings: 'ICRIR sets out Enhanced Inquisitorial Proceedings and transitional measures for completing inquests at advanced stage' (25 April 2024) (https://icrir.independent-inquiry.uk/news/icrir-sets-out-enhanced-inquisitorial-proceedings-and-transitional-measures-for-completing-inquests-at-advanced-stage/).

163 In *Re Burns Application* [2022] NIQB 18 held that this was a broad discretion which only permitted a "*light touch*" review and held "*advisable*" to mean "*prudent or sensible*".

164 Indeed, there are law firms in Belfast dedicated to such inquests and it is a practice area at the Northern Irish Bar; if the law provides a legal options for a client, there will—understandably—be lawyers who use it.

for recourse to lethal force.[165] The Labour Government has indicated that it will judicially review the decision.[166]

123.4. One of the key issues is that, following an inquest, there are often calls for soldiers to be prosecuted. This is a good example of 'lawfare' as there is no evidential burden that must be reached before the inquest will be held (unlike, for example, a decision to prosecute by the DPP)[167] and it is an unpleasant, and stressful, process for veterans to go through (especially with the fear of prosecution thereafter).[168]

123.5. Examples of the protracted process to which veterans can be subject can be seen in:

123.5.1. *Re Soldiers A and C*: Soldiers A and C challenged a decision by the AGNI directing a fresh inquest into the 1972 fatal shooting of Joseph McCann by British soldiers in Belfast. Although the soldiers had been acquitted of murder in 2021 following the exclusion of key evidence, the AGNI ordered a new inquest shortly before the 2023 Act came into effect, which now prohibits such inquests. The applicants argued that the AGNI's decision was irrational, based on factual error, and legally futile due to the 2023 Act. The court found arguable grounds for judicial review on the issues of material error and the impact of the 2023 Act, but

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165 *In the matter of an inquest into the deaths of Kevin Barry O'Donnell, Patrick Vincent, Peter Clancy and Sean O'Farrell* [2025] NICoroner 1 [322], [336]

166 'Government to challenge Clonoe inquest ruling, MP says' (BBC, 22 March 2025) (https://www.bbc.co.uk/news/articles/c1kj1d0y2y9o).

167 To the contrary, there is a duty to investigate in England under s 1 of the Coroners and Justice Act 2009 where there is reason to suspect that (i) the deceased died of a violent or unnatural death; (ii) the cause of death is unknown; or (iii) the deceased died while in custody or otherwise in state detention.

168 A colleague has held conversations with veterans, and is aware of, at least, 20 Northern Ireland veterans who have this 'Sword of Damocles' hanging over them.

imposed a stay on further proceedings until legislative circumstances change.[169]

123.5.2. *Thompson v PPS*: William Thompson challenged a decision of the Public Prosecution Service ("**PPS**") regarding the 1971 fatal shooting of his mother, Kathleen Thompson, by a British soldier in Londonderry. In 1972, the Director of Public Prosecutions (being the predecessor of the PPS) determined that there would be no prosecution arising out of the death, and in 1972 a coroner returned an open verdict. Following a 2021 inquest that found the use of lethal force by 'Soldier D' was unjustified, the PPS sent directions to the Police Service of Northern Ireland ("**PSNI**") outlining further lines of enquiry, but did not expressly characterise this as an instruction under Section 35(5)(a) of the Justice (Northern Ireland) Act 2002. The applicant argued that the PPS failed to exercise its statutory powers properly, that the PSNI was under a legal duty to prioritise the investigation, and that the PPS's approach was irrational and unlawfully motivated. The Court of Appeal upheld the High Court's dismissal of the application, holding that the PPS had in fact acted under Section 35(5)(a) in substance, despite the absence of express reference, and that such a direction did not legally require prioritisation by the police.[170]

123.5.3. *Secretary of State for Northern Ireland v Coroner Fee*: The coroner investigating the alleged murder of Liam Paul Thompson by loyalist paramilitaries in 1994 considered a number of folders containing sensitive material. She agreed that the contents of the

169 *Re Soldiers A and C* [2025] NIKB 31.
170 *Thompson v PPS* [2024] NICA 27.

majority of evidence should remain secret under public interest immunity arrangements, but that a 'gist' of the evidence in one folder ought to be made public under the principles of open justice. The SOSNI challenged that decision, but a majority of the Court of Appeal ruled that the coroner had acted rationally in making her determination.[171] The case was heard by UKSC on 12 June 2025 with judgment pending.

123.6. These cases demonstrate the potential for an exceptionally lengthy and ongoing process for veterans, often spanning decades – sometimes 50 years or more from the events themselves – especially where prior investigations have taken place.

123.7. The 2023 Act sought to address this through s 44, which purports to stop/prevent such inquests. The Labour Government's draft Remedial Order[172] does not seek to repeal this provision but is reportedly exploring other proposals to allow some inquests to resume. The intention behind the 2023 Act, and the establishment of the Independent Commission for Reconciliation and Information Recovery ("**ICRIR**"), was that all of the inquests would be replaced by the ICRIR.[173]

123.8. Given the challenges to immunity and the Government's stated intention to resume the inquests, soldiers now face (i) inquests; (ii) investigation by the ICRIR; and (iii) criminal prosecution. This risks lending an increased

171 *Secretary of State for Northern Ireland v Coroner Fee* [2024] NICA 39.

172 Northern Ireland Office, 'A proposal for a Remedial Order to amend the Northern Ireland Troubles (Legacy and Reconciliation Act) 2023' (December 2024) (https://assets.publishing.service.gov.uk/media/675023929ef923a1bbc97a33/Remedial_Order_to_amend_the_Northern_Ireland_Troubles__Legacy_and_Reconciliation_Act__2023.pdf).

173 *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59 [214]-[237] stated that the ICRIR system was not capable of undertaking an ECHR investigation which casts further doubt over the 2023 Act.

impetus to the vexatious pursuit of soldiers (in both of the senses noted above).

123.9. Whilst this issue is currently limited to Northern Ireland, there is no reason why such a practice could not develop elsewhere in the UK in relation to overseas military conduct. Given the practice of claimant firms of solicitors, coupled with the application of the procedural requirement of Article 2, one can see that such an industry could also arise throughout the UK.

Sub-question 3: How can this be fixed? Does it require derogation from or withdrawal from the ECHR?

Previous attempts to reform

124. As noted above, there have been two significant pieces of legislation in the last five years which have sought to address the proliferation of legal claims against Armed Forces personnel: (i) the 2021 Act, and (ii) the 2023 Act. I start with the efficacy of those attempts before considering further possible reforms.

2021 Act

125. The 2021 Act created a presumption against prosecution for overseas personnel where five years had expired from the date of the alleged offence.[174]

125.1. Section 2 provides that "*it is to be exceptional for a relevant prosecutor*[175] *making a decision to which that section applies to determine that proceedings should be brought against the person for the offence or, as the case may be, that the proceedings against the person for the offence should be continued.*"

174 Section 1(2)-(4).

175 The "*relevant prosecutors*" are defined in s 7(3) and include the Director of Service Prosecutions and the Director of Public Prosecutions.

125.2. Section 3 provides factors that prosecutors are required to take into consideration when deciding whether to prosecute.[176]

125.3. Section 5 then makes clear that there is a requirement for the AGNI's consent to prosecute where the conditions are met.

125.4. Section 11 requires the court to take factors into account when considering whether to extend time limits under s 7 of the HRA.[177]

125.5. The immediate question is whether the 2023 Act will be challenged as incompatible with the ECHR under s 4 of the HRA. I return to this following the analysis of the 2023 Act and the Northern Irish High Court and Northern Irish Court of Appeal in *Re Dillon and Others*.[178]

125.6. It must be recognised, however, that the 2021 Act was a limited measure that was constrained by the then-government's policy of remaining compliant with the ECHR and its expansive jurisprudence (that is, it needed to have, at least, a 'respectable argument' for compatibility). It is important to view much of the legislation in this area not as reflections of what any Government believed would 'solve the problem', but rather its best possible response given ECHR constraints. Often, there was some level of risk taken, and an awareness that the legislation would be litigated both here and in Strasbourg, which might result in further amendments. The 2021 Act does not restore the primacy of LOAC/IHL by removing the influence of the ECHR in this area.

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176 Those factors include (i) the adverse (mental health/judgement) effect (or likely adverse effect) on the person of the conditions the person was exposed to during deployment overseas including threats, injuries or death of colleagues; (ii) the interest in finality where there had previously been an investigation with no prosecution; and (iii) the exceptional demands and stresses placed on personnel in overseas deployments.

177 These factors include (i) the impact of delay on evidence, and (ii) the ability to remember events and the dependence of the memories of individuals taking into account the inability to keep records, among others: s 7(2).

178 *Re Dillon and Others* [2024] NICA 59.

The 2023 Act and Re Dillon

126. The 2021 Act did not cover legacy cases in Northern Ireland because those operations were not overseas. The 2023 Act sought to address that issue:

126.1. The 2023 Act was more wide-ranging than the 2021 Act in that it includes, for example, establishing the ICRIR which possesses broad investigative powers.

126.2. Most akin to the 2021 Act is section 19 of the 2023 Act, which goes further than the 2021 Act in that the ICRIR must grant immunity to an applicant from prosecution if certain conditions are met.[179] The immunity provisions were thus not confined to security services personnel, but applied to anyone involved in conduct forming part of the Troubles (which again goes further than the 2021 Act).

126.3. The Northern Ireland High Court in *Re Dillon and Others*[180] made a declaration pursuant to section 4 of the HRA that the provisions in the 2023 Act relating to (i) immunity from prosecution are incompatible with Articles 2 and 3 of the ECHR; (ii) the ending of Troubles-related civil proceedings are incompatible with Article 6; and (iii) the inadmissibility

[179] The key condition was that the applicant must give a true account of their involvement in conduct forming part of the Troubles to the best of their knowledge and belief. Section 21(2) places a positive duty upon the ICRIR to take reasonable steps to obtain any information which the Commissioner for Investigations (CFI) knows or believes is relevant to the veracity of the applicant's account. Immunity may be revoked under section 26 where a person is subsequently convicted of an offence of making a false statement (section 27), a terrorist offence or an offence with a terrorist connection (section 26(2)). There is also an exception for sexual offences or inchoate offences relating to a sexual offence is provided for in Schedule 5, paragraph 2.

[180] *Re Dillon and Others* [2024] NIKB 11. See the criticism of this judgment in Richard Ekins, Stephen Laws, Conor Casey, 'The Impact of the Human Rights Act 1998 in Twenty-Five Cases' (Policy Exchange, 2024) 57-59 (https://policyexchange.org.uk/wp-content/uploads/The-Impact-of-the-Human-Rights-Act-1998.pdf).

of material in civil proceedings are incompatible with Articles 2, 3, and 6 of the ECHR.[181]

126.4. The Northern Ireland High Court held that the position of the ECtHR toward amnesty-like provisions, like those in the 2023 Act, was that they are only permissible in very limited circumstances.

126.5. The Northern Ireland Court of Appeal accepted that the ECtHR "*contemplates the possibility of exceptions*" ([183]) to its general position on the impermissibility of amnesty for offences involving Articles 2 and 3, including where it would contribute to a "*reconciliation process*" ([185]). However, the trial judge had concluded there was "*no evidence that the granting of immunity under the 2023 Act will in any way contribute to reconciliation in Northern Ireland*" ([183]).[182]

126.6. Pausing there, it is surprising that the trial judge found that the granting of immunity did not contribute to reconciliation, given that one of the key purposes of the legislation was to promote reconciliation by dealing with Troubles-related deaths.[183] That is why the key condition to immunity under the 2023 Act was providing information on a Troubles-related

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181 Summarised in the Court of Appeal judgment: *Re Dillon and Others* [2024] NICA 59 [38].

182 Discussed in the High Court at [187] of that judgment. The Court of Appeal accepted as a finding of fact that the policy drive to the 2023 Act was to "*end (what were considered to be) vexatious claims against veterans*" (*Re Dillon and Others* [2024] NICA 59, [10]). At first instance, the High Court noted one option to comply would be victim-led, namely that immunity could be granted where victims were willing to exchange immunity for information (*Re Dillon and Others* [2024] NIKB 11, [187]). It is very difficult to see how this could work in practice.

183 This was further to the Stormont House Agreement 2014 and an attempt to break through the deadlock caused by the resignation of Martin McGuinness in 2017 owing to the treatment of legacy cases. This was not the first attempt at such a body but one of the previous attempts, in 2013 the Police Service of Northern Ireland's Historical Enquiries Team (HET), was found to be incompatible with Article 2 by investigating state wrongdoing differently to paramilitaries by HM Inspectorate of Constabulary. See the summary in Brice Dickson, 'In defence of Northern Ireland's Legal Commission (ICRIR)' (2025) 2 EHRLR 136, 137. Also discussed in *Re Dillon and Others* [2024] NIKB 11, [87]-[103].

activity, that is precisely because the intention was to bring truth to victims and to solve the questions of the past.[184]

126.7. This is all the more surprising when one considers that immunities and amnesties have been a key theme in the peace process with a view to promoting reconciliation:

126.7.1. Section 4 of the Northern Ireland Arms Decommissioning Act 1997 is entitled "*Amnesty*" and notes at sub-section 1 that "*No proceedings shall be brought for an offence listed in the Schedule to this Act in respect of anything done in accordance with a decommissioning scheme*." Indeed, s 5 granted *de facto* immunity in providing that no weapons shall be forensically tested before they were destroyed, thereby wiping away huge swathes of evidential material to bring a prosecution against those with unlawful arms (such as paramilitaries).[185]

126.7.2. Sections 3 to 5 of the Northern Ireland (Location of Victims' Remains) Act 1999, placed limits on information and forensics obtained in locating the bodies of the 'disappeared'.[186] This amounts to a *de facto* immunity where, like the 2023 Act, the focus

184 Professor Brice Dixon who is Professor Emeritus of Humans Rights Law at Queen's University, sat on the Human Rights Commission and sits on the board of the ICRIR (https://icrir.independent-inquiry.uk/icrir-board-our-commissioners/). He noted that over 120 cases have already come to the Commission seeking such truth and reconciliation. There are 25 published investigations on their website, including the infamous Guildford pub bombing: https://icrir.independent-inquiry.uk/live-investigations-in-information-recovery/.

185 A criticism of this provision is that it is asymmetric in that it only involved wiping away forensics of evidence that could be used to prosecute paramilitaries with no equivalent for British personnel. A similar asymmetry exists in relation to the keeping of and/or willingness to disclose state records to inquests: the state has such records and will comply where paramilitaries will not.

186 The 'disappeared' were those that went missing in Northern Ireland in the Troubles following abduction by paramilitaries and their bodies have never been found: https://www.iclvr.ie/en/iclvr/pages/thedisappeared.

was to get to the truth of what happened to the victim and to give their family closure.[187]

126.7.3. The early prisoner release scheme was a key part of the BGFA[188] which, presumably, all concerned believed was compliant with the ECHR.[189] As noted above, however, the recent expansion of Article 2 casts separate doubt over the compatibility of this scheme but it has not been challenged (and in practice it is doubtful that anyone would be interested in doing so).[190]

126.7.4. In this context, it is surprising that the 2023 Act, which merely continued the theme of immunities in exchange for information to provide truth to the families of the deceased, was found to be incompatible with the ECHR. Whilst Colton J in the Northern Ireland High Court referred to these Acts,[191] he did not expressly deal with them when reaching his conclusion on breach of the ECHR,[192] and they were not addressed at all by the Northern Ireland Court of Appeal (discussed below).

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187 Colin Murray and Anurag Deb, 'The Legacy and Reconciliation Act is really that bad: a reply to Brice Dickson' (3 October 2023) [4] (https://sluggerotoole.com/2023/10/03/the-legacy-and-reconciliation-act-is-really-that-bad-a-reply-to-brice-dickson/), argue that the Remains Act is substantively different because individuals could be convicted on other material such that it did not amount to an amnesty. This arguably ignores the reality that without evidence a prosecution will not occur.

188 https://www.bbc.co.uk/news/uk-northern-ireland-65054962/. Implemented by the Northern Ireland (Sentences) Act 1998.

189 The 'PRISONERS' section of the BGFA, [1] expressly states that "*Any such arrangements will protect the rights of individual prisoners under national and international law*." On a natural reading, this includes the ECHR and it is difficult to see how this is compatible with *Re Dillon and Others* which held that conditional immunities are incompatible with Articles 2 and 3 of the ECHR: an early release and immunity are part of the same spectrum of a defendant not being exposed to the full force of the law.

190 Outside of the Troubles context, there is also section 71 of the Serious Organised Crime and Police Act 2005 which permits the DPP to issue an immunity notice specifying the conditions which must be complied with in order to avail of immunity from prosecution.

191 *Re Dillon and Others* [2024] NIKB 11 [76]-[81].

192 ibid [156]-[187].

126.8. In *Re Dillon and Others*, there were also challenges under various aspects of EU law (as domestically incorporated by the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020).[193] They were held to apply when the 2023 Act came into force.[194] It is beyond the scope of this advice, but consideration should also be given to whether amendments to domestic legislation are required to tailor those EU law rights to curb 'lawfare'.

126.9. The Conservative Government filed an appeal to this decision, but after the General Election the Labour Government stated that it was no longer pursuing its appeal in relation to incompatibility with the ECHR on 29 July 2024.[195] That appeal nevertheless led to the judgment by the Northern Ireland Court of Appeal in *Re Dillon and Others*.[196] The Court noted the "*unusual*" nature of the concession, but welcomed it as they agreed with the analysis of the Northern Irish High Court.[197]

126.10. The Northern Ireland Court of Appeal made clear at [164] that it was seeking to predict what the ECtHR would say if faced with the issue, and added its own observations at [172] that "*We are confident that the ECtHR has set its face against amnesties and immunity in a fashion which would result in the 2023 Act being held to be incompatible with the Convention, notwithstanding the point … that immunity was conditional and could be revoked. In addition, we were struck by the clear message from the*

193 The purpose of these statutes (in particular, s 7A of the 2018 Act and s 5 of the 2020 Act) was held in *Re Allister and Others v Secretary of State for Northern Ireland* [2022] NICA 15, [194] to be "*subjugation in the event of any conflict with a previous enactment*". See *Re Dillon and Others* [2024] NICA 59 [66]. *Re Allister* went to the UKSC at [2023] UKSC 5. These allow the disapplication of primary legislation if they are incompatible with directly effective EU law (*Re Dillon and Others* [2024] NICA 59 [72]-[73]).

194 *Re Dillon and Others* [2024] NICA 59 [55]-[161]. The domestic incorporation of EU law rights is referred to by way of the 'conduit pipe'.

195 *Re Dillon and Others* [2024] NICA 59 [15].

196 ibid.

197 ibid [16].

Committee of Ministers that the introduction of an amnesty provided for by the 2023 Act was likely to be incompatible with the Convention."[198]

126.11. The Court placed weight on the *Ullah* principle[199] and relied on *Margus v Croatia*;[200] *Mocanu, Kavaklıoğlu and Others v Turkey*;[201] *Hasan Kose v Turkey*;[202] *Vazagashvili and Sahanva v Georgia*;[203] *Makuchyan and Miasyan v Azerbaijan and Hungary*;[204] *Yamman v Turkey*;[205] *Nikolava v Bulgaria*;[206] *Okkali v Turkey*;[207] *Association "21 December 1989" and Others v Romania*[208] in noting that amnesties for actions which involve Articles 2 and 3 are not compatible with the ECHR.[209] The Court also noted domestic law on this issue.[210] All of these cases post-date the BGFA.

126.12. Permission to appeal was granted by the UKSC on 7 April 2025, with a hearing date set for 14 October 2025.[211] If the decision is not overturned, there is Northern Ireland High Court and Northern Ireland Court of

198 Interestingly, the Court of Appeal at [7] expressly recognised that the issues were political as well as legal and sought to justify its role on the basis that they were solely concerned with the legality of the legislation which "*is a legitimate part of the judicial function reflective of adherence to the rule of law and the constitutional role of the courts recognised both at common law and in legislation*".

199 This principles arises out of *R(Ullah) v Special Adjudicator* [2004] 2 AC 323 which held that in the absence of some special circumstances, the English court should follow any clear and constant jurisdiction of the Strasbourg Court. See *Re Dillon and Others* [2024] NIKB 11 [149] and *Re Dillon and Others* [2024] NICA 59 [164].

200 *Margus v Croatia* (4455/10, 2014, ECtHR).

201 *Mocanu; Kavaklıoğlu and Others v Turkey* (15397/02, 1999, ECtHR).

202 *Hasan Kose v Turkey* (15014/11, 2010, ECtHR).

203 *Vazagashvili and Sahanva v Georgia* (50375/07, ECtHR).

204 *Makuchyan and Miasyan v Azerbaijan and Hungary* (17247/13, 2020, ECtHR).

205 *Yamman v Turkey* (2005) 40 EHRR 49.

206 *Nikolava v Bulgaria* (2009) EHRR 40.

207 *Okkali v Turkey* (2010) 50 EHRR 43.

208 *Association "21 December 1989" and Others v Romania* (2015) 60 EHRR 25.

209 *Re Dillon and Others* [2024] NICA 59 [165]-[172].

210 ibid [169], citing *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11. At [175]ff *Re Dillon* continues to look at issues around the ICRIR that are beyond the scope of this advice as they do not directly concern vexatious pursuit of individual veterans but may be worth considering further in the context of public inquiries generally.

211 https://www.supremecourt.uk/cases/uksc-2025-0013.

Appeal authority that, *inter alia*, the (conditional) immunity provisions in the 2023 Act are incompatible with Articles 2 and 3 of the ECHR.[212]

126.13. As a result, the Labour Government has put forward draft remedial orders to address *Re Dillon and Others* which seek to repeal all of the conditional immunity provisions.[213]

127. Reverting to the 2021 Act, this has not yet been challenged but there is a real risk that it, too, may be found to be incompatible with Articles 2 and 3 of the ECHR on the basis that the presumption against prosecution amounts to a form of conditional immunity in light of *Re Dillon and Others*.[214]

212 There had been an inter-state case brought by the Republic of Ireland against the UK but it is unclear whether that will proceed given the Government's stated intention to repeal the immunity provisions.

213 https://committees.parliament.uk/publications/46855/documents/241262/default/ .

214 Dickson notes at 139 that "*It is absolutely clear that the government saw a link between the aims of that legislation and the aims of the proposed legacy legislation for Northern Ireland: while British soldiers who had served in Northern Ireland would not benefit from the Overseas Operations Act, they would be reassured by provisions in the separate legislation to be enacted for Northern Ireland.*"

PART III: THE FAIRNESS TEST

128. This section considers whether we can put British citizens first when it comes to social housing and public services. In particular:

128.1. How have ECHR Articles 8 (family life) and 14 (discrimination) been interpreted by courts to confer obligations on public authorities to house non-citizens?

128.2. How have the courts used these articles to intervene on the eviction of housing association tenants for anti-social behaviour?

128.3. Are the courts the right forum for determining the trade-offs that arise under these laws?

128.4. Can we put British citizens first when it comes to social housing and public services?

EXECUTIVE SUMMARY

129. ECtHR jurisprudence has given courts further powers to make decisions in housing, and indeed in areas which many would consider to be more for politicians than for judges. However, it should be stressed that the case law set out above makes it clear Contracting Parties have a wide margin of appreciation in this area, and should policy be enacted by way of primary legislation, it may be possible to mitigate some of the issues the ECHR has caused in this area and create a fairer system for all.

130. Article 8 has expanded the defences available to tenants in possession cases, and some ECHR jurisprudence has also previously been used to confer benefits on non-citizens. Further, Article 14 means that the Government cannot discriminate against foreign nationals on a blanket basis when it comes to housing and benefits. However, other ECHR jurisprudence shows a broad

margin of appreciation with respect to housing matters with Contracting Parties, and it may be possible to fix with primary legislation many of the issues arising.

ANALYSIS

Background

Social Housing

131. In broad terms, housing provision by local authorities is governed by the Housing Act 1996 ("the "**1996 Housing Act**"). Part 6 of the 1996 Housing Act governs the allocation of social housing by local authorities, whilst the provision of temporary accommodation is governed by Part 7 of the 1996 Housing Act.

132. Part 6 gives local authorities powers to set up an allocation scheme for social housing in which they determine priorities between qualifying persons, and for the procedure to be followed in allocating accommodation (see section 167(1) of the 1996 Housing Act). Interpretation of an allocation scheme is a matter for the Court.[215]

133. Part 7 of the 1996 Housing Act places obligations on local authorities to assess applications by those who are homeless and/or threatened with homelessness, as well as helping with who are threatened with homelessness avoid it, and provide initial help to the homeless who are eligible for assistance. They must secure that suitable accommodation is available for an individual (i) who is homeless; (ii) who is in priority need of accommodation; (iii) who did not become homeless intentionally (see the 1996 Housing Act, section 193(2); and (iv) if an individual is considered to have "priority need".

215 See *R (Flores) v Southwark LBC* [2020] EWCA Civ 1697.

134. An individual is considered in priority need if, as per section 189 of the 1996 Housing Act (i) they are a pregnant woman or a person with whom a pregnant woman resides or might reasonably be expected to reside; (ii) they are a person with whom dependent children reside or might reasonably be expected to reside; (iii) they are vulnerable as a result of old age, mental illness or handicap or physical disability or some other special reason, or is someone with whom such a person resides or might reasonably be expected to reside; and/or (iv) they are homeless or threatened with homelessness as result of an emergency such as flood, fire or other disaster.

Immigration Status

135. The regulations setting out which classes of persons from abroad are eligible or ineligible for an allocation under Part 6 are the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006 No.1294).

136. Broadly (as per s.160ZA(1) of the Housing Act 1996, as inserted by s.146 Localism Act 2011 and further expanded on in the guidance "Allocation of accommodation: Guidance for local housing authorities in England" at paragraph 3.6 - 3.14) the categories of eligible individuals are individuals with (i) refugee status and/or humanitarian protection (where their application for asylum has been *accepted*); (ii) indefinite leave to remain; (iii) EU settled status; (iv) leave to remain after fleeing conflict in Ukraine, or Afghanistan, Sudan, Israel and Gaza; and (v) limited leave as a victim of human trafficking or modern slavery.[216]

137. In addition, there is an extensive, complex web of legal obligations on the part of central and local governments towards those who enter or remain in the country illegally, whether they are able to regularise their status or not. This

[216] This is also the case with regard to assistance under Part 7 (see s 185(1) of the Housing Act 1996).

includes the duty to provide support and accommodation to them and their dependents (including providing food, clothing, accommodation to a certain standard, and medical care). These are contained in a variety of instruments including the Immigration and Asylum Act 1999, the Care Act 2014, and the Nationality, Immigration and Asylum Act 2002. These duties are ultimately derived from the ECHR, most notably Article 3 and Article 8 (for family-related needs). The importance of these duties was recognised recently in the ongoing litigation over the accommodation of asylum-seekers in Epping.[217] There have been various attempts to restrict or exclude support depending on immigration status, but the legislation has never adopted a total exclusion of rights to illegal migrants, as some form of support is necessary to comply with the ECHR.[218]

Possession

138. With regard to seeking possession of a rental property, a landlord can only seek possession of a property on certain grounds. These are set out in Schedule 2 of the Housing Act 1985 and Schedule 2 of the Housing Act 1988 (the "**1988 Housing Act**").

139. It is not proposed to set out all of the grounds here. However, it is important to note that some are mandatory (which require a court to grant possession if they are proven, for example Ground 8 of the 1988 (high rental arrears)) and some are discretionary, so if proven the court must decide whether possession is reasonable.

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217 See, e.g., *Secretary of State for the Home Department Somani Hotels Limited v Epping Forest District Council* (summary of appeal from [2025] EWHC 2183 (KB) – full judgment not available at time of writing) [27].

218 See the summary contained in Shu Shin Luh and Connor Johnston, *Migrant Support Handbook* (Legal Action Group, 2023) 325-358, 805-830.

140. Possession on the grounds of nuisance and/or anti-social behaviour tend to be on discretionary grounds, although there is one mandatory ground for very serious anti-social behaviour (such as conviction of a serious offence).

Benefits

141. The benefits foreign nationals can access is a complex matter and it is not proposed to list them all here. However, attention is drawn to the following:

141.1. Asylum seekers (that is, those who are waiting on their asylum decision) are not entitled to benefits such as Universal Credit, but instead may be eligible for accommodation and/or asylum support from the Home Office (as detailed below). This includes schooling for their children and may include healthcare.[219]

141.2. Most people admitted to the UK from outside the EEA on limited leave to remain will be subject to the condition that they have "*no recourse to public funds*" and therefore any attempt to access benefits could lead to their prosecution and/or removal.

141.3. Non-EEA nationals with indefinite leave to remain can access social security benefits and tax credits on the same basis as UK nationals.

142. Section 98 of the Immigration and Asylum Act 1999 ("the "**1999 Immigration Act**") states that whilst a decision on full asylum support is being considered, an asylum seeker may be provided with temporary support if they appear to be destitute. An asylum seeker who appears likely to become destitute within 14 days, but not immediately, may also be entitled to asylum support under section 95(1)(b) of the 1999 Immigration Act, but not to temporary support.

[219] See Asylum support: What you'll get - GOV.UK.

However, the Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7 regulation 5 states that accommodation must be provided:

142.1. If the household of the asylum seeker includes a child (under 18), both pieces of legislation are clear they must be granted temporary support.

142.2. Additionally, if a person applying for section 95 or section 98 support (or a dependant family member) is a vulnerable person, the Home Secretary must consider their special needs when considering providing support.[220]

142.3. Accommodation does not need to be in any particular form but must be "adequate to the needs" of asylum seekers (section 96 of the 1999 Immigration Act).

Sub-question 1: How have ECHR Articles 8 (family life) and 14 (discrimination) been interpreted by courts to confer obligations on public authorities to house non-citizens?

143. First, it is important to emphasise that the ECtHR has been clear that Article 8 cannot be construed as recognising a right to be provided with a home;[221] any positive obligation to house the homeless is limited;[222] and, there should be a wide margin of appreciation for housing matters.[223]

144. Second, the ECtHR has found it legitimate for Contracting Parties to put in place criteria according to which a benefit such as social housing can be allocated, when there is insufficient supply available to satisfy demand, so long as such criteria are not arbitrary or discriminatory. Indeed, it has set out that states may be justified in distinguishing between different categories of

220 The Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7, reg 4
221 *Chapman v United Kingdom* (2001, ECtHR GC) [99].
222 *Hudorovič and Others v Slovenia* (2020, ECtHR) [114].
223 *LF v United Kingdom* (December 2022, ECtHR) [4].

immigrants and in limiting the access of certain categories to public services such as social housing. *Bah v United Kingdom*,[224] recognised the scarce stock of social housing available in the UK and the legitimacy, in so allocating, of having regard to the immigration status of those in need of housing.

145. Third, the ECtHR found in *Hasanali Aliyev and Others v Azerbaijan*,[225] 2022, [46]-[47] that an eviction which took place in the context of the management of state-owned housing could, in principle, be seen as aiming at the fair distribution of the available state housing and, therefore, as pursuing a legitimate aim in the interests of the economic well-being of the country and the protection of the rights of others, within the meaning of Article 8.

146. However, *R (on the application of Morris) v Westminster City Council*[226] ("*Morris*") held that it was a breach to discriminate on the basis of nationality and immigration control in the context of priority needs in housing. On the facts of the case, the applicant for local authority housing was a British citizen but her daughter was not. The local authority considered that the daughter did not qualify for priority housing under s. 185(4) of the Housing Act 1996 because she was not a British citizen. The Court held that this was a breach of Articles 8 (the right to family life) and 14 (right against discrimination).

147. The Court in *Morris* at [31] made reference to the ECtHR case of *Gaygusuz v Austria*[227] (Application no. 17371/90). In that case, a Turkish national was refused a benefit, purely on the basis he was not an Austrian national and that was found to be in breach of Article 14 in conjunction with Article 1 of Protocol

224 *Bah v United Kingdom* [2011] ECHR 1448 [49], [52].
225 *Hasanali Aliyev and Others v Azerbaijan*, (42858/11, 9 June 2022, ECtHR), [46]-[47].
226 *R (on the application of Morris) v Westminster City Council* [2005] EWCA Civ 1184.
227 *Gaygusuz v Austria,* (17371/19, 16 September 1996, ECtHR).

1 (the right to property). The ECtHR noted that weighty reasons are required to justify such discrimination.[228]

148. The Court in *Morris* commented at [44] that "*Putting foreign nationals under pressure to leave if they cannot regularise their stay is a perfectly intelligible policy objective. But while it is simple to justify in relation to foreign nationals, it has no discernible justification in relation to British citizens. The same is true of benefit tourism: while there may be separate reasons of non-residence for denying such people benefits, subjecting them to disadvantage purely in order to discourage them from exercising the right of abode which their citizenship carries seems to me to require very solid justification.*"

Sub-question 2: How have the courts used these articles to intervene on the eviction of housing association tenants for anti-social behaviour?

Local authority landlords

149. Historically, the House of Lords (before it became the UKSC) found that it was not open to a residential occupier against whom possession was sought to raise a proportionality argument under Article 8.[229]

150. However in *Doherty v Birmingham City Council* the Court acknowledged that due to developments in the Strasbourg jurisprudence, the law in the UK must also develop.[230]

151. This came to a head in *Pinnock v Manchester City Council* ("*Pinnock*") in which the UKSC considered the Strasbourg jurisprudence.[231] In particular the UKSC noted *McCann v United Kingdom*[232] and stated that "*The loss of one's home is the*

228 Ibid, [42].
229 See in particular *Harrow London Borough Council v Qazi* [2004] 1 AC 983, *Kay v Lambeth London Borough Council* [2006] 2 AC 465.
230 *Doherty v Birmingham City Council* [2009] 1 AC 367 [68] per Lord Scott, and [138] per Lord Mance.
231 *Pinnock v Manchester City Council* [2010] UKSC 45.
232 *McCann v United Kingdom* (19009/04, ECtHR).

most extreme form of interference with the right for respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under [Article 8]*, notwithstanding that, under domestic law, his right of occupation has come to an end" a*nd rejecting the contention that *"the grant of the right to the occupier to raise an issue under article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant"*.[233]

152. The UKSC also noted *Kay v United Kingdom*[234] (the ECtHR proceedings on the same facts as *Kay v Lambeth*)[235] in which at [73] the ECtHR stated they welcomed: "*… the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of article 8"* and at [74] that "*…The Court concludes that the decision by the County Court to strike out the applicant's article 8 defences meant that the procedural safeguards required by article 8 for the assessment of the proportionality of the interference were not observed…It follows that there has been a violation of article 8 of the Convention in the instant case."*

153. The UKSC therefore concluded in *Pinnock* at [45] that "*Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end*"

154. This approach has also gained recognition in statute with the introduction of the Housing Act 1985 section 84A (by the Anti-Social Behaviour, Crime and Policing Act 2014), which whilst providing additional mandatory grounds for possession, expressly recognises that they are subject to Article 8 rights.

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233 *Pinnock v Manchester City Council* [2010] UKSC 45 [54].
234 *Kay v United Kingdom* (37341/06, 21 September 2010, ECtHR).
235 *Kay v Lambeth* [2006] 2 AC 465.

Private Landlords

155. Historically, the ECtHR had been content to consider cases in which private landlords brought possession hearings.[236] In *McDonald v McDonald*,[237] the UKSC found that, with regard to UK possession cases, although Article 8 could be engaged in possession cases concerning private landlords, if the person seeking possession was not a public body, a court could consider the question of the necessity or proportionality of the interference as already concluded due to the underlying statutory scheme regulating possession and it was not necessary to consider it. This was endorsed by ECtHR in the Respondents' appeal.[238]

How does this operate in practice?

156. The question a court will consider when an Article 8 defence is raised is (as per *Hounslow LBC v Powell* "*whether making an order for the occupier's eviction is a proportionate means of achieving a legitimate aim*"?[239] This is an exercise of balancing the interests of the claimant against the personal circumstances of the defendant, and is very much a fact-based exercise.

157. In *Pinnock*, the UKSC explicitly declined to give guidance as to how this balancing exercise should operate, stating that this should be left to "*the good sense and experience of judges sitting in the County Court*".[240] Given that the Court of Appeal has indicated that an appellate court would be reluctant to disturb such an assessment by a County Court judge (*Southend on Sea BC v Armour*),[241]

236 *Ivanova and Cherkezov v Bulgaria* [2016] ECHR 373 and *Zehentner v Austria* [2009] ECHR 1119.
237 *McDonald v McDonald* [2016] UKSC 28
238 *FJM v UK* (2019) 68 EHRR SE5—see in particular [41]–[45].
239 *Hounslow LBC v Powell* [2011] UKSC 8, [33].
240 *Pinnock v Manchester City Council* [2010] UKSC 45 [57].
241 *Southend on Sea BC v Armour* [2014] EWCA Civ 231

this places a huge amount of responsibility on individual County Court judges in these cases.

158. Examples of when Article 8 defences have proved successful in cases in which possession is sought for anti-social behaviour include:

158.1. *Flagship Housing Group v McAllister*:[242] The mandatory ground for possession (Ground 7A of Schedule 2 of the 1988 Housing Act) against the tenant who had admitted to a drugs related offence was dismissed on account of (i) the tenant's medical condition (ii) the medical condition of her daughter who was preparing for GCSEs, and (iii) the absence of complaints from neighbours.

158.2. *Southend on Sea BC v Armour*[243] [2014] EWCA Civ 231 where possession proceedings were brought against the tenant on anti-social behaviour grounds, including accusations of verbal abuse of neighbours and contractors, as well as turning on electricity when contractors were working causing one to receive an electric shock. The judge at first instance found that a possession order was no longer proportionate as the tenant had complied with his tenancy for over a year, and this was upheld by the Court of Appeal.

159. It is, however, difficult to know how often such defences are successful as County Court judgments are mostly unreported.

Sub-question 3: Are the courts the right forum for determining the trade-offs that arise under these laws?

160. As set out above, there are downsides to the courts determining these trade-offs. The possession cases put a huge amount of power in the hands of lower

242 *Flagship Housing Group v McAllister* (April 2017) Legal Action 38, Cambridge County Court.
243 *Southend on Sea BC v Armour* [2014] EWCA Civ 231.

court justices. With regards to the *Morris* question, one can see an argument that the question as to who is entitled to a state benefit should be determined by the executive, rather than a judge.

Sub-question 4: Can we put British citizens first when it comes to social housing and public services?

161. I am asked to consider whether British citizens could be given priority when it comes to access to social housing and public services. There is a perception that whilst asylum seekers are being put up in hotels, homeless British citizens may not be able to access housing services.

162. It should be noted that in 2010, the system for providing accommodation to asylum seekers has been privatised, with Serco Group Plc, Mears Group Plc and Clearsprings Ready Homes responsible for providing the accommodation.

163. This is in contrast to accommodation that would be offered to a British citizen or other eligible person, whose homelessness application and any temporary accommodation would be dealt with by a local authority.

164. However, the strain on the system caused by the influx of asylum seekers has caused requirements to be placed on all local authorities to participate in the asylum dispersal scheme (this was done under the Conservative Government in 2023). In particular, there was a mandatory scheme to house asylum seeker children which was unsuccessfully challenged by Medway Council.[244]

165. Whilst there are certainly refinements that could be made allowing British citizens to have priority in applications for certain accommodation, such blanket legislation is likely to breach the ECHR on the grounds of discrimination as per the cases of *Gaygusuz v Austria* and *Morris* (noted above).

244 *R (Medway Council) v Secretary of State for the Home Department* [2023] EWHC 377 (Admin).

166. Additionally, any legislation which did not take into account the rights of children who were non-British citizens could also fall foul of the ECHR as per *Morris*. Additionally, the ECHR considers children to have "*extreme vulnerability*" and this is considered a decisive factor which takes precedence over any considerations relating to the child's irregular migration status[245]. States are also required to take necessary steps to provide appropriate protection and humanitarian assistance to asylum-seeking children[246] and the ECtHR has further stated in relation to Article 8 that the best interests of the child must be paramount in all decisions involving children, noting that this was a broad consensus in international law.[247]

167. Such legislation which did not take into account migrant children therefore would be likely to fall into difficulty.

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245 See amongst many others *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, (13178/03, 12 October 2006, ECtHR), [55]; *Muskhadzhiyeva and Others v Belgium,* (41442/07, 19 January 2010, ECtHR), [56]; *Popov v France,* (39472/07 and 39474/07, 19 January 2012, ECtHR), [91].

246 *Muskhadzhiyeva and Others v Belgium,* (41442/07, 19 January 2010, ECtHR), [62]; *Popov v France,* (/07 and 39474/07, 19 January 2012, ECtHR), [91].

247 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, (13178/03, 12 October 2006, ECtHR), [83]; *Rahimi v Greece*, (8687/08, 5 July 2011, ECtHR), [108]; *Popov v France,* (39472/07 and 39474/07, 19 January 2012, ECtHR), [140].

PART IV: THE JUSTICE TEST

EXECUTIVE SUMMARY

High-level test: Can we ensure prison sentences reflect Parliament's intentions and stop disruptive protests without being told it is 'disproportionate'?

168. In relation to disruptive protests, the short answer is 'no', as a result of the UKSC's approach in *Director of Public Prosecutions v Ziegler and Others* ("***DPP v Ziegler***")[248] which established a proportionality test.[249] There is a good argument that this is not legitimately underpinned by ECtHR case law.[250] However, the asymmetry of appeals to the ECtHR[251] is such that this cannot be tested in Strasbourg. As such, it is the current law in the UK.

169. Similarly, in setting genuinely mandatory, harsh sentences (which could not be reduced under any circumstances), the answer would also be 'no', unless Parliament was willing to legislate in breach of the ECHR (which is within its constitutional powers but would put the UK in breach of its international obligations).

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248 *Director of Public Prosecutions v Ziegler and Others* [2021] UKSC 23

249 See, generally: David Spencer, Sir Stephen Laws KCB KC (Hon), and Niamh Webb 'Might is Right? The 'Right to Protest' in a new era of disruption and confrontation' (Policy Exchange, 2024) (https://policyexchange.org.uk/wp-content/uploads/Might-is-Right-Final.pdf); Dr Paul Stott, Richard Ekins and David Spencer, 'The 'Just Stop Oil' protests: A legal and policing quagmire' (Policy Exchange, 2022) (https://policyexchange.org.uk/wp-content/uploads/2022/11/The-%E2%80%98Just-Stop-Oil-protests.pdf); Richard Ekins and Sir Stephen Laws KCB, KC (Hon), 'Amending the Public Order Bill' (Policy Exchange, January 2023) (https://policyexchange.org.uk/wp-content/uploads/2023/01/Amending-the-Public-Order-Bill.pdf); Charles Wide QC, 'Did the Colston trial go wrong? Protest and the criminal law' (Policy Exchange, 2022) (https://policyexchange.org.uk/wp-content/uploads/2022/10/Did-the-Colston-trial-go-wrong.pdf).

250 The detailed analysis on this point was undertaken by Anthony Speaight KC and can be provided separately.

251 There is no ability for the state to appeal to Strasbourg where it thinks that the domestic court has gone too far. As a result, there is a constant ratcheting up of rights protections with no opportunity for the ECtHR to hear appeals brought by states.

170. In both cases, to get around the effect (or perceived effect) of the ECHR and its case law, clear legislation would be required. Any such legislation would likely result in a declaration of incompatibility under the HRA (from UK courts), and be challenged in the ECtHR as being incompatible with Convention rights.

Sub-question 1: Can we lawfully introduce mandatory minimum sentences for repeat offenders, strictly applied?

171. Mandatory minimum sentences with no consideration of an early release or no prospect of rehabilitation are not permitted under the ECHR. This has been interpreted strictly by the ECtHR in cases involving life sentences. However, in some circumstances, mandatory minimum sentences for repeat offenders are permitted under the ECHR, as the ECtHR has interpreted the ECHR to allow flexibility in the sentencing framework.

172. Applying minimum sentencing rigidly to protests without judicial discretion risks breaching proportionality principles under Articles 10 (freedom of expression) and 11 (freedom of association).[252] As such, to be considered compatible with the ECHR, mandatory minimum sentences must include mechanisms such as parole reviews to maintain proportionality and support rehabilitation, thereby balancing deterrence with human rights commitments.

Sub-question 2: Can we lawfully introduce outright bans on disruptive protests blocking highways and transport networks, with no requirements for proportionality?

173. Imposing outright bans on disruptive protests without considering proportionality is likely to be in contravention of conventional rights under the ECHR and HRA. Articles 10 (freedom of expression) and 11 (freedom of association) only allow restrictions if they are prescribed by law, aim to achieve legitimate objectives (for example, public safety), and are proportionate. The

252 See *Gülcü v Turkey, (*17526/10, 19 January 2016, ECtHR).

DPP v Ziegler approach requires courts to evaluate the proportionality of restrictions by considering factors like the level of disruption and harm to third parties. Legislation introducing blanket bans risks declarations of incompatibility under Article 4 of the HRA and challenges from the ECtHR.

ANALYSIS

Introducing mandatory minimum sentences for repeat offenders

174. Introducing mandatory minimum sentences for repeat offenders in the context of disruptive protests often engages Articles 9 (freedom of thought), 10 (freedom of expression), and 11 (freedom of assembly) of the ECHR through an examination that balances (i) the rights of the accused or convicted, (ii) public order and security, and (iii) the rights of individuals not involved in the protest.

175. The ECtHR grants a margin of appreciation to states to determine penalties for crimes, acknowledging that local courts are best positioned to balance societal needs, cultural norms, and legal traditions.[253] Contracting States can therefore set penalties to meet valid objectives under the ECHR, such as curbing disorder, ensuring safety, or protecting others' rights, as permitted by Articles 10(2) (limits to freedom of expression) and 11(2) (limits of freedom of association) of the ECHR, even in those cases where individuals or collectives are exercising their freedom of expression and freedom of assembly and association.[254]

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253 In *Léger v France* (19324/02, 11 April 2006, ECtHR) [72] the ECtHR ruled that sentencing was a matter of domestic jurisdiction. In *James, Wells and Lee v United Kingdom*, (25119/09 and 57715/09 and 57877/09, 18 September 2012, ECtHR), [195] the ECtHR ruled that Article 5(1) (right to liberty) does not guarantee a 'fair' or balanced prison term, and fairness checks under Article 5(1)(a) are typically off-limits. By contrast, in *Gülcü v Turkey,* (17526/10, 19 January 2016, ECtHR) the ECtHR intervened only when a sentence exceeding two years for throwing stones during a protest was deemed too harsh, given the offender's age and context, showing that national freedom is curbed only in extreme cases.

254 See *Kudrevičius and Others v Lithuania* (37553/05, 15 October 2015, ECtHR) where the ECtHR noted at [108] that states have a broader room to act when protests cause significant disruption, such as blocking

176. However, penalties require (i) a fairness check, as punishments for peaceful or low-impact protests cannot be excessive;[255] (ii) a need to distinguish between different forms of protest activity;[256] and (iii) potentially providing rehabilitation to justify ongoing detention.[257]

177. This flexibility for the national authorities permits countries to establish their own sentencing structures, including mandatory minimums or open-ended sentences, provided that they leave room for case-by-case judgment.

178. In *Venables v United Kingdom*,[258] the ECtHR found the UK's use of detention for young offenders to be compatible with the ECHR because it included tailored reviews via minimum terms and Parole Board decisions.[259] Under section 53(1) of the Children and Young Persons Act 1933, a person convicted of murder committed when below the age of 18 years shall be detained 'during His Majesty's pleasure'. This is a mandatory sentence, which did not allow the court any discretion in determining the sentence. The expression 'during His[260] Majesty's pleasure' was interpreted as an indeterminate sentence, equivalent in practice to a life sentence. It was held that the Home Secretary had the power to determine the minimum period (or 'tariff') which must be served by the

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roads and held the prison sentences to be compatible. See also *Mariya Alekhina and Others v Russia* (38004/12, 17 July 2018, ECtHR).

255 See *Ezelin v France*(11800/85, 26 April 1991, ECtHR) [53] where a lawyer was disciplined with a reprimand by the Guadeloupe Bar for participating in a peaceful demonstration that turned disorderly without personally engaging in violence and the ECtHR found the reprimand disproportionate as the applicant's passive participation in a peaceful protest did not justify sanctions. See also *Éva Molnár v Hungary* (10346/05, 7 October 2008, ECtHR) [43].

256 See *Kudrevičius and Others v Lithuania* (37553/05, 15 October 2015, ECtHR).

257 *James, Wells and Lee v United Kingdom* (25119/09, 57715/09 and 57877/09, 18 September 2012, ECtHR), [218], [221].

258 *Venables v United Kingdom* 2000) 30 EHRR 121

259 See *Ibid*; see also Ministry of Justice, *The Sentencing Bill – European Convention on Human Rights Memorandum* (5 March 2020) [106] (https://assets.publishing.service.gov.uk/media/5e66531886650c5140f17a70/sentencing-bill-echr-memorandum.pdf).

260 At that time, 'Her Majesty's pleasure'.

person sentenced, to satisfy the requirements of retribution and deterrence, before they can be considered for release on licence.

179. This indicates that states may set fixed penalties if they are designed to account for individual circumstances based on public policy priorities on criminal law issues. However, in practice, these safeguards may also serve as mechanisms through which defendants might seek more favourable conditions for their sentencing, often leading to appeals before national and international courts. It should be noted, however, that a truly 'lifetime' sentence, or a minimum set at what the ECtHR might view as a disproportionately harsh level, would likely not have succeeded.

180. As a result, the imposition of mandatory minimum sentences is not prohibited by the ECHR *per se* and the ECtHR grants national authorities considerable discretion through the 'margin of appreciation' to determine penalties for crimes, including the use of mandatory minimums. However, this discretion is not absolute and Parliament's ability to implement strictly applied mandatory minimums may be practically constrained by the requirement to build in safeguards for individual circumstances, and the fact that at some upper limit the ECtHR will determine the mandatory minimum to be in breach on the basis that it is disproportionate.[261] The UK case law on this point must be viewed in the light of the fact that sentencing regimes were drafted to enable the UK to have a good argument for compatibility; even if stricter regimes might have been preferred, they would likely have been in breach of the ECHR. This restriction on the imposition of penalties not only applies to protests but has also been extended to more serious crimes.

[261] Sentencing Act 2020 (c 17) ss 311–315 reflects this with the mandatory minimum sentences containing escape clauses where there are "exceptional circumstances". This is also reflected in the Court's approach in R v Rehman and Wood [2005] EWCA Crim 2056; *R v Jordan, Alleyne and Redfern* [2004] EWCA Crim 3291 [25]-[26]

Other Policy Issues

181. Alongside the potential human rights concerns, the introduction of mandatory minimum sentences for those involved in disruptive protests would undoubtedly place additional (although perhaps limited) pressure on the UK's already strained criminal and prison system. These impacts could be included as part of potential challenges to the legislation in both the UK and the ECtHR. While such sentences may be necessary to ensure adequate deterrence and reflect the seriousness of disruptive protest offences, they would inevitably increase prison populations and demand greater resources for both incarceration and rehabilitation programmes, as required to maintain strict compliance with the ECHR.

182. It is clear that the prison system is already under significant strain. The ECtHR outlined in *James, Wells, and Lee v United Kingdom* that a lack of rehabilitation programs for 'imprisonment for public protection' offenders resulted in unjust detention under Article 5 (right to liberty). [262] Imprisoning more protesters for offences such as public nuisance or highway obstruction (Highways Act 1980, s 137) could increase prison congestion, thereby limiting access to programmes aimed at offender rehabilitation. This could lead to assertions of violations of Article 5 (right to liberty) if detention is not sufficiently justified or if rehabilitation options are unavailable.[263]

183. While these concerns may be valid, they should be weighed against the legitimate need to ensure that penalties for disruptive protests adequately reflect their impact on society and provide sufficient deterrence to prevent future offences. The challenge lies in balancing these competing considerations while maintaining system capacity.

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262 *James, Wells and Lee v United Kingdom* (25119/09 and 57715/09 and 57877/09, 11 February 2013, ECtHR) [218]-[219].

263 ibid [221].

184. The Sentencing Act 2020 builds on the Criminal Justice Act 2003 (s. 142), and lists the purposes of sentencing, including punishment, deterrence, rehabilitation, public safety, and victim reparation (Sentencing Act 2020, s. 57). These established sentencing principles face potential constraints when Articles 10 (freedom of expression) and 11 (freedom of association) considerations are applied to cases involving disruptive protests. The requirement to balance human rights protections against traditional sentencing objectives may limit judicial discretion to impose appropriately robust penalties that reflect the severity of the disruption caused. This tension is particularly evident where the proportionality assessment mandated by *DPP v Ziegler* may prevent courts from delivering sentences that adequately serve the purposes of punishment and deterrence. Unsurprisingly, the varying considerations in this area as well as the necessity for 'balancing' these different considerations have created an unhelpful level of uncertainty; for example:

184.1. Some judicial practice shows that the *DPP v Ziegler* test has not prevented courts from imposing more severe punishment when deemed proportionate.[264]

184.2. In contrast, the precedent established in *Yaroslav Belousov v Russia*[265] which cautions against penalties that might create a chilling effect on lawful protest, raises concerns that legitimate sentencing objectives may be subordinated to human rights considerations, potentially undermining the deterrent effect necessary to address increasingly disruptive protest tactics.

264 See *R v Trowland & Decker* [2023] EWCA Crim 919.

265 *Yaroslav Belousov v Russia* (2653/13 and 60980/14, 4 October 2016, ECtHR) [181].

The requirement for proportionality in banning disruptive protest blocking highways and transport networks

185. Proportionality is a core part of the *DPP v Ziegler* test when assessing the compatibility of measures with the ECHR.

186. The ECtHR grants national authorities a broad 'margin of appreciation' to determine penalties for disruptive protests, permitting sentences that emphasise public order and safety. This margin of appreciation[266] is, however, limited by the mandates of Articles 10 (freedom of expression) and 11 (freedom of assembly) of the ECHR.

187. Therefore, unlike other countries which are not members of the ECHR (for example, Australia and New Zealand), the UK Parliament is *obliged* to rationalise and justify its criminal policy in relation to the broad principles contained in the ECHR, ensuring that it remains compliant, such that it can withstand scrutiny by the ECtHR. That is not to say that membership of the ECHR ensures a more rational criminal policy, but rather that membership of the ECHR actually makes criminal policy design more time-consuming, imposes substantive limitations, and encourages risk-aversion, in that the UK: (i) must produce sufficient evidence that it has considered its ECHR obligations, and appropriately weighed the interests at play in relation to each specific legislative or policy change;[267] (ii) avoids policy positions that have been deemed in breach by the ECtHR in similar situations elsewhere; and (iii) is subject to scrutiny far beyond judicial review (including because criminal

266 For detailed commentary, see: 'The Margin of Appreciation' (Council of Europe, Lisbon Network, THEMIS Competition) (https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp).

267 See, e.g., 'The Sentencing Bill – European Convention on Human Rights, Memorandum prepared by the Ministry of Justice' (5 March 2020) (https://assets.publishing.service.gov.uk/media/5e66531886650c5140f17a70/sentencing-bill-echr-memorandum.pdf).

law could be challenged in the ECtHR even if embodied in primary legislation, which is not amenable to judicial review).

188. UK Courts traditionally accepted a 'reasonable excuse' defence when dealing with offences committed during the occurrence of disruptive protests, an approach that was never successfully challenged in the ECtHR.[268] However, this approach changed when the UKSC in *DPP v Ziegler* established a proportionality test, evaluating factors such as (i) the nature of the protest, (ii) the level of disruption, and (iii) the impact on third-party rights. However, its anticipated effect may have been diluted by subsequent decisions which appear to reaffirm the courts' reluctance to impose blanket proportionality tests for all protest-related offences, and emphasise parliamentary sovereignty in policy decisions as to balancing competing rights.

189. The proportionality test established in *DPP v Ziegler* for protest-related offences establishes a step-by-step assessment of the defendant's conduct. The test evaluates whether a restriction (for example, a conviction or penalty) on protest rights is justified, with the following key elements:

189.1. **Engagement of ECHR Rights**: Courts must determine if the protest involves Article 10 (expression, for example political messaging) or Article 11 (assembly, for example public gatherings).

189.2. **Prescribed by Law**: The restriction must stem from explicit legal provisions, such as Section 137 of the Highways Act 1980, for obstruction offences.

[268] See *Nagy v Weston* [1965] 1 WLR 280, 284C–D, *Hirst v Chief Constable of West Yorkshire* (1987) 85 Cr App R 143; *DPP v Jones (Margaret)* [1999] 2 AC 240, 257D; see *Anthony Speaight Report* [1]-[3]; [7]-[10].

189.3. **Legitimate Aim**: The restriction must serve a purpose under Articles 10(2) or 11(2), like preventing disorder, ensuring public safety, or protecting others' rights (for example, freedom of movement).

189.4. **Necessity in a Democratic Society**: Courts evaluate proportionality by considering:

189.4.1. Nature of the protest (peaceful or violent).

189.4.2. Extent and duration of disruption (for example, traffic or economic impact).

189.4.3. Whether the protest targeted its objective (for example, government sites).

189.4.4. Risk of violence or public harm.

189.4.5. Availability of less restrictive measures to manage the protest.

189.5. **Proportionality of Interference**: The penalty must not excessively limit ECHR rights. Courts must weigh the protest's democratic value against its impact, ensuring convictions or sentences are justified.

190. Although it led to the discontinuation of several prosecutions, the impact of the *DPP v Ziegler* decision has so far been mixed.[269] Nevertheless, as a result of the *DPP v Ziegler* test, Courts are likely to analyse prosecutions through the prism of proportionality such that it will not be possible to stop disruptive protests without a risk of such an approach being held to be disproportionate.[270] As

[269] See, for example: *Reference by the Attorney General for Northern Ireland Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; *R v Sarti* [2025] EWCA Crim 61.

[270] Penalties for participants in primarily peaceful and non-disruptive protests may be considered disproportionate: in *Oya Ataman v Turkey* (74552/01, 5 December 2006, ECtHR), [42] the Court ruled that dispersing a peaceful, minimally disruptive protest solely for lack of authorisation was disproportionate, highlighting the need for a fact-specific fairness check. See further *Ezelin v France*

noted above, it is unclear that *DPP v Ziegler* is, itself, underpinned by a clear line of Strasbourg authority. Parliament could, therefore, pass legislation removing the proportionality test but this is likely to be challenged in the ECtHR. It is unclear whether the ECtHR would find such legislation to be a breach of the ECHR.

191. Moreover, under the HRA, UK courts may conclude that such a ban is incompatible with Articles 10 (freedom of expression) and 11 (freedom of assembly), potentially issuing a Section 4 declaration of incompatibility. Further, in addition to these declarations under national law, an unsatisfied plaintiff could reasonably formulate an application and eventual ECtHR rulings against the UK.

192. Even if an outright ban were enacted, UK judges, bound by s 3 of the HRA, may well interpret it restrictively to align with ECHR rights. The *DPP v Ziegler* test mandates proportionality in protest-related cases, requiring courts to consider the democratic role of protests and refrain from imposing excessive penalties. A ban without proportionality would likely be narrowed by courts to require case-specific assessments.

(11800/85, 26 April 1991, ECtHR). By contrast, see *Kudrevičius and Others v Lithuania* (37553/05, 15 October 2015, ECtHR) for violent protests.

PART V: THE PROSPERITY TEST

193. This section considers the following question: Can we prevent courts from treating action on climate change as a human right, and stop what are often perceived to be endless legal challenges to infrastructure projects? Within that question, there are two specific sub-questions:

193.1. How is the Paris Agreement on climate change being used in courts to challenge government policy (for example, the UK-Australia Free Trade Agreement); and

193.2. Why did the last government introduce new legally binding duties in the Environment Act, and can these be repealed?

EXECUTIVE SUMMARY

194. The Prosperity Test section raises important issues and is a significant example of the damaging effects of lawfare in the UK. Judicial review, and defensive decision-making predicated on fear of judicial review, have hobbled the development of essential infrastructure over many decades. Sam Richards of Britain Remade has pointed out that we have not built a reservoir in over 30 years, a nuclear power station in 30 years and offshore wind farms take 13 years to get going, despite only taking two years to build.[271] A third runway at Heathrow Airport continues to be "*one-part infrastructure, two-part national soap opera*".[272]

195. Vital road projects are dogged by legal challenges brought by "*anti-roads campaigner*" dubbed "*one of Britain's costliest Nimbys*",[273] and the huge HS2 rail

271 https://conservativehome.com/2025/01/24/sam-richards-the-conservatives-need-to-get-to-work-now-on-a-new-plan-to-build-the-economy/.

272 Navraj Ghaleigh, 'Climate Constitutionalism of the UK Supreme Court' [2021] Journal of Environmental Law 441.

273 https://www.telegraph.co.uk/news/2025/04/09/chris-todd-britains-costliest-nimby (discussed further below).

project has been so protracted that the previous Prime Minister eventually saw no option but to cancel the northern leg of the line in 2023.[274] One factor in that decision may have been the now infamous bat tunnel which cost in excess of £100m to institute contested mitigation measures specifically disowned by Natural England.[275] The Lower Thames Crossing, for example, was originally expected to cost £5.2bn but that has ballooned to £9bn.[276] Norway built an equivalent project for £109m, contrasting unfavourably with the £267m spent on the planning stage alone of the Lower Thames project.[277] An "*acoustic fish deterrent*" is proposed at Hinkley Point C.[278] Proposed wind and solar projects require significant new investment in pylons and high-voltage overhead lines, ominously described by campaigners as a "*desecration*" of the landscape.[279]

196. This section therefore raises highly contested policy issues that are significant for the future growth prospects of the UK. Crucially for the purposes of this advice, however, the impact of the ECHR and the HRA on these issues is more peripheral than for other sections. Major infrastructure projects and climate change questions rarely give rise to directly actionable claims by individuals on human rights grounds. This section can therefore deal with many of the core issues more shortly than would be necessary if the focus of this advice were to be on lawfare issues more broadly.

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274 The facts have changed, says Rishi Sunak, as he scraps HS2 leg' (BBC, 4 October 2023) https://www.bbc.co.uk/news/uk-politics-67005544.

275 'Natural England's role in High Speed 2' (Natural England, 8 November 2024 https://naturalengland.blog.gov.uk/2024/11/08/natural-england-role-in-high-speed-2/.

276 'Revealed: How the Lower Thames Crossing is breaking records for all the wrong reasons' (Britain Remade, 12 January 2024) (https://www.britainremade.co.uk/revealed_how_the_lower_thames_crossing_is_breaking_records_for_all_the_wrong_reasons).

277 ibid.

278 'Fish protection measures at Hinkley Point C' (https://www.edfenergy.com/energy/nuclear-new-build-projects/hinkley-point-c/supporting-the-environment/acoustic-fish-deterrent).

279 'Battle lines drawn over 'monstrous' pylons and solar farm 'wastelands'' (BBC, 3 February 2025) (https://www.bbc.co.uk/news/articles/c2d3zlkl4kro).

197. This section first addresses a direct challenge to the hitherto orthodox view that climate change and human rights are separate domains, which is the case of *Verein Klimaseniorinnen Schweiz and Others v Switzerland*[280] (*"**Klimaseniorinnen'**)*. The ECtHR held in that case that Switzerland was liable for its failure to take sufficient positive regulatory steps to mitigate the "*current and future threat to the enjoyment of human rights*" caused by climate change.[281] It then briefly addresses the effect on domestic litigation of the Paris Agreement, noting the absence of human rights issues raised by that treaty, before considering other international instruments and the recent Environment Act 2021.[282] Finally, it addresses the indirect effect of the HRA on judicial review proceedings to examine whether ECHR withdrawal would have a material impact on the problem of excessive judicial review of infrastructure projects, concluding that it is unlikely, subject to any potential ongoing ripple effects of the *Klimaseniorinnen* decision.

ANALYSIS

Climate change and the ECHR

198. In the recent and controversial *Klimaseniorinnen* case, the ECtHR held that the Swiss government was in breach of its obligations under Article 8 of the ECHR. Case law has established that in relation to "*complaints relating to environmental nuisance*" there must be "*actual interference*" with the applicant's "*enjoyment of his or her private or family life or home*" and, in addition, that a "*certain level of severity was attained*".[283] The case was brought by some individual senior citizens and "a non-profit association" established under Swiss law.[284]

280 *Verein Klimaseniorinnen Schweiz and Others v Switzerland* (53600/20, 9 April 2024, ECtHR).
281 ibid [436].
282 The Paris Agreement was agreed pursuant to the United Nations Framework Convention on Climate Change (1992) in Paris on 12 December 2015. It sets out to reduce emissions of greenhouse gases.
283 *Verein Klimaseniorinnen Schweiz and Others v Switzerland* (53600/20, 9 April 2024, ECtHR) [514].
284 ibid [10].

199. The difficulty of establishing a valid human rights claim in the context of climate change was vividly illustrated in this case by virtue of the fact that all of the individual applicants failed because they lacked the necessary standing to bring the claim.[285] This was because they could not demonstrate the requisite "*degree of intensity giving rise to a pressing need to ensure their individual protection*".[286] *Klimaseniorinnen* itself, by contrast, was held to have sufficient interest to bring the successful claim because they were a registered association (a very straightforward workaround to previously strict rules of standing, which is the legal term for the rules determining who is permitted bring a claim in the first place). This is a significant development in encouraging and enabling future litigation over climate policy—which may end up embracing many areas of government policy—and illustrates the growing mismatch between the terms of the ECHR and the ECtHR's decisions.

200. The ECtHR held that failure to regulate direct harm caused by environmental pollution that attains a certain minimum level is a breach of Article 8.[287] So, for example, a steel plant in Russia that damaged the health of residents was a breach.[288] The obligations imposed by the court extended to the Russian state because it had a duty to regulate private industries to prevent such harm and it had failed to do so. The ECHR therefore imposes a "*positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8*".[289] This is subject only to the discretion of the court whose "*first task is to assess whether the State could reasonably be expected so as to prevent or put an end to the alleged infringement*".[290]

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285 ibid [535].
286 ibid [533].
287 Muhamad Alamro, 'The European Court of Human Rights and climate change: an evolving jurisprudence' [2025] Journal of Planning & Environment Law 1098, 1099.
288 *Fadeyeva v Russia* (55723/00) (2007) 45 EHRR 10.
289 ibid [89].
290 ibid.

201. The conclusion reached by the court on Article 8 at [573]-[574] is worth setting out in full.

> "*573. In conclusion, there were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets (see paragraphs 558 to 559 above). By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.*
>
> *574. The above findings suffice for the Court to find that there has been a violation of Article 8 of the Convention*."[291]

202. Importantly, the ECtHR noted the prescriptive requirements placed on the Swiss government to bring forward regulatory measures that would satisfy the court's insistence that the government "*act in good time*", through a "*carbon budget or otherwise*". Further, on the usually wide 'margin of appreciation' accorded to Contracting Parties, the ECtHR noted that:

> "*543. ….the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States*."[292]

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291 *Verein Klimaseniorinnen Schweiz and Others v Switzerland* (53600/20, 9 April 2024, ECtHR) [573]-[574].
292 *Klimaseniorinnen* [543].

203. Judge Eicke, the British judge in the case, gave the sole dissenting judgment, and was overruled 16-1 on many of the issues.[293] He noted that his "*disagreement … goes to the very heart of the role of the Court within the Convention system*", and regretted that "*the Court's normally careful, cautious and gradual approach*" had been replaced by a judgment that went "*well beyond what I consider to be, as a matter of international law, the permissible limits of evolutive interpretation*".[294] He held that the majority had "*unnecessarily expanded the concept of 'victim' …[and] created a new right" and that the Court had "tried to run before it could walk*".[295]

204. Judge Eicke went on to argue that the voluntary and nationally determined approach in the Paris Agreement is "*difficult to reconcile (if not wholly inconsistent) with the Court's primary role of ensuring observance of a common minimum standard of protection applicable equally to all Contracting Parties*".[296] He also drew attention to the fact that despite "*repeated calls by the Parliamentary Assembly for the adoption of an additional protocol" to "provide for… a right to clean and healthy environment*", "*the Contracting Parties to the Convention*" have responded to such calls with consistent "*refusal*".[297]

205. Furthermore, Judge Eicke expressed concern that relevant legislation passed by the Swiss Parliament was "*expressly rejected by … a referendum in June 2021*" and added that "*great care is required in such a context not to be perceived to be relying (at least in part) on this very expression of the democratic will of the people of Switzerland as a basis for finding a violation of Article 8"*.[298]

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293 The judge concurred on Article 6(1), but relied on different reasoning to reach that conclusion.
294 *Klimaseniorinnen* [2]-[3] and [68] per Judge Eicke.
295 ibid [4] and [68].
296 ibid [14].
297 ibid [19].
298 ibid [21].

206. No less important and relevant, however, were Judge Eicke's comments in relation to standing. The majority repeatedly insisted that they did not want to broaden the definition to allow an '*actio popularis*', which means an unrestricted power for anyone to bring a claim if they think there is a potential breach of the law, regardless of whether they were personally affected. Historically, the ECtHR has consistently held that only victims who are "*directly affected*" may claim,[299] absent "*highly exceptional circumstances*".[300] Judge Eicke claimed, flatly, that the court had "*created exactly what the [majority] judgment repeatedly asserts it wishes to avoid, namely a basis for actio popularis type complaints*".

207. Judge Eicke warned that the effect of this change could mean that:

207.1. Contracting Parties will ultimately feel the need, or even be required, to introduce rules to permit such standing under domestic law; and

207.2. Where no such standing for an association is provided for in national law, "*the Court will, in fact, find itself having to consider these applications as a court of first instance… [for] which this Court is not designed and is generally ill-equipped to fulfil [and] this would be even more challenging when confronted with the inevitably detailed and complex evidence*".[301]

208. One major concern raised by Judge Eicke's prediction is the potential effect on the HRA 1998. Currently, s. 7 HRA makes clear that only "*victims*" may seek redress under the Act.[302] In domestic law, the *R (Ullah) v Special Adjudicator*[303] ("***Ullah***") case established the "*mirror*" principle, which means that the courts will generally follow established ECHR jurisprudence. This could mean that cases could be brought by wholly unrelated crowd-funded pressure groups,

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299 *Lambert and others v France* (46043/14, ECtHR) [89].

300 *Klimaseniorinnen* [465] and [470] per the majority.

301 ibid [50].

302 Section 7(1) 'A person… may (a) bring proceedings… or (b) rely on the Convention… only if he is (or would be) a victim…'.

303 *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

such as the Good Law Project, directly to the ECtHR, recalling further that the usual 'margin of appreciation' was expressly narrowed by the ECtHR in *Klimaseniorinnen*.[304] It could even lead, as Alex Goodman KC has suggested, to UK courts using s. 3 of the HRA to expand s. 7 of the HRA beyond victims to include pressure groups.[305] This could have a significant impact on the volume of future litigation that could be brought challenging new infrastructure projects for years to come.

209. The *Klimaseniorinnen* case attracted considerable attention in the media and elsewhere. It is important to be clear that the judgment must be situated within an evolving case law that means it cannot be regarded as an aberration or outlier—and it was decided by an overwhelming majority in the ECtHR. In those circumstances, it may be thought that the direction of travel of the ECtHR could be a material factor in assessing whether continued membership of the ECHR could have a material and deleterious effect on the freedom of manoeuvre of a future government in relation to climate change policies.

The Paris Agreement

210. The Paris Agreement agreed at COP21, committed signatories to a number of goals including: limiting global temperature increase to "*well below 2 degrees Celsius above pre-industrial levels*"; "*global peaking of greenhouse gas emissions*"; and binding commitments by all parties to "*prepare, communicate and maintain a*

304 *Klimaseniorinnen* [543].

305 'Implications for the UK of the New Standing Test for Human Rights and Climate Change Verein Klimaseniorinnen Schweiz and Others v Switzerland (App. no. 53600/20) and related applications' (Landmark Chambers, 26 April 2024) (https://www.landmarkchambers.co.uk/news-and-cases/implications-for-the-uk-of-the-new-standing-test-for-human-rights-and-climate-change-verein-klimaseniorinnen-schweiz-and-others-v-switzerland-app-no-53600-20-and-related-applications).
Section 3 (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. (2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted.

nationally determined contributions… [and] pursue domestic mitigation measures" to achieve them.

211. The Paris Agreement was considered in the case of *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council*[306] ("***Finch***"), which was a judicial review of a decision by Surrey Council to grant planning permission for a fossil fuel development to extract up to 3.3 million tonnes of hydrocarbons for commercial production. The UKSC held that the extraction of oil was causally connected to emissions thus making an environmental impact assessment essential because there would be a "*significant impact on climat*e".[307]

212. The obligation on the Government to set "national target and budget mechanisms" is found in s. 1 of the Climate Change Act 2008 which required the UK to reduce carbon emissions by 80% from 1990 levels.[308] This section was amended following the Paris Agreement to require the UK to reduce emissions by 100% relative to the 1990 baseline.[309] There were no ECHR or other human rights issues raised in this litigation but this case illustrates the fact that litigation risks remain high for this this kind of infrastructure project.

213. In the *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd*[310] ("***Heathrow***") case, judicial review of the proposed third runway development at Heathrow considered the effect of the Paris Agreement as well as briefly also considering a claim that human rights were at stake. The claim

306 *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20 [31].

307 ibid [7].

308 Section 1: (1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline. (2) "The 1990 baseline" means the aggregate amount of (a) net UK emissions of carbon dioxide for that year, and (b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas.

309 Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056.

310 *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52 [101].

addressed the framework for how an application for the grant of development consent would be dealt with. What was perhaps notable about this case was the attempted use of a statutory requirement in s. 5(8) of the Planning Act 2008 that the minister take "*account of Government policy relating to the mitigation of, and adaptation to, climate change*". The Court of Appeal had held that the Government had failed to fulfil a legal duty to take the Paris Agreement into account and explain how it had done so.[311]

214. The UKSC firmly rejected the approach of the lower court and decided that "*government policy*" should be "*given a relatively narrow meaning*" such as "*a formal written statement of established policy*".[312] This was to avoid making civil servants "*trawl through Hansard and press statements to see if anything had been said by a minister which might be characterised as policy*".[313] Thus the view of the government that the "*international obligation of the UK under the Paris Agreement were sufficiently taken into account… [was] plainly a rational one*".[314] In any event, any "*change in the UK's international obligations under the Paris Agreement*" would happen at the development consent order stage.[315]

215. The human rights element of the claim related to an attempt to argue that the s. 5(8) of the Planning Act duty should be read in light of s. 3 of the HRA. The claim was that "*an intolerable risk to life and to people's homes contrary to articles 2 and 8 of the European Convention on Human Rights*" should inform the interpretation of the s. 5(8) duty.[316] The UKSC held that any such effects would occur following a development consent order where a fresh assessment would be made. The important aspect of this case is that the court did not exclude the possibility of human rights arguments being in play at future stages of the

311 *R (Plan B Earth) v Secretary of State for Transport and Heathrow Airport* [2020] EWCA Civ 214 [233].
312 *Heathrow,* [105]-[106].
313 ibid [105].
314 ibid [132].
315 ibid.
316 ibid [113].

process. In those circumstances, a decision to exit the ECHR and possibly repeal the HRA might have some relevance and importance at future stages of the third runway decision making process.

216. The frosty reception in the UKSC of attempts to make the Paris Agreement an essential and material factor in ministerial decision-making across a swathe of public policymaking has not deterred creative legal arguments being made in later case law. This is not least because the UKSC in *Heathrow* recognised that the reduction in the emission target from 80% to 100% was a response to the Paris Agreement, thus conferring more influence on it than would normally be accrued by a pure unincorporated international agreement.[317]

217. The Court of Appeal gave further consideration to the appropriate treatment of the Paris Agreement in the *R (on the application of Friends of the Earth Ltd) v Secretary of State for International Trade/UK Export Finance (UKEF)* [318] *("**UKEF**")* case. This concerned a decision by the UK government to provide loan and credit guarantees to a liquid natural gas project in Mozambique. The Court of Appeal held that the Government "*chose, but were not compelled by domestic law to take into account*" the Paris Agreement. Having chosen to do so, the Government only had to hold a "*tenable*" view that the project was compatible with its obligations under the Paris Agreement, the construction of which was contested because the Paris Agreement has some conflicting aspects in relation to obligations in developing countries. The Court of Appeal found for the Government but expressed its concern that there is "*a lack of clear guidance as to how unincorporated agreements such as the Paris Agreement should be construed as a matter of domestic law*".[319] The Court of Appeal also held that in principle, the

317 Ibid [94]-[97].

318 *R (on the application of Friends of the Earth Ltd) v Secretary of State for International Trade/UK Export Finance (UKEF)* [2023] EWCA Civ 14.

319 ibid [50] (iii).

government "*must also be able to say, without successful challenge, that it thinks on balance and in good faith that a particular decision is compliant*".[320]

218. A controversial scheme to widen the road that passes close to the World Heritage site at Stonehenge again raised the issue of how to address obligations under the Paris Agreement, albeit briefly. The Paris Agreement had prompted a review of the relevant National Policy Statement which the Court of Appeal in *Save Stonehenge World Heritage Site Limited, R (on the application of) v Secretary of State for Transport & Ors*[321] (*"**Stonehenge**")* held the Secretary of State correctly took into account.[322] The Court of Appeal also held later in the judgment that whether the "*tenability approach*" was the right one, as it was in this case, depended on "*the circumstances of the individual case*" and set out seven non-exhaustive factors.[323] The Court of Appeal held that "*the Secretary of State's approach to the NPSNN review was unimpeachable*" because he had considered the "*carbon emissions likely to be generated*" and believed that the scheme was "*consistent with the UK's trajectory towards net zero*".[324]

219. The Court of Appeal also held in the *Stonehenge* case that the obligation to comply with the World Heritage Convention should be treated under the same tenability test, despite that obligation being given direct statutory force under s. 104 of the Climate Change Act 2008.[325] The Court of Appeal held that the Secretary of State was "*entitled to conclude*" that approving the scheme would not be in breach of the Heritage Convention.[326] The court held, incidentally,

320 ibid [50] (v).
321 *Save Stonehenge World Heritage Site Limited, R (on the application of) v Secretary of State for Transport & Ors* [2024] EWCA Civ 1227.
322 ibid [192].
323 ibid [142], [146]-[147].
324 ibid [194].
325 ibid [152], s 104(4) Climate Change Act 2008: 'This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations'.
326 ibid [166].

that his view was not just tenable but "*the proper interpretation*" and the approval was possible without "*offending or jeopardising the UK's international obligations*".[327] Finally, it was suggested by one claimant that there was a breach of Article 6 of the ECHR, but this "*was abandoned in oral argument, was rejected by the judge as untenable and has not been pursued on appeal*".[328] As it happens, and notwithstanding the years of effort to secure approval, the new Government decided to abandon the scheme.

Other international instruments

220. It is important to acknowledge that the ECHR does not operate in a vacuum and consideration must be given to other international agreements on top of the Paris Agreement, as the *Stonehenge* case helps to illustrate. In *HM Treasury v Global Feedback Ltd*[329] *("**GFL**")*, the Court of Appeal considered not just the Paris Agreement but also the United Nations Framework Convention on Climate Change ("**UNFCC**") when examining the scope of the Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (known generally as "**the Aarhus Convention**"). The Aarhus Convention imposes limits under Article 9(4) on the costs that can be incurred by individuals and groups who bring actions that fall within the terms of Article 9(3):

220.1. Article 9(3) to "*…ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions… which contravene provisions of its national law relating to the environment*".

220.2. Article 9(4) to "*provide adequate and effective remedies"* that are *"fair, timely and not prohibitively expensive*".

327 ibid [167].
328 ibid [60].
329 *HM Treasury & Anor v Global Feedback Limited* [2025] EWCA Civ 624.

221. The costs limits are set out in the Civil Procedure Rules in Part 46.26:

> *"(1) Subject to rules 46.25 and 46.28, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 46.27.*
>
> *(2) For a claimant the amount is –*
>
> > *(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;*
> >
> > *(b) £10,000 in all other cases.*
>
> *(3) For a defendant the amount is £35,000."*

222. Protection on costs is obviously of critical importance for applicants considering bringing judicial review claims against government decisions. In the *GFL* case, the claimants challenged Regulations giving effect to a recent trade deal with Australia.[330] The substance of the claim was that the Regulations would "*harm the environment by adversely impacting on climate change*" and that the government had failed to "*assess the nature and extent of … carbon leakage for reasons which were illogical or irrational*".[331] The Court of Appeal construed the term "*relating to the environment*" in Article 9(3) narrowly, but the case is notable because it does not mention the ECHR or the HRA at any point and yet the freedom of action for ministers and others would still appear to be at significant litigation risk. This case is currently being appealed to the UKSC.

330 Customs Tariff (Preferential Trade Arrangements and Tariff Quotas) (Australia) (Amendment) Regulations 2023 (SI 2023 No. 195).

331 *GFL* (n 329) [5]-[6].

Environment Act 2021

223. In the Introduction of their comprehensive annotated guide to the enormous Environment Act 2021 (the "**2021 Environment Act**"), Badger and Macrory say that apart from the Climate Change Act 2008, the Environment Act 2021 is "*the most significant environmental law for a generation in terms of both scope and substance*".[332] Maria Lee described it as "*extraordinary in its scale and scope*".[333] The Environment Act 2021 was "*largely designed to fill the perceived gaps in environmental governance arrangements following Brexit*".[334] The Act fulfils a commitment in s 16 of the European Union (Withdrawal) Act 2018 to bring forward legislation that, *inter alia*, establishes environmental principles, imposes a duty on the government to publish long term policy statements and sets up the Office of Environmental Protection ("**OEP**").

224. The Environment Act 2021 requires the government to adopt "*an environmental improvement plan*" in s 8. It also specifies in s 1 that there must be a "long-term target" set in each of the following areas: air quality, water, biodiversity and resource efficiency and waste management. Furthermore, targets must be set for air pollution in relation to "particulate matter" (s 2) as well as for "*species abundance*" (s 3). It is the "*duty of the Secretary of State to ensure*" that the targets are met under s 5. The authors of *Environmental Law* (10th ed), say that the s 5 duty "on the face of it sounds like a strong commitment" but they go on to point out that the process of review "*involves the government reporting to Parliament*" rather than being strictly legal duties enforceable in the courts.[335] Their critique continues:

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332 Badger and Macrory, Environment Act 2021: Text, Guide and Analysis (Hart Publishing: 2022), 17.

333 Maria Lee, 'The Environment Bill : A framework for progressive environmental law?' (18 October 2019) (https://www.brexitenvironment.co.uk/2019/10/18/framework-progressive-environmental-law/).

334 ibid 22.

335 Bell, McGillivray, Pedersen, Lees, and Stokes, *Environmental Law* (10th ed, OUP, 2024) 25.

> "*… the use of improvement plans together with targets significantly changes the governance landscape for environmental law and policy. By shifting the focus on to plans and targets drafted by the government, with no requirements as to the actual quality and definition of the aspirations and targets and no formal process of consultation in respect to whether the 'significant improvement test' is met or not, and with wide scope to change and amend the targets, there is a clear sense that environmental protection is becoming quasi 'legal' and more 'political'.*"

225. The source for the claim that there is "wide scope to change and amend targets" is s. 4(3) which expressly permits regulations under ss 1-3 "*which revoke or lower a target*" if the "*meeting the existing target would have no significant benefit*" or "*because of changes in circumstances*" or if the "*costs of meeting it would be disproportionate*". A requirement to publish a statement to be laid before Parliament is found is s 4(4). This power is sharply criticised by Lee, who is quoted in a Commons Library paper as claiming that the Act "*worryingly enables the pursuit of an immediate deregulatory agenda*".[336] Other critiques during the passage of the Bill included the then shadow Secretary of State, who cited Greenpeace, expressing concern that there was no legally binding non-regression clause, and that the new OEP has "no powers to issue fines" unlike the equivalent EU body.[337]

226. The Environment Act 2021 also requires the minister to make "*a policy statement on environment principles*" under s. 18. Ministers are required "*to have due regard to*" this policy statement, a phrasing that was strengthened during passage of the bill from the original requirement to "*have regard to*" which appears frequently elsewhere and is arguably the lowest tier of ministerial obligation.

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336 Maria Lee, 'The Environment Bill: A framework for progressive environmental law?' (18 October 2019) quoted in the House of Commons Library analysis of the Bill (https://researchbriefings.files.parliament.uk/documents/CBP-8824/CBP-8824.pdf) 27.

337 Quoted in the House of Commons Library analysis, ibid, at 15-16.

The s 19 obligation is caveated by not being necessary where there is "no significant environmental benefit" or would be "*disproportionate*" (s19(2)). Furthermore, s 19(3) exempts defence, taxation and spending from the section, although a further exemption for "*any other matter specified in regulations by the Secretary of State*" was dropped from the final draft bill. The abandoned clause was criticised as "*an absurd caveat to vital rules*" by Caroline Lucas MP on Twitter.[338] Lucas also described the 2021 Act as a "*missed opportunity*" and claimed on her website that the bill "*actually weakens our current environmental protections… and takes us backwards in so many areas… [with] loopholes that allow the Secretary of State to weaken an environmental target*".[339]

Ministerial statement

227. The Act also contains a requirement under s. 20 for ministers who are introducing any bill that contains provisions that would constitute environmental law if enacted to make a statement that the bill will not "*have the effect of reducing the level of environmental protection provided by existing environmental law*". If such a statement is not possible, then the minister must make a statement that they still wish the House to proceed. This requirement mirrors the well-known Statement of Compatibility obligation in s. 19 of the HRA. Such a statement may help make clear that the House proceeded with its eyes open in relation to future legislation, a point which may be raised in judicial review proceedings.

228. Important powers to make regulations in various areas are conferred in the Environment Act 2021, consistent with recent trends to set general frameworks in Acts which are then fleshed out subsequently by ministers. The Environment Act 2021 also confers a significant power to make amendments to primary

338 Quoted in the House of Commons Library analysis, ibid, at 49.
339 Quoted in the House of Commons Library analysis, ibid, at 25.

legislation. This is another example of a Henry VIII clause – such clauses are increasingly common but (as noted above) are controversial in constitutional terms because they allow ministers to amend, and effectively make, primary legislation without parliamentary scrutiny:

> "*142 Consequential provision*
>
> *(1) The Secretary of State may by regulations make provision that is consequential on this Act or regulations under this Act.*
>
> *(6) Regulations under this section may amend or repeal provision made by or under any legislation (**whenever passed or made**).*" (emphasis added)

229. The terms in parentheses in s 142(6) above are particularly powerful because they, very unusually, permit ministers to make amendments to legislation passed *after* the 2021 Environment Act as well as before—a 'prospective' Henry VIII clause. The effect of this provision would be to permit ministers in a future Government, hypothetically, to undermine or unwind legislative measures taken during the current Parliament in relation to environmental matters.[340] It could even, at least in theory, insert the abandoned clause mentioned above into the 2021 Environment Act that permits ministers to exempt "*any other matter specified in regulations*" that was critiqued by Lucas. While such a provision can obviously be repealed, the risk is that a future Government in a hurry, or uncertain of its numbers in Parliament, could use this to repeal legislation enacted during the current Parliament (subject, of course, to *vires* challenges on what is genuinely 'consequential'). Unless and until it is repealed it would be a constitutional menace.

340 A later Parliament could also do this as no Parliament can bind its successors; but there is an obvious difference between a later Parliament doing so, and a Minister having the power to do so.

Summary

230. The generality and cautious nature of much of the drafting of Part 1 of the Environment Act 2021 has attracted considerable criticism from campaigners committed to more aggressive measures on environmental issues. Others may take a more sanguine view of the very obvious shift in the Act that is clearly designed to ensure that accountability for environmental decisions is conducted in the political rather than legal realm.

231. Finally, as discussed, there is scope to deploy existing provisions in the Environment Act 2021 to amend prior and even subsequent legislation, including perhaps the Environment Act 2021 itself. This may mean that potentially significant reforms could be achieved with less inconvenience than might at first appear. In other words, it may not be necessary to resort to full-blown repeal. The Environment Act 2021 might even be thought to contain interesting elements of discretion and flexibility in terms of the powers conferred on ministers that could constitute something of a potential poison pill, whether or not that was originally intended. It might even be suggested that such endogenous and more subtle reforms could be made at a lower risk of a *Klimaseniorinnen*-style challenge. By contrast, a straightforward repeal of the Environment Act 2021 might be more vulnerable to claims to have failed to take or maintain sufficient positive measures designed to mitigate carbon emissions so as to satisfy the sensibilities of the Strasbourg court.

Judicial review culture

232. In a seminal 1990 article in *Public Law*, Mr Justice Schiemann (as he then was) contrasted the effect of what he termed "*open*" and "*closed*" standing rules.[341] Describing the level of liberality as "*to a degree a matter of fashion*", he defended

[341] Schiemann, 'Locus standi' [1990] Public Law 342.

a more closed system in part on the basis that being "*sued is a distraction from the business of governing*" and that the "*possibility of being sued can cause an administrator to concentrate less on the quality of his decision and more on making it 'judge-proof'*".[342] He also mentioned the costs of litigation to the system and the "substantial damage" caused by delay.[343]

233. It is fair to say that the pendulum of fashion has swung considerably towards a more open judicial review system in general terms. Whether this can be ascribed in whole or in part to the influence of prior membership of the EU or the current membership of the ECHR is a matter of speculation. What is not in doubt, however, is the sharp increase in litigation that in a previous era might have been described as having been brought by 'busybodies', even if an examination of judicial review outcomes might suggest that busybodies were rarely refused leave to bring claims on that ground alone.[344]

234. It may be that continued membership of the ECHR and the existence of the HRA reduces the ability of parliament to restrict access to the courts for repeat litigants who manifestly do not qualify for the label of 'vexatious', not least because they are not bringing litigation on the same issue each time.

235. It should be noted that the *R (Unison) v Lord Chancellor (Equality and Human Rights Commission and another intervening*,[345] case, one of the leading judgments on access to justice, expressly relied on claimed fundamental constitutional rights rather than the HRA. This was because the claimant was not a "*victim*" for the purposes of s. 7 of the HRA – although the ECHR case law "*concerning the right to access to justice*" was mentioned in passing. It might be thought,

342 ibid 345 and 348.

343 ibid.

344 *R v IBA, ex parte Whitehouse* (*The Times*, 14 April 1984); *R v GLC, ex parte Blackburn* [1976] 1 WLR 550 'Mr Blackburn comes before us once again. This time he draws our attention…'.

345 *R (Unison) v Lord Chancellor (Equality and Human Rights Commission and another intervening)* [2017] UKSC 51.

therefore, that exit from the ECHR and repeal of the HRA may not clear the obstacles in the path of significant reform to the question of who may bring judicial review proceedings to challenge infrastructure projects, although the passing reference to ECHR case law on access to the courts could be of relevance if UK membership continues.

Remedial measures?

236. Many of the serious problems caused by judicial review of domestic infrastructure are not directly impacted by membership of the ECHR but are affected by a culture of excessive deference to ever increasing and complex legal regulation both domestic and international.

237. Recent moves to achieve 'dynamic alignment' on energy policy more closely with the EU may also become increasingly relevant.[346] Previous Governments have attempted to mitigate some of the effects of delays in planning permission decisions in domestic law. One important example was the creation of Nationally Significant Infrastructure Projects ("**NSIPs**") through the Planning Act 2008. This sought to streamline decision making by centralising important decisions to the Secretary of State to make the final decision. This attempted solution has not worked, but it is not obvious how continued membership or exit from the ECHR would assist in improving the status quo.

238. More recent reform proposals follow an influential report by Lord Banner, an expert in planning and judicial review.[347] He recommended that the current three stages of judicial review applications in relation NSIPs should be reduced

346 Daniel Hannan, 'Starmer and the EU are still trying to punish Britain for Brexit' (The Telegraph, 19 July 2025) (https://www.telegraph.co.uk/news/2025/07/19/starmer-eu-punish-britain-for-brexit).

347 'Independent review into legal challenges against Nationally Significant Infrastructure Projects' (Lord Banner, assisted by Nick Grant, 28 October 2024) (https://www.gov.uk/government/publications/independent-review-into-legal-challenges-against-nationally-significant-infrastructure-projects/independent-review-into-legal-challenges-against-nationally-significant-infrastructure-projects)

by one. Applicants currently have the right to bring an application on the papers, with the right to appeal to an oral hearing and from there an appeal to the Court of Appeal. Lord Banner suggested that the paper application stage be removed.

239. The stated aim of reducing the three bites of the cherry to two is apparently to weed out unmeritorious claims. Lord Banner proposed that the target timescale for the oral hearing in the High Court should be within four weeks of the deadline for the Defendant and that the target timescale for the Court of Appeal's determination of an application for permission to appeal against the refusal of permission to apply for judicial review should also be four weeks.[348] Lord Banner rightly pointed out that there "*is no established constitutional right to multiple bites of the cherry at the permission stage*" and gave the example of s 289 of the Town and Country Planning Act 1990.[349]

240. Another proposed measure is the creation of an Environmental Fund into which developers could contribute in lieu of specific mitigation measures in each application. The argument for a holistic national programme of environmental protection and development is compelling and could see a more balanced approach than imposing specific requirements each time. These sensible proposals have received widespread support but there is a risk that these and other measures are rearranging deckchairs on the Titanic. The proposals are small, important but limited changes that do not really presage a sea-change in the regulatory environment that could mitigate the decades of neglect and delays in critical national infrastructure projects essential for the future prosperity of the country. Again, the ECHR and the HRA are of important but limited relevance to these issues; attempts to address the broader

348 ibid.
349 ibid [21].

concerns in relation to domestic planning policy raise issues that go beyond the ECHR and the HRA.

Conclusion

241. The continuance of the HRA and ongoing membership of the ECHR is of less visible salience to the 'Prosperity Test' (as framed) than some of the other tests addressed in this advice. However, it is important to recognise that this may understate the broader significance of ECHR rights to the jurisdiction of Government and thus ossification of public policy. Planning decisions (especially for key infrastructure) are important but not the whole of the relevant 'prosperity' considerations. For example, Article 6 (fair trial) and Article 1 of Protocol 1 (protection of property) will have had significant effects in terms of Government decision-making in all sorts of contexts that affect 'prosperity', but these will not necessarily be 'visible': some policies will be left on the cutting-room floor, or not even considered in the first place, in order to avoid potential challenges down the line. In addition, given the strong feeling on this issue, it is entirely plausible that the developments in *Klimaseniorinnen* (both its conclusion on standing, and bringing climate change within the ambit of the ECHR) could affect substantial swathes of government policy. The wider constraints on any future government attempting to improve the prosperity of the UK through reforming and streamlining domestic planning and other significant constraints are serious and long term. ECHR withdrawal would be important in this context but is not the only consideration; it might be a necessary part of the solution, but much is needed besides.

PART VI: THE BELFAST (GOOD FRIDAY) AGREEMENT

Can the UK leave the ECHR without breaching the Belfast (Good Friday) Agreement?

242. The BGFA comprises two interrelated agreements:

242.1. The first agreement is the Multi-Party Agreement, whose terms were agreed by the British and Irish governments and several political parties in Northern Ireland. The Multi-Party Agreement revolves around several commitments and undertakings by the parties. The most important undertakings include a total and absolute commitment to peaceful, democratic politics and the renouncement of political violence. It also includes both a mutual recognition of the legitimacy of the different political aspirations of the parties, and a commitment to reconciliation and rapprochement within shared democratic frameworks. The parties also endorsed the commitments made by the Irish and British Governments in respect of the constitutional position and future of Northern Ireland, and the recognition that its position in the Union would continue unless and until a majority of the people on each part of the island of Ireland, North and South, freely and concurrently choose to bring about a united Ireland.

242.2. The second agreement is the British-Irish Agreement, or the "*Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland*" to give it its full name, which supersedes the 1985 Anglo-Irish Treaty. In this Agreement, the British and Irish Governments recognise that the status of Northern Ireland should not be changed without the free consent of majority of the people of Northern Ireland. The Governments make a "*solemn commitment to*

support, and where appropriate implement, the provisions of the Multi-Party Agreement".

243. There is a very deep link between the two Agreements, with the agreement reached in the multi-party talks, the Multi-Party Agreement, forming an annex to the British-Irish Agreement, and, conversely, the British-Irish Agreement being an annex to the Multi-Party Agreement. Indeed, both Agreements are standardly referred to together as the BGFA. But strictly speaking it is the British-Irish Agreement that is a treaty between two sovereign states and is binding in international law. The Multi-Party Agreement is a political agreement that is intended to form the basis for an ongoing peace process and may be expected to develop over time.

The ECHR and the British Irish Agreement

244. The Multi-Party Agreement is not itself a treaty. The British-Irish Agreement is a treaty and imposes obligations on the UK and the Republic of Ireland, including of course obligations in relation to the Multi-Party Agreement. The terms of the British-Irish Agreement quite clearly do not require the UK to be a member state of the ECHR, nor do they purport to restrain withdrawal.

245. Article 2 of the British-Irish Agreement imposes an obligation on the UK (and Ireland) "*to support, and where appropriate implement, the Multi-Party Agreement*". This is not language that implies that the British-Irish Agreement incorporates the terms of the Multi-Party Agreement, such that a failure to comply strictly with the terms of the Multi-Party Agreement (or, strictly speaking, with the commitments by the two states recorded in it) – read as if it were itself a treaty rather than a political agreement – would constitute a breach of the British-Irish Agreement.

246. Whether the British or Irish Government's actions in relation to the terms of the Multi-Party Agreement constitute a breach of the British-Irish Agreement, and thus breach international law, would turn on whether they amount to a failure to support the Multi-Party Agreement or a failure, where appropriate, to implement it. In the absence of a mechanism for binding dispute resolution, the question of whether any action or inaction constituted such a failure would fall to be determined by negotiation, including of course in the British-Irish Intergovernmental Conference.

247. Established in accordance with Article 2 of the British-Irish Agreement, the point of the Conference is set out in the Multi-Party Agreement. Paragraph 2 of Strand Three: British-Irish Intergovernmental Conference says that "*The Conference will bring together the British and Irish Governments to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both Governments.*" Paragraph 5 says that in view "*of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters*". Paragraph 6 says that "*The Conference also will address, in particular, the areas of rights, justice, prisons and policing in Northern Ireland (unless and until responsibility is devolved to a Northern Ireland administration)*". Paragraph 4 provides that:

> "*All decisions will be by agreement between both Governments. The Governments will make determined efforts to resolve disagreements between them. There will be no derogation from the sovereignty of either Government.*"

248. Article 4 of the British-Irish Agreement made ratification of the Agreement conditional on British legislation having been enacted to implement the provisions of Annex A to the Constitutional Issues chapter of the Multi-Party Agreement, on amendments to the Constitution of Ireland having been approved by referendum, and on British and Irish legislation having been

enacted to establish the institutions mentioned in Article 2. All three conditions on ratification refer, unsurprisingly, to actions yet to be taken, to legislation that has to be enacted before the British-Irish Agreement can enter into force in international law and before the Multi-Party Agreement can be put into practice. Article 4 does not refer to any obligation to remain a member of the ECHR. Both the UK and the Republic of Ireland were Contracting Parties of the ECHR when the BGFA was signed. The focus of the British-Irish Agreement is on the obligations that Britain and Ireland will owe to one another in relation to supporting the Multi-Party Agreement, including enacting domestic legislation and making changes to the Constitution of Ireland.

249. The only way in which the UK (or Ireland) could be said to be in breach of the British-Irish Agreement by withdrawing from the ECHR is if the UK (or Ireland) could be said thereby to have failed to discharge its obligation to support, or where appropriate implement, the Multi-Party Agreement. It thus follows that one needs to consider closely the terms of that Agreement to see whether, or how, ECHR withdrawal would constitute a failure of support or appropriate implementation.

ECHR and the Multi-Party Agreement

250. Nothing in the Multi-Party Agreement can be construed as imposing any obligation on the UK (or on Ireland) to be, or to remain, party to the ECHR and subject to the jurisdiction of the ECtHR – indeed such a commitment would have been surprising given that Article 58 of the ECHR confers on all Contracting Parties the right to denounce it.[350]

[350] The context of the references to the ECHR had been a series of cases against the UK following actions in the Troubles, for example *Ireland v UK* (5310/71, 18 January 1978, ECtHR). As such, a concern that they were seeking to address was to ensure that Northern Ireland institutions complied with the substances of the ECHR.

251. At a minimum, any limitation on the UK's express right to withdraw under the ECHR, albeit operating vis-à-vis only one other State party to the ECHR (the Republic of Ireland), would have had to have been provided for in clear, express and unambiguous terms in the British-Irish Agreement.

252. With one exception, the references to the ECHR in the Multi-Party Agreement concern the domestic law applicable in Northern Ireland and the powers of the new democratic institutions for which Strand One makes provision, especially the Assembly, and other public bodies, including police and prisons. The exception concerns the domestic law of the Republic of Ireland.

253. The ECHR is mentioned in Strand One: Democratic Institutions in Northern Ireland, under the heading "*Safeguards*", with paragraph 5 referring to "*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*". Specifically, the ECHR (and any Bill of Rights for Northern Ireland) will be a safeguard that "*neither the Assembly nor public bodies can infringe*" and there will be "*arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland*". Paragraph 11, under the heading "*Operation of the Assembly*", provides that the Assembly may set up a special committee to consider whether proposed legislation is compatible with equality requirements, including the ECHR. Paragraph 26, under the heading "*Legislation*" provides that "*The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to… the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void*".

254. The focus of these references is on limiting the power of the Assembly (and, in paragraph 5 "*public bodies*") to breach ECHR rights.

255. These references to the ECHR as a limit on the powers of the Assembly (and other "*public bodies*") correspond with paragraph 2 of the first part of the Rights, Safeguards and Equality of Opportunity chapter, under the heading "*United Kingdom Legislation*", which provides that:

> "*The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency*."

256. That the point of referring to the ECHR in the BGFA framework was to provide a salient limitation on the power of public authorities within Northern Ireland, is clearly reflected in the precise nature of the obligations imposed on the British Government. The British Government committed itself to completing "*incorporation into Northern Ireland law*" of the ECHR in a manner that features "*direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency*."

257. The reference to "*including*" the power to overrule Assembly legislation certainly suggests that incorporation was intended to encompass additional domestic judicial remedies in respect of non-legislative acts of public authorities in Northern Ireland that infringe Convention rights, such as executive or administrative decisions. This reading is supported by the Multi-Party Agreement's reference to the importance of having safeguards to prevent "*public bodies*" from infringing the ECHR. Since public bodies exercise statutory authority rather than promulgate legislation, the courts could not "*ensure*" that other public bodies did not infringe ECHR rights if their role was limited to overruling Assembly legislation on the grounds of inconsistency with the ECHR.

258. The commitment on the part of the UK to complete the incorporation of the ECHR along with "*direct access to courts*", in the context of the incorporation of rights into the law applicable in Northern Ireland, clearly refers to access to domestic courts and not to the ECtHR. Only domestic courts could provide remedies in domestic law, such as overruling "*Assembly legislation on grounds of inconsistency*" or quashing executive and administrative decisions that infringe Convention rights. The ECtHR cannot directly overrule Assembly legislation, executive action, or administrative decisions on grounds of inconsistency (since its decisions cannot flow directly into the UK legal system); only a domestic court can do that.

259. In addition, it would make no sense to read a duty on the British Government to incorporate the ECHR into the law applicable in Northern Ireland, with direct access to the courts, as entailing a further and quite different duty to remain a party to the ECHR. Or to put the point another way, the duty to incorporate the ECHR into the law applicable in Northern Ireland is not a duty to maintain the position in international law by virtue of which persons within Northern Ireland retain a right of individual petition to the ECtHR.

260. Indeed, the right of individual petition to the Strasbourg Court already existed both in the UK and in the Republic of Ireland, and the BGFA says nothing about it except in so far as any modification to it – whether by reason of ECHR treaty change or British or Irish denunciation of the ECHR – would, of course, constitute a matter that it might be necessary to discuss in the British-Irish Intergovernmental Conference. When the Agreement says "*direct access to the courts*", this must in context mean the courts of Northern Ireland and the UK and cannot be understood, or have been intended to be understood, as meaning the ECtHR.

261. It follows that the only commitment that the Multi-Party Agreement imposes on the British Government in relation to the ECHR is to incorporate the text of ECHR rights into the law applicable in Northern Ireland and thus to impose legally enforceable restrictions on the powers of the Assembly, Executive, and other public bodies, complete with remedies, including the power to nullify any legislative infringement of the rights. References to the ECHR in the BGFA are references to the text of ECHR rights, rather than to the Convention as a treaty-based system of international adjudication. It is hard otherwise to read the obligation to incorporate the ECHR into domestic law and to limit the competence of the Assembly.

262. The point of the references to the ECHR in this context is to provide a ready means for limiting the power of the Assembly, the Executive Committee[351] and other public bodies and thus providing reassurance to the people of Northern Ireland.

263. The more specific references to the ECHR in the Multi-Party Agreement itself limit the devolved institutions, rather than the British Government or the Westminster Parliament (the unlimited lawmaking authority of which is expressly affirmed in paragraph 33 of Strand One). However, the British Government, and thus the UK as a state, is obliged to act with rigorous impartiality on behalf of all the people of Northern Ireland, respecting equal civil, political, social and cultural rights and eschewing discrimination. (If a united Ireland is ever formed, the Irish Government will be subject to the same obligation in relation to its exercise of jurisdiction over Northern Ireland.)

264. The most persuasive reading of the Multi-Party Agreement's references to "*public bodies*" is that they were never intended to extend to public authorities

[351] For completeness, the Scotland Act 1998, s. 57 contains similar provisions to the effect that a minister of the Scottish government cannot pass subordinate legislation that is incompatible with ECHR rights.

exercising non-devolved powers that impact Northern Ireland. In particular, the Multi-Party Agreement's references to public bodies does not encompass His Majesty's Government or its departments or, of course, the Westminster Parliament (which is not even a "public authority" for the purposes of section 6 of the HRA); rather, it is intended to refer to public authorities exercising devolved powers. As set out above, the structure of the Multi-Party Agreement deals with non-devolved powers in Strand Three where they are treated as a subject for discussion between the British and Irish governments in the British-Irish Intergovernmental Conference – the agreement providing expressly that, while "*determined efforts*" must be made to resolve differences between the two governments, "*there will be no derogation from the sovereignty of either Government*".

265. The whole history and context of the Multi-Party Agreement suggests that the rights protection it is seeking to guarantee is specifically protection against the abuse of the devolved institutions of Northern Ireland to reinforce inequalities or otherwise to exploit the historically divided communities of the Province. The BGFA, particularly the detailed provisions of the Multi-Party Agreement, must be read in this light.

Conclusion

266. As a result of the above, my conclusions are that:

266.1. The British-Irish Agreement, which is the part of the BGFA that is a treaty and is binding on the UK in international law, does not refer to the ECHR at all and in no way implies or entails that the UK or Ireland in 1998 renounced their right to withdraw from the ECHR in future.

266.2. The Multi-Party Agreement, which the UK has agreed to support, does refer to the ECHR, but these references all concern the domestic law of

Northern Ireland and the need to provide assurances to the different parties that they will be secure from the abuse of devolved power.

266.3. The British Government's obligation to support the Multi-Party Agreement does require the UK to maintain the substance of the ECHR as a limit on the Assembly and other public bodies in Northern Ireland, but this need not require incorporation of the ECHR in terms.

266.4. The law applicable in Northern Ireland could provide assurances against the abuse of devolved power in a number of ways, which are a matter for negotiation between the parties, with the most straightforward option for these purposes (i.e. in the event of UK withdrawal from the ECHR) being to maintain the Northern Ireland Act, and the HRA only in relation to Northern Ireland institutions (but not otherwise, as discussed further below).

266.5. It is therefore clear that the BGFA requires the incorporation of the substantive rights embodied in the text of ECHR[352] into the law applicable in Northern Ireland, without prescribing any particular means of incorporation. Indeed, the Human Rights Commission of Northern Ireland was established (pursuant to the BGFA) to draft a Northern Irish Bill of Rights as part of this exercise but was unable to complete the task owing to disagreements as to its contents. The Republic of Ireland is itself under an equivalent obligation, but again the BGFA does not prescribe how this is to be discharged.

[352] In my view this means bringing into Northern Ireland domestic law the substantive rights embodied in the text of the ECHR, but not its jurisprudence. This would therefore permit the UK to diverge from the ECtHR's (over-expansive) construction of the meaning and application of those rights in Northern Ireland to, for example, address the prosecutions of and civil actions against combatants of the Troubles.

266.6. In the event that the UK were to withdraw from the ECHR but pass a Northern Irish Bill of Rights to fulfil this obligation (as the BGFA itself envisaged), the political arguments at play are complex, and are beyond the scope of this legal advice.

266.7. Finally, there is the question of whether any special provision made for Northern Ireland in accordance with the BGFA should be extended across the UK. This is clearly contrary to the logic of the BGFA and begs the question why anomalous constitutional provisions made for Northern Ireland should be imposed beyond its borders.

PART VII: THE UK-EU TRADE AGREEMENT[353]

267. The TCA is an international treaty agreed between the UK and the EU which sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation, and participation in Union programmes.

268. Articles 763 and 771 provide that the parties "*shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties*." These commitments are described as "*essential elements of the partnership established by this Agreement*". However, Article 772 provides that "*for a situation to constitute a serious and substantial failure to fulfil any of the obligations described as essential elements... its gravity and nature would have to be of an exceptional sort that threatens peace and security or that has international repercussions*". On the basis of these provisions, I therefore conclude there would be no reasonable basis for the EU to terminate the entirety of the TCA as a consequence of the UK's withdrawal from the ECHR.

269. Part Three of the TCA concerns criminal law enforcement co-operation. It provides for close co-operation on a range of issues:

269.1. Exchanges of DNA, fingerprints and vehicles registration data (Title II & ANNEX 39);

353 For more details, see Conor Casey, Richard Ekins KC (Hon), Sir Stephen Laws KCB, KC (Hon), 'The ECHR and the Belfast (Good Friday) Agreement' (Policy Exchange, 2025) (https://policyexchange.org.uk/wp-content/uploads/The-ECHR-and-the-Belfast-Good-Friday-Agreement.pdf).

269.2. Transfer and processing of passenger name record data (Title III & ANNEX 40);

269.3. Cooperation on operational information (Title IV);

269.4. Cooperation with Europol (Title V & ANNEX 41);

269.5. Cooperation with Eurojust (Title VI & ANNEX 42);

269.6. Surrender (Title VII & ANNEX 43);

269.7. Mutual assistance (Title VIII); and

269.8. Exchange of criminal record information (Title IX & ANNEX 44).

270. Article 524 of the TCA states that co-operation on these matters is "*based on*" the Parties' and EU 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 Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically*."

271. Each Party "*may at any moment terminate*" these co-operation measures by written notification for breach of these protections. Unlike the general rules on mutual respect for rights, there is "*no requirement that the breach be of the exceptional sort required for a breach of the general human rights obligations*".[354]

272. Article 692 provides that "*if this Part is terminated on account of the United Kingdom or a Member State having denounced the European Convention on Human Rights or Protocols 1, 6 or 13 thereto, this Part shall cease to be in force as of the date that such denunciation becomes effective or, if the notification of its termination is made*

[354] Christopher McCrudden, 'Human Rights and Equality': Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press, 2022) 157.

after that date, on the fifteenth day following such notification." This seems to expressly anticipate that denunciation of the ECHR would be the equivalent of a breach of the basis of co-operation justifying termination of Part Three of the TCA.

273. UK withdrawal from the ECHR would justify the EU terminating this part (only) of the TCA and its provision for co-operation on criminal justice matters. (Likewise, if France or the Republic of Ireland were to withdraw from the ECHR, this would entitle the UK to terminate this part of the Agreement.)

274. This right to terminate on the grounds of ECHR withdrawal must be seen in the context of the general right of either party to collapse all or part of the agreement for any reason whatsoever with twelve months' notice pursuant to Article 181.[355] Thus, whilst there is the risk of termination of Part Three on the basis of ECHR withdrawal, the general risk of termination exists in any event. The only practical impact is whether a notice period of twelve months applies or not.

275. The real analysis is a political one as to whether the EU would ostensibly rely on ECHR withdrawal to threaten immediate termination of that part, potentially with a view to renegotiating the TCA.

276. For completeness, this analysis is consistent with the legal assessment of the BGFA noted above. Article 692 of the TCA envisages that the UK or an EU member state may denounce the ECHR, which is a ground for terminating the application of Part Three of the TCA. This Agreement postdates the EU-UK Withdrawal Agreement ("**Withdrawal Agreement**") and the protocol concerning the treatment of Northern Ireland contained therein ("**Northern**

[355] It is important to note that the EU itself is *not* a party to the ECHR and that the Court of Justice in Opinion 2/13 rejected EU accession to the ECHR on the grounds that it would have an "*adverse effect on the autonomy of EU law*".

Ireland Protocol"),[356] which expressly aim to protect the BGFA in all its parts. Thus, Article 692 suggests that neither the UK nor the EU (including the Republic of Ireland) considers UK withdrawal from the ECHR to constitute a breach of the BGFA.

277. Any EU decisions to suspend or withdraw from all or part of the TCA requires the unanimous approval of the Council of the EU and consent of the EU Parliament;[357] although the Commission may have or may acquire the ability to act unilaterally on a provisional basis to initiate a temporary suspension.[358]

278. In conclusion, there is no escaping the fact that withdrawal from the ECHR would provide the EU with a ground to terminate Part 3 of the TCA. However, there exists a right to terminate by either party for any reason whatsoever in any event on twelve months' notice. As such, the consequences of any such withdrawal are more likely to be political than legal. There is, of course, a prospect that the EU may waive its right to terminate, and proceed on the basis of the current TCA terms. That is a political analysis beyond the scope of this advice.

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356 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/92, Protocol on Ireland/Northern Ireland.

357 Treaty on the Functioning of the European Union, Article 218; see the explanation in Georgina Wright, 'UK–EU future relationship: EU ratification and provisional application' (Institute for Government, 23 April 2020) (https://www.instituteforgovernment.org.uk/article/explainer/uk-eu-future-relationship-eu-ratification-and-provisional-application).

358 cf Council Decision (EU) 2020/2252 (29 December 2020) (https://eur-lex.europa.eu/eli/dec/2020/2252/oj/eng).

PART VIII: THE WINDSOR FRAMEWORK AGREEMENT[359]

279. There is a risk that if or when a government proposes UK withdrawal from the ECHR, claimants will apply to the Northern Ireland Courts arguing that ECHR withdrawal would breach Article 2 of the Windsor Framework Agreement and is thus unlawful as a matter of domestic law.

280. The Withdrawal Agreement contained a dedicated Northern Ireland Protocol.[360] This Protocol was later amended to become the Windsor Framework Agreement.[361] Article 2(1) of the Windsor Framework Agreement provides:

> "*The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.*"

281. Article 2 of the Windsor Framework Agreement commits the UK to ensuring alignment between Northern Irish law and EU law regarding the six equality directives listed in Annex 1 of the Windsor Framework Agreement. It also places a more open-ended obligation on the UK. With respect to those aspects of EU law that protect the rights and equality arrangements of the Rights,

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359 For further details see Conor Casey, Richard Ekins KC (Hon), Sir Stephen Laws KCB, KC (Hon), 'The ECHR and the Belfast (Good Friday) Agreement' (Policy Exchange, 2025) (https://policyexchange.org.uk/wp-content/uploads/The-ECHR-and-the-Belfast-Good-Friday-Agreement.pdf).

360 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/92, Protocol on Ireland/Northern Ireland.

361 Decision no 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

Safeguards and Equality of Opportunity part of the BGFA, Article 2 additionally provides that there will be no diminution of such protections as a result of Brexit.

282. Article 4(1) of the Withdrawal Agreement provides that the provisions of the Agreement (which include the Windsor Framework Agreement) and the provisions of Union law made applicable by this Agreement:

> "*shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.*"

283. In Article 4(2) of the Withdrawal Agreement the UK explicitly agreed to provide "*the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions*". Section 7A of the European Union (Withdrawal) Act 2018 as inserted by the European Union (Withdrawal Agreement) Act 2020, is the statutory mechanism by which the UK has undertaken to implement provisions like Article 2 and Article 4. It provides, in subsection (1), that:

> "*all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and… all such remedies and procedures from time to time provided for by or under the withdrawal agreement... are without further enactment to be given legal effect or used in the United Kingdom.*"

284. And, in subsection (2), that:

> "*The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be –*

(a) recognised and available in domestic law, and

(b) enforced, allowed and followed accordingly."

285. In a series of cases, including *Re Dillon and Others* and *Re SPUC*[362], the Northern Irish courts have held that the non-diminution of rights obligation in Article 2 of the Windsor Framework Agreement has direct effect in UK law. This means that, pursuant to the European (Withdrawal) Act 2018 (as amended), any legislation or executive action inconsistent with Article 2 is liable to be disapplied by the courts.

286. There are two key aspects to the analysis for the purposes of this advice.

287. **First**, the role of the ECHR in Article 2 has been recently considered by the Northern Irish Court of Appeal in *Re Dillon and Others* where it held that a breach of the ECHR did not constitute breach of an actionable EU law right.[363] It follows that withdrawal from the ECHR should not be a diminution of EU law rights for the purposes of the Windsor Framework Agreement.[364] As a result, my view is that withdrawal from the ECHR is not an issue in relation to the Windsor Framework Agreement. That is sufficient for the purposes of the law as it currently stands, but the case is going to the UKSC so that analysis may have to be revisited.[365]

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362 *Re SPUC* [2023] NICA 35.

363 See [127], [137]-[149]. The Court of Appeal disagreed with the High Court that a breach of the ECHR was the equivalent to a breach of the Charter of Fundamental Rights (see the High Court decision at [2024] NIKB 11, [571]-[582]).

364 This is supported by Christopher McCrudden, "Human Rights and Equality", in Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press, 2022) 148.

365 Andrew Dinsmore and I are acting for the Northern Ireland Veteran's Movement. We have obtained permission to intervene in the UKSC hearing in *Re Dillon and others* to argue that the Legacy Act 2023 is compatible with the ECHR and the Victims' Directive. The UKSC may take a different view on the Court of Appeal's conclusion that a breach of the ECHR is not an actionable breach of EU law. As such, this advice may change following that the UKSC ruling.

288. **Secondly**, and in any event, the Northern Irish Court of Appeal in *Re SPUC*[366] held that to establish a breach of Article 2 of the Windsor Framework Agreement, several factors must be satisfied:

> *"(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged;*
>
> *(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020*
>
> *(iii) That Northern Ireland law was underpinned by EU law;*
>
> *(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU;*
>
> *(v) This has resulted in a diminution in enjoyment of this right; and*
>
> *(vi) This diminution would not have occurred had the UK remained in the EU."*

289. Factor (vi) requires asking "*whether but for the UK's exit that diminution would have been able to occur, legally. If the answer is negative, then Article 2's non-diminution obligation applies*."[367] Therefore, if the ECHR fell within Article 2 (which it has currently been held not to by the Northern Irish Court of Appeal), the question is whether the UK's membership of the ECHR was legally obligatory while the UK was a member of the EU (that is, was the UK entitled to leave the ECHR when it was a member state of the EU?). On this point, McCrudden is correct in stating that ECHR withdrawal would not breach Article 2 as "*we cannot say that the UK's membership in the Convention is underpinned by EU law*".

366 [2023] NICA 35, para 54 – as applied by the Northern Irish Court of Appeal in *Re Dillon and others*.

367 Christopher McCrudden, 'Human Rights and Equality', in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press, 2022) 148.

290. Rather, the UK's membership of the ECHR has always been underpinned "*only by a political commitment*"[368] and was never a legal obligation imposed by EU membership. While the EU and the ECHR are intertwined in practice (every EU member state is a signatory to the ECHR, and the EU has a treaty obligation to join the ECHR – although it has not in fact done so),[369] the EU treaties never made an ongoing commitment to ECHR membership legally obligatory.

291. While their views are of course not legally authoritative, it is telling that the furthest the European Commission itself has ever gone in linking ongoing membership of the EU with membership of the ECHR is to say that (emphasis added):

> "*Any Member State deciding to withdraw from the Convention and therefore no longer bound to comply with it or to respect its enforcement procedures* ***could, in certain circumstances, raise concern*** *as regards the effective protection of fundamental rights by its authorities. Such a situation, which the Commission hopes will remain purely hypothetical, would need to be examined under Articles 6 and 7 of the Treaty on European Union*."[370]

292. In other words, the view of the 'guardian of the treaties' is that whether it is problematic for a member state to withdraw from the ECHR will turn on the substantive consequences of withdrawal for the protection of rights, not on the act of ECHR withdrawal *per se*.

293. This means there would be no basis for the courts to rely on Article 2 of the Windsor Framework Agreement to disapply legislation that sought to (i) authorise the government to denounce the ECHR, or (ii) to repeal the whole or

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368 ibid.

369 This has been complicated by the Court of Justice's Opinion 2/13 which rejected accession to the ECHR because it did not want the EU to be subject to the jurisdiction of the ECtHR.

370 'Answer given by Mr Frattini on behalf of the Commission' (26 January 2007) (https://www.europarl.europa.eu/doceo/document/E-6-2006-5000-ASW_EN.html?redirect).

any part of the HRA.[371] In any event, it remains open to Parliament to prevent use of the European (Withdrawal) Act 2018 (as amended) and the Windsor Framework Agreement to challenge a decision to denounce the ECHR. It is open to a future government to invite Parliament to pass legislation authorising denunciation that expressly also disapplies the European (Withdrawal) Act 2018 (as amended) and records Parliament's conclusion that ECHR membership was never underpinned by EU law.

294. In conclusion, there are two important aspects: (i) the Northern Irish Court of Appeal in *Re Dillon and Others* held that the ECHR does not fall within Article 2 of the Windsor Framework Agreement such that there is nothing in it to impede withdrawal, and (ii) even if it did fall within Article 2, there is a good argument that there was no legal (as opposed to political) obligation on the UK to remain a signatory to the ECHR even when the UK was a member of the EU. It follows that leaving the ECHR now is unrelated to Brexit and is not a basis on which to disapply legislation under the Windsor Framework Agreement.

[371] The argument that the Windsor Framework Agreement cannot act as an obstacle to the UK leaving the ECHR and repealing the HRA would, of course, apply with even greater force should the UKSC hold in the *Re Dillon and Others* appeal that the lower courts have misinterpreted Article 2 of the Windsor Framework Agreement as having direct effect in the UK.

PART IX: ALTERNATIVES

Introduction

295. If the UK decides to take steps to respond to the difficulties identified in the preceding sections, what are the alternative options available to it?

296. The question of how the HRA operates, and what alternatives might exist to the current framework, have already been the subject of substantial public debate and analysis. I refer to some of these briefly below, but I do not attempt a comprehensive summary of these prior analyses; rather, I seek to outline potential options for an alternative legal framework, focusing on the legal aspects rather than the political judgements that would inevitably be required. This outline should be developed once you and the Shadow Cabinet have reached a view on the headline question of principle on whether the UK should leave or remain a signatory to the ECHR.

297. In summary, I consider that there are seven main alternatives to the current arrangements:

297.1. **Options whilst remaining a signatory to the ECHR:**

297.1.1. **Option 1: attempt to reform the ECHR.** The UK could keep its existing domestic arrangements, but seek to reform the ECHR itself, including the rules of the ECtHR.

297.1.2. **Option 2: repeal the HRA but retain ECHR membership**. This option would revert to the pre-HRA position, where the ECHR was an international legal instrument to which the UK is a signatory rather than being incorporated into domestic law.

297.1.3. **Option 3: Bill of Rights whilst remaining a signatory to the ECHR**. This option involves repealing and replacing the HRA

with a UK Bill of Rights (or similar 'bill' or 'charter' protecting certain fundamental rights and perhaps also setting out citizens' responsibilities).

297.2. **Options if the UK withdraws from the ECHR:**

297.2.1. **Option 4**: **retain the HRA but leave the ECHR**. The UK could keep the HRA, incorporating the text of the ECHR in the Schedule but merely as a domestic law instrument (with Parliament able to amend the Act as necessary).

297.2.2. **Option 5: A new UK Bill of Rights to replace the ECHR.** This goes further than Option 4 in that it involves a complete break from, and repealing of, the HRA and passing a UK Bill of Rights outside of the ECHR.

297.2.3. **Option 6: Bill of Rights combined with future legislation on specific subject matter**. This option involves repealing the HRA, withdrawing from the ECHR and passing a relatively straight-forward Bill of Rights that domestically incorporates (the vast majority of) the ECHR. The difference with Option 5, however, is that those rights will be subject to further, specific legislation (e.g. on immigration, veterans, freedom of speech).[372]

297.2.4. **Option 7: existing legislative rights, the common law and future legislation**. This option involves withdrawing from the ECHR and repealing the HRA without enacting any replacement UK Bill of Rights (or similar). This would mean that

[372] It would not, technically, be necessary to include a provision in the Bill of Rights recognising this intention because it is always open to Parliament to pass further legislation to develop or refine prior legislation. It may, however, be useful to note this intention either in a provision or in a parallel statement so that the public knows that the intention is that further legislation will supplement the Bill of Rights.

> Parliament would have primary responsibility for determining what rights should be protected, with the bulk of these contained in existing statutes (many of them pre-dating the HRA), along with new statutes drafted to a high level of specificity rather than as broad principles, and supplemented by the common law.

298. For completeness, I note that short of derogation under Article 15 (which requires a major threat to the "*life of the nation*", and cannot be used to in relation to Articles 2[373] or 3)[374] the ECHR contains no provision for "*temporarily suspending particular elements of it*" (which seems to be a recent suggestion of former Home Secretary, Lord Blunkett).[375] Moreover, while it might be technically possible to withdraw from the ECHR, and then re-join with reservations (which was briefly suggested by Tony Blair in 2003, having earlier been floated by the Conservative Party in Autumn 2001),[376] under Article 57, "*reservations of a general character are not permitted*".[377] It is likely that any reservations would have to comply "*with the object and purpose*" of the ECHR,[378] and would not be recognised by the ECtHR as valid if they were so broad as to render the UK's re-accession effectively meaningless.[379] As this advice demonstrates, the impact of the ECHR is so significant that any reservation that attempted to meaningfully change its impact in relation to one or several of these legal tests would not be permitted, or would otherwise be deemed

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373 Except in the context of lawful acts of war.

374 See paragraph Part I:87 above.

375 Charles Hymas, 'Suspend ECHR to pave way for migrant deportations, Blunkett tells Starmer' (Telegraph, 22 August 2025) (https://www.telegraph.co.uk/politics/2025/08/22/suspend-echr-pave-way-migrant-deportations-blunkett-starmer/?recomm_id=a117e3e8-99fb-4b11-93f8-5fb7b82566b8).

376 See Vaughne Miller, 'European Court of Human Rights rulings: are there options for governments?' (House of Commons Library Research Briefing, SN/IA/5941, 18 April 2011) 25-27 (https://researchbriefings.files.parliament.uk/documents/SN05941/SN05941.pdf).

377 ECHR, Article 57(1).

378 Vienna Convention on the Law of Treaties, Article 19.

379 See Stefan Kirchner, 'Reservations and the European Convention on Human Rights' (2020, SSRN) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617901).

unlawful (including, for example, if it sought to derogate from Article 3 to any extent).[380] The 'trick' of leaving and rejoining to significantly alter the effective impact of the ECHR has never been attempted by a Contracting Party.[381]

Options whilst remaining a signatory to the ECHR

Option 1: attempt to reform the ECHR

299. The prospect of reforming the ECHR 'from within' is superficially attractive. It is clear that the ECtHR has significantly departed from the intent of the original signatories in many areas,[382] so it might be thought that the Contracting Parties are capable of reining it in, and also re-framing its rules on a more reasonable basis.

300. The unfortunate reality is that multiple rounds of reforms have been attempted, through a series of 'Declarations' issued by Contracting Parties in the Interlaken Process,[383] but these have failed to achieve much in the way of meaningful improvements.[384] At one stage, the UK led this process, which produced the Brighton Declaration in 2012. These documents involved many hours of work by government lawyers and civil servants, but have had little impact on the 'mission creep' of the ECtHR. While there have been limited improvements to the ECtHR's caseload management system, the general view

380 cf the opinion of David Pannick QC (as he then was) et al noted in Miller (n 376) 26.

381 In 1998, Trinidad and Tobago attempted similar steps in relation to the International Covenant on Civil and Political Rights, when it tried to denounce and then reaccede to the First Optional Protocol to the ICCPR with a reservation (on death penalty cases). This reservation was struck down by the UN Human Rights Committee, which held that it was a bound as a state party to the Protocol. Trinidad then decided, definitively, to denounce the Protocol. See Glenn McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol' (2001) Human Rights Quarterly 769, 771-772 (https://www.jstor.org/stable/pdf/4489355.pdf).

382 See e.g. John Finnis and Simon Murray, 'Immigration, Strasbourg, and Judicial Overreach' (Policy Exchange, 2021); NW Barber, R Ekins and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016).

383 For example, conferences have been held to reform the ECHR at Interlaken (2010), Izmir (2011), Brighton (2012), Oslo (2014), Brussels (2015), and Copenhagen (2018).

384 Suella Braverman KC MP and Guy Dampier, 'Why and How to Leave the European Convention on Human Rights' (Prosperity Institute, 2025) 15-16 ("Braverman and Dampier").

seems to be that "*most proposals have not been implemented, mainly due to principled or practical opposition of the [ECtHR], and that the implemented proposals have not led to profound change*",[385] meaning that "*it is unlikely… that the States and the Court are prepared to take any 'more profound measures'*".[386]

301. Amending the articles of the ECHR itself is even more difficult, requiring the agreement of all signatories.[387] As Lord Woolf remarked in 2011 in relation to the then-Government's proposals to reform the ECHR:

> "*We have got a stark option: either we accept the European Convention, or we don't accept it and decide to leave ... It's very difficult to do what Mr Clarke indicated he would like to do … because there are 47 signatories in Europe which are signatories to the European Convention as well as ourselves. To try and amend that is a virtually impossible task*."[388]

302. The issue is that the ECHR affects the Contracting Parties in different ways, owing to their national constitutions, any incorporating legislation, their judiciaries, the nature and habits of their executive power, the strength of judicial review, the prevailing media and NGO ecosystem and so on. Some are able to take a more aggressive stance towards Strasbourg, others are constrained by their national courts; and of course, some do not face the same

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385 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?' (2020) 20 Human Rights Law Review 121.

386 ibid 150.

387 The ECHR can be amended through 'protocols'—separate legal instruments that modify or supplement the Convention. For a protocol to be adopted, it generally requires a decision by the Committee of Ministers (the governing body of the Council of Europe), which operates on a two-thirds majority (Article 20(d) of the Statute of the Council of Europe). Once a protocol is adopted, it must be ratified by the Contracting Parties. The number of ratifications required depends on the specific protocol. For significant procedural or structural changes (including changes in the text itself or reforms to the ECtHR), protocols often require universal ratification. For example, Protocol 14, which made administrative reforms to the ECtHR, including judicial term-lengths, and a new case filtering mechanism, required ratification by all Contracting Parties. In practice, achieving consensus among all 46 Contracting Parties is challenging, and some protocols have taken years to enter into force due to delays in ratification (Protocol 14 took from 2004-2010 to be ratified by all states).

388 'Europe's human rights laws can't be reformed, Tories are told' (*Daily Telegraph*, 22 February 2011).

issues (for example, on illegal migration) as others due to geography. The argument might be made that if the problems get bad enough, states will *have* to act—but so far we have not reached that point. Any suggestion of restarting something like the Interlaken Process (which did not attempt to change the text of the ECHR itself, but rather the ECtHR's processes) has been dismissed by Strasbourg. Most recently, in May 2025, nine of the 46 Contracting Parties sent an open letter to the Council of Europe, seeking "*a new and open minded conversation about the interpretation of the European Convention on Human Rights*". The letter raised ("*In all modesty*") a number of issues with the ECtHR, including:

> "*Whether the Court, in some cases, has extended the scope of the Convention too far as compared with the original intentions behind the Convention, thus shifting the balance between the interests which should be protected.*
>
> *We believe that the development in the Court's interpretation has, in some cases, limited our ability to make political decisions in our own democracies. And thereby affected how we as leaders can protect our democratic societies and our populations against the challenges facing us in the world today.*
>
> *We have seen, for example, cases concerning the expulsion of criminal foreign nationals where the interpretation of the Convention has resulted in the protection of the wrong people and posed too many limitations on the states' ability to decide whom to expel from their territories.*"[389]

303. Within days, the Secretary General of the Council of Europe, Alain Berset, responded via an official press notice: "*Debate is healthy, but politicizing the Court is not. In a society governed by the rule of law, no judiciary should face political*

[389] Open Letter to the Council of Europe (22 May 2025), signed by the leaders of Denmark, Austria, Czech Republic, Latvia, Poland, Italy, Belgium, Estonia, and Lithuania (https://www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf).

pressure", adding that the ECtHR "*should never be undermined*".[390] A few weeks' later, Berset gave a rare interview to *The Times* (even though the UK had not signed the original letter). While he did not resile from the previous official response, he added that "*I see the necessity to adapt but we must also do this respecting our core values*".[391] Since then, the secretariat has not shown any sign of initiating a review of the concerns raised in the earlier open letter, although it is possible it may do so in future. At present, however, there seems to be little prospect of meaningful conversation, let alone reform. Indeed, the Attorney General Lord Hermer KC has recently publicly accepted that there is little prospect of reforming the Convention in any meaningful way: "I think we also need to be plain that it would be a political trick to pretend that in the short term any of those changes are going to make a difference to what we are currently facing and what we are determined to address in really practical ways." He added that previous changes agreed were minor and took nearly a decade to implement.[392]

304. Lastly, it might be argued that it is important to be *seen* to attempt a reform, and if this clearly fails, to then leave. This is a political rather than a legal point; it might well be countered that the record of significant reform is far from encouraging. Further, and importantly, by the likely time of the next General Election, we will know whether the nine states seeking "*a new and open minded conversation*" have found a willing interlocutor and have made any real progress.

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390 'Alain Berset on the joint letter challenging the European Court of Human Rights' (Press Statement of the Secretary General, Council of Europe, 24 May 2025) (https://www.coe.int/en/web/portal/-/alain-berset-on-the-joint-letter-challenging-the-european-court-of-human-rights).

391 "ECHR 'must adapt to face growing backlash against migration'" (*The Times*, 5 June 2025) (https://www.thetimes.com/world/europe/article/echr-migration-news-snk5nzjqx).

392 'Promise of ECHR reform a 'political trick', says Attorney General' (*The Times*, 10 September 2025) (https://www.thetimes.com/uk/politics/article/promise-of-echr-reform-a-political-trick-says-attorney-general-k6hzkksz0).

Option 2: repeal the HRA but retain ECHR membership

305. I have also considered one approach which involves retaining ECHR membership, but repealing the HRA so that the Convention rights are no longer incorporated into domestic law. This would revert to the pre-1998 *status quo* (albeit with UK law having developed for almost 30 years in the meantime with the ECHR as part of the domestic legal framework).

306. The substantive effect of this would be to sweep away the various provisions of the HRA referred to above which require the courts to take account of ECtHR jurisprudence, which affect the interpretation of domestic legislation, and impact upon the decisions of UK public authorities.

307. As to the impact that this would have on the UK legal framework:

307.1. As a continuing signatory to the ECHR, the UK would remain subject to and bound by it under international law.

307.2. The ECHR would not be directly enforceable in the UK courts and would no longer form part of UK domestic law. However, UK courts would still refer to the ECHR to interpret domestic legislation and in developing the common law, for example where the law was considered uncertain or incomplete, as they did before the HRA.[393] Indeed, there is a presumption at common law in favour of interpreting a domestic statute consistently with the UK's international obligations.[394]

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393 For an explanation of the pre-HRA position, see *R v Lyons* [2003] 1 AC 976 [13] per Lord Bingham (emphasis added): "*rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complementary and not as alien or antagonistic systems.* ***Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law.***"

394 See e.g. *Assange v The Swedish Prosecution Authority* [2012] 2 AC 471 [122].

307.3. It is also important to note that the HRA does not require UK courts to follow Strasbourg jurisprudence: s 2 merely enjoins the courts to "*take into account*" such jurisprudence,[395] although in practice, the approach of the UK courts has led to a "*general alignment between the interpretation of Convention rights at the domestic and the international levels*".[396] There are examples of UK courts declining to follow such jurisprudence (and even influencing the ECtHR to change course), albeit those cases are few and far between.[397] This is not to underplay the impact of the HRA—but it should not be thought that repealing the HRA would itself necessarily and fundamentally change the approach of UK Courts to the interpretation of Convention rights.

307.4. Persons seeking to enforce their Convention rights would need to take their cases to the ECtHR. The ECtHR's decisions in cases brought against the UK would then be binding on the UK pursuant to Article 46 of the ECHR. The ECtHR would still continue to issue interim measures, including Rule 39 Orders, against the UK.

308. Therefore, Option 2 would mean that the UK remains subject to ECtHR judgments (and vulnerable to interim measures) and UK courts would still take into account ECtHR jurisprudence. However, the influence of that jurisprudence would almost certainly be less pervasive than under the current HRA framework: to argue the contrary would be suggest that the HRA had no real substantive effect on UK domestic law, which seems to me to be obviously

395 As noted above, however, this has led to the *Ullah* principle pursuant to which the Courts now seek to predict what ECtHR will find and, in practice, Strasbourg case law is now regarded as binding.

396 See n 18.

397 See e.g. *R v Horncastle* [2010] 2 AC 373 and *R (Hicks) v Commissioner of Police* [2017] AC 256. These decisions subsequently influenced ECtHR jurisprudence: see *Al-Khawaja and Tahery v United Kingdom* (26766/05) [2012] 2 Costs LO 139 (ECHR Grand Chamber) and *S, V and A v Denmark* (2019) 68 EHRR 17 respectively.

wrong.[398] In my view, Option 2 is therefore unlikely to be a workable solution to the practical problems that arise in relation to the five tests above.

309. If you and the Shadow Cabinet conclude that the UK should leave the ECHR, this option does not arise. However, it illustrates there are alternatives to leaving the ECHR that would still reduce the impact of ECtHR jurisprudence on UK domestic law over time; the decision is therefore not necessarily a binary one.

Option 3: Bill of Rights whilst remaining within the ECHR

The draft Bill of Rights Bill

310. On 22 June 2022, then Justice Secretary Dominic Raab presented a draft Bill of Rights Bill to Parliament. The draft Bill proposed far greater changes than the review had recommended. It was subsequently shelved by the Truss administration, and not revived by the Sunak Government. At the time, it was the subject of stringent criticism, including from two former UKSC Justices, Lord Mance[399] and Lady Hale.[400]

311. The Explanatory Notes stated that the Bill would continue to give effect to the same Convention rights protected under the HRA, whilst also, *inter alia*,[401] (i) preventing the over-expansive interpretation of these rights in the UK's

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398 Parliament could in theory enact a short statute providing instructions to the UK Courts about how they should henceforward approach jurisprudence (although see below for a discussion of the problems with a previous attempt to do ECtHR so in the context of the draft Bill of Rights Bill). This would be a variant on Option 1, but with the ECtHR retaining jurisdiction over UK disputes (which would not be the case under Option 1).

399 Jonathan Mance, "*The Protection of Rights – this way, that way, forwards, backwards…*": Thomas More Lecture, 26 October 2022 (https://www.lincolnsinn.org.uk/wp-content/uploads/2023/02/The-Protection-of-Rights_Lord-Mance_Sir-Thomas-More-Lecture-2022.pdf). In fact, by the time of this lecture, the Bill had already been shelved and was never to return to Parliament.

400 Brenda Hale, "*Do we need a British Bill of Rights?*", Annual Human Rights Lecture, Northern Ireland Human Rights Commission, 4 July 2022 (https://nihrc.org/news/detail/annual-human-rights-lecture-2022-lady-hales-keynote-address-in-full).

401 https://publications.parliament.uk/pa/bills/cbill/58-03/0117/en/220117en.pdf.

particular contexts; (ii) "*increas[ing] democratic oversight of human rights issues*"; (iii) reducing the burden placed on public authorities; (iv) giving "*great weight*" to the legislature's views when considerations of public interest arose; (v) "*strengthen[ing] the right to freedom of speech*"; (vi) "*recognis[ing] trial by jury as of fundamental importance to the UK criminal justice system*"; (vii) "*limit[ing] the Bill's extraterritorial application*"; (viii) compelling courts to have due regard to the importance of public protection when interpreting Convention rights; and (ix) "*provid[ing] that some rights cannot prevent the deportation of foreign criminals, except in very narrow circumstances*".

312. In my view, this draft legislation was flawed in a number of important respects:

312.1. First, it was often drafted in overtly political language that is not usually adopted in a statute, and at times stated (or restated) the obvious, such as the status of the UKSC or the supremacy of Parliament (or, indeed, clause 9 dealing with jury trials). Apart from the stylistic issue, the problem with such clauses is that they fall to be interpreted by the courts like any other clause, and thus enable courts to rule on issues over which Parliament would usually wish to retain complete control.

312.2. Second, it might be said that some of the provisions were difficult to square with UK's membership of the ECHR. By way of example, the attempts to restrict the application of Article 8 in deportation cases (whilst seeking to elevate another right—freedom of speech—to higher status), and the provisions restricting the circumstances in which positive obligations could be imposed on the UK. However, this would depend on the ambit of the margin of appreciation; if sufficiently wide, there would be no conflict between these clauses and membership of the ECHR. Although opponents of the Bill also pointed to clause 24, which

sought to require UK courts to ignore ECtHR interim measures, such interim measures have no basis in the text of the ECHR itself.[402]

313. Critics of the Bill made two other broad points:

313.1. First, they argued that the Bill of Rights Bill was, in fact, not a proper Bill of Rights at all. Rather, it took an existing set of rights—as set out in the ECHR, and as interpreted by the ECtHR and the UK courts to date—and then sought to limit or change how they were to be applied in various ways. Indeed, it could be said that the rights were imprecise in their terms and left much of the analysis to the courts,[403] which was ironic because the genesis of the exercise was an unhappiness with the approach the courts had been taking. However, given that the Bill contained the text of the ECHR in an Appendix, it is unfair to contend that the Bill was not a Bill of Rights at all.

313.2. Second, they argued that the practical effect of the Bill would likely have been to increase the number of appeals to Strasbourg from the UK on grounds of breaches of the ECHR by the UK. This risked achieving the opposite result to the apparent intention of 'repatriating' rights-based disputes to the UK and empowering UK courts over the ECtHR. I would agree that it is not possible to separate out (a) membership of the ECHR from (b) ECtHR jurisprudence, by seeking to keep the rights but not how they are interpreted by a court that has jurisdiction over disputes in relation to them. However, to point to an increase in litigation rather misses the point; the likelihood is that any decision to leave the ECHR, in whatever terms, would lead to a raft of litigation (especially in the

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402 See Richard Ekins, 'Rule 39 and the Rule of Law' (Policy Exchange, 5 June 2023); see further Richard Ekins, 'Human Rights and the Rule of Law' (Policy Exchange, 17 April 2024) 21-22.

403 See further Richard Ekins, 'Thoughts on a Modern Bill of Rights' (Policy Exchange, 2022) (https://policyexchange.org.uk/wp-content/uploads/2022/07/Thoughts-on-a-Modern-Bill-of-Rights.pdf).

transitional phase, although this would probably reduce once any uncertainties had been resolved, whether through the courts or legislation).

314. None of this is to say that the Bill was perfect or could not be improved upon. But repealing and replacing the HRA with a Bill of Rights, with the UK remaining a signatory to the ECHR, is an available option, but the jurisdiction of the ECtHR would continue.

Conclusion on options whilst remaining a signatory to the ECHR

315. In my view, the overarching difficulty with all of these options remains the role of the ECtHR which will continue to (i) influence government policy in a (possibly overcautious) way to avoid any risk of a declaration of incompatibility, (ii) provide bases for campaigners to continue to bring inappropriate claims that will hinder government in the five key tests noted above, and (iii) embolden UK domestic courts to intervene in government policy decisions (even if primary legislation seeks to direct them away from doing so). All three of these effects are likely to continue to hinder government policy.

316. As a result, my view is that to achieve the policy goals identified in the five tests, the better (legal) course is to leave the ECHR. I note the following, high level, options for doing so.

Options if the UK were to withdraw from the ECHR

Option 4: retain the HRA in amended form but leave the ECHR

317. The HRA furthers the protection of "*Convention rights*", which are set out in Schedule 1 to the Act, in a number of respects:

317.1. It requires (inter alia) that any UK court or tribunal determining a question that has arisen in connection with a Convention right must take into account judgments, decisions, declarations and advisory opinions of the ECtHR (s 2);[404]

317.2. The Act requires that legislation must be interpreted consistently with Convention rights insofar as this is possible (s 3(1));

317.3. It mandates that public authorities act in a manner compatible with Convention rights (s 6(1));

317.4. Courts are allowed to make a declaration of incompatibility where legislation cannot be interpreted in a manner consistent with Convention rights, which triggers ministerial powers to remedy the incompatibility through an expedited legislative process (ss 4 and 10); and

317.5. The HRA requires that the minister in charge of a Bill make a statement as to the Bill's compatibility with Convention rights or justify any incompatibility (s 19).

318. It would be possible, in principle, to leave the ECHR but retain the HRA (including Schedule 1 containing the Convention rights), removing (*inter alia*) the requirement to take into account Strasbourg jurisprudence. This would require s 2 of the Act to be rewritten or repealed, and other changes would be required.[405]

319. The effect of this would be that the Convention rights would remain part of domestic law, but UK courts would be able to diverge more readily from

404 In addition, s 2(1)(b)-(d) refers to following certain decisions of the European Commission of Human Rights and the Committee of Ministers (of the Council of Europe).

405 For example, to ss 10(1)(b), 14, 16, 17 and 18.

ECtHR jurisprudence. This could give Parliament more freedom to legislate because (i) a breach of the HRA would no longer imply a breach of the UK's international obligations, and (ii) Parliament could clarify how rights are to be interpreted, either in general or in a particular context.

320. Further, the revised Act could make clear that not only were UK courts not required to take account of future ECtHR decisions, but could decline to follow past decisions and also reconsider previous English decisions that were based on ECtHR jurisprudence which the court considers should no longer be followed (although that ability is implicit in our common law system in any event, even with the HRA still in place). Further, this option would remove individuals' ability to take matters to the ECtHR, including the possibility of obtaining Rule 39 Orders (discussed above).[406]

321. There is considerable potential value in this course: often it is the *interpretation* placed on Convention rights by the ECtHR, not the *rights themselves*, that are problematic for UK policymaking. How the ECHR is *interpreted* today would probably be unrecognisable to those who were involved in its creation and drafting.[407]

322. Therefore, if UK courts were more readily able to diverge from ECtHR jurisprudence, what are often perceived to be the negative effects of ECtHR jurisprudence on UK law could lessen over time. Further, a possible benefit to this option is that the changes required to UK domestic law would not be as

406 See Richard Ekins, 'Human Rights and the Rule of Law' (Policy Exchange, 2024) 19–22.

407 See Conor Casey and Yuan Yi Zhu, 'Revisiting the British Origins of the European Convention on Human Rights' (Policy Exchange, 24 May 2025), in particular Lord Sumption's introduction and the impact that the ECtHR has had on the development of Convention rights (https://policyexchange.org.uk/wp-content/uploads/Revisiting-the-British-Origins-of-the-European-Convention-on-Human-Rightspdf.pdf).

great as some of the other options considered below, but the UK would still have left the ambit of the ECHR.[408]

323. There are, however, three main problems with this approach—without more—as a long-term solution to the issues with the ECHR considered in this advice:

323.1. First, the focus of this solution remains on the (British) court having primary responsibility for setting and interpreting human rights, as opposed to Parliament. This solution therefore fails to address one of the key sentiments in this debate which is that the democratically elected Parliament should have the final say on the limit of human rights.

323.2. Second, any changes to domestic law would be incremental and slow, depending on cases making their way through UK courts and existing Strasbourg jurisprudence being reconsidered on a case by case basis. It is realistic to assume that, on any view, it would take years before substantial changes in UK law would be felt.

323.3. Third, it is far from guaranteed that UK courts would in fact reinterpret ECHR rights in a way that would produce significant changes. After all, the courts would be considering the same legal text—the ECHR—and the same rights, and it is therefore possible that, even if not enjoined to do so by statute, there would be a desire to take account of ECtHR case law and to follow prior decisions on Convention rights. Indeed, in many areas it is the decisions of domestic courts that are problematic, for example in *Re Dillon and Others* on the Legacy Act 2023 and *DPP v Ziegler* in domestic protest cases. The UK courts apply a doctrine of precedent and the common law approach is to develop legal principles from past case law: this approach would be unlikely to produce substantial differences in

408 The question of how disruptive this change will be is, of course, dependent upon other sections of this paper, including the impact of leaving the ECHR on the TCA and the BGFA.

approach to existing rights, even if Strasbourg jurisprudence is no longer given the same deference as currently.

324. In my view, therefore, Option 4 has potential merit as an interim step while more substantial changes are considered. However, it would not produce the significant legal changes that the public would expect if they voted for a party promising to withdraw from the ECHR.

Option 5: A new UK Bill of Rights to replace the ECHR

325. This alternative version of Option 3 would be to (a) repeal the HRA, (b) leave the ECHR and (c) enact in their place a new UK Bill of Rights (or similar 'bill' or 'charter' protecting certain fundamental rights).

326. It will be immediately apparent that this solution addresses the two fundamental problems identified above that afflicted the draft Bill of Rights Bill in 2022.

327. The question then becomes: what should this new Bill of Rights include (and not include)?

328. This engages value judgements and political questions that are beyond the scope of a legal advice. However, with that caveat in mind, I make some brief comments below which might be useful for those who will consider and decide these issues.

329. First, the UK would need to decide *which* rights merit statutory protection, and which rights should be left to the common law to regulate. In that regard, comparisons might be drawn with other Commonwealth jurisdictions with Bills of Rights such as New Zealand[409] and Canada,[410] and (by contrast)

409 New Zealand Bill of Rights Act 1990. See also the New Zealand Human Rights Act 1993.

410 Canadian Charter of Fundamental Rights and Freedoms. Note that this Charter has constitutional status, whereas New Zealand's Bill of Rights Act and Human Rights Act are simply Acts of the New

Australia, which has chosen not to have any Bill of Rights (but protects certain rights via its Constitution).[411] Further, it will be important to differentiate between (a) true fundamental human rights (such as the right to life, the prohibition of torture and inhuman or degrading treatment, and freedom of speech) in relation to which there is (or ought to be) consensus that they should be protected and (b) issues that are much more politically controversial. A sensible approach to a new Bill of Rights would be to focus on the former,[412] albeit it might be said that the *text* of the ECHR does not fall foul of this criticism, and that it is the *interpretation* of those rights from the ECtHR that is the problem.

330. Second, the way in which the rights protected by the new Bill of Rights would impact upon other UK legislation and the common law would need to be considered.

331. Third, any carve-outs from the rights set out in the Bill of Rights would need to be considered, for example in the context of military conflict and other areas of public concern (for example, in relation to immigration).

332. Fourth, the interaction between the new Bill of Rights and previous case law addressing the ECHR could be complex; with a range of legislative design choices available, ranging from allowing courts to refer to these cases where relevant, to barring any reliance on earlier ECHR-era case law. There is a risk

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Zealand legislature in the same way that the HRA is simply a UK statute that can be repealed like any other Act.

411 Namely: (1) the right to vote, (2) protection against acquisition of property on unjust terms, (3) the right to a trial by jury, (4) freedom of religion and (5) prohibition of discrimination on the basis of State of residency.

412 See, in this regard, Sir Noel Malcolm, *Human Rights and Political Wrongs: A New Approach to Human Rights Law* (Policy Exchange, 2017) e.g. at 139–142. This paper proposes withdrawing from the ECHR and replacing it with a "*Bill or Charter of Human Rights for the UK*" that is "*concerned only with the real, essential human rights – those rights the violation of which would count as oppression and tyranny … stated, where possible, not in open-ended generative abstractions, but in specific prohibitions on the government and all its public officials … By focusing as strictly as possible on the abuse of governmental power, this approach would move some matters out of the ambit of human rights law and into that of ordinary law-making*".

that if a Bill of Rights incorporated the ECHR terms verbatim, UK courts could adopt the same expansive interpretative approach of the ECtHR that would require regular legislation to correct.

333. Lastly, consideration will need to be given, when looking at this option, whether a new UK Bill of Rights would likely be sufficiently different in effect when compared to the ECHR to justify withdrawing from the ECHR and repealing the HRA, with all the controversy and upheaval that this will inevitably produce. One obvious difference would be to untether the UK more firmly than the other options considered above from the jurisprudence of the ECtHR, which as discussed above is arguably the major area of concern for UK policymaking (rather than the ECHR rights *per se*). Further, a newly drafted UK Bill of Rights would allow for differentiation from the current ECHR text where considered appropriate which (a) may allow for greater and faster divergence from previous cases influenced by ECtHR jurisprudence and (b) would give Parliament greater control over the precise rights that are protected in statute and the ability to make amendments to those protections over time. This is currently not possible in circumstances where the changes are driven principally by the development of jurisprudence in Strasbourg over which Parliament has no control.

Option 6: a new Bill of Rights combined with specific legislation

334. This option would be to (a) repeal the HRA, (b) leave the ECHR, (c) enact in their place a new UK Bill of Rights (or similar 'bill' or 'charter' protecting certain fundamental rights), with (d) the intention that there would be specific pieces of legislation on specific areas such as immigration, veterans and freedom of speech.

335. It is likely that such an option would domestically incorporate the ECHR but with some tweaks. This would avoid the need for the Bill of Rights itself to be

overly complicated. Without more, there would be a risk that the UK courts take the same expansive interpretations as the ECtHR which may defeat the purpose of leaving the ECHR. As such, specific legislation could be passed at the same addressing the key issues created by the ECHR, detailing how individual rights were to be defined in particular areas. If you were to adopt this approach, it would be wise to have a series of specific pieces of legislation thoroughly considered in advance of the General Election to be contained in the manifesto, with the promise that they would be passed early in the Parliament. As a result, the public would have a full picture on the scope of domesticated human rights and how the difficulties identified above would be dealt with.

336. This provides continuity with the current position whilst giving the Government significantly more flexibility to address the issues that arise in the five tests. Beyond those five tests and the legislation required to address the issues identified above, there remains a risk that the UK courts would take expansive interpretations of the ECHR that would defeat the purpose of leaving. As such, further legislation may be required to address those issues as they arise. With that said, an advantage of Option 6 (and Option 7 below) is that they ensure that there is more flexibility to address new areas including, for example, cyber and AI issues where the human rights implications may not be fully known at the point of passing the Bill of Rights where Option 5 would require amendments to the Bill of Rights itself that could be more difficult.

Option 7: existing legislative protections supplemented by the common law

337. Option 7 involves (a) repealing the HRA (and the repeal of provisions drawing on the HRA/ECHR in all other legislation),[413] (b) leaving the ECHR but (c) <u>not</u>

[413] Some of these could be repealed immediately (i.e. by description, where the HRA or Convention rights are referenced in the statute itself); whereas others reflect ECHR obligations or ECtHR case law without

enacting any substantive UK Bill of Rights in its place, and instead reverting to other existing statutory and common law protections and considering new legislation on key areas.[414] This would be a return to what has been termed "*the British model of rights protection*".[415] This model, which prevailed in the UK before 1998, placed Parliament at the forefront of rights protection, but without needing a single (if only perceived) 'superior' statute through which judicial supervision would take centre stage. A variation on Option 7 would be to repeal the HRA, and then set up a working group to review the various statutory protections that cover the same ground as the ECHR, with a view to specific, narrow pieces of legislation. These existing provisions could also be listed in an 'index' or 'directory'-style Bill of Rights statute, adding any new substantive rights not otherwise sufficiently protected (for example, freedom of expression).

338. On the face of it, this might seem quite a radical shift in the legal framework, given that the UK has been a signatory to the ECHR since 1950.[416] However, it should be remembered that for much of this period, the ECHR was not an important feature in the UK's legal landscape, partly because the ECtHR's more activist approach took time to develop, and also because it was not until the Blair government enacted the HRA that these rights were brought into domestic law.

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that being obvious on the face of the statute book. This latter category would have to be repealed in slower time.

414 I note that a similar proposal has been put forward by Braverman and Dampier (n 384), together with proposals for the post-ECHR framework.

415 See, generally, Richard Ekins, 'Models of (and Myths about) Rights Protection': Lisa Burton Crawford, Patrick Emerton, Dale Smith (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 227-247.

416 It is worth recording that the Attlee government signed the ECHR very reluctantly, over concerns that it might eventually supplant UK law: see Conor Casey and Yuan Yi Zhu, 'Revisiting the British Origins of the European Convention on Human Rights' (Policy Exchange, 2025) (https://policyexchange.org.uk/wp-content/uploads/Revisiting-the-British-Origins-of-the-European-Convention-on-Human-Rightspdf.pdf); see also A.W. Brian Simpson, *Human Rights and the End of Empire* (OUP, 2001).

339. The common law has long recognised fundamental rights such as freedom of speech, the right to a fair trial, protection of private property rights, and personal liberty.[417] Indeed, famously, fundamental rights have been part of English law since at least Magna Carta in 1215. It is therefore important to recognise that the protection of fundamental rights in UK law was not invented by the HRA, or indeed the ECHR.[418]

340. Over time, the bulk of what is now drawn under the ECHR umbrella (both substantive and procedural rights) has been included in various UK statutes, beginning in earnest in the 19th century but with the greatest activity in the 20th century. As a rule, these various 'rights' are drafted in the 'British' rather than the 'continental' style, in the sense they are drafted to a high level of specificity, and are usually crafted in terms of procedural requirements, or remedies (rather than broad-brush, free-standing principles). All of this is supplemented by the common law, which provides flexibility at the margins.

341. The key difference between this approach and Option 6 is that Option 7 seeks to avoid the risks inherent in legislating for high-level 'rights', which may create free-standing obligations of uncertain ambit, subject to unpredictable expansion by the courts. The traditional UK approach to legislation (itself drawn from the common law) tended to be remedy-based (a particular infringement would give rise to a particular remedy); or impose specific duties or punishments on the individual or the state. This means that governments and Parliament can better control and predict future obligations, and expand or trim them as necessary (whereas it may be less willing, or politically able, to amend a 'rights' statute, even if it does not have the status of superior law). In

417 Other protections/principles with a long history at common law include the right to seek legal redress in the courts (access to justice), procedural fairness and open justice.

418 In that regard, it is noteworthy that in the context of judicial review, there are many examples of common law limitations on executive power that are not grounded in Convention rights, as recent high profile cases (e.g. *Miller No. 1* and *Miller No. 2*) have demonstrated.

short, it is possible that by seeking to replace the HRA/ECHR with an equivalent 'rights' instrument, it could be inviting the same problems it had with the ECHR: where a particular document becomes expansive, pervasive, and politically unchallengeable.

342. It is beyond the scope of this advice to give a comprehensive account of the statutory and common law protections that exist independently of the ECHR/HRA. I therefore limit myself to briefly outlining below some of the key common law protections that would survive the repeal of the HRA and the UK's withdrawal from the ECHR; in addition to listing a range of statutory provisions that cover the same ground as the ECHR (see Part XIV: Appendix 1).

343. Two particularly important (and complementary) principles of human rights protection were developed at common law prior to the enactment of the HRA:[419]

343.1. First, the doctrine of "*anxious scrutiny*" for protection against rights infringements (which grew out of the basic common law standard of reasonableness), which was summarised by Sir Thomas Bingham MR in *R v Ministry of Defence, ex p Smith*[420] (concerning the rights of gay people to serve in the British military), at p.554E-G, as follows: "*The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable*".[421]

343.2. Second, the principle of legality (which developed from the basic common law standard of *ultra vires* applicable to public authorities): see,

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419 See, for further detail, Michael Fordham QC, "*Common Law Rights*" (Public Law Project, October 2010).

420 *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA).

421 This decision was by reference to (inter alia) human rights as set out in the ECHR, but the doctrine of "*anxious scrutiny*" would still apply in respect of infringements of fundamental rights recognised by UK domestic law.

for example, *R v Lord Chancellor, ex p Witham* (concerning access to justice issues), stating that whilst the UK does not have a written constitution there are akin to "*constitutional rights*" at common law, namely such rights that "*cannot be abrogated by the state save by specific provision by an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate*".[422] In other words, the principle of legality dictates that official action, particularly where it infringes fundamental rights, must be authorised by law.[423]

344. These principles broadly mirror Articles 6 and 3 of the ECHR respectively (albeit the latter is wider than Article 3's focus on inhuman and degrading treatment). This reflects the fact that the common law often mirrors the Convention rights, or rather the ECHR reflects the common law: see Lord Hoffmann in *R v Secretary of State for the Home Department, ex p Simms*[424] [2000] 2 AC 115, at p131D-132C. The same could be said for various UK statutes which map onto Convention rights or aspects of them. Many other examples of this could be given.[425]

345. It is also important to recognise that both before and after the HRA was enacted, Convention rights have influenced the development of the common law. This has been so pervasive that, again, it would be impossible to give a comprehensive account of this process, or the myriad parts of UK domestic law that have been influenced in this way. It is, however, clear that leaving the ECHR and repealing the HRA would not amount to a 'factory reset' of UK law to its state pre-ECHR and pre-HRA; to achieve anything like that would

422 *R v Lord Chancellor, ex p Witham* [1998] QB 575, 581E-F, per Laws J.

423 See further see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 (concerning the rights of Chagossians to return to the Chagos Islands, i.e. the right of abode), [45].

424 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, at p131D-132C.

425 See, in that regard, the table in Braverman and Dampier (n 384) 40-44.

involve a complicated legislative programme aimed at rolling back case law and relevant legislative provisions.

346. The relationship between the common law and the HRA/ECHR has been considered by UK judges at the highest level.[426] For example:

346.1. In *R (Osborn) v Parole Board*,[427] Lord Reed said that the HRA did not "*supersede the protection of human rights under the common law or statute, or create a discrete body of law based on the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate*".

346.2. Similarly, in *Kennedy v Charity Commission*,[428] Lord Mance said that:

> "*Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law… In some areas the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence… And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is*

426 For academic commentary (from the expressly-stated perspective of being against UK withdrawal from the ECHR), see e.g. Mark Elliott, 'Repealing the Human Rights Act, withdrawing from the ECHR: be careful what you wish for' (Public Law for Everyone, 4 March 2013) (https://publiclawforeveryone.com/2013/03/04/repealing-the-human-rights-act-withdrawing-from-the-echr-be-careful-what-you-wish-for/)—suggesting that the ECHR essentially adumbrates what was already implicit in the common law. In my view, this analysis goes too far because unquestionably the ECHR goes *beyond* what was recognised in the common law, but it illustrates that the Convention rights and common law do often map onto each other.

427 *R (Osborn) v Parole Board* [2014] AC 1115 at [57].

428 *Kennedy v Charity Commission* [2015] AC 455 at [46].

certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene".

347. As to how the process of interplay and osmosis between the common law and ECHR has worked in practice:

347.1. Examples where the ECHR has influenced and changed the common law include, to take one example among many, the development of the common law in relation to privacy rights.[429] Previous common law restrictions on the ability to claim damages for breach of confidence were changed following the recognition that, post-HRA, Articles 8 and 10 of the ECHR formed part of UK domestic law and should therefore be treated as part of the cause of action for breach of confidence. Unsurprisingly, rights derived from the ECHR have expanded rather than reduced the scope of common law protections (because, if the common law goes further than the ECHR, there is no basis for *narrowing* the common law protections by reference to the ECHR).[430]

347.2. Equally, as noted above, there are a few (rare) examples where the English Courts have influenced the ECtHR and persuaded it to change course.

348. There are, however, clear differences between a common law system and a codified system (whether in UK statute or an international legal instrument):

348.1. First, the common law is inherently more flexible than a written instrument/statute. The contrast between UK common law and civil systems of law (for example, in countries such as France) which rely much more heavily on codified statutes/legal codes rather than previous

429 See, e.g., *Campbell v MGN Ltd* [2004] 2 AC 457, esp. at [11]-[22].

430 The same is of course true for UK statutes: for example, the Equality Act 2010 goes further in its attempts to protect against discrimination than would be mandated by membership of the ECHR.

case law, is instructive in this regard and, in my view, is a significant benefit of the common law in general. However, that is not to say that a non-codified system is preferable in the specific context of the protection of fundamental rights, where there are very respectable arguments that having a clearly defined set of rights is beneficial (amongst other things) so that the citizen knows what their basic rights are in clear terms.[431]

348.2. Second, and relatedly, the common law develops on an incremental basis as and when issues arise in cases. This means that it is inherently likely that more *comprehensive* rights protection will be achieved through a written instrument, although this is subject always to the question of what rights should qualify for that sort of protection.

349. Accordingly, there are both benefits and drawbacks to not having a centrally codified system of rights protection, depending on one's perspective.[432] It is important not to overstate the impact of Option 7. The UK would not be abandoning fundamental rights protection. It would retain established common law principles and legislation which provide such protections. It would also remain a signatory to international legal instruments such as the Universal Declaration of Human Rights. Equally, the UK Government would not have free rein, or anything close to free rein, to act as it pleased, unless given clear authority by Parliament on a given issue: the safeguards against the abuses of executive power provided by judicial review, and the common law's "*anxious scrutiny*" of infringements of rights, would remain in place.

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431 That said, the "living instrument" doctrine means that, in some instances, the ECtHR has expanded the Convention rights far beyond what the text of the ECHR actually says, which produces the opposite of legal certainty.

432 There are examples internationally of either approach working: compare and contrast two close neighbours and Commonwealth countries with common law traditions – Australia and New Zealand – the former does not have a codified rights statute (albeit it does protect some rights via its constitution), but the latter does.

Conclusion on alternatives

350. The focus of this advice has been on the ECHR's impact on the key policy areas and the legality of withdrawal (denunciation). If the decision is to leave, I have set out a range of alternative options.

PART X: THE MECHANICS OF LEAVING THE ECHR

International Law

351. Exiting the ECHR in international law is a relatively simple matter. The ECHR contains a provision which allows Contracting Parties that have been a party to the Convention for at least five years to denounce it.[433] Article 58 provides that any such party must notify the Secretary General to the Council of Europe and provide six months' notice. [434] The Secretary General is obliged to notify the other parties to the ECHR.[435]

352. Article 58(2) makes clear that such a denunciation does not have the effect of releasing the party concerned from its obligations under the ECHR in respect of "*any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective*".

353. In other words, denunciation does not have retrospective effect. Moreover, the judgments of the ECtHR that have already been taken would need to be executed and implemented by the UK, even after denunciation.[436] In reality, this is a relatively minor matter as the UK is the subject of only a small number of outstanding judgments which have not been executed and implemented.[437]

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433 ECHR, Article 58.

434 ibid.

435 Leaving the Council of Europe and the Convention system is not unprecedented, albeit in very different circumstances. Greece departed temporarily in 1970, but rejoined in 1974 following the fall of the military junta. See: Council of Europe, 'The Greek case became a defining lesson for human rights policies in Europe' (18 April 2007) (https://www.coe.int/en/web/commissioner/-/the-greek-case-became-a-defining-lesson-for-human-rights-policies-in-europe). Russia was expelled from the Council of Europe (and hence the Convention system) in March 2022, following the invasion of Ukraine.

436 See e.g., Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Report on the draft Bill (16 December 2013) [106]. For a practical example, see e.g., Ukraine and Netherlands v Russia (Judgment of the Grand Chamber, 9 July 2025).

437 See e.g. Ministry of Justice, 'Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2023–2024' (CP 1192, November 2024) which highlights a small number of cases which are still under supervision at 12 (https://assets.publishing.service.gov.uk/media/673dd5bead6a5d7d2b1b0880/Responding_to_human_rights_judgments_2023-2024__web_.pdf).

354. The ECHR has been extended to the Crown Dependencies by the UK (they are not members of the ECHR in their own right).[438] Article 58(4) of the ECHR provides that the ECHR may be denounced in respect of any territory to which it has been declared to extend. While this has the potential to create some political complications if the Crown Dependencies disagreed with the UK's departure from the ECHR, it is clear that their subjection to the ECHR is dependent on the UK, and it is for the UK to decide whether to remain. The Crown Dependencies cannot be a part of the ECHR other than through the UK, since the UK is responsible for their foreign policy.

355. The ECHR is also referenced in other international agreements – most notably the BGFA and the TCA. These issues are addressed in separate sections of this advice.

356. While it is the current policy of the Council of Europe to require ECHR membership in order to join the Council of Europe, there is nothing in its founding statute which expressly requires continued ECHR membership. Article 3 states that "*Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms*".[439] It could therefore be argued that the UK could maintain its membership of the Council of Europe even if it withdraws from the ECHR. However, expulsion for political reasons would be a risk, albeit that can be very difficult to achieve given the large membership of the Council.[440] In addition to the fact that expulsion would have no basis in the

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438 Jersey, Guernsey and the Isle of Man. Article 56(1) of the Convention allows parties to the Convention to extend its application "to all or any of the territories for whose international relations it is responsible."

439 Statute of the Council of Europe (London, 5 May 1949) (https://rm.coe.int/1680306052).

440 Under Article 8 of its founding Statute, if the Committee of Ministers (the decision-making body of the Council of Europe, made up of the foreign ministers of each member) decides that a member has "seriously violated Article 3" of its founding Statute, it can be suspended and asked to withdraw. If it does not withdraw, then the Committee may decide it has ceased to be a member. All decisions require a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled

Council's founding statutes, and be very difficult to co-ordinate, it is not obvious that the Council of Europe would want to exclude the UK in view of its international significance more generally.

Domestic Law

357. In addition to the abovementioned steps, in order to exit the ECHR it is likely that steps would have to be taken in domestic law. The signature, ratification and denunciation of treaties is a prerogative power which rests with the executive acting on behalf of the King. Until 2017, that would have been the end to the matter and it probably would have been accepted that there was no place for Parliament or the courts to intervene. As Lord Templeman put it in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*,[441] "*[t]he Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty*".

358. The UKSC's decision in *R (on the application of Miller) v Secretary of State for Exiting the European Union*[442] ("***Miller 1***") has made the issue somewhat more complex.[443] In *Miller 1*, the UKSC acknowledged that the case of *Council of Civil Service Unions v Minister for the Civil Service*[444] had set out that:

> "*Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts*."[445]

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to sit on the Committee: Article 20(d). Article 3 provides that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

441 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476.

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

443 *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, see in particular [82]-[83].

444 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

445 *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [55].

359. Nonetheless, the UKSC concluded (by a majority of 8 to 3) that an Act of Parliament was required to authorise Ministers to give notice of the decision of the UK to leave the EU and that the use of prerogative powers was not sufficient.

360. This conclusion was justified on the basis that the constitution required such a fundamental change to be affected by parliamentary legislation. In particular in that context, the UKSC noted that withdrawal from the EU would remove some existing domestic rights of UK residents.[446]

361. While the HRA sets out no obvious statutory restrictions on denouncing the ECHR, the decision in *Miller 1* has provoked a number of legal and academic commentators to argue that, while it could be argued that the *ratio* of the *Miller* judgment is confined to the wholly exceptional and unique nature of EU law, it could also be contended that its core conclusions are equally applicable to the ECHR.[447]

362. One argument which has been raised is that the new principle, created by *Miller 1*, might require a court to consider whether removing the right of individual petition to Strasbourg and also the obligation, under Article 46 of the ECHR, obliging the UK to comply with adverse judgments of the court, were of sufficient constitutional significance as to require explicit authorisation by Parliament.[448]

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446 Ibid [82]-[83].

447 See e.g. Alex Peplow, 'Withdrawal from the ECHR after Miller – A Matter of Prerogative?' (UK Constitutional Law Association, 28 February 2017) (https://ukconstitutionallaw.org/2017/02/28/alex-peplow-withdrawal-from-the-echr-after-miller-a-matter-of-prerogative/); G Phillipson and A Young 'Would use of the prerogative to denounce the ECHR 'frustrate' the Human Rights Act? Lessons from Miller' (2017) Public Law 150-175; J Williams, 'Miller and the Human Rights Act 1998: can the Government withdraw the UK from the ECHR by the royal prerogative?' (Thomson Reuters, Public Sector Blog, 28 February 2025) (http://publicsectorblog.practicallaw.com/miller-and-the-human-rights-act-1998-can-the-government-withdraw-the-uk-from-the-echr-by-the-royal-prerogative/).

448 G Phillipson and A Young, 'Would use of the prerogative to denounce the ECHR "frustrate" the Human Rights Act? Lessons from Miller' (2017) Public Law 150-175.

363. It has also been argued that the ECHR, as an international treaty, "*is clearly a direct source of domestic law through the HRA, which depends for its content on the continued application of the ECHR to the UK. If the ECHR ceased to apply to the UK, then all the main obligations of the HRA would be rendered meaningless.*"[449] Furthermore, via the HRA, "*the ECHR is heavily integrated into the public law of the UK, and into the constitutional frameworks of the devolved nations*."

364. There is therefore a real risk that if a future Government sought to denounce the ECHR without specific authorisation in an Act of Parliament, opponents might seek to obtain relief in the domestic courts (effectively precluding a notice being sent to the Secretary General). There is certainly some litigation risk arising from such arguments, in the sense that the point would be litigated, but it is unclear whether the challenge would succeed.

365. While the contrary position could be cogently argued such that a new Act of Parliament authorising ECHR withdrawal was not required, it might be wise to avoid the legal hazard and take a belt and braces approach. In those circumstances, it would be safest to assume that a simple Act authorising denunciation would be required.

366. This would have the practical effect of delaying denunciation—particularly since the Government would have to manage such a Bill in the House of Lords (which could be expected to be opposed to the UK leaving the ECHR). Clearly, any decision to withdraw from the ECHR ought to be a manifesto commitment, so that the House of Lords would, under the Salisbury Convention, accept the legislation carrying this commitment into effect. The experience of the European Union (Notification of Withdrawal) Act 2017 might demonstrate that

449 A Peplow, 'Withdrawal from the ECHR after Miller – A Matter of Prerogative?' (UK Constitutional Law Association, 28 February 2017) (https://ukconstitutionallaw.org/2017/02/28/alex-peplow-withdrawal-from-the-echr-after-miller-a-matter-of-prerogative/).

any such delay need not be substantial.[450] In any event, the delay between notification and withdrawal would allow an incoming Government further time to consult and determine what, if any, new human rights framework should be implemented in Great Britain and Northern Ireland.

[450] The European Union (Notification of Withdrawal) Act 2017 was laid before Parliament on 26 January 2017 and gained Royal Assent on 16 March 2017. One assumes that a Government wishing to exit the ECHR would have made denouncing the ECHR a manifesto commitment (and therefore it is envisaged that such a Bill would benefit from the Salisbury-Addison Convention in the House of Lords).

PART XI: CONCLUSION

367. It is hard to overstate the impact the ECHR has had on government decisions, across the range of policy areas canvassed in this advice. The tests represent key areas of concern but they obviously do not represent the totality of the ECHR's impact on the UK. As to each of those tests:

367.1. **The Sovereign Borders Test**, highlights the substantial ECHR limitations placed on the Government in the context of immigration and border control. This is the area where the most urgent and extensive changes are needed.

367.2. **The Veterans Test**, notes the particular difficulty in Northern Irish legacy cases where the Government spent considerable time and energy on the 2023 Act only to be told by the Northern Irish Court of Appeal that it did not comply with the ECHR (despite following a well-worn path of using immunities to further reconciliation). Again, the ECHR has been a fundamental and corrosive constraint on the Government's ability both to address this sensitive area, and also to clarify the law applying to British forces on operations.

367.3. **The Fairness Test**, notes the more limited role that the ECHR plays in the allocation of social housing and benefits where the main concern is not to discriminate (although, as with all areas, governments have sought to align policies with the ECHR, meaning that an absence of friction at present is not itself determinative of the legal 'opportunity cost' of the ECHR).

367.4. **The Justice Test**, which notes (i) the proportionality test in *DPP v Ziegler* when legislating to ban protests, and (ii) the inability to set blanket minimum sentences. Here, the ECHR places excessive (and

unpredictable) limits on the Government's ability to set strong deterrents for serious crime, and to police demonstrations (albeit some limits would probably be appropriate regardless of the ECHR).

367.5. **The Prosperity Test**, notes the (currently) limited role the ECHR plays in holding back infrastructure projects. There is, however, serious concern that this could be a major growth area for litigation following *Klimaseniorinnen*.

368. The UK joined the ECHR "*only reluctantly and suspiciously*", and "*probably signed the Convention only because they expected never to be challengeable under it*".[451] The view of officials at the time was that because of its long history of common law rights protections, and its very strong institutions, Britain "*was, occasional aberrations apart, beyond reproach*".[452] Had the ECtHR stuck closely to the original text and intention behind the ECHR when it was agreed in 1950, it is likely that it would not represent any real barrier to the UK addressing the issues raised in the tests noted above.

369. Since then, the jurisprudence has developed unpredictably because the ECtHR regards the ECHR as a 'living instrument' such that its decisions, and in consequence those of domestic courts, are not constrained by the wording of the ECHR itself. Indeed, Rule 39 Orders are a clear example where the ECtHR has gone well beyond the original text to give itself jurisdiction to grant injunctions against national governments. This expansive approach of judges in the ECtHR seems to be reinforced by a strong risk aversion among UK judges and civil servants, seeking to avoid any potential for incompatibility with the ECHR. The friction between the national interest and the ECHR may well be understated: for every policy that is tried and litigated, one can imagine that

451 David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) 72.
452 AW Brian Simpson, *Human Rights and the End of Empire* (OUP, 2001) 50.

there is a penumbra that are quietly dropped before ever being tested. Despite quite serious attempts to check these tendences, they show no sign of abating. Attempts to reform the ECHR or the workings of its court have so far proved ineffective. In the unlikely event that the current dissatisfaction of a small number of Contracting Parties crystalises into a formal process, whether the necessary reforms have been achieved will be obvious in the next three to four years.

370. It is worth remembering that countries that inherited the British model of rights protection have continued to improve their approach to rights protection and official accountability, but have done so without binding themselves to international courts. As Lord Sumption has observed:

> "*In countries such as the United Kingdom, with independent and apolitical courts of high standing, it is unnecessary to have another tier of judicial supervision at the international level. Other countries with judicial systems similar to Britain's, such as Canada and New Zealand, have a high reputation for defending human rights without submitting their domestic arrangements to the scrutiny of an international court. If Britain were to withdraw from the Convention and re-enact the same provisions as a purely domestic instrument, it would be possible to defend all the same basic rights without submitting to the overbearing regulatory instincts of the Strasbourg Court.*" [453]

371. The precise nuances and immediate consequences of denunciation are not without their complexities, and significant political capital will be required to effect a policy to leave the ECHR; however, this advice demonstrates that none of these complexities is insurmountable (notably, the BGFA is not a barrier).

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[453] Lord Sumption, 'The Purpose and Limits of International Courts' (Conference, Mathias Corvinus Collegium, 1-2 June 2023) (https://youtu.be/bESRGpWlbqI); see also Lord Sumption, 'Judgment call: the case for leaving the ECHR' (*The Spectator*, 30 September 2023) (https://www.spectator.co.uk/article/judgment-day-the-case-for-leaving-the-echr/).

The form of rights protection that might follow leaving the ECHR is an open question, this advice sets out the various options that are available, and their relative merits. Appendix 1 notes the current protections for the main ECHR rights and demonstrates that denouncing the ECHR, and with it the ECtHR, would not lead to an immediate vacuum of rights protection.

372. It is also important to avoid conflating the politics of leaving the ECHR with the legality of doing so. Lord Hermer KC, the Attorney General for England & Wales, has recently suggested – without, it seems, adducing any actual evidence – that other countries may not be willing to enter into migration or return deals with the UK if it were no longer a member of the ECHR. That is a primarily a political question, not a legal one, and is a matter for each individual country. However, insofar as other countries take the same approach as the UK, that flies in the face of the numerous migration deals that the UK has with other countries regardless of whether they are in the ECHR or not.[454] Such comments are, in my view, designed to direct attention away from the legal difficulties created by the ECHR and the legality of leaving, which has been the focus of this advice.

373. For obvious reasons, this advice focuses on setting out the 'problems'. If the policy decision is to leave the ECHR, further detailed work would need to be undertaken on these options, but it is clear at this point that all would require legislation that would be contentious.

374. Whatever policy is chosen, it will need to be given crystal-clear expression in any future general election manifesto, explaining what steps a future Government intends to take on the ECHR, and drafted in such a way as to

454 As does the EU, which has a comprehensive returns programme which operates through agreements with Russia, Belarus, Hong Kong, Pakistan and 77 African, Caribbean and Pacific countries who are not signatories to the ECHR: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/effective-firm-and-fair-eu-return-and-readmission-policy_en.

avoid any suggestion that it is a conditional intention (for example, it should specify that the UK Government would leave the ECHR and repeal the HRA irrespective of the stance of devolved administrations). That would be important not only for parliamentary handling, especially in the House of Lords, but also (and more importantly) so that we can be clear with the electorate as to what our policies are, and the manifesto on which Conservative Party candidates would stand.

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Shadow Solicitor General

2 October 2025

PART XII: APPENDIX 1 – COMMON LAW HUMAN RIGHTS PROTECTIONS[455]

"*The table is not intended as an assessment of whether there are existing mechanisms which provide equivalent protection to the Human Rights Act, but rather to provide some non-exhaustive examples of domestic legislation and common law principles which cover some of the same ground.*

	Examples of relevant legislation and common law provisions
Article 2 *Right to life*	*1. Murder (Abolition of Death Penalty) Act 1965.* *2. Suicide Act 1961 (Criminal Justice Act (Northern Ireland) 1966) – aiding or abetting suicide.* *3. Fatal Accidents Act 1976 (not Scotland or Northern Ireland) – relatives of those killed by wrongdoing of others may recover damages.* *4. Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 – where in public interest a public inquiry should be conducted by relevant Procurator Fiscal.* *5. Fatal Accidents (Northern Ireland) Order 1977. 6. Domestic Violence Crime and Victims Act 2004 – causing or allowing death of child or vulnerable adult.* *7. Corporate Manslaughter and Corporate Homicide Act 2007 – corporate responsibility for death by gross breach of duty of care.* *Also: Criminal offences, for example murder/manslaughter/culpable homicide; Coroner investigation of death; Office for Police Conduct; Police Investigations and Review Commissioner (Scotland); The Scottish Public Services Ombudsman (deals with complaints about Scottish Prison Service), the Police Ombudsman for Northern Ireland and the Prisons and Probation Ombudsman.*
Article 3 *Prohibition of*	*1. Bill of Rights 1689 – prohibits cruel and unusual punishment.*

455 This table is reproduced from: 'Appendix 1 – Examples of relevant domestic legislation and common law provisions which cover Articles within the Human Rights Act': Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998* (CP 588, December 2021) 89-94. It has not been brought up to date to reflect any legislative changes since then. It is also quoted in Braverman and Dampier (n 384) 40-44.

torture and inhuman or degrading treatment or punishment	*2. Offences Against the Person Act 1861 – Actual Bodily Harm / Grievous Bodily Harm.* *3. Criminal Justice Act 1988 – prohibits torture by public officials in performance of their duties.* *4. Education Act 1996 outlaws corporal punishment in schools.* *5. Children (Equal Protection from Assault) (Scotland) Act 2019 – clarifies law on corporal punishment and removed right of 'reasonable chastisement' in Scots' law.* *6. Children and Young Persons (Scotland) Act 1937 – prohibits cruelty to those below the age of sixteen.* *7. Protection from Harassment Act 1997 and Family Law Act 1996 – preventative civil injunctions, interdicts and interim interdicts in Scotland.* *8. Protection from Harassment (Northern Ireland) Order 1997.* *9. Family Homes and Domestic Violence (Northern Ireland) Order 1997.* *10.Domestic Abuse (Scotland) Act 2011 – domestic abuse interdicts.* *11.Domestic Abuse Act 2021 and Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021.* *12.Children Act 2004 – removes defence of reasonable chastisement for offences of Actual Bodily Harm or cruelty.* *13.Adults with Incapacity (Scotland) Act 2000 – offence of ill-treatment and wilful neglect.* *Also: Common assault and tort of battery (and now under Criminal Justice Act 1988); common law assault in Scotland; common law breach of the peace in Scotland; evidence obtained under torture is excluded from trial; international treaties, for example, United Nations Convention Against Torture and European Convention Against Torture; regulators including Care Quality Commission, Care Inspectorate (in Scotland), The Scottish Public Services Ombudsman,*

	the Police Ombudsman for Northern Ireland, Office for Police Conduct, Police Investigations and Review Commissioner (Scotland) and HMI Prisons.
Article 4 Prohibition of slavery and forced labour	*1. Slavery Abolition Act 1833 – formally abolished slavery.* *2. Gangmasters (Licensing) Act 2004 – compulsory licensing scheme for gangmasters and other agricultural agencies.* *3. Criminal Justice and Licensing Act 2010 (Scotland) – offence of trafficking.* *4. Modern Slavery Act 2015 – offences of human trafficking, slavery and forced labour.* *5. Human Trafficking and Exploitation (Scotland) Act 2015 – offence of human trafficking and also requires Scottish Ministers to prepare a trafficking and exploitation strategy.* *Also: Modern Slavery Human Trafficking Unit, part of the National Crime Agency; National Referral Mechanism set up in 2009 following ratification of Council of Europe Convention on Action against Trafficking in Human Beings to identify victims of trafficking.*
Article 5 Right to liberty and security	*1. Magna Carta.* *2. Magna Carta Hiberniae* *3. Police and Criminal Evidence Act 1984 and Codes of Practice – restrictions on powers of police to detain/arrest and to hold.* *4. Police and Criminal Evidence (Northern Ireland) Order 1989.* *5. Criminal Procedure (Scotland) Act 1995 and Police, Public Order and Criminal Justice (Scotland) Act 2006 in addition to powers under common law – place restrictions on powers of the police to detain and arrest in Scotland.* *6. Mental Health Act 1983 and Mental Capacity Act 2005 – deprivation of liberty safeguards. See also Mental Capacity Act (Northern Ireland) 2016.*

	7. Mental Health (Care and Treatment) (Scotland) Act 2003, Mental Health (Scotland) Act 2015 and Criminal Procedure (Scotland) Act 1995 – deprivation of liberty safeguards in Scotland. *Also: Writ of Habeas Corpus; false imprisonment; offence of kidnapping.*
Article 6 Right to a fair trial	*1. Contempt of Court Act 1981 – limits what can be published about a case while it is ongoing and confidentiality of jury deliberations.* *2. Police and Criminal Evidence Act 1984 – right to contact a solicitor.* *3. Police and Criminal Evidence (Northern Ireland) Order 1989.* *4. Criminal Procedure (Scotland) Act 1995 – rights in criminal proceedings.* *5. Criminal Procedure and Investigations Act 1996 and Civil Procedure Rules – duty to disclose all relevant information.* *6. Criminal Justice and Licensing (Scotland) Act 2010 and common law – disclosure.* *Also: rules of natural justice, for example, rules against bias and right to a fair hearing; presumption of innocence and burden of proof on prosecution; trial by jury.*
Article 7 No punishment without law	*1. Sentences set out in relevant legislation. Coroners and Justices Act 2009, court must follow the relevant sentencing guidelines.* *2. Criminal Justice and Licensing (Scotland) Act 2010 – establishes new Scottish Sentencing Council to oversee sentencing guidelines in Scotland.* *3. General presumption that law will not be retrospective unless clear in legislation. War Crimes Act 1991 rare example of retrospective criminal liability.*
Article 8 Right to respect for private and family life	*1. Police and Criminal Evidence Act 1984 – procedure to apply for search warrant. Also Police and Criminal Evidence (Northern Ireland) Order 1989.*

	2. Criminal Procedure (Scotland) Act 1995 – procedure to apply for a search warrant in Scotland. *3. Data Protection Act 2018.* *4. United Kingdom General Data Protection Regulation.* *5. Investigatory Powers Act 2016 and Regulation of Investigatory Powers (Scotland) Act 2000 – protection from infringements of privacy in relation to personal data and surveillance.* *6. Health and Social Care Act 2008 – introduces Care Quality Commission and requires service providers to meet minimum standards of care. See also the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003.* *7. Immigration Act 2014.* *Also: Common law defamation, confidentiality laws and privacy, tort of trespass.*
Article 9 Freedom of thought, conscience and religion	*1. Public Order Act 1986 – offence of incitement to religious hatred.* *2. Criminal Justice (Scotland) Act 2003 – aggravation of offence where religious prejudice.* *3. Criminal Justice and Immigration Act 2008 – abolishes common law offence of blasphemy in England and Wales.* *4. Equality Act 2010.* *5. Northern Ireland Act 1998 (see sections 75 and 76).* *No formal restrictions on the freedom of worship.*
Article 10 Freedom of expression	*1. Contempt of Court Act 1981 – balance freedom of expression with right to fair trial.* *2. Bill of Rights – freedom of speech in Parliament* *3. Scotland Act 1998 – freedom of speech in the Scottish Parliament. See also the Northern Ireland Act 1998.* *4. Education (No 2) Act 1986 – freedom of speech within law for staff, students and speakers at university.*

	5. Theatre Act 1968 – abolished censorship on theatre. *6. Freedom of information Act 2000 and The Freedom of Information (Scotland) Act 2002.* *Also: Common law principle of freedom of speech subject only to provisions of common law or statute; Defamation – protection of reputation weighed against the wider public interest; Disclosure of certain documents to the press where referred to in court proceedings; Common law right of access to information from public authorities; Universal Declaration of Human Rights and International Covenant on Civil and Political Rights; Independent Press Standards Organisation.*
Article 11 Freedom of assembly and association	*1. Public Order Act 1986 – created offences in relation to public order.* *2. Civic Government (Scotland) Act 1982 – sets out provisions in respect of public processions.* *3. Peaceful assembly is 'ordinary and reasonable' use of public highway.* *4. Trade Union Act 1871 and Employment Act 1990, consolidated in the Trade Union and Labour Relations (Consolidation) Act 1992; Trade Union Act 2016 – right to join a trade union and right not to join a trade union.*
Article 12 Right to marry and found a family	*1. No prescribed right to marry. Marriage formalities in: Marriage Act 1949 and Marriage (Scotland) Act 1977 – e.g. marriage under 16 is void.* *2. Matrimonial Causes Act 1973 – right to divorce.* *3. Adoption and Children Act 2002 – provisions in respect of adoption.* *4. Adoption and Children (Scotland) Act 2007 – provisions in respect of adoption in Scotland.* *5. Civil Partnership Act 2004.* *6. Gender Recognition Act 2004 – allowing trans people to change legal gender.* *7. Forced Marriage (Civil Protection) Act 2007.*

	8. Marriage (Same Sex Couples) Act 2013, Marriage and Civil Partnership (Scotland) Act 2014. *9. Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 and Marriage and Civil Partnership (Northern Ireland) Regulations 2020.* *10.Universal Declaration of Human Rights – right to marry and found a family.*
Article 14 Prohibition of discrimination in the protection of other rights	*1. Equality Act 2010 – e.g. 'equality duty' requiring public bodies to have due regard to the need to eliminate discrimination, to advance equality of opportunity and to foster good relations between people (not Northern Ireland which has various pieces of legislation in relation to discrimination, including section 75 of the Northern Ireland Act 1998)."*