

## **Bill of Rights: European Convention on Human Rights Memorandum**

### **SUMMARY OF THE BILL**

1. The Bill will repeal the Human Rights Act 1998 (“HRA”) and replace the HRA framework. In particular, the Bill will:
  - a. Restate the Convention rights, described in the same terms as in the HRA and the European Convention on Human Rights (clause 2 and Schedule 1);
  - b. Change the approach to be taken to the interpretation and application of Convention rights (clauses 3 – 8);
  - c. Alter the approach the courts should take to legislation that is incompatible when interpreted using orthodox principles of construction, such that interpretation should not be strained in order to achieve compatibility, and instead the legislation should be declared to be incompatible (clause 10 and paragraph 2 of Schedule 5);
  - d. Require public authorities to act compatibly with the Convention rights, save where Parliament has provided otherwise through primary legislation (clause 12);
  - e. Make provision for how a person may bring a human rights claim, and introduce a new permission stage for human rights claims to proceed (clauses 13-16);
  - f. Remove the ability to rely on the Convention rights under the Bill of Rights in proceedings (other than criminal proceedings) relating to breaches alleged to have taken place in connection with military operations overseas (clause 14);
  - g. Make provision as to the courts’ power to award damages for breaches of Convention rights, and prescribe factors which the courts must consider before awarding damages (clauses 17-19);
  - h. Limit courts’ powers to allow appeals against deportation on Article 6 grounds, require disclosure of journalistic sources, grant relief affecting freedom of expression or freedom of thought, conscience and religion, and have regard to interim measures of the European Court of Human Rights (clauses 20-24);
  - i. Require adverse judgments of the European Court of Human Rights against the United Kingdom to be notified to Parliament, and provide for the

- circumstances in which remedial secondary legislation may be made (clauses 25-26 and Schedule 2);
- j. Make provision for giving domestic effect to derogations and the current reservation the UK has to Article 2 of the First Protocol to the ECHR with respect to education (clauses 27-29 and Schedule 3); and
  - k. Make provision in connection with the United Kingdom judge to the European Court of Human Rights (clause 30 and Schedule 4).
2. The Bill will not contain any replacement for sections 11 and 19 of the HRA. Accordingly, there will no longer be an express preservation of rights and causes of action which exist outside of the Bill, and there will no longer be a requirement for a minister in charge of a Bill in either House of Parliament to make a statement as to its compatibility with the Convention rights (clause 37 and paragraph 2 of Schedule 5).
3. The Bill is considered to be compatible with the European Convention on Human Rights. The ECHR implications are considered in this Memorandum. The Department considers that the Clauses of and Schedules to this Bill which are not mentioned in this Memorandum do not give rise to any issues.

## **ECHR IMPLICATIONS**

### **CONVENTION RIGHTS**

4. **Clause 3** functionally replaces section 2 HRA, regarding the interpretation of Convention rights. It expressly states that the Supreme Court is the ultimate judicial authority on questions arising in domestic law in connection with the Convention rights; and sets out that a court determining a question in connection with a Convention right:
- i. must have particular regard to the text of the Convention right, and in construing that text may have regard to the preparatory work of the Convention (i.e. the travaux préparatoires); and
  - ii. may have regard to the development under the common law of any right that is similar to the Convention right.

5. In relation to Strasbourg jurisprudence, the clause provides that a court:
  - a. must not adopt an interpretation of a Convention right that expands the protection conferred by that right unless it has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it; but
  - b. subject to that, may adopt an interpretation of a Convention right that diverges from Strasbourg jurisprudence.
6. **Clause 4** provides that freedom of speech (a subcategory of freedom of expression) should be given great weight, save in certain identified contexts.
7. **Clause 5** provides that a court may not interpret a Convention right as involving a new positive obligation. In other words, the court may not find a positive obligation to exist which was not recognised prior to the commencement of the Bill of Rights, or reinstate a pre-commencement interpretation which had subsequently been overturned. **Clause 5** further provides that when applying an existing interpretation of a Convention right requiring a public authority to comply with a positive obligation, a court must give great weight to the need to avoid applying an interpretation that would have any of five specified effects. These include requiring the police to protect individuals who are involved in criminal activity or otherwise or otherwise undermining the police's ability to determine operational priorities, and requiring an investigation to be conducted to a standard which is not reasonable in all the circumstances.
8. **Clause 6** will require that, if a person is currently serving a custodial sentence for a criminal offence and a domestic court is considering whether a relevant Convention right of that person has been breached, the court must give great weight to the general concept of the importance of reducing the risk to the public from people who have committed criminal offences and who are serving custodial sentences. The clause will not apply to Articles 2, 3, 4(1) and 7 (i.e. the 'absolute' rights, protection of which cannot be weighed up against anything else). While public protection (or a related concept) is already an explicit available limitation or

qualification in relation to certain rights, such as Article 6 and Article 8, the new clause will ensure that courts have appropriate regard to this consideration in any balancing exercise.

9. **Clause 7** requires the courts to give great weight to Parliament's role in deciding how competing policy aims and Convention rights should be balanced. Whilst deference to Parliament is already shown by the courts, the clause codifies the court's current practice as detailed by Lord Reed in SC<sup>1</sup> and clarifies the balancing exercise to be undertaken.
  
10. **Clauses 3 to 8** will allow the domestic courts to interpret and apply the Convention rights more restrictively than the ECtHR. This is already possible under the HRA, but the new clauses are intended to lead to a greater willingness by the domestic courts to decline to follow Strasbourg jurisprudence (within the limit established by **clause 3(3)(a)**), particularly in light of:
  - a. **clause 3(3)(b)**, which expressly provides that courts may adopt different interpretations of Convention rights than Strasbourg if those interpretations do not expand the protection conferred by the rights (i.e. the Strasbourg approach is established as a 'ceiling' but not a 'floor' for domestic courts interpreting the Convention rights);
  - b. the emphasis on the text of the rights, and explicit references to the preparatory work of the Convention and the common law;
  - c. the requirement that great weight be given to freedom of speech, including where this would affect the scope or protection of another right;
  - d. the prohibition on the recognition of new positive obligations and limitation on the application of existing interpretations;

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<sup>1</sup> R (SC) v Secretary of State for Work and Pensions, Equality and Human Rights Commission intervening [2021] UKSC 26

- e. the requirement that domestic courts give the greatest possible weight to the importance of reducing the risk to the public posed by those subject to custodial sentences; and
- f. the requirement that domestic courts give the greatest possible weight to Parliament's responsibility for determining the appropriate balance as between different policy aims and rights, including when considering the margin of appreciation. The intention is to ensure that the Courts continue to give great weight to the respect due to Parliament's view of the public interest (which might differ from Strasbourg's) when determining a question arising in connection with a Convention right pursuant to **Clause 3**.

11. **Clause 4** is intended to also lead to more restrictive application of rights than Strasbourg would adopt where the great weight to be given to the importance of protecting freedom of speech permits greater interference with another qualified right than would otherwise be the case. This is most likely to arise in connection with Article 8. Whilst the government's intention is to limit an individual's ability to rely on other Convention rights when they are in competition with freedom of speech, the courts will remain obliged to act compatibly with each of the Convention rights, and so the great weight to be given to the importance of protecting freedom of speech will never operate to extinguish those other rights. **Clause 4** also provides for exemptions where the court should not give great weight to freedom of speech, including in the determination of whether a person has committed a criminal offence.

12. **Clause 5** expressly bars the domestic courts' ability to interpret rights as containing positive obligations which have not already been recognised in the domestic or Strasbourg jurisprudence. Existing interpretations of rights as including positive obligations then recognised by either Strasbourg or the domestic courts will be retained. This is subject to the domestic court being satisfied that application of that interpretation is appropriate, having regard to the great weight to be given to the need to avoid the specified effects. The approach will ensure that the Courts have discretion to consider whether an obligation previously understood to exist should apply in the particular circumstances. It will not prevent the Courts applying the interpretation giving rise to the obligation in appropriate cases.

13. **Clause 6** requires courts considering whether a Convention right has been breached to give the greatest possible weight to the importance of reducing the risk to the public from those subject to custodial sentences. **Clause 7** requires the courts to give the greatest possible weight to the principle that Parliament has responsibility for deciding how policy aims and the rights of individuals – individually or collectively – should be balanced.
14. **Clause 8** applies where a court is considering, in relation to a decision to deport a foreign national offender<sup>2</sup> whether the relevant legislative provision that action is taken under is compatible with Article 8. It provides that where a court is considering a deportation provision in relation to a foreign national offender and Article 8 (right to private and family life), it may not be found incompatible unless it requires the court to act in a way that would result in such manifest harm that it would be extreme (defined as exceptional, overwhelming, and not capable of being mitigated or otherwise be irreversible). In addition, where the harm is to someone other than a qualifying child a deportation provision will not be incompatible should it require the overall circumstances to be even more exceptional and compelling than those in relation to a qualifying child.
15. We consider **clauses 3 – 8** to be compatible with the ECHR. Compatibility is to be judged by reference to the state of the law as at introduction. State parties to the ECHR are not required to directly incorporate the ECHR into domestic law, nor to follow/apply all decisions of the Strasbourg Court. Where domestic courts do not follow judgments of the ECHR, there is an opportunity for constructive judicial dialogue, and the ECtHR may in some cases elect to amend its approach in light of the domestic court analysis. Encouraging greater judicial dialogue is part of the aim of these clauses. In relation to **clause 5**, in exercising their discretion as to whether to apply a pre-commencement interpretation involving a positive obligation, the courts will be subject to the obligation in **clause 12** to act compatibly with Convention rights.
16. In relation to **clause 8** the clause does not affect challenges to individual deportation decisions, but rather affects challenges against the legislation itself.

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<sup>2</sup> That is, a person sentenced to a custodial sentence of 12 months or more.

**Clause 8** does not alter the current deportation legislation, which has been found to be compatible.

## **INTERPRETATION OF LEGISLATION AND DECLARATIONS OF INCOMPATIBILITY (Schedule 5 and Clause 10)**

17. Section 3 HRA is repealed as result of **paragraph 2 of Schedule 5** repealing the HRA in its entirety. Repeal of the HRA will come into force on such day as made in regulations by the Secretary of State (see **Clause 39(2)**). **Clause 39(2)** provides a power for the Secretary of State to amend legislation to preserve or restore the effect of an interpretation previously given to it under section 3 HRA. The intention is that repeal of the section 3 HRA will not come into force until regulations to preserve the effect of any section 3 judgments the Government wishes to preserve are in place. This is to mitigate the risk of there being a gap between repealing section 3 HRA and amendment of the relevant legislation, which could result in the law essentially changing twice.

18. Section 3 interpretations are, in principle, adopted in the circumstances of the relevant case/situation (in contrast to amendment of legislation, which changes the relevant provision for all circumstances). The repeal of section 3 will not affect the cases in which the section has previously been relied on by courts/tribunals to read legislation compatibly with the Convention rights, or previous uses of section 3 by public authorities. It will, however, mean that a court or public authority considering an analogous situation in future will no longer be able to rely on section 3 to interpret the legislation compatibly. While this will lead to an increase in declarations of incompatibility, we do not consider those incompatibilities would be created by the Bill of Rights itself. Rather, section 3 will simply be removed as a tool for courts and public authorities in future. Further, repeal of section 3 is not retrospective, and so the repeal will have no effect on instances where provisions were read in accordance with section 3 prior to commencement but litigated afterwards.

19. **Clause 1(2)(b)** confirms that the effect of repealing section 3 HRA is that courts are no longer required to read and give effect to legislation, so far as possible, in a

way which is compatible with Convention rights. Courts will use orthodox principles of construction to interpret legislation, as well as interpreting Convention rights in accordance with **Clause 3**.

20. The repeal of section 3 HRA will remove the requirement for the Court to read and give effect to legislation so far as possible compatibly with Convention rights. **Clause 10** will also permit declarations of incompatibility to be made in respect of any subordinate legislation, whereas at present they are only available where subordinate legislation is incompatible because the primary legislation compels that incompatibility (alongside any other appropriate remedial options). It is the Department's view that there is no requirement to provide a particular remedy under Article 13 and that a declaration of incompatibility is capable of initiating steps to consider the incompatibility and remove it.

## **PROCEEDINGS**

21. **Clause 14** provides that the Bill of Rights does not confer a right to bring proceedings, or rely on a Convention right, in relation to an alleged breach of Convention rights in the context of military operation overseas. But **clause 14** will not prevent any person from relying on a Convention right in any criminal proceedings.
22. By removing extraterritorial application in such cases, **Clause 14** would at present lead to situations where the United Kingdom did not provide an effective remedy in circumstances required by Article 13 ECHR, or as part of one of the substantive rights such as Articles 2, 3 and 5. In order to maintain compatibility with the ECHR, the intention is therefore to introduce alternative remedies to cover such circumstances before this provision is commenced. This is expressly required by the Bill itself, as **Clause 39(3)** provides that **Clause 14** may be commenced only if the Secretary of State is satisfied that doing so is consistent with the United Kingdom's obligations the Convention (rather than the Convention rights, so covering Article 13 as well). We therefore consider **clause 14** (read with clause 39(3)) to be compatible with the Convention rights.

23. **Clauses 15 -16** require claimants bringing proceedings against a public authority under the Act to obtain the Court's permission to bring the human rights aspect of their claim. This permission stage will apply to all proceedings other than judicial review in England and Wales, Scotland, and Northern Ireland. It will only apply to judicial review claims issued in England and Wales. The judicial review procedure in Scotland and Northern Ireland will remain unchanged.

24. In order to grant permission, the court must satisfy itself of two criteria. The first criterion is that the person is, or would be, a victim of the act of a public authority; and the second criterion is that the claimant has demonstrated that they have suffered a significant disadvantage in relation to the act, or proposed act. If the claimant cannot demonstrate a significant disadvantage they will only be granted permission if the court considers it is appropriate to do so for reasons of wholly exceptional public interest.

25. Article 13 is engaged by **clauses 15 – 16**. The threshold set by **clauses 15 -16** is modelled on the ECtHR's own admissibility criteria, which provide the route by which arguable breaches of the ECHR rights by States may be assessed by the ECtHR. Previously, the requirement to declare inadmissible any application in which "the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits" was subject to a caveat preventing the ECtHR from ruling inadmissible a case in which the applicant had not suffered a significant disadvantage where there had been no consideration by a domestic tribunal. Protocol 14 to the ECHR removed the caveat, such that now there is no requirement, in order for an application involving insignificant harm to be declared inadmissible, that a domestic tribunal should first have opined. This was stated to be in order "to give greater effect to the maxim de minimis non curat praetor". An alleged breach causing no significant disadvantage (unless respect for human rights requires examination of the application on the merits) does not, under the Convention, require an effective remedy; and the provision is thus considered to be compatible.

26. Under **Clause 17** it will continue to be the case (as under section 8(1) of the HRA) where an act of a public authority is found to be unlawful, the court may grant such remedy as it considers just and appropriate.

27. Under **Clause 18** it will continue to be the case (as under section 8(3) of the HRA) that no award of damages is to be made unless, taking account of all the circumstances of the case - including any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and the consequences of any decision (of that or any other court) in respect of that act - the court is satisfied that it is unable to grant a remedy that is just and appropriate without making an award of damages. However, whereas the HRA made reference to general ECtHR principles, the Bill of Rights sets out with greater particularity the approach that courts should take in determining whether to make an award of damages and the quantum of any award.

28. **Clause 18** provides that, in determining whether an award of damages and the quantum would be 'just and appropriate', the court must take into account 'all the circumstances of the case', including but not limited to the 'factors' set out in **Clause 18(5)**. These factors fall into two broad categories: those relating to the particular facts of the case (including any other remedies granted, and the conduct of the claimant) and those relating to the impact the decision on damages would have in the future (including the impact on the public authority's ability to carry out its functions). The listed factors are: any conduct of the person that the court considers relevant; anything done by the public authority to avoid acting incompatibly with the right in question; how serious the effects of the unlawful act are; any other remedy granted or decision made in respect of the same unlawful act; and the impact an award of damages would have on the provision of public services, including future awards in similar cases.

29. **Clause 18** is considered to be compatible. **Clause 18** does not preclude the court from making an award in line with the ECtHR damages case law. Further, the case law reveals that the ECtHR takes a highly fact-specific approach to considering what damages should be awarded.

30. To ensure compliance with Article 5(5) ECHR (which provides that “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”), **Clause 18** clarifies that where an unlawful act is incompatible with Article 5, it is not a requirement for an award of damages that the person suffered loss or damage arising from the unlawful act or that the court is to satisfied that is unable to grant a remedy that is just and appropriate without making an award of damages.

### **Limits on the court’s power to allow appeals against deportation**

31. **Clause 20** applies where the Secretary of State makes a deportation order in respect of a foreign national offender and they make an appeal against that action. The provision provides that where the appeal is made on Article 6 grounds the tribunal must dismiss the appeal unless it considers that removal would result in a breach of the right so fundamental to amount as a nullification. In addition, the provision provides that where the deportation decision was informed by assurances from the receiving state, the court is to presume the assessment of those assurances by the Secretary of State is correct, unless it could not reasonably conclude that the assurances would be sufficient to prevent a nullification of the right.

32. This provision is considered to be compatible with the ECHR. A person cannot be deported on account of there being a real risk that their treatment abroad will breach their Article 6 rights, where to do so would amount to a flagrant denial of justice. The presumption of the assurance will not prevent an independent tribunal from considering whether the circumstances of an individual’s deportation amount to a nullification of the right to a fair trial in the recipient State where the Secretary of State has relied upon those assurances. A presumption is necessarily rebuttable and so should not fetter the Court’s discretion to a degree that prevents it from considering whether there will be a breach of the substantive right (and the court would need to act compatibly with **Clause 12** of the Bill in any case).