

# Simon Carne

---

Dear Review Panel

1 March 2021

## RESPONSE TO CALL FOR EVIDENCE

I write with a brief suggestion in response to Theme One of the Call for Evidence. My suggestion relates to the interaction of (A) the duty to “take into account” under the Human Rights Act and (B) the “living instrument doctrine” applied to the European Convention on Human Rights.

The Review Panel will be well aware that, under the living instrument doctrine, the Convention “must be interpreted in the light of present day conditions”. This means not only that decisions of the ECtHR are not necessarily what the original drafters intended but also that, as Baroness Hale has said,<sup>1</sup> the living instrument doctrine permits the ECtHR to arrive at decisions which “the drafters definitely did *not* intend.”

It is my belief that a significant element of the criticism voiced in the UK about the Convention is attributable to concerns created when the ECtHR uses the freedom granted by the living instrument doctrine to arrive at a decision which would not be found acceptable in the UK if such an outcome were to come before our legislature for a decision on whether to implement it.

So the UK finds itself in the position whereby (i) it has signed up to a Convention which can be interpreted by the ECtHR judges in a manner which is contrary to the intentions at the time the UK signed-up; (ii) unlike case law generated in the UK, such decisions of the ECtHR cannot be overturned by the UK Parliament (without first withdrawing from the Convention); and (iii) as a result of current UK statute, UK judges are required to “take into account” those unpalatable decisions.

In light of the foregoing, my suggestion is that the requirement to “take into account” might be modified so that it continues in its current form only in relation to decisions of the ECtHR which are *not* reliant on the living instrument doctrine. The duty should be reduced (or eliminated entirely) for all other cases.

I realise that ECtHR decisions are not handed down with a label on them indicating which decisions rely on the living instrument doctrine and which do not. And, whilst some judgements do (I believe) make it clear that the Court has applied the doctrine, others may require a degree of interpretation to discern which side of the dividing line they lie. Where necessary, under my proposal, it would be a matter for the UK court to decide whether or not the duty to “take into account” applied in any specific case. It may assist the court if the legislation which brought in this new approach were to contain a presumption in favour of (or against) “taking into account” so that it is clear which way the burden of proof lies.

I hope you will find this suggestion helpful in your deliberations.

---

<sup>1</sup> The speech I refer to is reproduced at <https://www.gresham.ac.uk/lectures-and-events/beanstalk-or-livinginstrument-how-tall-can-the-european-convention-on-human>. The passage I rely on is in the first paragraph under the heading “Conclusion”, near the end.

Yours sincerely

A handwritten signature in black ink that reads "Simon Carne". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Simon Carne

---