



**CENTRE FOR BREXIT**  
POLICY

# TIME TO LEAVE THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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# THE CENTRE FOR BREXIT POLICY

The Centre for Brexit Policy (CBP) is a think tank backed by cross-party voices who support the UK leaving the EU. The CBP was formed to propose the critical policy changes enabled by Brexit that will boost national prosperity and well-being in years to come, as well as help ensure that Britain fully 'takes back control' after leaving the European Union.

The CBP aspires to trigger a deep and wide debate about what Brexit should mean for the UK over the next decade or two. By providing a focus for the development of post-Brexit public policy, the CBP hopes to help formulate an overarching framework for the UK that maximises the opportunities Brexit affords. This will be promoted to government, Parliamentarians, and the public welcoming contributions from those who want to see Brexit open a new and fruitful chapter in our country's life.

The CBP has three core objectives:

- Identify the benefits and opportunities of Brexit across the full spectrum of economic, trade, social, foreign, defence and security policy areas proposing new policies for the government's agenda
- Continue to make the intellectual, evidence-based case for a 'real' Brexit and provide the government with clear and constructive advice on how to deal with ongoing negotiation and implementation issues. A 'real' Brexit means regaining full control over our laws, borders, seas, trade, and courts.
- Check any attempts to dilute Brexit, as well as serving as a catalyst and rallying point for positive news stories that, over time, will be able to persuade and demonstrate the many substantial advantages of Brexit

Delivery of these objectives is based on professional, substantive fact-based research by experts in their fields leading to authoritative reports, short papers, OpEds, events, and briefing meetings - both within and without government.

The CBP is supported by a cadre of expert CBP Fellows drawn from multiple disciplines to provide additional expertise and experience in developing an agenda for policy change that will ensure the British people benefit from Brexit.

# AUTHOR

Martin Howe KC

**Martin Howe KC specialises in intellectual property law and European law, and appeared regularly at the European Court at Luxembourg before the UK left the EU. He worked extensively on the European Convention on Human Rights as a member of the coalition government's Commission on a Bill of Rights for the United Kingdom. He is a Fellow of the Centre for Brexit Policy and is chairman of Lawyers for Britain, formed in 2016 as the lawyers' group supporting Leave in the referendum campaign. Lawyers for Britain continues to work on the legal issues involved in restoring the UK's sovereignty and control over its own laws following its exit from the EU.**

## EXECUTIVE SUMMARY

The European Convention on Human Rights (ECHR) was drafted after the War with the laudable aim of protecting basic rights against the risk of countries sliding back into totalitarianism but the European Court of Human Rights in Strasbourg has become effectively a law making body rather than adhering to its allotted task of interpreting the text as agreed by the founding states.

### GENERAL CASE FOR LEAVING THE ECHR

The UK's human rights law has been a long-running sore since the Blair government brought in the Human Rights Act in 1998 (HRA), which (1) gave effect within the UK's internal law to the ECHR and (2) required UK courts, to "take into account" judgments and opinions of the European Court of Human Rights at Strasbourg when interpreting the ECHR rights.

The Strasbourg Court has persistently interpreted the meaning of the Convention by creating new legal rules and doctrines not founded on the actual Convention text, which in some important cases are demonstrably contrary to the intentions of its drafters. So interpreted, it is now a completely different instrument from what was agreed in the 1950s. Instead of protecting basic rights upon which all can agree, it seeks to prevent states from exercising legitimate democratic choices and wrongly demonises such choices as breaches of human rights.

The most urgent problem created by this situation - amongst many others - is the apparently uncontrollable inflow of illegal immigrants in small boats across the Channel who use asylum and human rights laws to resist removal from the UK. The government's solution to deport arrivals to Rwanda and process their asylum claims there has so far been entirely stymied by a web of legal challenges, with the Supreme Court judgment of 15 November 2023 being the latest, possibly fatal, blow.

Although the ECHR is not an EU instrument and comes under the ambit of the Council of Europe, now that we are no longer an EU member and are not under the same constraints, we should be asking whether, in these changed circumstances, why we need to farm out the interpretation of our fundamental rights and liberties to a foreign court, when other countries around the world see no need to entrust this vital task to an external regional court.

### CAUSES OF THE IMMEDIATE SMALL BOATS PROBLEM

The ECHR itself does not contain any rights to asylum; instead, rights to asylum are covered in the Geneva Refugees Convention, which was drafted in parallel by very much the same group of countries.

But, in a series of cases, the Strasbourg Court has decided that states should be held responsible for what happens to people outside their borders if such people are expelled,

despite the words of the ECHR that only requires states to secure the convention rights to people “within their jurisdiction”. This case law has expanded so that, according to the ECHR, it is a breach of Article 3 (the prohibition against torture or inhumane or degrading treatment) if “*substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.*”

In April 2022, in order to remove the huge economic incentive for illegal immigration into the UK, the UK government announced it had reached a memorandum of understanding with Rwanda under which illegal arrivals would be transferred from the UK to Rwanda for their claims to asylum to be processed there instead of in the UK. A number of migrants brought legal challenges against their removal to Rwanda, and asked our courts for ‘interim relief’ – ie, preventing the removals being carried out until after the full hearing of their challenges, which would necessarily take months or years to complete.

UK courts from the High Court up to the Supreme Court carefully considered whether or not interim relief should be granted. The High Court decided not to grant interim relief and the Court of Appeal upheld that refusal on 13 June 2022.

An appellant sought to appeal to the Supreme Court that evening and the next day a three-judge panel headed by the President of the Court refused permission to appeal, accepting an assurance from the Home Secretary that she would facilitate the return of the appellant from Rwanda in the event of the English court later deciding that person ought to be allowed to return.

However, that judgment of the Supreme Court panel was confounded by an ‘indication’ of interim measures made by the Strasbourg Court (without a hearing) that evening, with which the UK government decided to comply, halting any flights to Rwanda until after the full hearing of legal challenges against the policy.

Subsequently on those challenges, the Court of Appeal ruled that the policy would contravene Article 3 of the ECHR, which outlaws inhuman or degrading treatment. And on 15 November 2023, the Supreme Court dismissed the government’s appeal, leading to an announcement by the Prime Minister of a new treaty with Rwanda coupled with emergency legislation (so far of unspecified content) apparently intended to reverse the effect of the Supreme Court judgment.

So, at best a vital policy of the government fully supported by Parliament will have been frustrated by legal delays running into years during which illegal migrants have continued to pour across the Channel. And that assumes that the emergency legislation and new treaty announced by the Prime Minister will effectively cure the problem and allow implementation of the Rwanda policy, an assumption that is far from certain.

## **NO COMPLETE SOLUTION SHORT OF PUTTING IN TRAIN WITHDRAWAL FROM THE ECHR**

Not only can the UK leave the ECHR at will, but doing so will allow the issues raised in the recent Supreme Court judgment to be overcome.

## UK Must Put In Train Leaving the ECHR

There are two basic reasons why the ECHR cannot be made acceptable through attempts to mitigate the effects of the Strasbourg Court's judicial activism:

- **The fundamental problem with such efforts is that so long as the UK is a member of the ECHR, the right of individual petition to the Strasbourg Court persists**
- **The political problem is that the UK government machine cannot be relied on not to be pusillanimous in such a scenario**, leading to a serious risk that the non-implementation of the Strasbourg doctrines would be watered down or even abandoned.

Although hopes continue to flourish about modifying the Convention, a sober look at the reality of the UK situation does not reveal any fruitful avenues for success:

1. **Renegotiating the ECHR is not a practical way forward to solving the problems of boats arriving across the English Channel within a politically relevant timetable**
2. **The government has already missed the alternative opportunity of excluding the Human Rights Act from applying to measures taken under the Illegal Migration Bill to remove illegal migrants from the UK**
3. **If we were serious about negotiating substantial changes to the ECHR, the best way would be to set a firm timetable for withdrawal and say that we would reconsider our decision if changes could be agreed**

Hoping to solve our problems by negotiation in the absence of an exit timetable is just a recipe for further delay, giving an excuse for doing nothing while will-o-the-wisp hopes of agreements are pursued.

## Leaving the ECHR Resolves Supreme Court Issues

In the light of the Supreme Court's judgment, is leaving the ECHR is enough to solve the small boats problem and allow the Rwanda policy to go ahead? The Supreme Court judgment contains a section asserting that "the principle of non-refoulement" arises not just from the ECHR but also arises from a series of pieces of domestic legislation, from other international treaties to which the UK is party, and even perhaps that it might form part of customary international law.

The most important of these other references is Article 33(1) of the Geneva Refugees Convention and there are three respects in which the obligation arising from that Article is different from, and much less extensive than, the rule laid down in the Strasbourg Court's case law under the ECHR:

- **The Geneva Refugees Convention prohibits the return of refugees to territories where their life or freedom "would be threatened"**
- **The scope of the obligation is different from that under the ECHR, since it is limited to persons whose life or freedom would be threatened "on account of his race, religion, nationality, membership of a particular social group or political opinion"**
- **Most importantly, there is no equivalent of the ECHR *Chahal* case under the Geneva**

**Refugees Convention requiring that the evaluation of whether there will be ill treatment in the country of destination must be carried out by a court, as opposed to a governmental authority**

## HOW TO LEAVE THE ECHR

A contracting State may leave the ECHR by the simple act of giving six months notice to the Secretary General of the Council of Europe. Unfortunately - in the light of the *Miller 1* case - it is an open question whether the Crown can give such notice without authority from Parliament.

But this could be achieved by an Act that sweeps away the machinery set up by the HRA either completely or partially:

- 1. The most basic option would be for that Act to simply sweep away all the machinery set up by the HRA.** However, that step might increase some of the problems identified below and, in addition, there are arguments for having an explicit rights framework that controls the actions of devolved legislatures, as well as of ministers and other bodies when they pass delegated legislation.
  - **That could be achieved by retaining the text of the parts of the ECHR currently scheduled to the HRA**
  - **But the Act would make clear that**
    - That text is not to be interpreted by reference to any judgments of the Strasbourg Court
    - Courts should disregard both Strasbourg judgments and UK judgments to the extent that they are based upon Strasbourg jurisprudence
    - The Convention text should be interpreted as far as possible in accordance with its original meaning
- 2. It might be desirable to go further and incorporate some of the modifications of interpretation suggested in the Bill of Rights Bill**

Given either of these approaches, other potential obstacles to leaving the ECHR would be surmountable, as outlined below:

- **The Scottish Parliament and the Welsh Assembly would not have a right to veto leaving the ECHR**
- **The Belfast (Good Friday) Agreement does not oblige the UK to continue to adhere to the ECHR, so long as the substance of the Convention rights is still available in Northern Ireland law**
- **The UK's withdrawal from the ECHR is not prevented by the Trade and Cooperation Agreement with the EU**
- **Leaving the ECHR does not oblige the UK to withdraw from the Council of Europe as a whole**

# INTRODUCTION

The European Convention on Human Rights (ECHR) was drafted after the War with the laudable aim of protecting basic rights against the risk of countries sliding back into totalitarianism. But the Strasbourg Court (the European Court of Human Rights) has become effectively a law making body rather than adhering to its allotted task of interpreting the text that was agreed by the founding states.

We should ask ourselves, what purpose is served by having a foreign court that supervises our rights and liberties? Canada, Australia and New Zealand seem perfectly happy that they can protect the rights of their citizens without needing to subject themselves to some external regional court. When the foreign court to which we have submissively subjected ourselves is as deeply flawed as the Strasbourg Court, the question should not be “why should we leave” but “why on earth are we still a member?”.

It is not possible in this short paper to do anything approaching an across-the-board survey of even the most important areas where Strasbourg Court decisions have detrimentally distorted the original meaning of the ECHR. For example, its over-extension of the originally modest right to respect for private and family life in Article 8 with damaging consequences for media freedom could merit a paper its own.

Therefore this paper will

- I. **Summarise the general case for leaving the ECHR**
- II. **Describe the causes of the immediate “small boats” problem – ie, the connected problem of Rule 39 so-called “orders” or “injunctions”, and the extra-territorial application of the ECHR and the HRA**
- III. **Explain why there is no complete solution to these problems short of the UK putting in train its withdrawal from the ECHR**
- IV. **Discuss how to leave the ECHR**

# I - THE GENERAL CASE FOR LEAVING THE ECHR

The UK's human rights law has been a long running sore - or sometimes much more than a sore - since the Blair government brought in the Human Rights Act (the "HRA") in 1998. That Act gave effect within the UK's internal law to the ECHR.

But it did more than that. It also required UK courts, when interpreting the ECHR rights, to "take into account" judgments and opinions of the European Court of Human Rights at Strasbourg.<sup>1</sup> The Bill's sponsor, Lord Chancellor Lord Irvine of Lairg, insisted that this legislative formula would allow UK courts to depart from Strasbourg Court interpretations of the ECHR if they disagreed with them. Unfortunately, this provision was interpreted by our courts as requiring them to "*follow any clear and constant jurisprudence of the Strasbourg Court*" and to "*keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less*".<sup>2</sup>

The most urgent current problem largely caused, or at least greatly exacerbated, by our current human rights laws is the apparently uncontrollable inflow of illegal immigrants in small boats across the Channel. They use asylum and human rights laws to resist removal from the UK, despite having passed through safe third countries on their way here. The government's solution - to deport arrivals to Rwanda so that their asylum claims can be assessed there - has so far been entirely stymied by a web of legal challenges, with the Supreme Court judgment of 15 November 2023 being the latest, possibly fatal, blow.<sup>3</sup>

But immediate and pressing though that problem is, it is not the only area where human rights law based on Strasbourg Court jurisprudence has caused severe problems and will do so in future. Retiring Defence Secretary Ben Wallace condemned as "lunacy" the situation whereby the armed forces feel constrained to use lethal force against suspected terrorists in lawless countries because of the serious complications that would arise under the ECHR if they were to be captured. These problems flow directly from the Strasbourg Court's misinterpretation of the ECHR to make it apply outside the domestic territories of its contracting states.

Others have written more widely about the range of doctrines created by the Strasbourg Court that are not based on the Convention text or on any reasonable interpretation of its original meaning. Notably, Lord Sumption in his Reith Lecture criticising "mission creep" at Strasbourg,<sup>4</sup> in his book covering that and wider ground,<sup>5</sup> and in his recent Spectator article calling for the UK to leave the ECHR,<sup>6</sup> has laid out a compelling intellectual case that the Strasbourg Court is taking political decisions that should be the prerogative of elected politicians.

The problem underlying both of these specific issues - and many others as well - is the Strasbourg Court's approach to "interpreting" the ECHR. Under the guise of applying a "dynamic" interpretation, or interpreting it as a "living instrument", the Strasbourg Court has persistently engaged in a task that is quite different from interpreting the meaning of the Convention that was drafted by the founding contracting states. That has been, to create new legal rules and doctrines not founded on the actual Convention text, which in some important cases are demonstrably contrary to the intentions of its drafters.<sup>7</sup>

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1 HRA 1998, section 2(1)(a).

2 Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 at para 20.

3 *R (AAA (Syria) and ors) v Home Secretary* [2023] UKSC 42.

4 Reith Lecture, "Human Rights or Wrongs", 4 June 2019.

5 Jonathan Sumption, "Trials of the State - Law and the Decline of Politics," Profile Books, London (2019).

6 "Judgment call: the case for leaving the ECHR", Spectator, 30 Sept 2023.

7 This was so in the case of prisoner voting, as demonstrated by Dominic Raab in his paper "Prisoner Voting, Human Rights & the Case for Democracy", Civitas, 2011, at pages 5-6.

Defenders of the ECHR are fond of citing the involvement of British politicians - especially Conservative politicians - in the drafting of the original Convention and its First Protocol.<sup>8</sup> What these defenders fail to take account is that the Convention, as now interpreted by many decades of Strasbourg Court judgments, is a completely different instrument from what was agreed in the 1950s. So interpreted, it is far more extensive, intrusive and unpredictable than the original. Instead of protecting basic rights upon which all can agree, it seeks to prevent states from exercising legitimate democratic choices and wrongly demonises such choices as breaches of human rights.

Furthermore, the circumstances now are profoundly different from the political circumstances that led to the UK participating in the drafting of the ECHR and in signing up to it in the 1950s. Then, it was seen as an important instrument in helping prevent countries in Europe from sliding back into totalitarianism.

The circumstances also profoundly changed in 2020 when the UK finally left the EU's legal order. The ECHR is not an EU instrument and comes under the ambit of the Council of Europe, a wider body that now contains 46 states<sup>9</sup> of which only 28 are EU members. However our EU membership would have made it practically difficult, even if legally possible in theory, to leave the ECHR and still remain an EU member.

Now that we are no longer an EU member we are not under the same constraints. One thing that we should be doing, having left the EU, is examining treaty commitments to which we were subject while an EU member and asking whether they are any longer in our national interests, in these changed circumstances. It should be for proponents of continued membership to justify positively why we need to farm out the interpretation of our fundamental rights and liberties to a foreign court, when other countries around the world see no need to entrust this vital task to an external regional court.

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8 The First Protocol, agreed in 1952, contains some important rights that were not included in the original Convention text because they were not liked by the previous Attlee Labour government. The protection of the right to property under Article 1 of the First Protocol was feared by Labour to interfere with its nationalisation plans, and Labour also disliked the protection given to the rights of parents over the education of their children in Article 3 that might inhibit hostile measures against non-State schools.

9 Russia left the Council of Europe by notice given on 15 March 2022 following its invasion of Ukraine.

## II – THE CAUSES OF THE IMMEDIATE SMALL BOATS PROBLEM

The large scale arrival of migrants across the Channel has led to a complete breakdown of the UK's ability to enforce our laws about who is and who is not allowed to come and live here. Many of those who cross are economic migrants and not genuine refugees at all. Even those who originally had a claim to be refugees when they left their country of origin should have claimed refuge in the first safe country they reached, not in the UK, after passing through France and often other countries as well.

This chapter describes the current legal situation in which the UK finds itself with regard to dealing with migrants crossing the Channel and how expanded Strasbourg case law has led to this position.

### THE CURRENT SITUATION

Unfortunately, at the moment, our legal and administrative systems are incapable of removing migrants from the UK, even where all appeals have been exhausted and they have been found to have no right to be here. The migrants and the people traffickers know this, which is why they keep on coming despite the dangers of the journey.

The government's preferred solution (and indeed probably the only credible solution) to the current crisis created by the mass illegal arrival of migrants across the English Channel is to remove them promptly to Rwanda where their asylum claims would be processed. But, in June 2023, the Court of Appeal ruled<sup>10</sup> that such an approach would contravene Article 3 of the ECHR, which outlaws inhuman or degrading treatment. And on 15 November 2023, the Supreme Court dismissed the government's appeal, leading to an announcement by the Prime Minister of a new treaty with Rwanda coupled with emergency legislation (so far of unspecified content) apparently intended to reverse the effect of the Supreme Court judgment.

That judgment would be read with absolute astonishment by lawyers of only a generation ago. Our courts, conscious of their lack of expertise in foreign relations matters, have traditionally deferred to the judgement of the executive in that field. The UK government's assessment is that Rwanda would operate the asylum scheme properly, so asylum seekers transferred there would not be at risk of being returned to their home countries if they would be subjected to mistreatment there. Detailed agreements and monitoring arrangements between the UK government and Rwanda would back this up.

But the UN High Commissioner for Refugees (UNHCR) does not agree. This agency was allowed to intervene and effectively act as a party in the case, instructing counsel and submitting evidence to the court. So our domestic judges are now left acting as referees on foreign relations matters between our own government and a UN agency that is politically committed to preventing the Rwanda or similar schemes at all costs. The Supreme Court justices relied in large part on the evidence submitted by the UNHCR in effectively reaching a conclusion that Rwanda is unsafe for transferred migrants. The judges applied the legal test of "whether there are substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill treatment, as a consequence of refoulement<sup>11</sup> to another country."<sup>12</sup>

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10 *R (AAA) v Home Secretary* [2023] EWCA Civ 745.

11 A French word equivalent to expulsion or deportation.

12 Judgments of Lords Reed and Lloyd-Jones, para 38.

This test is not in the ECHR itself. However, the test arises from the Strasbourg Court jurisprudence that purports to “interpret” the ECHR, as does the requirement that the test should be applied directly by a court rather than by a government or administrative authority.<sup>13</sup> Since Parliament through enacting the HRA has directed the courts to apply the ECHR rights and in doing so to take account of Strasbourg case law, the judges cannot be faulted in this regard in effectively following the instructions given to them by Parliament.<sup>14</sup> There are other aspects of the Supreme Court judgment that are more open to question, to which we shall return below.

So, at best, a vital policy of the government fully supported by Parliament will have been frustrated by legal delays running into years during which illegal migrants have continued to pour across the Channel. And that assumes that the emergency legislation and new treaty announced by the Prime Minister will effectively cure the problem and allow implementation of the Rwanda policy, an assumption that is far from certain.

## THE PROBLEM ARISING FROM STRASBOURG COURT CASE LAW

The ECHR itself does not contain any rights to asylum. This is not an accident. Instead, rights to asylum were covered in the Geneva Refugees Convention, which was drafted in parallel by very much the same group of countries.

But the Strasbourg Court decided in a series of cases that states should be held responsible for what happens to people outside their borders if such people are expelled. This is despite the words of the ECHR that only requires states to secure the convention rights to people “within their jurisdiction”. This case law expanded so that, according to the ECHR, it is a breach of Article 3 (the prohibition against torture or inhumane or degrading treatment) if “*substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.*”<sup>15</sup>

This interpretation is far short of a certainty or even a probability that a person would be subjected to treatment contrary to Article 3. It involves weighing imponderables, and effectively places on the state seeking to deport someone the difficult task of proving the absence of risk. Further, according to the Strasbourg Court’s jurisprudence, the existence of such a risk must be assessed by a court if the person to be deported challenges an administrative decision, rather than by the executive or a non-court adviser.<sup>16</sup>

The question of whether illegal entrants to the UK who are sent to Rwanda would face risks that would make it unacceptable to send them there is an intensely political one. It involves foreign policy issues of the assessment of the current and future behaviour of a foreign government, as well as compelling considerations of the public interest in stemming illegal migration that effectively destroys the ability of the United Kingdom to control its own borders in addition to endangering the lives of those who cross the Channel in small boats.

The effect of the Strasbourg Court’s “interpretation” of the ECHR is to remove this decision from democratically accountable politicians in government and Parliament, and place it in the hands of the judiciary. Placing it in the hands of judges does not alter the nature of the decision itself nor make it any less intrinsically political.

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<sup>13</sup> This latter point, who should apply the test, arises from *Chahal v UK* [1996] 23 ECHR 413 and other Strasbourg Court cases.

<sup>14</sup> And indeed the government in its appeal accepted that this was the correct legal test which the court should apply *under law as it stands*.

<sup>15</sup> *Chahal v UK* [1996] 23 ECHR 413, at para.74 summarising the Strasbourg Court’s previous case law. The Court went on to rule in that case that the danger posed by the person being expelled to the security of the host state is not to be taken into account.

<sup>16</sup> *Chahal v UK*, *ibid*.

Some commentators have suggested that the Supreme Court judgment has established as a “fact” that persons deported to Rwanda would be at risk of ill treatment contrary to Article 3. Therefore, it is argued, it would be wrong for Parliament to pass legislation effectively reversing the Supreme Court’s decision, or instead handing that decision to ministers and Parliament, since that would be tantamount to legislating that a fact is not a fact. This argument is mistaken. The upshot of the Supreme Court’s judgment is not to establish a “fact”, but instead to express an opinion as to the likelihood of risks - an opinion that is to a large extent based on the evaluation of imponderable factors.

It can be argued that judges in UK domestic courts are not necessarily the best persons to carry out this kind of evaluation of risks in a foreign country, which is very different from the UK. The government of Rwanda strongly disagrees with the UK court’s conclusions.<sup>17</sup>

Even within the domestic judiciary, opinions were divided on this case, with two judges in the High Court and the Lord Chief Justice in the Court of Appeal disagreeing that the necessary level of risk had been demonstrated, on the basis of the same evidence as that relied upon by the Supreme Court. The Supreme Court judgment involved giving a great deal of deference to the evidence from the UNHCR, an agency with an extremely strong political commitment to opposing Western countries moving the processing of asylum claims to countries elsewhere in the world.<sup>18</sup>

The Supreme Court decision is obviously a major reverse for the government’s policy. But even if the Prime Minister’s proposed emergency legislation were to be effective in reversing the Supreme Court decision, that is still a long way from being the end of the deleterious effects of the Strasbourg Court’s doctrines.

It will then have been laid down by Parliament that the policy of transferring migrants to Rwanda is not as a general rule unlawful. However, that will not prevent individual migrants arguing that they are at risk under Article 3 because of their own special circumstances, or indeed from raising other grounds. It seems inevitable that there will be further legal challenges that may cause extensive additional delays before decisions of UK courts are reached actually allowing removals to Rwanda to proceed.

And even then, there is yet another potential legal hurdle. Under the ECHR, individual applicants may bring petitions directly to the Strasbourg Court once their remedies under UK domestic law are exhausted. And when they do so, they are likely to apply for “indications” under Rule 39 of the Strasbourg Court’s rules of procedure that they should not be removed to Rwanda until after the final ruling on their petitions, likely to be years down the line.

## HOW WE GOT TO THIS POSITION

On 14 April 2022, the UK government announced that it had reached a memorandum of understanding with Rwanda under which illegal arrivals would be transferred from the UK to that country for their claims to asylum to be dealt with there instead of in the UK. The purpose of the plan was to remove the huge economic incentive for illegal immigration into the UK. This incentive is created by the fact that illegal entrants are able to stay in the UK for lengthy periods while their long running claims to asylum are dealt with, and thereafter they are almost never removed even if their asylum claims and legal challenges fail.

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17 <https://allafrica.com/stories/202311160072.html> “While this was ultimately a decision for the UK’s judicial system, we take issue with the ruling that Rwanda is not a safe country for asylum seekers and refugees,” Government Spokesperson Yolande Makolo said in a statement. “Given Rwanda’s welcoming policy and our record of caring for refugees, the political judgments made today were unjustified.”

18 The judgment placed considerable weight on reliance on the UNHCR’s “expertise and experience”: paras 65 and 66.

Under the plan, their claims to refugee status would be considered in Rwanda in a safe environment, but where they would not have access to the economic benefits of living in the UK. A number of migrants brought legal challenges against their removal to Rwanda, and asked our courts for interim relief preventing the removals being carried out until after the full hearing of their challenges, which would necessarily take months or years to complete.<sup>19</sup>

Our courts from the High Court up to the Supreme Court carefully considered whether or not interim relief should be granted. The key point in their view was that the removal of an applicant to Rwanda would not prevent that applicant from continuing to pursue his or her legal challenge in the UK courts, and if that challenge was ultimately successful then the applicant could be brought back to the UK from Rwanda. Set against that, if applicants were seen to be able to defer their removal from the UK for lengthy periods of time until their legal challenges could ultimately be resolved, that would undermine the important objective of the government's policy of seeking to deter illegal entry to the UK.

For these reasons, the High Court decided not to grant interim relief and the Court of Appeal upheld that refusal on 13 June 2022. An appellant sought to appeal to the Supreme Court that evening, and the next day at 12.15 a three-judge panel headed by Lord Reed, the President of the Court, refused permission to appeal, accepting an assurance from the Home Secretary that she would facilitate the return of the appellant from Rwanda in the event of the English court later deciding that person ought to be allowed to return.<sup>20</sup>

However, that judgment of the Supreme Court panel was confounded by the Strasbourg Court in a last-minute ruling overriding the judgement of the Supreme Court panel.

## Interim Relief Indications by the Strasbourg Court Under Rule 39

The appellant was due to leave on a charter flight to Rwanda on the evening of the Supreme Court's justices' panel decision but, in a dramatic move that day, the Strasbourg Court issued an interim measure "to indicate to the Government of the United Kingdom, under Rule 39, that the applicant should not be removed until the expiry of a period of three weeks following the delivery of the final domestic decision in the ongoing judicial review proceedings."<sup>21</sup>

The Court's announcement of this measure did not identify the judge or judges responsible, but it is understood that it was issued on the authority of a single judge. The measure was widely reported as being an "injunction" or "order" by the Strasbourg Court, although it is in fact no such thing. But unfortunately it had the effect that the Home Office abandoned its plans to start removing illegal migrants to Rwanda.

Rule 39 of the Strasbourg Rules of Court, mentioned in the announcement, states that a judge "may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings."

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19 As indeed has turned out to be the case, as can be seen from the timetable of the substantive proceedings considered in the previous section of this paper.

20 *R (NSK (Iraq)) v Secretary of State for the Home Department*: the Supreme Court's reasons are at <https://www.supremecourt.uk/news/rwanda-permission-to-appeal-application-refused.html>

21 <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7359967-10054452&filename=Interim%20measure%20granted%20in%20case%20concerning%20asylumseeker%E2%80%99s%20imminent%20removal%20from%20the%20UK%20to%20Rwanda.pdf>

There are two points to be made about this:

- **The first is that the Strasbourg Court (or at least a duty judge of that court) thought that it was appropriate to overrule, after only the most cursory examination of the case, the considered decisions of three tiers of courts in the UK** culminating with the Supreme Court on whether or not the circumstances of the case justified interim relief. Given that the Strasbourg Court is, according to its own doctrines, meant to be a backstop court that allows a “margin of appreciation” to national courts in taking their decisions, this is a remarkable step that gives rise to legitimate suspicion that the judge concerned was swayed by a political dislike of the UK government’s Rwanda policy, rather than by proper judicial assessment of the case.
- **More importantly, the Court claims that these interim “indications” are binding in international law** and that a contracting state such as the UK is obliged to comply with an “indication” that is addressed to it. This is yet another area where the Strasbourg Court has departed from the text of the ECHR in order to expand the scope of its own powers.

No such power is however conferred by the ECHR itself. On the contrary, Article 46(1) states:

*“1. The High Contracting Parties undertake to abide by the **final** judgment of the Court in any case to which they are parties.” (emphasis added)*

There is no provision anywhere else in the Convention text that would make any judgement or decision other than a final one binding on the contracting states. The inclusion of the word “final” in Article 46(1) is a plain indication that the states who drafted the Convention intended to limit the binding effect of Strasbourg Court decisions to **final** judgments and not to confer a power on the Court to make interim or other rulings that are binding on the contracting states.

## Misinterpretation of Rule 39

Rule 39 is not part of the Convention text. It forms part of the Rules of Court that are adopted by the Court in plenary session under Article 25(d). On the face of it, the power to make rules is a power to regulate and control the proceedings of the court, not a power to expand the scope of the jurisdiction conferred on the Court by the Convention itself. If so, it would produce the remarkable result that a simple majority of the judges of the Court itself could by-pass the requirement that amendments to the Convention need to be agreed by the contracting states by adding new jurisdictions or expanding them beyond the jurisdictions conferred by the contracting states in the Convention text.

Nor does the wording of Rule 39 itself support an interpretation that it confers a binding power on the Court. It carefully uses the word “indicate” rather than “order” or “direct”. The fact that interim indications are not binding was correctly acknowledged by the Strasbourg Court in its earlier judgments.<sup>22</sup> But in 2003 in *Mamatkulov and Abdurasulovic v Turkey*,<sup>23</sup> the Court dramatically reversed its earlier position and concluded that “*by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Turkey is in breach of its obligations under Article 34 of the Convention.*” Article 34 relates to the right of individual petition and the last sentence states that “*The High Contracting Parties undertake not to hinder in any way the effective exercise of this right [of individual petition].*”

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22 *Cruz Varas v Sweden* [1991] ECHR 26, 20 March 1991 at [102]; *Conka v. Belgium* (13 March 2001) No. 51564/99.

23 [2005] ECHR 64, Grand Chamber Judgment of 4 Feb 2005, at [129].

There was a dissenting judgment by three of the judges,<sup>24</sup> and it is worth quoting their conclusions:

*“24. It follows from all the above that the compulsory nature of provisional measures “indicated” by this Court cannot be derived from the rules of general international law, nor from Articles 34 (right of individual application) or 26 § d (right of the Court to enact rules of procedure) of the Convention, as interpreted in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. The same conclusion results from the practice of the European Court of Human Rights itself, including its initial attitude in the present instance (see judgment, §24).*

*25. Our basic conclusion is, therefore, that the matter examined here is one of legislation rather than of judicial action. As neither the constitutive instrument of this Court nor general international law allows for holding that interim measures must be complied with by States, the Court cannot decide the contrary and, thereby, impose a new obligation on States Parties. To conclude that this Court is empowered, de lege lata, to issue binding provisional measures is ultra vires. Such a power may appear desirable; but it is up to the Contracting Parties to supply it.”*

The emphasis on the contrasting words “legislation” and “judicial action” is in the original text of the dissenting judgment and has not been supplied by this author. These conclusions are compelling, and in the author’s view clearly correct. The argument that Article 34 renders interim indications binding does not stand up to the slightest scrutiny. It may or may not be that actions taken by the State interfere with the right of individual petition under Article 34 but, if so, that is because of the nature of the measures themselves, not because they do or do not contravene a Rule 39 indication.

So this is an important example (and indeed one of many) of the use of specious reasoning by the Strasbourg Court to expand its own powers beyond those conferred by the ECHR itself or to “interpret” it in order to create new rights or extended rights that are not to be found in the text. The dissenting judges correctly labelled the actions of the Strasbourg Court in holding it has a power to impose binding interim orders as *ultra vires* (beyond the powers) conferred by the ECHR. Their criticism that the majority reasoning “is one of *legislation* rather than of *judicial action*” can be applied more widely to many judgments of the Strasbourg Court.

For readers interested in the subject of Rule 39 indications, a much fuller treatment of the legal arguments than is possible in this short paper is to be found in “Rule 39 and the Rule of Law” by Richard Ekins KC.<sup>25</sup> Professor Ekins, in fact, makes an important additional argument to those above, that the ECHR does not permit a single judge to exercise binding jurisdiction on behalf of the Court, and certainly not to issue binding judgments or orders without hearing submissions or evidence from the party adversely affected. His conclusion is: ‘*The Strasbourg court has no authority to grant interim relief and member states of the convention have no obligation in international law to comply with rule 39 rulings.*’

In a foreword within the Ekin paper, Lord Sumption made the following point:

*“The Rwanda scheme is extremely controversial, and I am neither attacking or defending it. But whatever one thinks about it, the ability of a court to torpedo a critical legislative policy without any hearing or substantial consideration of the merits by a purely procedural mechanism, ought to cause concern. If interim measures are available in cases like this, it is probable that no legislative scheme for the prompt removal of illegal immigrants can succeed.”*

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24 Judges Caflisch, Türmen and Kovler.

25 Published by Policy Exchange, 2022.

This raises the question of what happens if the Supreme Court's November 2023 judgment is reversed by legislation and the UK courts rule that one or more illegal migrants can be sent to Rwanda after considering the individual legal grounds that they or their advisers will undoubtedly raise. It is a virtual certainty that, when the last legal hurdle in the UK is passed, another application will be made to the Strasbourg Court for a last minute "interim indication" against deportation to Rwanda. What will the UK government do if that application is granted?

Section 55 of the Illegal Migration Act 2023 now makes provision for what happens under UK domestic law if the Strasbourg Court issues an interim indication against the removal of a person from the UK under the Act. Section 55(2) states that a Minister of the Crown may, but need not, determine that the duty to remove that person under the Act is not to apply. If the Minister does not decide to follow the interim indication, s.55(6) states that the immigration authorities and courts or tribunals dealing with the case "may not have regard" to Strasbourg's interim indication.

This appears to clarify the position, and in particular the doubts that might be created by the duty in section 2 of the HRA to "take account of" Strasbourg judgments and other expressions of opinion. So if a ministerial decision is taken to disregard the Strasbourg interim indication, it then cannot be used as a mechanism to hold up the deportation under UK domestic law.

Needless to say, the insertion of section 55 in the Act provoked protests from predictable quarters, with the former Lord Chief Justice Thomas claiming that this is "a symbolic breach of the rule of law". That would only be so if Strasbourg Court interim indications created an international law obligation on States to comply with them, which, for reasons set out above, they do not. Indeed, the body that is breaching the rule of law in this saga is the Strasbourg Court itself.

The flawed argument that the UK - by disregarding an interim indication - would be acting in breach of international law unfortunately seems to have a hold over the minds of many Euro-habituated lawyers, including many in-house government legal advisers and the external lawyers whom they regularly consult. A remarkable consensus of uncritical acceptance of the flawed legal claims of European courts and institutions seems to prevail. There are even media reports that the current Attorney General is of the view that Strasbourg interim indications are binding in international law, despite the strength of the arguments against that proposition. If this is correct, it is both baffling and deeply unfortunate, and the government collectively will need to disregard that viewpoint if it is to have a chance of making the Rwanda policy work after it has passed its emergency legislation.

## Extending the ECHR To Apply Extraterritorially

These expansive rulings on interim indications are just one of the many ways in which the Strasbourg Court over the years has expanded its own powers and the scope of human rights law through legally dubious or downright indefensible "interpretations" of the ECHR.

Article 1 of the ECHR says that its members are obliged to secure the rights to everyone in their own jurisdictions. Its words do not impose any obligation to secure rights to anyone in other places. Indeed, it is clear from Article 56 headed "Territorial application" that it does not even extend to dependent territories of the contracting states in the absence of an (optional) declaration under Article 56.

However in a series of cases, the Strasbourg Court began interpreting "jurisdiction" in Article 1 not as meaning the territory a State in which its laws apply, but instead as extending outside its territory into any place where it exercises effective control, even if only partial or for limited purposes. Such a meaning of "jurisdiction" in Article 1 is plainly inconsistent with the existence and structure of Article

56. If the ECHR applies automatically to colonial and similar territories under Article 1, why should it be necessary for there to be a system by which it can optionally be extended to such territories under Article 56?

This argument came to a head in *Al-Skeini v United Kingdom*,<sup>26</sup> in which claims were brought for the deaths of Iraqi civilians in Basra at a time when British troops were occupying the region in the aftermath of the Iraq war. British troops were under the authority of the US-led Coalition Provisional Authority, which in international law was the occupying power in Iraq until a new Iraqi government could be established and left in place local Iraqi authorities (including police) under the overall control of the occupying powers.

The Strasbourg Court in a Grand Chamber judgment held that British occupying forces in Iraq were subject to the ECHR under the “effective control” principle that it had developed in previous judgments. It held that:

*“138. Another exception to the principle that jurisdiction under Article 1 is limited to a State’s own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State’s own armed forces, or through a subordinate local administration (see *Loizidou (preliminary objections)*, § 62; *Cyprus v. Turkey*, § 76; *Banković and Others*, § 70; *Ilaşcu and Others*, §§ 314-16; and *Loizidou (merits)*, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State’s military and other support entails that State’s responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see *Cyprus v. Turkey*, §§ 76-77).”*

When it came to the manifest inconsistency of this “effective control” principle, which would have entailed the automatic application of the Convention over the colonial and dependent territories of the Contracting States, with Article 56, the court said as follows:

*“140. The “effective control” principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, “with due regard ... to local requirements”, to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, **which was included in the Convention for historical reasons, cannot be interpreted in present conditions** as limiting the scope of the term “jurisdiction” in Article 1. The situations covered by the “effective control” principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible ...” (emphasis added)*

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26 [2011] ECHR 1093, Grand Chamber

The emphasised words in the text above are very telling. Whatever the arguments about the circumstances in which the Strasbourg Court may be entitled to revise the application of some parts of the ECHR in the light of changed social circumstances over time (such as a clause which refers to “what is necessary in a democratic society”<sup>27</sup>), the “living instrument” or “dynamic” approach logically can have no application to a fundamental structural point of interpretation as to where the Contracting States intended that the rules in the Convention should apply. Yet the Court’s reference to the inclusion of Article 56 for “historical reasons” and its deliberate contrast with “present conditions” gives the game away that the Court is engaged in re-writing the ECHR to its own liking, rather than limiting itself to its proper judicial role of interpreting it.

Unfortunately, this confirms that the Strasbourg Court is infused with a combination of zealotry and sophistry that makes it incapable of fulfilling its duty to interpret the ECHR in accordance with its intended meaning. Instead, it is intent in this and many other areas on a task of re-writing the Convention under the flimsiest guise of interpreting it. In doing so, it unilaterally changes the nature and scope of the obligations that the contracting States voluntarily assumed when they chose to adhere to the Convention.

There are further and other reasons why the Strasbourg Court’s interpretation of the ECHR to apply to a military occupation zone cannot be right. This interpretation implies that the whole panoply of rights in the ECHR must be made available in a military occupation zone.

Yet, to make one obvious point, Article 5 on the right to liberty contains no provision that would allow the detention of prisoners of war, or of, for example, the secret police of the previous regime, or of enemy combatants if fighting were to continue. When confronted with this nonsensical result of its own previous rulings in *Hassan v United Kingdom*,<sup>28</sup> the Strasbourg Court effectively read into Article 5(1) ECHR an additional permissible ground for detention where that detention is consistent with the Third and Fourth Geneva Conventions, and replaced the explicit requirement in Article 5(4) for *habeas corpus* in front of a judge with a requirement merely for administrative review under the Fourth Geneva Convention. This was on the basis that State practice since the ECHR was drafted, where States had consistently not regarded themselves as subject to Article 5 ECHR when detaining people in combat situations, justified an implied modification of the permissible exceptions to the right to liberty in Article 5.<sup>29</sup>

Thus the Strasbourg Court is revealed as nakedly legislating, and legislating incompetently at that, meaning that it then has to re-legislate in order to mitigate some of the dire and obviously wrong consequences of its previous legislation.

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27 In Articles 9(2) and 10(2) on what restrictions are justifiable on freedom of conscience and religion and freedom of expression.

28 No 29750/09, Grand Chamber judgment of 16 Sept 2014.

29 Judgment para 102. It is notable that three judges of the Court, including the later President Judge Spano, dissented from this conclusion: “6. In sum, the majority’s resolution of this case constitutes, as I will explain more fully below, an attempt to reconcile norms of inter-national law that are *irreconcilable* on the facts of this case. As the Court’s judgment does not conform with the text, object or purpose of Article 5 § 1 of the Convention, as this provision has been consistently interpreted by this Court for decades, and the structural mechanism of derogation in times of war provided by Article 15, I respectfully dissent from the majority’s finding that there has been no violation of Tarek Hassan’s fundamental right to liberty.”

### III - WHY THERE IS NO COMPLETE SOLUTION TO THESE PROBLEMS SHORT OF PUTTING IN TRAIN WITHDRAWAL FROM THE ECHR

There have been a number of thoughts and proposals for seeking to mitigate the impact of the Strasbourg Court's over-reaching jurisprudence on the UK while remaining a member of the ECHR. Indeed, this author once participated in such an exercise, as a member of the Cameron Coalition governments Commission on a Bill of Rights for the United Kingdom.<sup>30</sup>

A further and more recent attempt on similar lines was contained in the Bill of Rights Bill, introduced to Parliament by Dominic Raab when he was justice secretary but it was withdrawn on 27 June 2023.

This chapter explains two important conclusions:

- **Why there is no solution to these problems short of putting in train withdrawal from the ECHR**
- **Why leaving the ECHR will allow issues raised by the Supreme Court judgement to be resolved**

#### WHY WE MUST LEAVE THE ECHR

There are two basic reasons why the ECHR cannot be made acceptable through attempts to mitigate the effects of the Strasbourg Court's judicial activism – one is fundamental to the ECHR and the other is political:

- **The fundamental problem with such efforts is that so long as the UK is a member of the ECHR, the right of individual petition to the Strasbourg Court persists.** This was originally an optional feature, but became compulsory with the coming into force of Protocol No 11 in 1998. This means that, if the UK were to modify its own law in order to prevent individuals from relying on some of the invented "interpretations" by the Strasbourg Court, disappointed individuals would then be able to bring petitions directly to the Strasbourg Court which would no doubt make findings of Convention violations based on its own previous judgments.

Thus, the risk of this course of action if it is pursued in a way that is effective in curtailing Strasbourg doctrines rather than merely as window dressing, is that it would lead to significant conflict at the international level between the UK and the Strasbourg Court and the Committee of Ministers, which under the ECHR has the role of over-seeing implementation of Strasbourg Court judgments. Such a conflict took place to an extent over the prisoner voting issue, another instance where the Strasbourg Court invented a doctrine not supported by the relevant text (Article 3 of the First Protocol) and in that case demonstrably contrary to the intentions of the diplomatic conference that drafted it.

- **The political problem is that the UK government machine cannot be relied on not to be pusillanimous in such a scenario,** leading to a serious risk that the non-implementation of the Strasbourg doctrines would be watered down or even abandoned.

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<sup>30</sup> <https://www.gov.uk/government/news/a-uk-bill-of-rights-the-choice-before-us>

Nevertheless, hope springs eternal that some kind of re-negotiation of the ECHR might succeed. For example, there are recent signs that at least some European countries are finding the restraints imposed by the ECHR, as interpreted by the Strasbourg Court, at least irksome. On 2 November 2023, then Home Secretary Suella Braverman visited Austria, which is planning to adopt its own Rwanda-style scheme for sending illegal migrants to another country to deal with their asylum claims.<sup>31</sup> On 7 November 2023, Italian Prime Minister Giorgia Meloni announced that Italy had reached an agreement with Albania to set up asylum processing centres there where inbound asylum seekers would be processed on Italy's behalf.<sup>32</sup>

Of more immediate relevance to the ECHR and the Strasbourg Court is a recent announcement by Gérald Darmanin, the French interior minister, who said that France would deport foreigners deemed a threat without waiting for the Strasbourg Court to rule on their cases.

These developments have led some people to say that we should try to renegotiate the ECHR, instead of leaving it. The problems caused by the Strasbourg Court's activism are undoubtedly causing frustration and even anger among some powerful European countries, as Gérald Darmanin's announcement shows.

However, these countries' schemes may well run into problems with the Strasbourg Court similar to those encountered by the UK. In addition, these countries, as EU member states, are bound by the EU's Asylum Procedures Directive 2013/32/EU and the Reception Condition Directive 2013/33/EU. It is quite possible that these Directives may be interpreted by the EU's court at Luxembourg as precluding out-of-country processing, in which case Austria and Italy will face a major conflict with the EU quite apart from any problems under the ECHR.

More fundamentally, a sober look at the reality of the UK situation does not reveal any fruitful avenues for success:

1. **Renegotiating the ECHR is not a practical way forward to solving the problems of boats arriving across the English Channel within a politically relevant timetable.** What would be involved? In order to amend the text of the ECHR, the formal agreement of all 46 of its member states would be needed.

The Cameron government tried a renegotiation in 2012 when the UK held the Presidency of the Council of Europe. The aim was to get the Strasbourg Court to give national governments and courts a greater 'margin of appreciation' in interpreting human rights. Unfortunately, that negotiating aim was watered down into an anodyne declaration on the principle of subsidiarity, and some useful but limited changes to the Strasbourg Court's procedure to make it easier to get rid of frivolous cases. The minor changes to the ECHR text needed to implement these modest procedural reforms did not come into force until 2021, nine years later.

Even if the UK could find a few allies willing to make significant changes to the ECHR, there would be opposition from other countries who take a different view. Some have vehemently criticised the UK's Rwanda plan. Unfortunately, unanimity from 46 countries is required to make a change.

Nor would changes relating just to asylum issues solve the manifold problems created in many areas by the Strasbourg Court, including its extraterritorial application to military operations as described above. Achieving unanimous support from 46 States for across the board reforms to the ECHR in order to put the Strasbourg Court's numerous doctrines back to bed is just an unachievable objective.

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31 <https://www.telegraph.co.uk/news/2023/11/02/austria-agreement-uk-rwanda-style-migrant-deal/>

32 <https://www.reuters.com/world/europe/italy-pm-hails-migrants-deal-with-albania-possible-model-eu-2023-11-07/>

- 2. The government has already missed the alternative opportunity of excluding the Human Rights Act from applying to measures taken under the Illegal Migration Bill to remove illegal migrants from the UK.** The Illegal Migration Bill could have solved the problems created by the ECHR under UK domestic law, if it had been drafted to exclude the Human Rights Act, as well as some other relevant UK domestic legislation.

In fact, a backbench amendment was tabled by Sir Bill Cash MP and others that would have ousted the HRA, the ECHR and the Geneva Refugees Convention from applying to the removal of illegal migrants from the UK under the Bill. Regrettably the government failed to take up this suggestion, an issue on which apparently the Prime Minister overruled the then Home Secretary Suella Braverman.<sup>33</sup> While the inclusion of such clauses would have been controversial, if introduced into the Bill at that time, the Parliament Act procedure would have been available if necessary to over-ride objections by the House of Lords, and the case which went to the Supreme Court could have been short circuited.

That course could have led to conflict with the Strasbourg Court but a robust government could have weathered that by drawing in allies such as M Darmanin of France to give support in the Council of Ministers. But, despite the robust views of then Home Secretary Suella Braverman, the government balked at such a solution and instead went for a watered-down Illegal Migration Bill. This sought to push compliance with the ECHR to the limit, but to stay within it **as interpreted by the Strasbourg Court.**

As a result, the Rwanda removal scheme is still left vulnerable to ECHR-based legal challenges in the UK courts. There will be challenges based on individual circumstances even if emergency legislation reverses the effect of the Supreme Court decision, unless that emergency legislation is drafted to exclude those individual challenges as well.

And, even if the UK courts ultimately allow removals to Rwanda to go ahead, migrants' lawyers can then make direct petitions to the Strasbourg Court and ask that Court for an "interim indication" against the deportation going ahead until the full hearing of their case, likely to be years later. As mentioned above, last year the government bowed to such an interim indication and halted a flight to Rwanda at the last minute. Since then no flights have taken place. The government now has the clear power under UK law to ignore Strasbourg Court interim indications in future, but there is still a question mark over whether it has the robustness to do so and face the ensuing row.

- 3. If we were serious about negotiating substantial changes to the ECHR, the best way would be to set a firm timetable for withdrawal and say that we would reconsider our decision if changes could be agreed.** That would focus minds, and it would become clear in a short time whether or not satisfactory changes could be made. If (as strongly suspected) meaningful changes could not be made, then at least we would be on the way to solving our ECHR problems within a reasonable timescale since we would leave six months after giving formal notice. If emergency legislation does disapply the HRA (and it is yet to be seen whether it will do so) the UK government's position would be greatly strengthened if this is done in conjunction with an announcement that the UK will leave the ECHR on the principled grounds that the Strasbourg Court has exceeded its powers and its proper role both in this area and in other areas.

In such circumstances when the UK is on the exit ramp it is sustainable to disapply the Strasbourg Court's jurisprudence to which the UK objects pending our formal exit. What would be very difficult to sustain is to maintain defiant non-implementation of the Strasbourg Court's jurisprudence while professing to remain a long term member.

Hoping to solve our problems by negotiation in the absence of an exit timetable is just a recipe for further delay, giving an excuse for doing nothing while will-o-the-wisp hopes of agreements are pursued.

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<sup>33</sup> Resignation letter of Suella Braverman as Home Secretary, 13 Nov 2023.

## WHY LEAVING THE ECHR PROVIDES A COMPLETE SOLUTION

One question that has been asked in the light of the Supreme Court's judgment is whether leaving the ECHR is enough to solve the small boats problem and allow the Rwanda policy to go ahead.

Of course, as has already been argued above, the point of leaving the ECHR is to solve a whole range of difficult and serious problems (such as removing unjustified constraints on overseas military operations), even if the small boats problem is the most immediate and pressing one.

The Supreme Court judgment contains a section asserting that what the judgment refers to as "the principle of non-refoulement" arises not just from the ECHR, as applied within the UK by the HRA, but also arises from a series of pieces of domestic legislation, from other international treaties to which the UK is party, and even suggests (without deciding) that it might form part of customary international law.<sup>34</sup>

The most important of these other references is Article 33(1) of the Geneva Refugees Convention, which is where the word 'refouler' originally appears in a treaty text (the French word 'refouler' is inserted in brackets into the English text of that Article as a synonym for 'expel or return'). There are three respects in which the obligation arising from that Article is different from, and much less extensive than, the rule laid down in the Strasbourg Court's case law under the ECHR.

- **First, the Geneva Refugees Convention prohibits the return of refugees to territories where their life or freedom "would be threatened".** Unlike the Strasbourg case law, it does **not** say that individuals cannot be deported whenever there are "substantial grounds for believing" that they would be exposed to "a real risk" of ill treatment.
- **Secondly, the scope of the obligation is different from that under the ECHR, since it is limited to persons whose life or freedom would be threatened "on account of his race, religion, nationality, membership of a particular social group<sup>35</sup> or political opinion".** This means it **does not** apply to persons who might be subjected to ill treatment for other reasons, nor does it apply under Article 33(2) to persons who present a serious danger to their host country or who have been convicted of a serious crime.
- **Thirdly, and most importantly, there is no equivalent of the ECHR *Chahal* case under the Geneva Refugees Convention requiring that the evaluation of whether there will be ill treatment in the country of destination must be carried out by a court, as opposed to a governmental authority.** Article 32(2) requires only that the expulsion decision be reached in accordance with due process of law and that there should be a right of appeal to a "competent authority" which need not be a court. Therefore the Geneva Refugees Convention does not represent a barrier against the Rwanda policy if the issue under the ECHR and the Strasbourg Court case law is properly dealt with.

The Supreme Court also referred to UN Covenant on Civil and Political Rights of 1966. However the text of this Treaty does not mention anything about non-refoulement and the Court was reduced to quoting a contentious opinion of the UN Human Rights Committee asserting that such an obligation arises by implication from a general obligation on States to ensure Covenant rights to all persons in their territory or under their control.<sup>36</sup>

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<sup>34</sup> Para 25.

<sup>35</sup> The Geneva Refugees Convention has also been the subject of activist expansion well beyond its original meaning, in particular by an unjustifiable expansion of the phrase "social group".

<sup>36</sup> Para 22. This opinion seems odd, since the limitation of Covenant rights to persons in a State's territory or under its control suggests that States are not responsible for ensuring Covenant rights to persons who no longer on their territory or in their control.

Finally the Court referred to the UN Convention against Torture, which contains a prohibition against a State expelling or returning a person “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This is limited specifically to torture, does not extend to other kinds of inhumane treatment, and appears directed against a risk of torture in the territory to which the person is expelled and not to more diffuse risks of onward expulsion of the kind in issue in the Rwanda case.

It is a fundamental principle of the UK’s constitutional law that international treaties do not form part of domestic law and do not give rise to legal rights and obligations in the courts unless Parliament has legislated to give them such effect. Of the treaties mentioned by the Supreme Court judgment, only the ECHR (via the HRA) and in some respects the Geneva Refugees Convention<sup>37</sup> have been given effect under UK domestic law. Since the function of the domestic courts, including the Supreme Court, is to interpret and apply the domestic law of the UK it is arguable that the Supreme Court’s essay on the other international treaty obligations of the UK trespasses beyond the Court’s proper constitutional functions and into the arena of the executive and of politics.

In any event, the proposition that the particular legal rule applied by the Supreme Court arising under the Strasbourg Court’s interpretation of Article 3 of the ECHR is imposed by other international treaties falls down when subjected to detailed scrutiny.

Leaving the ECHR and thereby escaping the Strasbourg Court’s flawed case law will allow the problems which have beset the Rwanda policy to be solved.

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<sup>37</sup> Via s.2 of the Immigration Appeals Act 1993 and s.82(1), 84(1) and 94(7) of the Nationality, Immigration and Asylum Act 2002.

# IV - HOW TO LEAVE THE ECHR

## Dealing With Implications of the Miller 1 Case

Since the course of leaving the jurisdiction of the Strasbourg Court but maintaining membership of the Convention has been closed off by Protocol No 11, the question arises of whether there is any barrier that makes it difficult for the UK to leave the ECHR.

Under Article 58, a contracting State may “denounce” (ie, leave) the ECHR by the simple act of giving six months notice to the Secretary General of the Council of Europe. That State is then free from the obligations of the ECHR although, under Article 58(2), the Strasbourg Court will retain jurisdiction to give judgment on alleged violations committed before the date when the notice became effective.

Unfortunately - in the light of the *Miller 1* case<sup>38</sup> - which held that the Crown’s treaty terminating prerogative was impliedly restricted in the case of the EU treaties, it is an open question whether the Crown can give such notice without authority from Parliament. However, this probably is an academic point since an Act of Parliament would be needed to replace or modify the HRA and that Act could then contain an explicit authorisation for the Crown to give notice under Article 58.

This could be achieved by such an Act sweeping away the machinery set up by the HRA either completely or partially:

- 1. The most basic option would be for that Act to simply sweep away all the machinery set up by the HRA.** However, that step might increase some of the problems identified below and, in addition, there are arguments for having an explicit rights framework that controls the actions of devolved legislatures, as well as of ministers and other bodies when they pass delegated legislation.
  - **That could be achieved by retaining the text of the parts of the ECHR currently scheduled to the HRA** (ie, those Articles that set out the individual rights) as part of UK domestic law, even though the Convention text is no longer binding on the UK at the international level.
  - **But the Act would make clear that**
    - That text is not to be interpreted by reference to any judgments of the Strasbourg Court
    - Courts should disregard both Strasbourg judgments and UK judgments to the extent that they are based upon Strasbourg jurisprudence
    - The Convention text should be interpreted as far as possible in accordance with its original meaning
- 2. It might be desirable to go further and incorporate some of the modifications of interpretation suggested in the Bill of Rights Bill** – eg, reinforcing media freedom against judge-made encroachments based on enlargement of the right to respect for private and family life into a basis for restricting the circulation of truthful information, or re-connecting some of the Convention rights to their historical origin in *habeas corpus* or other long standing rights and freedoms recognised in UK law. On the other hand, repatriating the Convention rights in this way should not be used as an opportunity for a UK based set of rights to become a Christmas tree on which is hung a new fundamental right at the behest of every pressure group.

Given either of these approaches (re-enactment of the unadorned original Convention text under UK law or enacting it with modifications), other potential obstacles to leaving the ECHR would be surmountable, as outlined below:

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<sup>38</sup> *R (Miller) v Sec of State for Exiting the EU* [2017] UKSC 5.

- **The Scottish Parliament and the Welsh Assembly would not have a right to veto leaving the ECHR.** The devolution legislation cross-links to the HRA and to the ECHR and thereby to the Strasbourg jurisprudence, since both the devolved legislatures and executives are bound in law not to do anything contrary to the Convention rights.

However, whether the UK should belong to the ECHR at the international level is clearly a foreign relations matter and reserved for the Westminster Parliament. The Westminster Parliament is entitled both in law and at the political level to make changes to the legislation governing the powers of the devolved legislatures and executives consequent on the changes to the UK's external treaty relations. Nor is Westminster's power in this regard restricted by any constitutional convention.<sup>39</sup>

- **The Belfast (Good Friday) Agreement does not oblige the UK to continue to adhere to the ECHR, so long as the substance of the Convention rights is still available in Northern Ireland law.** The Belfast Agreement contains references to the ECHR. Most importantly, the "Rights, Safeguards and Equality of Opportunity" chapter includes the following paragraph:

*"2. 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."*

Although some have argued that this obliges the UK to continue to adhere to the ECHR that is not what it says. It is concerned with immediate legislative steps to be taken at the time of the Agreement, as are other paragraphs of the chapter. Notably, at that time Ireland had not taken steps to incorporate the ECHR into its domestic law and had no plans to do so, thus paragraph 9 imposes a more limited obligation on the Irish Government to

*"also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will ... bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context."*

So, paragraph 2 means what it says and an obligation cannot be read into it by implication that the UK must remain adhered to the ECHR forever or at least indefinitely, particularly when the Irish government was placed under no corresponding obligation to incorporate the ECHR into its own law at all. Prof Ekins and John Larkin QC (former Attorney General for Northern Ireland) concluded in their 2021 paper<sup>40</sup> that the obligation to "complete incorporation into Northern Ireland law of the European Convention on Human Rights" was discharged fully by the enactment of sections 6 and 24 of the Northern Ireland Act 1998.

Apart from the reference in that Chapter, the Belfast Agreement also refers to the ECHR in Strand One where paragraph 5 requires there to be safeguards for all communities, which, in addition to such matters as cross-community consent for key decisions, include:

<sup>39</sup> The Blair government's devolution legislation gave rise to the so-called "Sewel Convention", for some reason named after an unprepossessing junior minister in the then Labour government, which requires the Westminster Parliament to ask for consent before itself legislating with the devolved competence of the legislatures. But changing the Convention rights framework of the devolution settlements does not fall within the powers of the Scottish Parliament or of the Welsh Assembly, so is not inhibited by the Sewel Convention, despite attempts by various parties (notably Scottish Nationalists) to misinterpret the scope of the Convention as applying to anything that affects the powers of those legislatures.

<sup>40</sup> Human Rights Law Reform, How and Why to Amend the Human Rights Act 1998, Policy Exchange, at paragraph 13.

*“(b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;*

*(c) 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;”*

These provisions are concerned with the implementation under UK domestic law within Northern Ireland of rights under the Convention, and with providing safeguards to ensure that Northern Ireland legislative and executive bodies comply with the obligations stemming from those rights. They do not relate, except indirectly or inferentially, to the UK’s external adherence to the Convention. There is no mention, either here or elsewhere in the Belfast Agreement, of petitions to the Strasbourg Court, of its jurisprudence or of international actions in that court.

The substance of these safeguards required in Strand One would continue to be supplied through the continued maintenance in UK domestic law of the Articles of the ECHR in which the Convention rights are set out, as set out above in the second option.

- **The UK’s withdrawal from the ECHR is not prevented by the Trade and Cooperation Agreement with the EU.** Such a withdrawal would not breach the UK’s obligations under the TCA. However, under Article 692(2), it would give rise to a right for the EU to terminate Part Three of the TCA (the Part on “Law Enforcement and Judicial Cooperation in Criminal Matters”) coincident with the date when the UK’s notice of withdrawal from the ECHR becomes effective.

Since Article 692(1) gives either party the right to terminate Part Three for no reason at all on nine months’ notice, the sole effect of Article 692(2) would be to accelerate by 3 months the moment when the EU could terminate Part Three (if it so chose) following a decision by the UK to leave the ECHR.

However Part Three of the TCA (and indeed the TCA as a whole) is not some kind of unilateral gift by the EU. It was entered into by the EU because it brings significant benefits and advantages to the EU, not as an act of altruism to the UK. Therefore although it can be expected that the EU might engage in bluff and bluster (and the inclusion of Article 692(2) was itself such an act of bluff and bluster) it does not follow that the EU would give up the concrete advantages to law enforcement and extradition which it gains through Part Three of the TCA. And even if it were to do so, how would that come near offsetting the concrete advantages which the UK would gain by leaving the ECHR?

- **Leaving the ECHR does not oblige the UK to withdraw from the Council of Europe as a whole.** The Council of Europe was established by the Treaty of London in 1949. That Treaty, otherwise known as the Statute of the Council of Europe, provides in Article 3 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 Article 8 provides that:

*“Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.”*

Although Article 8 has never formally been exercised, on two occasions States have withdrawn from the Council of Europe because of an imminent risk of expulsion. In 1969, Greece withdrew from the Council of Europe rather than face an adverse vote in the Council of Europe following findings of widespread torture by the Greek junta regime. In 2022, Russia withdrew in order to avoid an imminent expulsion on the grounds of human rights violations in the course of its illegal invasion of Ukraine, another Council of Europe member.

The Statute requires the protection of human rights and fundamental freedoms in general terms. It does not require members to adopt the precise definitions of those rights in the ECHR, still less to adopt and apply each and every twist and turn of how the Strasbourg Court “interprets” those rights.

It can be seen that the two instances where expulsion decisions under Article 8 were on the cards that “seriously violating Article 3” indeed requires a disregard for human rights far removed from a principled disagreement with the Strasbourg Court’s excesses of jurisdiction, which generate objections in other countries as well as in the UK. (It should be noted that Gérald Darmanin, the French interior minister, has said that France would deport foreigners deemed a threat without waiting for the Strasbourg Court to rule on their cases and pay any fines if necessary.<sup>41</sup>) Departing from the ECHR is compatible with the UK’s continued membership of the Council of Europe.

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<sup>41</sup> “France ready to break European rights law on deportation”, The Times, 24 October 2023.



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## TIME TO LEAVE THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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