



**Remarks by Baroness Hale, former President of the UK Supreme Court,
delivered on her behalf at a hearing of the Committee on Legal Affairs and
Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) in
Paris, 22 March 2023**

Currently it is my belief that the Human Rights Act 1998 complies with the UK's obligation to have an effective domestic remedy to secure compliance with the Convention rights. It does this by:

- (1) Making the Convention rights into rights in UK law;
- (2) Making it unlawful for any public authority to act in a way which is incompatible with the Convention rights;
- (3) Giving victims a remedy in UK courts and tribunals;
- (4) Requiring UK courts and tribunals to 'take into account' the judgments and decisions of the European Court of Human Rights and other Council of

Europe organs; I have always taken this to mean that if it is clear that the victim will win in Strasbourg then he or she should win in the UK;

(5) Requiring everyone to 'read and give effect' to UK legislation of all kinds and whenever passed in a way which is compatible with the Convention rights 'so far as it is possible to do so';

(6) If this is not possible, empowering courts and tribunals to ignore incompatible provisions in secondary (delegated) legislation but not in Acts of the UK Parliament, which remain valid;

(7) Requiring a Government Minister who sponsors a Bill in Parliament to state whether or not he or she believes that it is compatible with the Convention rights.

Dominic Raab, the Secretary of State for Justice, has stated that in his view the provisions of the Bill of Rights Bill are compatible with the Convention rights.

Others are not so sure. It maintains the basic structure set up in the Human Rights Act. Convention rights are rights in UK Law. Public authorities must comply unless prevented by an incompatible Act of Parliament. Victims have remedies if they don't. But:

- (1) It removes the obligation to take the Strasbourg court's jurisprudence into account and expressly allows UK courts and tribunals to adopt a different interpretation;
- (2) It forbids a court from developing any Convention right further than Strasbourg has done unless the court has no reasonable doubt that Strasbourg would do the same;
- (3) Thus it forbids the courts developing the rights within the margin of appreciation which Strasbourg leaves to Member States – this must be left to Parliament (I appreciate that this is an internal constitutional matter but it indicates a desire to curb the courts' enthusiasm for Convention rights);
- (4) The only exception is freedom of expression, which the courts are free to develop (which looks like pleasing the media, as do certain other provisions in the Bill);
- (5) It removes the obligation to read and give effect to legislation in a way which is compatible with the Convention rights – instead courts *must* look at the text of the Convention and *may* look at the travaux préparatoires, thus going back to the original meaning and intent of the drafters, rather

than adopting the 'living instrument' doctrine developed by the Strasbourg court;

All of these are likely to lead to the UK interpreting and applying the Convention rights differently from the Strasbourg court, the UK being taken to there more often, and the UK losing cases there more often.

(6) Perhaps most problematically, it restricts the scope of positive obligations

– that is, requiring a public authority to do any act. There can be no new positive obligations – even if Strasbourg develops one; and even with the existing positive obligations, the courts will have a choice whether or not to apply them; they will have to give 'great weight' to the need to avoid applying an interpretation which would

- (a) Have an impact on the ability of a public authority to perform its functions;
- (b) Undermine the public interest in allowing public authorities to decide on how to allocate their resources;
- (c) Require the police to protect people engaged in criminal activities (this is aimed at so-called Osman warnings – most of which, it is said,

are warnings to gang members of a risk to life from other gang members)

- (d) Undermine the police's ability to decide their operational priorities;
- (e) Require an investigation to be conducted to higher standards than reasonable; or
- (f) Affect the operation of primary legislation.

This is all a constitutional innovation – giving the courts power to ignore an authoritatively laid down interpretation of the Convention rights if it will be inconvenient for any of those reasons. Once again, it is uncoupling the interpretation and application of the Convention rights in the UK from their interpretation and application in Strasbourg. It is particularly troubling in relation to the absolute and non-derogable rights in articles 2, 3 and 4, each of which have a series of positive obligations consequential on the principal negative one – not to kill, torture or enslave – that is, to have a system of laws and regulation to protect the right, to investigate possible breaches and bring the perpetrator to justice, and in certain circumstances to protect potential victims from risk.

(7) It looks as if not only does it not require the government and others to respect interim measures from Strasbourg but instead it requires such measures to be ignored.

There is plenty more in the Bill, most of it of domestic rather than international concern. But internationally the overall message is that it will reduce the protection currently given to the Convention rights in UK law, uncouple UK human rights law from Strasbourg human rights law, and make it questionable whether UK law does indeed provide an effective domestic remedy for breach of the Convention rights.

We should note that although the Bill had its first reading in the House of Commons in June 2022 it has so far gone no further. This is partly because its sponsor, Dominic Raab, was not in office while Liz Truss was Prime Minister and partly because, although he is now back in office, his political future is not certain. But if he survives the current enquiry into his conduct, we may expect the Bill to make further progress.

It has been noted that this Bill is but one example of the government's willingness to act in ways which *may* be incompatible with the UK's international obligations in politically charged situations. Another example is the Northern Ireland Protocol Bill, which has gone through all its stages in the House of Commons and most of its stages in the House of Lords, and allows the UK unilaterally to disapply provisions of the Northern Ireland Protocol in the EU withdrawal agreement.

And another example is the current Illegal Migration Bill, which is currently in its committee stage in the House of Commons. It can readily be argued that some of its provisions are incompatible with our obligations under the United Nations Geneva Convention on the Rights of Refugees, the Council of Europe Convention on the Prevention of Trafficking in Human Beings, and the European Convention on Human Rights. Clause 1(5) expressly provides that the duty to interpret legislation compatibly with the Convention rights 'does not apply in relation to provision made by or by virtue of this Act'. Suella Braverman, the Home Secretary, was unable to make a statement that in her view the provisions of the Bill are compatible with the Convention rights. This is only the third time that such a statement has been made. I'm told that the first was when section 28 of the Local Government Act 1988, prohibiting the promotion of homosexuality, was

repeated, but it was repealed very shortly afterwards; the second was the prohibition of political advertising in the broadcast media in the Communications Act 2003, but this was in fact eventually found compatible with the Convention rights by the Grand Chamber in the case of *Animal Defenders International v United Kingdom*; it seems unlikely that the Illegal Migration Bill, should it be passed, will enjoy such a fate. All of this is, to say the least, surprising in a country which has always prided itself on upholding the international legal order.